

**United States Department of Labor
Employees' Compensation Appeals Board**

THELMA NICKERSON, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Sepulveda, CA, Employer**

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**Docket No. 03-1474
Issued: February 20, 2004**

Appearances:
Thelma Nickerson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On May 19, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 30, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue on appeal is whether the appellant has met her burden of proof to establish that she is entitled to compensation benefits after October 6, 1997.

FACTUAL HISTORY

This is the second appeal in the present case. In an April 9, 2002 decision, the Board affirmed a June 1, 2000, decision of the Office, which terminated appellant's compensation benefits effective October 6, 1997. The case was remanded with regard to the continuing

residuals from the accepted work-related injury.¹ The Board found that the report of Dr. Lawrence N. Borelli, a Board-certified orthopedic surgeon selected as the impartial medical specialist, did not fully address the relationship between the employment injury and appellant's diagnosis of chronic pain syndrome.² The law and the facts of the case are set forth in the Board's prior decision and incorporated herein by reference.

On July 24, 2002 the Office referred the case back to Dr. Borelli and requested that he clarify whether the diagnosis of chronic pain syndrome was related to appellant's accepted work-related injury of February 5, 1981. The Office provided Dr. Borelli with appellant's medical records, a statement of accepted facts and a description of appellant's employment duties.

In a supplemental report dated August 25, 2002, Dr. Borelli indicated that the additional medical records did not change any of his prior conclusions. He advised that chronic pain syndrome was more of a clinical description rather than a specific diagnosis and that it is an accepted clinical syndrome where the pain is chronic and the patient's attention to and behavior due to pain becomes all pervasive and beyond what is normally expected from such a condition. The physician concluded that, in the absence of any other specific injury and due to the unrelenting complaint of low back pain from the date of injury, the chronic pain syndrome was secondary to the specific work injury.

In a decision dated October 30, 2002, the Office denied appellant's claim for compensation benefits after October 6, 1997.³

LEGAL PRECEDENT

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden of proof shifted to appellant to establish that she had disability causally related to her accepted injury.⁴

¹ Docket No. 01-1241 (issued April 9, 2002). The Office accepted appellant's claim for a lumbosacral strain sustained on February 5, 1981.

² In a report dated April 16, 1999, Dr. Borelli diagnosed the following: (1) spondylolisthesis, L4-5; (2) status post total hip replacement; (3) obesity; and (4) chronic pain syndrome; however, he did not diagnose lumbosacral strain. He concluded that the appellant did have minimal to slight residuals as a result of her injury of February 5, 1981 and proceeded to explain the basis for his opinion but the Board found that he did not adequately identify the nature of these injury-related residuals. Although the physician negated any causal relationship between appellant's February 5, 1981 employment injury and the diagnosed conditions of spondylolisthesis at the L4-5 level and status post total hip replacement, he did not fully address the relationship between the employment injury and appellant's diagnosis of chronic pain syndrome. The Board directed the Office to obtain clarification from Dr. Borelli on this issue.

³ In a letter dated November 20, 2002, appellant requested a hearing before an Office hearing representative. On May 19, 2003 appellant appealed the Office decision dated October 30, 2002 to the Board. The record reveals that a hearing was held on September 18, 2003; however, the decision of the Office was not in the record. The Board notes that this decision is null and void as the Office and the Board may not have concurrent jurisdiction over the same issue in a case. *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

⁴ See *Manuel Gill*, 52 ECAB 282 (2001).

ANALYSIS

As noted in the prior appeal, appellant submitted medical evidence from Dr. George J. Thomas, III, her attending Board-certified orthopedic surgeon, who disagreed with the opinion of Dr. Fredrick J. Lieb, a Board-certified orthopedic surgeon and the Office second opinion referral specialist, who found that appellant's accepted lumbosacral strain had resolved without residual and that her right hip arthroplasty was not related to the accepted injury. Based on this conflict in medical opinion, the Office referred appellant to Dr. Borelli selected as the impartial medical specialist.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁵

The Board noted that Dr. Borelli's April 16, 1999 report noted a great disparity between objective physical findings, with essentially normal magnetic resonance imaging and computerized axial tomography scans and the disability appellant displayed. He found subjective factors of occasional minimal to slight low back to buttock pain. He opined that appellant had degenerative spondylolisthesis at L4-5, which was too remote to be related to the employment injury.

On July 24, 2002 the Office specifically requested Dr. Borelli clarify whether the appellant's diagnosis of chronic pain syndrome was related to the February 5, 1981 industrial injury and to provide medical rationale for the opinion expressed.

The Board finds that Dr. Borelli's supplemental report is insufficient to resolve the issue of whether appellant's employment injury of February 5, 1981, caused a chronic pain syndrome. In an August 25, 2002 report, Dr. Borelli advised that chronic pain syndrome was more of a clinical description rather than a specific diagnosis and that it was an accepted clinical syndrome where the pain is chronic and the patient's attention to and behavior from the pain becomes all pervasive and beyond what is normally expected from such a condition. While Dr. Borelli provided a definition of chronic pain syndrome, his report is vague and unrationalized with respect to the causal relationship between the accepted employment injury and appellant's diagnosis of chronic pain syndrome as was requested by the Office.⁶ The physician concluded that "in the absence of any other specific injury and due to the unrelenting complaint of low back pain from the date of injury, that the chronic pain syndrome is secondary to the specific work injury." Although Dr. Borelli supported causal relationship in this statement, he did not provide a rationalized opinion regarding the causal relationship between appellant's chronic pain syndrome and the employment injury accepted for a lumbosacral strain, which Dr. Borelli indicated had resolved within two months of the February 5, 1981 injury.⁷ The Board has held

⁵ *Aubrey Belnavis*, 37 ECAB 206 (1985).

⁶ *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

⁷ *Id.*

that medical conclusions unsupported by rationale are of little probative value.⁸ For this reason, the Board finds that the supplemental report of Dr. Borelli, on the issue of any residuals of the work-related injury after October 6, 1997, is insufficient to resolve the outstanding conflict in this case.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the referee medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative, or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second referee specialist for a rationalized medical opinion on the issue in question.⁹ Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Federal Employees' Compensation Act will be circumvented when the referee specialist's medical report is insufficient to resolve the conflict of medical evidence.¹⁰

The Board will set aside the Office's October 30, 2002 decision on the issue of continuing residuals and remand the case for referral to another referee medical specialist. After such further development as may be necessary, the Office shall issue an appropriate final decision on whether appellant has met her burden of proof to establish that she is entitled to compensation benefits after October 6, 1997.

CONCLUSION

The Board finds that this case is not in posture for decision at this time.

⁸ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

⁹ *See Nathan L. Harrell*, 41 ECAB 402 (1990).

¹⁰ *Harold Travis*, 30 ECAB 1071 (1979).

ORDER

IT IS HEREBY ORDERED THAT the October 30, 2002 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this opinion.

Issued: February 20, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member