

¹ 5 U.S.C. §§ 8101-8193.

“doctor shopped” and improperly gave the weight to the medical opinion of an OWCP referral physician.

FACTUAL HISTORY

On July 22, 2005 appellant, then a 63-year-old supervisory transportation security screener, filed a traumatic injury claim alleging that on July 19, 2005 she sustained tingling and shooting pain in the upper and lower back, into the arms and feet while loading luggage. She began treatment with Dr. Douglas A. Swift, Board-certified in occupational medicine. On September 7, 2005 OWCP accepted sprain/strain of the neck. An October 21, 2005 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated mild cervical spondylosis at C3-4 through C6-7 without significant stenosis.

Appellant filed a claim for compensation for the period October 27, 2005 to March 18, 2006. In a May 17, 2006 decision, OWCP denied the claim. In an August 3, 2006 decision, it denied her request for a hearing as untimely.

Appellant relocated from River Bridge, Louisiana to Pass Christian, Mississippi. By letter dated August 9, 2007, the employing establishment informed OWCP that her physical limitations were such that there was no work available at either its New Orleans, Louisiana or Gulfport, Mississippi facilities. Dr. Swift submitted additional reports in which he diagnosed sprain/strain of neck and cervical spondylosis. He advised that appellant could perform light duty as of August 16, 2005. On April 27, 2007 Dr. Swift diagnosed unspecified sprain/strain of the back.

On August 22, 2007 appellant filed a claim for compensation for the period August 31, 2005 to June 30, 2007. On July 22, 2008 Dr. Swift added the diagnoses of lumbosacral spondylosis and myelopathy and shoulder sprain. In a February 27, 2009 report, he advised that appellant continued to be treated for chronic cervical pain, opining that the employment injury aggravated her preexisting cervical degenerative condition. Dr. Swift advised that she had reached maximum medical improvement and could perform sedentary duties.

In March 2009 OWCP referred appellant to Dr. Charlton Barnes, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an April 8, 2009 report, Dr. Barnes noted appellant's complaint of neck, shoulder and low back pain. On physical examination, range of motion was normal but painful and there was no muscle loss. Dr. Barnes diagnosed cervical and lumbar strain and nonemployment-related diabetes. He advised that any aggravation of the underlying degenerative cervical disease or a lumbar strain would have resolved two years after the injury. Dr. Barnes concluded that appellant had reached maximum medical improvement. In an attached work capacity evaluation, he provided permanent restrictions and stated that she was not strong enough to lift baggage. In a supplementary report dated May 12, 2009, Dr. Barnes indicated that appellant had cervical and lumbar pain, but it was difficult to determine exactly how much. He advised that there was no objective evidence to support that her cervical condition was currently active, but that she had a permanent soft tissue injury that kept her from returning to her position as a security screener.

OWCP determined that a conflict in medical opinion arose between Dr. Swift and Dr. Barnes regarding appellant's residuals and work capacity. On August 20, 2009 it referred appellant to Dr. James L. West, III, Board-certified in orthopedic surgery, for an impartial evaluation.

In a September 14, 2009 report, Dr. West noted appellant's complaint of constant neck, shoulder, arm, upper thoracic and lumbar pain. He indicated that, while she would not move her neck on physical examination, she moved it during the interview. Waddell's signs were present. Dr. West reviewed x-ray and MRI scan studies and concluded that appellant's symptoms were related to her underlying degenerative disc disease and not the employment injury.

In correspondence dated October 6 and November 13, 2009 and January 4, 2010, OWCP asked Dr. West to supplement his opinion as to whether appellant had a work-related aggravation of her preexisting cervical degenerative condition and, if so, whether it was temporary or permanent and whether it was disabling. He was also asked to provide an opinion as to whether appellant's diagnosed low back condition was employment related and whether she continued to require treatment for the accepted conditions.

In a February 4, 2010 report, Dr. West advised that there had been no additional aggravation of the cervical or lumbar spine, that appellant had returned to preinjury status and that her lumbar condition was not employment related. He reiterated that she had no restrictions. In letters dated February 18, March 19 and April 19, 2010, OWCP asked Dr. West when appellant's work-related cervical strain became no longer active or disabling.

In a May 28, 2010 report, Dr. Eric C. Puestow, a Board-certified internist and OWCP medical adviser, opined that appellant ceased to be symptomatic from the accepted cervical strain four weeks after the employment injury. He recommended that his report be forwarded to Dr. West for review. On July 6, 2010 Dr. West agreed with Dr. Puestow.

By decision dated August 6, 2010, OWCP denied appellant's claim for wage-loss compensation for the period commencing August 31, 2005.

