

computer monitor which required her to tilt her head to see through her bifocals. Appellant used the new monitor from August 14 to September 2000. She related: "One year ago, I was diagnosed with a bulging disc and mild stenosis in my neck. I believe that the repetitive motion of bending my head back to view the screen with my bifocals has irritated the nerves." Appellant did not stop work. The Office accepted her claim for cervical strain and an aggravation of cervical spondylosis.

Dr. Stephen F. Emery, a Board-certified orthopedic surgeon and appellant's attending physician, obtained a magnetic resonance imaging (MRI) scan study of her cervical spine on August 10, 2001, which was compared with a previous study dated September 30, 1999. The August 10, 2001 MRI scan revealed "C6-7 moderate right paracentral disc protrusion compression the right aspect of the cervical cord, resulting in mild central canal stenosis, measuring approximately [10] mm [millimeters]. There is also bilateral neural foraminal narrowing at this level, right greater than left, which has worsened compared with the previous examination."

In a report dated December 7, 2001, Dr. John H. Schneider, a Board-certified neurosurgeon, recommended an anterior cervical discectomy and arthrodesis at C6-7. In a progress report dated January 29, 2002, Dr. Emery discussed appellant's complaints of progressive loss of right hand motor skills and increased neck complaints. He diagnosed cervical stenosis with a herniated disc at C6-7. Dr. Emery attributed her condition to a workers' compensation injury and requested authorization from the Office for surgery. In a progress report dated February 14, 2002, he indicated that appellant was "unable to tolerate any activity" due to her neck pain. Dr. Emery opined that appellant should remain off work for one month pending approval for surgery from the Office. On March 22, 2002 he noted that the Office had not responded to his request for surgical authorization and found that she should remain off work for the "indeterminate future." Appellant filed claims for compensation on account of disability Forms CA-7 requesting compensation for time lost from work.

On September 26, 2002 the Office referred appellant to Dr. Dean C. Sukin, an orthopedic surgeon, for a second opinion evaluation. In a report dated October 31, 2002, Dr. Sukin discussed appellant's history of injury and medical treatment received. He diagnosed a C6-7 disc herniation with multiple level moderate stenosis. Dr. Sukin opined that appellant's need for surgery was due to a preexisting neck condition based on his reviews of the MRI scan studies. Regarding her disability from work, he stated:

"It is my opinion that [appellant] has had near total disability as a result of her neck condition. It is my opinion the reason she had such difficulty with the new computer monitor was that she was already suffering from a condition in her neck, as described above, *i.e.*, a paracentral right-sided disc protrusion at C6-7 and mild to moderate stenosis of at least four levels."

By letter dated November 27, 2002, the Office requested that Dr. Sukin address whether appellant's occupational exposure aggravated her underlying condition of a C6-7 disc protrusion with stenosis.¹ In a response dated January 2, 2003, Dr. Sukin asserted that appellant sustained a temporary aggravation of a preexisting condition due to her employment injury, which should have resolved within six months.

By decision dated January 6, 2003, the Office denied appellant's request for authorization for a cervical fusion and wage loss beginning February 14, 2002 on the grounds that the medical evidence did not establish that the need for surgery and her disability from work were due to the accepted employment injury.

In a progress report dated January 24, 2003, Dr. Emery reviewed Dr. Sukin's opinion and noted that "with no significant reinjury and identical findings on MRI [scans] and studies both before and after her work-related incident, it will be difficult to mount much of a defense. I do believe [appellant] had an aggravation of her preexisting condition while looking at the computer screen." He recommended that she not challenge workers' compensation due to her emotional state.

Appellant requested an oral hearing on February 3, 2003. On February 26, 2003 Dr. Schneider and Dr. Emery performed an anterior cervical discectomy and fusion at C6-7. In a decision dated April 12, 2004, an Office hearing representative set aside the January 6, 2003 decision after finding a conflict in medical opinion regarding whether appellant required cervical surgery due to her accepted employment injury. She further noted that Dr. Sukin did not adequately explain his finding that appellant's disability due to a temporary aggravation of her preexisting stenosis and herniated disc should have resolved within six months.

The Office referred appellant to Dr. Jeffrey J. Sabin, a Board-certified orthopedic surgeon, for an impartial medical examination. The Office requested that Dr. Sabin discuss whether appellant's need for surgery was due to her use of a computer monitor from August to September 2000 and whether the accepted condition of a temporary aggravation of preexisting cervical spondylolisthesis had resolved.

In a report dated August 2, 2004,² Dr. Sabin reviewed the medical records and noted that he did not have the report of Dr. Sukin or any MRI scan studies. He related:

"I do not have the MRI [scan] [studies] to review and that would be important. From what I can understand in evaluating the records and [appellant], she has had a worsening of her condition since the computer incident. This, however, does appear, at least with the information that I have, to be purely subjective at this point. If one is looking for objective information the MRI [scan] [studies] would be helpful. It is highly likely that [appellant] would be seeing the natural

¹ In a report dated December 18, 2002, Dr. Emery again requested authorization for a discectomy and fusion. He noted that appellant might experience permanent nerve damage from the delay.

² Dr. Sabin indicated that the date of his report was August 2, 2003; however, this appears to be a typographical error.

progression of her degenerative disc disease and stenosis being that she was seen just for that problem the year previously. The use of a computer for only a month would be unlikely to cause permanent changes. Again, the MRI [scan] [studies] would be helpful in evaluating this for objective information. Her subjective feeling is that it was related to the computer.”

