

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board.² In a November 24, 2006 decision, the Board found that OWCP did not meet its burden of proof in terminating appellant's compensation benefits.³ The Board found that there was a conflict in medical opinion between OWCP referral physician, Dr. Aubrey A. Swartz, a Board-certified orthopedist, and appellant's physicians, Dr. Walter M. Kidwell, a Board-certified anesthesiologist, and Dr. John S. Thalgott, a Board-certified orthopedist, as to whether appellant had residuals of her accepted work-related lumbar strain. The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.

To resolve the conflict OWCP, on December 7, 2007, referred appellant to a referee physician, Dr. Mary Ann Shannon, a Board-certified orthopedist. In a February 1, 2008 report, Dr. Shannon reviewed the record and examined appellant. She diagnosed chronic lumbar degenerative disc disease, predating the industrial fall without aggravation of underlying disease, exacerbation of preexisting facet arthropathy by industrial fall, resolved, aggravation of underlying degenerative disc disease following a June 2, 2005 motor vehicle accident, morbid obesity, deconditioning, diabetes and hypertension. Dr. Shannon noted a normal neurological examination and found no objective findings to verify appellant's conditions. She noted that appellant's industrial injury was temporary and the work-related symptoms ceased at the time of the June 2, 2005 motor vehicle accident. Dr. Shannon noted that magnetic resonance imaging (MRI) scans before and after the June 2, 2005 accident showed significant disc degeneration and aggravation. She noted that the nonindustrial conditions were myelopathy, disc degeneration, obesity and diabetes, all of which cause peripheral neuropathy and could explain her current pain, hypertension, disc degenerative disease and facet arthritis. Dr. Shannon noted that appellant had no physical limitations related to her work injury but restrictions related to her preexisting and motor vehicle conditions. She stated that appellant required no care for the work injury.

Appellant submitted reports dated February 27 and March 13, 2008 from Dr. Kidwell, who continued to note her complaints of low back pain with right leg radiculitis. A March 22, 2008 MRI scan revealed left lateral disc protrusion noted at L2-3, minor disc bulges and facet arthropathy noted and scoliosis.

On April 24, 2008 OWCP proposed to terminate medical and wage-loss benefits based on Dr. Shannon's report.

In a May 23, 2008 statement, appellant disagreed with the proposed termination. She stated that, on June 2, 2005, she was in a motor vehicle accident after undergoing authorized physical therapy for her accepted injury and had injuries to her shoulder and neck and believed

² Docket No. 06-1249 (issued November 24, 2006).

³ On February 10, 2005 appellant, then a 44-year-old health technician, filed a traumatic injury claim alleging that she sustained a neck and back injury after falling from a chair on a newly waxed floor while in the performance of duty. OWCP accepted the claim for lumbar strain and paid appropriate benefits. Appellant stopped work on the date of injury, February 10, 2005 and did not return

these injuries were consequential to her work injury. Appellant asserted that it was improper for Dr. Shannon to evaluate her and resolve a medical conflict as she was previously treated by a Dr. Mark Kabins, a partner of Dr. Shannon.

After the June 2, 2005 automobile accident, appellant was treated by Dr. Gary LaTourette, a Board-certified orthopedist, who diagnosed right shoulder lesion, possible labral tears. On September 14, 2005 he performed arthroscopy with debridement of the glenohumeral joint, synovectomy of the glenohumeral joint, open excision of the distal clavicle and anterior acromion. Dr. LaTourette diagnosed severe degenerative arthritis of the glenohumeral joint, downsloping of the anterior acromion and destroyed acromioclavicular joint with no meniscus. He noted that appellant reached maximum medical improvement on January 19, 2006. Other reports from Dr. Kidwell dated April 16, 2008 to January 22, 2009, diagnosed right lower extremity radiculitis secondary to industrial injury, disc bulge at L2-3 and L4-5 and facet joint arthropathy and opined that she was totally disabled. Reports from Dr. Thalgott dated August 21, 2008 to January 29, 2009, noted appellant's continued treatment for low back pain and opined that she was totally disabled.

Subsequently, OWCP accepted the June 2, 2005 motor vehicle injuries of the right shoulder and right rotator cuff repair on September 14, 2005 as consequential to the February 10, 2005 work injury.