Appellant requested a hearing that was held on January 26, 2011. In an April 14, 2011 decision, an OWCP hearing representative found there was insufficient evidence to support a conflict in medical evidence between Dr. Barnes and Dr. Swift, but a conflict arose between Dr. Swift and Dr. West as to whether appellant's residuals and ongoing disability. The case was remanded for OWCP to refer appellant for an impartial evaluation on this issue.

On April 26, 2011 OWCP referred appellant to Dr. Gordon P. Nutik, a Board-certified orthopedic surgeon, selected as an impartial specialist. In a June 2, 2011 report, Dr. Nutik reviewed the medical record and appellant's complaints of neck, shoulder and back pain with finger numbness. Neck examination demonstrated no spasm and pain to palpation. Shoulder and back examination demonstrated pain to palpation with normal sensation to light touch of all extremities. X-rays of the cervical and lumbar spine demonstrated nonspecific degenerative changes. Dr. Nutik advised that appellant had an employment-related neck strain and possibly an employment-related low back strain and that the soft tissue strains should have resolved over a three- to six-month period. The aggravation of appellant's cervical and low back degenerative

condition was temporary and resolved a year or two after the employment injury. Dr. Nutik concluded that she needed no further treatment due to the employment injury, but due to her nonemployment-related degenerative disease, she should work in a sedentary position. In a June 2, 2011 work capacity evaluation, he advised that appellant had reached maximum medical improvement and could work eight hours. Dr. Nutik provided restrictions of no reaching or squatting, with bending, stooping and kneeling limited to one hour daily, twisting, pushing and pulling to two hours daily, and lifting limited to 5 pounds frequently for three hours daily with a 10-pound maximum weight restriction. In a supplementary report dated June 30, 2011, he advised that he did not feel there were any objective findings to support a material worsening of appellant's preexisting cervical and lumbar degenerative changes and that any work-related aggravation would have resolved within a year or two after the July 19, 2005 employment injury.

On July 22, 2011 OWCP paid appellant compensation for the period August 31, 2005 through March 1, 2006. It proposed to terminate her medical benefits on the grounds that the medical evidence established that her work-related conditions had resolved.

In a decision dated July 22, 2011, OWCP denied appellant's claim for wage-loss compensation after March 1, 2006.

On August 10, 2011 appellant, through her attorney, requested a hearing regarding the July 22, 2011 decision. She did not respond to the proposed termination.

By decision dated August 25, 2011, OWCP finalized the termination of medical benefits. On September 12, 2011 appellant, through her attorney, requested a hearing regarding the August 25, 2011 termination decision.

Separate hearings were conducted on January 3, 2012. The first hearing concerned the July 22, 2011 decision finding that appellant was not entitled to wage-loss compensation after March 1, 2006. Appellant's attorney asserted that OWCP erred in finding a conflict between the opinions of Dr. Swift and Dr. West. Since Dr. West had initially been considered a referee physician, he was not a "physician making an examination for the United States" as provided in section 8123 of FECA. Counsel further asserted that, at a minimum, appellant was entitled to wage-loss compensation through July 19, 2007, based on Dr. Nutik's opinion that her employment-related condition resolved within one to two years of the July 19, 2005 employment injury. At the hearing regarding the August 25, 2011 termination of medical benefits, appellant's attorney again asserted that the medical opinion evidence was improperly weighed by OWCP. As appellant continued to have residuals of the employment injury, she was entitled to continued medical benefits.

In a March 21, 2012 decision, OWCP's hearing representative found that OWCP met its burden of proof to terminate appellant's medical benefits and affirmed the August 25, 2011 decision. She noted that it was appropriate for OWCP to find a conflict between appellant's physician, Dr. Swift, and Dr. West, even though Dr. West had initially been characterized as a referee physician. Dr. West's status was that of a second opinion physician. The hearing representative found that the weight of the evidence rested with the opinion of Dr. Nutik who provided an impartial medical evaluation and found that appellant's work injury had resolved.

In a March 30, 2012 decision, the hearing representative affirmed in part and reversed in part the July 22, 2011 OWCP decision. She found that the weight of the medical evidence rested with the referee opinion of Dr. Nutik; however, appellant was entitled to wage-loss compensation for the period March 2, 2006 to July 19, 2007. Appellant was not entitled to wage-loss compensation after that date.²

LEGAL PRECEDENT -- ISSUE 1

Under FECA, the term “disability” is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.³ Disability is thus not synonymous with physical impairment which may or may not result in incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA,⁴ and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁵ Whether a particular injury causes an employee to be disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁶

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁷ Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.⁸

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁹ Rationalized medical evidence is medical evidence which includes a physician’s rationalized medical opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed

² Appellant was thereafter paid wage-loss compensation from March 2, 2006 through July 19, 2007.

³ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁴ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁵ *Donald E. Ewals*, 51 ECAB 428 (2000).

