



## **FACTUAL HISTORY**

This is the second appeal in this case. The Board issued a decision on July 22, 2005 setting aside several prior Office decisions and remanding the case to the Office for further development regarding whether appellant met her burden of proof to establish that she sustained a recurrence of total disability on or after June 24, 1999 due to her September 16, 1998 employment injury.<sup>2</sup> The Board found that there was an unresolved conflict in the medical evidence regarding whether appellant sustained an employment-related recurrence of total disability on or after June 24, 1999. The Board explained that when the Office initially denied appellant's claim on December 2, 1999 it determined that the weight of the medical evidence regarding the nature of appellant's disability rested with the opinion of Dr. Edward J. Resnick, a Board-certified orthopedic surgeon. In September 1999, the Office determined that there was a conflict in the medical evidence between Dr. Steven J. Valentino, a Board-certified orthopedic surgeon and an Office referral physician, and Dr. Ira S. Cantor, an attending Board-certified internist, regarding appellant's ability to work on or after June 24, 1999. However, Dr. Valentino's March 18, 1999 report, which the Office indicated had formed his side of the conflict, related to appellant's medical condition prior to her claimed recurrence of total disability beginning June 24, 1999.<sup>3</sup> Therefore, at the time of the referral to Dr. Resnick, there was no conflict in the medical evidence regarding the main issue of the present case, *i.e.*, whether appellant sustained a recurrence of total disability on or after June 24, 1999 due to her September 16, 1998 employment injury. Consequently, Dr. Resnick served as an Office referral physician rather than an impartial medical specialist and a conflict was created between Dr. Resnick and Dr. Cantor regarding the nature of appellant's condition and disability on and after June 24, 1999.<sup>4</sup> The Board concluded that, given the unresolved conflict in the medical evidence, the case would be remanded to the Office for referral of appellant to an appropriate impartial medical specialist to determine whether she sustained an employment-related recurrence of total disability on or after June 24, 1999. The Board directed that, after such development as the Office deemed necessary, the Office should issue an appropriate decision on

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<sup>2</sup> Docket No. 05-22 (issued July 22, 2005). The Office accepted that on September 16, 1998 appellant, then a 47-year-old nurse consultant, sustained neck and lumbosacral sprains when her vehicle was struck from behind by another vehicle. She indicated on her claim form that she sustained "soft tissue damage to neck and back." Appellant returned to her regular work for the employing establishment on May 5, 1999 and stopped work on June 24, 1999, alleging that she sustained a recurrence of total disability on that date due to her September 16, 1998 employment injury.

<sup>3</sup> In his March 18, 1999 report, Dr. Valentino concluded that appellant had no limitations related to her September 16, 1998 employment injury. He indicated that appellant had degenerative changes in her cervical spine which were not related to her employment injury.

<sup>4</sup> In a July 26, 1999 report, Dr. Cantor concluded that appellant was "severely disabled" secondary to the effects of the September 16, 1998 vehicular accident. He indicated that according to the history appellant had not been pain free since September 16, 1998. In contrast, Dr. Resnick indicated in a September 28, 1999 report that appellant did not have any disabling residuals of her September 16, 1998 employment injury. He made note of appellant's many subjective complaints with voluntary restriction of motion and disproportionate pain complaints.

this matter.<sup>5</sup> The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand the Office referred appellant and the case record to Dr. Joseph S. Lubeck, a Board-certified neurologist and osteopath. On November 28, 2005 Dr. Lubeck provided a description of the September 16, 1998 employment injury and appellant's medical treatment since that time. He noted that appellant reported numerous physical complaints and cognitive difficulties that she alleged impacted her activities. Dr. Lubeck indicated that motor examination showed 5/5 strength in all muscle groups but that appellant was unable to elevate her arms complaining of pain. Sensory examination showed that all of appellant's modalities were intact, but she exhibited extreme hypersensitivity. Appellant complained of tenderness to finger pressure in the cervical and lumbar regions which was insufficient to produce a skin dimple. Dr. Lubeck stated that one could sustain a brain injury causing permanent cognitive difficulties without undergoing loss of consciousness during an accident, but that someone who had suffered such an injury would present with symptoms such as confusion, headaches, dizziness or double vision. He indicated that the medical records from September 16, 1998 and the following months did not indicate that appellant reported such symptoms consistent with a brain injury and that, in fact, appellant did not report such symptoms until 2002. Dr. Lubeck concluded that appellant did not sustain a brain injury on September 16, 1998 and stated:

“Regarding [appellant's] complaints of ongoing pain, all of the abnormalities on examination are subjective: that is, they are dependent on the patient's perceived response to various stimuli and maneuvers. I would agree with Dr. Resnick's assertion that some of these abnormalities may be interpreted as objective by other examiners. Nevertheless, they are prone to subject manipulation and embellishment unlike other aspects of the examination such as reflex or muscle bulk. It should be noted that [appellant] has no objective abnormalities on her neurologic examination and indeed her subjective complaints or subjective responses to examination maneuvers are far out of proportion to any noted objective abnormalities. In addition, her extreme response to maneuvers or tactile stimuli insufficient to produce a skin dimple on her limbs is inconsistent with any expected consequence of spinal or whiplash injury she may have suffered in September 1998. Consequently, I would agree with the conclusions of Drs. Valentino and Resnick that [appellant] had limited or absent abnormalities at the time of their examinations and had no neurologic abnormalities at the time of my examination of October 31, 2005.