On September 4, 2008 OWCP requested clarification from Dr. Shannon regarding the June 2, 2005 aggravation of appellant's low back condition. On November 11, 2008 Dr. Shannon opined that appellant had a permanent aggravation of her underlying degenerative disc disease from the June 2, 2005 automobile accident. She offered diagnoses, advised that appellant could perform sedentary work and referenced reports from Dr. Kabins.

On November 25, 2008 appellant underwent a functional capacity evaluation which was determined to be invalid due to inconsistent effort by her.

On January 2, 2009 OWCP requested further clarification from Dr. Shannon about whether there were objective findings to support her opinion about the permanent aggravation of appellant's low back injury. It also requested copies of reports from Dr. Kabins that were referenced by Dr. Shannon. No supplemental report was submitted by Dr. Shannon.

In a March 6, 2009 memorandum, OWCP stated that appellant would be referred to a second referee physician. It determined that Dr. Shannon did not clarify her opinion and also that she was an associate of a treating physician, Dr. Kabins.

On April 28, 2009 OWCP referred appellant to another referee physician, Dr. Anthony B. Serfustini, a Board-certified orthopedist. In an April 28, 2009 report, Dr. Serfustini noted reviewing the records provided and examining appellant. He reviewed her job requirements, noted a history of her work injury and reviewed treatment following the injury. In reviewing appellant's history, Dr. Serfustini noted both automobile accidents including medical evidence of her treatment after her June 2, 2005 motor vehicle accident. He noted findings upon physical examination of morbid obesity, limited range of motion of the lumbosacral spine, deep tendon reflexes were equal and symmetrical bilaterally, strength was inconsistent and reduced in all

muscle groups due to deconditioning, sensation was intact with negative straight leg raises bilaterally. Dr. Serfustini diagnosed thoracolumbar sprain/strain, soft tissue injury, left wrist pain syndrome and temporary aggravation of degenerative disc disease with chronic low back pain syndrome. He noted diagnoses with regard to the June 2, 2005 automobile accident of acute lumbosacral sprain/strain soft tissue injury, acute cervicothoracic sprain/strain soft tissue injury, right shoulder sprain/strain and temporary aggravation of preexisting glenohumeral arthritis. Dr. Serfustini noted nonindustrial diagnoses of degenerative disc disease at L4-5, degenerative facet disease at L4-5, L5-S1, chronic lumbar pain syndrome, morbid obesity, symptom magnification, pain behavior, chronic anxiety syndrome and narcotic dependency. He opined that appellant reached maximum medical improvement by October 2005 with regard to her February 10 and June 2, 2005 injuries and reverted back to her chronic lumbar pain syndrome. Dr. Serfustini noted that with regard to the February 10, 2005 incident the aggravation of chronic lumbar pain syndrome and degenerative disc disease was temporary ending in October 2005. He noted that appellant could return to a sedentary job, no lifting over five pounds with ability to change positions frequently. In a July 21, 2009 work capacity evaluation, Dr. Serfustini noted that she reached maximum medical improvement and could return to work full time with restrictions.

On August 7, 2009 OWCP requested that Dr. Serfustini address the conditions caused by the June 2, 2005 accident and state whether the February 10 and June 2, 2005 injuries resolved and whether the work restrictions related to work injuries or nonindustrial conditions. In a January 13, 2010 report, Dr. Serfustini noted that medical records from the February 10, 2005 injury revealed palpable tenderness of the lumbar and thoracic spine and he concluded that there was a temporal relationship between the low back sprain and the February 10, 2005 injury. He noted that by October 2005 appellant reverted back to the preaccident status with similar symptoms of chronic lumbar pain syndrome and noted no documentation supporting any progression in her condition from February to October 2005. Dr. Serfustini opined that she did not have any residuals of the February 10 or June 2, 2005 injuries. He noted work restrictions of lifting, pushing and pulling up to 10 pounds.

On February 2, 2010 OWCP expanded appellant's claim to include sprain of the lumbosacral joint, sprain of the neck, sprain of the back and thoracic region, sprain of the right shoulder and upper arm, temporary aggravation of preexisting right shoulder glenohumeral arthritis, all of which resolved as of October 31, 2005.

On February 2, 2010 OWCP proposed to terminate all compensation benefits on the grounds that Dr. Serfustini's reports established no residuals of the work-related conditions.