⁶ *Tammy L. Medley*, 55 ECAB 182 (2003); see *Donald E. Ewals*, *id.*

⁷ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

⁹ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

condition and the specific employment factors identified by the claimant.¹⁰ Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹¹

Section 8123(a) of FECA provides that, 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.¹² When 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 on a proper factual background, must be given special weight.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that she was disabled due to her accepted injury after July 19, 2007.

Appellant's claim was accepted for a sprain/strain of the neck based on the reports of her attending physician, Dr. Swift. In 2008, Dr. Swift added the diagnoses of lumbosacral spondylosis and shoulder sprain. He reported that the employment injury aggravated the preexisting degenerative disease of the cervical spine. Appellant was thereafter referred for examination to Dr. Barnes, who diagnosed cervical and lumbar strain and nonemployment-related diabetes. Dr. Barnes opined that any aggravation of appellant's underlying degenerative disease resolved within two years. OWCP found a conflict in medical opinion between Dr. Swift and Dr. Barnes and referred appellant for examination by Dr. West, designated as an impartial medical specialist. Dr. West found that appellant's ongoing back symptoms were related to her underlying degenerative disease and not the accepted employment injury. He stated there was no additional aggravation of either the cervical or lumbar spine due to the injury and that she had returned to her preinjury status.

An OWCP hearing representative found on review that the opinion of Dr. Barnes was not well rationalized such that a conflict in medical opinion did not arise until receipt of the report of Dr. West, who was found to be a second opinion examiner. While counsel contends that OWCP engaged in doctor shopping, the Board notes that the hearing representative's determination accords with Board case precedent.¹⁴

¹⁰ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹¹ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹² 5 U.S.C. § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

¹³ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁴ See *Bailey Varnado, Jr.*, 53 ECAB 755 (2002); *Mary L. Henninger*, 52 ECAB 408 (2001); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

Dr. Swift found that appellant was totally disabled due to the employment injury. Dr. West, OWCP's referral physician, advised that appellant's symptoms were due to her preexisting degenerative condition and were not related to the employment injury, and any work-related symptoms ceased four weeks after the employment injury.

Based on this conflict in medical opinion, regarding the extent of residuals and period of disability due to the employment injury, OWCP properly referred appellant to Dr. Nutik for an impartial evaluation.¹⁵ In his comprehensive reports dated June 2 and 30, 2011, Dr. Nutik provided examination findings and advised that appellant's current condition was due to preexisting degenerative changes. He clearly advised that the employment-related cervical strain and any work-related aggravation of appellant's preexisting degenerative changes would have resolved no later than two years after the employment injury.

The Board has carefully reviewed the opinion of Dr. Nutik and finds that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue in the present case. Dr. Nutik's opinion is based on a proper factual and medical history and he thoroughly reviewed the factual and medical history and accurately summarized the relevant medical evidence.¹⁶ He provided medical rationale for his opinion by explaining that any employment-related aggravation of appellant's preexisting cervical degenerative disease ceased no later than two years after the July 19, 2005 employment injury. Dr. Nutik's opinion is entitled to special weight as the impartial medical examiner and establishes that appellant is not entitled to wage-loss compensation after July 19, 2007.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.¹⁷ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁸ 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 appellant no longer has residuals of an employment-related condition, which require further medical treatment.¹⁹

¹⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9, 11 (September 2010).

¹⁶ See *Melvina Jackson*, 38 ECAB 443 (1987).

¹⁷ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹⁸ *Id.*

¹⁹ *Fred Simpson*, 53 ECAB 768 (2002).

ANALYSIS -- ISSUE 2

The Board finds that OWCP met its burden of proof to terminate appellant's medical benefits on August 25, 2011. The accepted condition is sprain/strain of the neck due to a July 19, 2005 employment injury. As discussed above, OWCP determined that a conflict in medical evidence had been created regarding whether appellant continued to have disabling residuals of the employment injury and properly referred her to Dr. Nutik for an impartial evaluation. In reports dated June 2 and 30, 2011, Dr. Nutik clearly advised that the employment-related neck strain had resolved and that any aggravation of her preexisting degenerative cervical condition ended no later than two years after the employment injury, or July 19, 2007. He further indicated that she required no further treatment for the employment injury. The most recent medical report from appellant's attending physician, Dr. Swift, is dated March 23, 2010, well before the termination of medical benefits on August 25, 2011. Dr. Nutik's opinion is therefore entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.²⁰ OWCP therefore properly terminated appellant's medical benefits on August 25, 2011.²¹

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.

CONCLUSION

The Board finds that appellant did not establish that she was entitled to monetary compensation for the period July 20, 2007 to June 11, 2008 and that OWCP properly terminated her medical benefits on August 25, 2011.

²⁰ See *Sharyn D. Bannick*, 54 ECAB 537 (2003).

²¹ *Manuel Gill*, *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the March 30 and 21, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 21, 2013
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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