“In summary, [appellant] has no significant neurologic impairment as a result of the injury she sustained on September 16, 1998 and had no significant residual neurological injury at the time of her reported second injury in May 1999.<sup>6</sup> In

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<sup>5</sup> The Board noted that Dr. Cantor had suggested that appellant sustained fibromyalgia syndrome or a brain injury due to the September 16, 1998 employment injury, but that neither of these conditions had been accepted as employment related.

<sup>6</sup> In mentioning a May 1999 injury, Dr. Lubeck appears to be referencing appellant's claim that she noticed increased employment-related symptoms when she engaged in some limited gardening at home in May 1999.

addition, although loss of consciousness is not a necessary precursor to mild traumatic brain injury, there is no evidence in her medical records that she sustained a head injury sufficient enough to produce a traumatic brain injury.”

In a January 11, 2006 decision, the Office denied appellant’s claim on the grounds that she had not shown that she sustained a recurrence of total disability on or after June 24, 1999 due to her September 16, 1998 employment injury. The Office found that the weight of the medical evidence on this matter rested with the well-reasoned opinion of the impartial medical specialist, Dr. Lubeck.

Appellant requested a review of the written record by an Office hearing representative. She argued that she sustained a brain injury on September 16, 1998 which continued to cause disability. Appellant’s attorney contended that Dr. Lubeck was not qualified to address appellant’s depression and fibromyalgia. In a May 23, 2006 decision, the Office hearing representative affirmed the Office’s January 11, 2006 decision.

### **LEGAL PRECEDENT**

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.<sup>7</sup> This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.<sup>8</sup> Where no such rationale is present, medical evidence is of diminished probative value.<sup>9</sup>

Section 8123(a) of the Federal Employees’ Compensation Act provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”<sup>10</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>11</sup>

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<sup>7</sup> *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

<sup>8</sup> *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

<sup>9</sup> *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

<sup>10</sup> 5 U.S.C. § 8123(a).

<sup>11</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

## ANALYSIS

The Office accepted that on September 16, 1998 appellant sustained neck and lumbosacral sprains when her vehicle was stuck from behind by another vehicle. She stopped work on June 24, 1999 alleging that she sustained a recurrence of total disability on that date due to her September 16, 1998 employment injury.

In its July 22, 2005 decision, the Board previously determined that there was a conflict in the medical opinion between Dr. Cantor, appellant's attending Board-certified internist, and Dr. Resnick, a Board-certified orthopedic surgeon and Office referral physician, on the issue of whether appellant sustained a recurrence of total disability on or after June 24, 1999 due to her September 16, 1998 employment injury. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Lubeck, a Board-certified neurologist and osteopath, for an impartial medical examination and an opinion on the matter.<sup>12</sup>

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Lubeck, the impartial medical specialist selected to resolve the conflict in the medical opinion.<sup>13</sup> The report of Dr. Lubeck establishes that appellant did not sustain an employment-related recurrence of total disability on or after June 24, 1999.

On November 28, 2005 Dr. Lubeck provided a description of the September 16, 1998 employment injury and appellant's medical treatment since that time. He reported the findings of his examination noting essentially normal findings except for some subjective responses to testing.<sup>14</sup> Dr. Lubeck concluded that appellant did not exhibit any disabling residuals of her neck and lumbosacral sprains from mid-1999 onwards. He discussed the subjective nature of appellant's complaints and examination results and stated, "It should be noted that [appellant] has no objective abnormalities on her neurologic examination and indeed her subjective complaints or subjective responses to examination maneuvers are far out of proportion to any noted objective abnormalities. In addition, her extreme response to maneuvers or tactile stimuli insufficient to produce a skin dimple on her limbs is inconsistent with any expected consequence of spinal or whiplash injury she may have suffered in September 1998."

Dr. Lubeck also extensively considered whether appellant sustained a brain injury on September 16, 1998. The Board notes that it has not been accepted that appellant sustained a brain injury due to the September 16, 1998 employment injury. Dr. Lubeck concluded that appellant sustained no such injury on September 16, 1998. He stated that one could sustain a brain injury causing permanent cognitive difficulties without undergoing loss of consciousness during an accident, but that someone who had suffered such an injury would present with symptoms such as confusion, headaches, dizziness or double vision. Dr. Lubeck indicated, however, that the medical records from September 16, 1998 and the following months did not

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<sup>12</sup> See *supra* note 10 and accompanying text.

<sup>13</sup> See *supra* note 11 and accompanying text.

<sup>14</sup> For example, appellant complained of tenderness to finger pressure in the cervical and lumbar regions which was insufficient to produce a skin dimple.

indicate that appellant reported such symptoms consistent with a brain injury and that, in fact, appellant did not report such symptoms until 2002.

The Board has carefully reviewed the opinion of Dr. Lubeck and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Lubeck's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.<sup>15</sup> He provided medical rationale for his opinion by explaining that there were no objective findings to show that appellant sustained an employment-related recurrence of total disability in mid-1999 as alleged. Dr. Lubeck made note of appellant's many subjective symptoms and explained that the medical evidence from the period following the September 16, 1998 accident did not show that she sustained a brain injury.<sup>16</sup>

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after June 24, 1999 due to her September 16, 1998 employment injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' May 23 and January 11, 2006 decisions are affirmed.

Issued: June 12, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>15</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

<sup>16</sup> Appellant's attorney contended that Dr. Lubeck was not qualified to address appellant's depression and fibromyalgia, but these conditions have not been accepted as employment related and are not the subject of the present appeal.