In correspondence dated March 1, 2010, appellant, through her attorney, disagreed with the notice of termination, indicating that Dr. Serfustini's report was insufficient to resolve the conflict of opinion in this case. He noted that Dr. Serfustini did not review the traffic accident report or photos of the vehicles after the June 2, 2005 accident. Appellant submitted discharge instructions from Summerlin Hospital dated November 20, 2004, where she was diagnosed with sprained back from a motor vehicle accident. She submitted a January 25, 2005 report from Dr. Cutis W. Poindexter, a Board-certified physiatrist, who treated her for a nonwork-related automobile accident on November 19, 2004. Dr. Poindexter diagnosed history of thoracolumbar strain due to motor vehicle accident, chronic low back pain and morbid obesity. Also submitted

were reports from a physician's assistant dated January 5 and February 2, 2010, who treated appellant for chronic low back pain with radicular symptoms and diagnosed lumbar discopathy. In a February 11, 2010 report, Dr. Thalgott noted that she had two significant incidents affecting her condition, a February 10, 2005 fall and a June 2, 2005 automobile accident. Appellant reported that her pain after the November 19, 2004 nonwork-related automobile accident completely abated and resolved prior to the February and June 2005 incidents. She submitted a repair estimate for her automobile, a lien settlement and an accident report.

On March 9, 2010 OWCP terminated appellant's compensation and medical benefits effective that day.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ After it has determined that, an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.⁶

ANALYSIS

OWCP accepted appellant's claim for work-related low back strain, sprain of lumbosacral joint, sprain of the neck, sprain of the back and thoracic region, sprain of the right shoulder and upper arm, temporary aggravation of preexisting right shoulder glenohumeral arthritis, resolved. The Board found a conflict in medical opinion and OWCP subsequently referred appellant to Dr. Serfustini to resolve the conflict.⁷

The Board finds that, under the circumstances of this case, the opinion of Dr. Serfustini is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that residuals of appellant's work-related low back strain sprain of the lumbosacral joint, sprain of the neck, sprain of the back and thoracic region, sprain of the right shoulder and upper arm, temporary aggravation of preexisting right shoulder glenohumeral arthritis resolved. Where there exists a conflict of medical opinion and the case is referred to an

⁴ *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

⁵ *Mary A. Lowe*, 52 ECAB 223 (2001).

⁶ *Id.*; *Leonard M. Burger*, 51 ECAB 369 (2000).

⁷ OWCP initially referred appellant to Dr. Shannon to resolve the medical conflict. However, Dr. Shannon was an associate of Dr. Kabins, a physician who had treated appellant. Therefore, Dr. Shannon cannot be an impartial specialist in this matter, pursuant to OWCP procedures and OWCP properly referred appellant to Dr. Serfustini to resolve the medical conflict. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4(b)(3)(b) (physicians who may not be used as referees include physicians previously connected with the claim or the claimant, or physicians in partnership with those already so connected).

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.⁸

In his report of April 28, 2009, Dr. Serfustini reviewed appellant's history, reported findings and noted that she had no objective complaints or findings due to the accepted conditions. He diagnosed thoracolumbar sprain/strain, soft tissue injury, left wrist pain syndrome, temporary aggravation of degenerative disc disease with chronic low back pain syndrome, acute lumbosacral sprain/strain soft tissue injury, acute cervicothoracic sprain/strain soft tissue injury, right shoulder sprain/strain and temporary aggravation of preexisting glenohumeral arthritis. Dr. Serfustini opined that by October 2005 appellant had reached maximum medical improvement with regard to her February 10 and June 2, 2005 injuries and reverted back to her base line chronic lumbar pain syndrome. He noted that the aggravation of chronic lumbar pain syndrome and degenerative disc disease sustained as a result of the February 10, 2005 incident was temporary ending in October 2005. Dr. Serfustini noted nonindustrial diagnoses of degenerative disc disease at L4-5, degenerative facet disease at L4-5, L5-S1, chronic lumbar pain syndrome, morbid obesity, symptom magnification, pain behavior, chronic anxiety syndrome and narcotic dependency. He opined that appellant would be able to return to a sedentary job, no lifting over five pounds with ability to change positions frequently. In a supplemental report dated January 13, 2010, Dr. Serfustini noted that by October 2005 she reverted back to the preaccident status with similar symptoms of chronic lumbar pain syndrome and noted no documentation supporting any progression in appellant's condition from February to October 2005. He opined that appellant did not have any residuals as it related to the February 10 or June 2, 2005 injuries. Dr. Serfustini opined that she did not require additional treatment for the work-related injury.

Appellant submitted a February 11, 2010 report from Dr. Thalgott, who noted that injuries from the November 19, 2004 nonwork-related automobile accident had completely resolved prior to the accidents of 2005 and the incidences affecting her condition were the February 20, 2005 fall and a June 2, 2005 automobile accident. Although Dr. Thalgott noted work injuries dated February 20 and June 2, 2005, he failed to explain how any continuing condition or medical restrictions and disability were causally related to the accepted employment injuries. He was also on one side of a conflict that was resolved by Dr. Serfustini⁹ and his reports do not otherwise provide new findings or medical rationale sufficient to establish that any continuing condition or residuals are causally related to the February 20 and June 2, 2005 work injuries.

Appellant submitted discharge instructions from Summerlin Hospital dated November 20, 2004 where she was diagnosed with sprained back from a motor vehicle accident. Also submitted was a report from Dr. Poindexter dated January 25, 2005, who treated her for a nonwork-related automobile accident on November 19, 2004 and diagnosed history of

⁸ *Solomon Polen*, 51 ECAB 341 (2000). See 5 U.S.C. § 8123(a).

⁹ See *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990). The Board notes that Dr. Thalgott's report did not contain new findings or rationale on causal relationship upon which a new conflict might be based.

thoracolumbar strain due to motor vehicle accident, chronic low back pain and morbid obesity. However, these reports did not specifically address how any continuing condition or disability was causally related to the February 10, 2005 work injury.

Also submitted were reports from a physician's assistant dated January 5 and February 2, 2010, who treated appellant for chronic low back pain with radicular symptoms and diagnosed lumbar discopathy. However, this evidence is of no probative medical value as the Board has held that physician's assistants are not competent to render a medical opinion under FECA.¹⁰

Consequently, the medical evidence submitted after Dr. Serfustini's report is insufficient to overcome his report or to create another conflict in the medical evidence. The Board finds that his opinion constitutes the weight of the medical evidence and is sufficient to justify OWCP's termination of benefits for the accepted conditions of lumbar sprain and strain and herniated disc at L4-5.

On appeal, appellant asserts that the termination of benefits in this case was improper and should not have been based on Dr. Serfustini's opinion which was factually inaccurate and insufficient to resolve the conflict of opinion in this case. Appellant's attorney argues that Dr. Serfustini discounted the June 2, 2005, work-related automobile accident which caused substantial damage to the automobiles and attributed her symptoms to a minor automobile accident on November 19, 2004 which involved minor car damage. He further asserts that, at the time of the physician's report, he did not have access to information regarding the damage to the vehicles involved in the accidents. The Board has reviewed Dr. Serfustini's report and cannot fault it on this ground. Dr. Serfustini reviewed appellant's history and, as noted above, demonstrated an awareness of the nonwork-related November 19, 2004 accident as well as the February 10 and June 2, 2005 work injuries. He extensively reviewed the medical evidence, including medical evidence most contemporaneous with the June 2, 2005 motor vehicle accident which noted the effects of the accident. Dr. Serfustini also reviewed the amended statement of accepted facts dated March 6, 2009, which noted that on June 2, 2005 appellant was involved in a motor vehicle accident in which she sustained consequential injuries and that her vehicle was totaled. The statement of accepted facts accurately reflected the facts of the case and provided information on the damage to the automobile on June 2, 2005. The impartial medical adviser addressed appellant's accepted injuries as well as those injuries not accepted. Dr. Serfustini provided findings on examination of each of these areas and a review of the diagnostic testing prior to providing his conclusion. He found no objective basis on which to attribute any continuing residuals of the accepted conditions. Dr. Serfustini's opinion is sufficient to resolve the conflict of opinion and establishes that appellant's work-related injuries resolved.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁰ See *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate benefits effective March 9, 2010.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 9, 2010 is affirmed.

Issued: November 23, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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