Dr. Sabin indicated that it was difficult to evaluate whether appellant’s aggravation of her preexisting cervical spondylosis was temporary or permanent given that she had already undergone surgery at C6-7. He stated: “I would think that the temporary aggravation of the preexisting cervical spondylosis should be resolved by now especially since surgery has been performed on that.” Regarding appellant’s current symptoms of neck pain and numbness, Dr. Sabin found that these complaints were due to “the natural progression of her degenerative disc disease and stenosis in the cervical spine.” He recommended no further treatment due to the employment injury. Dr. Sabin related:

“In conclusion, I find Dr. Sukin’s note to be important. I would find the actual MRI [scan] [studies] to be important and if I found [that] the MRI [scan] [studies] show the C6-7 disc to be identical before and after September 5, 2000 I would state with a high likelihood that this is a natural progression. If there is change in the size of the disc herniation that is significant at C6-7 then one could state that there has been objective evidence of a change perhaps related to the September 5, 2000 situation.”

By letter dated August 11, 2004, the Office requested that appellant submit a copy of the 1999 MRI scan study. Appellant submitted a September 30, 1999 MRI scan study of the brain and cervical spine, which indicated a “moderate[-]sized right paracentral and posterolateral disc protrusion is present at C6-7 resulting in spinal stenosis with an anteroposterior dimension of approximately 10 mm. There is also slight indentation of the cord anteriorly on the right secondary to this finding.”

The Office, by letter dated August 24, 2004, acknowledged that Dr. Sabin required additional evidence and enclosed the entire case record for his review. In a supplemental report dated September 7, 2004, Dr. Sabin declined to review the case record except for the October 31, 2002 and January 2, 2003 reports from Dr. Sukin. He agreed with Dr. Sukin’s finding that appellant’s need for surgery was not due to her computer use from August 18 to September 19, 2000. Dr. Sabin noted that he had not reviewed the MRI scan studies.

In a decision dated October 19, 2004, the Office found that appellant’s need for cervical surgery and her disability beginning February 15, 2002 were not causally related to her accepted employment injury. On November 3, 2004 appellant requested an oral hearing. By decision dated January 18, 2005, the hearing representative set aside the October 19, 2004 decision. She noted that Dr. Sabin’s opinion could not constitute the weight of the medical evidence as he repeatedly indicated in his original report that he needed to review the MRI scan studies but then failed to review the reports when provided with them by the Office. The hearing representative remanded the case for the Office to obtain the MRI scan films for Dr. Sabin to review and to request a supplemental report regarding the cause of appellant’s cervical condition and surgery.

On June 27, 2005 the Office provided MRI scan studies to Dr. Sabin dated September 30, 1999, October 2001 and January 20, 2005. In a supplemental report dated July 7, 2005, Dr. Sabin noted that an MRI scan of the cervical spine dated September 30, 1999 showed “C6-7 degenerative disc disease with a bulge of the disc going to the right side paracentrally [which] causes some right neural foraminal nerve compromise.” He found that an MRI scan of the thoracic spine was normal. An MRI scan of the cervical spine dated January 20, 2005 showed a C6-7 anterior disc fusion. Dr. Sabin asserted, “I have been presented with no evidence to show that there has been any change in [appellant’s] neck immediately before or immediately after September 5, 2000 which is the date used when [she] stated the problem began with the use of the computer screen I believe, in all likelihood, that the C6-7 disc would have been a natural progression of degenerative disc disease.”

By decision dated July 27, 2005, the Office determined that appellant’s cervical fusion and disability after February 15, 2002 were not due to her accepted employment injury. Appellant requested a telephonic hearing, which was held on February 8, 2006. She submitted a report dated March 27, 2006 from Dr. Emery who noted that he had treated appellant almost monthly from 1996 onward and that she never complained of cervical problems prior to December 22, 2000. Dr. Emery asserted that he obtained the 1999 MRI scan of her cervical spine due to complaints of facial numbness. He stated: “The extended duration of her hyperextended position of the cervical spine caused a material aggravation of her preexisting condition which ultimately resulted in surgery. Within a reasonable degree of medical certainty, but for the sustained hyperextension position, [appellant] would not have required the surgical intervention subsequently decided upon.” Dr. Emery noted that he advised appellant not to challenge workers’ compensation on January 24, 2003 due only to her emotional state and that he believed that her condition was “related to her reported work injury of sustained hyperextension of the neck.”

By decision dated June 6, 2006, the Office hearing representative affirmed the July 27, 2005 decision based on her finding that Dr. Sabin’s opinion represented the weight of the medical evidence.

LEGAL PRECEDENT

Section 8103 of the Federal Employees’ Compensation Act³ provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree of the period of disability or aid in lessening the amount of monthly compensation.⁴ In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under section 8103, with the only limitation on the Office’s authority being that of reasonableness.⁵

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

⁵ *Joseph P. Hofmann*, 57 ECAB ___ (Docket No. 05-1772, issued March 9, 2006); *James R. Bell*, 52 ECAB 414 (2001).

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.⁶ In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.⁷

Proof of causal relationship in a case such as this must include supporting rationalized medical evidence. Thus, in order for a surgery to be authorized, appellant must submit evidence to show that the requested procedure is for a condition causally related to the employment injury and that it is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.⁸

When 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.⁹ When the Office secures an opinion from an impartial medical specialist and the opinion of the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. However, when the impartial medical specialist's statement of clarification or elaboration is not forthcoming or the supplemental report is also vague, speculative or lacks rationale, the Office must refer appellant to a second impartial medical specialist for a rationalized medical report on the issue in question.¹⁰

ANALYSIS

Dr. Emery, appellant's attending physician, found that she required a cervical discectomy and fusion at C6-7 due to her accepted employment injury. Dr. Sukin, an Office referral physician, attributed her need for surgery to a preexisting nonemployment-related condition. The Office thus found that a conflict in medical opinion existed between Dr. Emery and Dr. Sukin regarding whether appellant required a cervical discectomy and fusion at C6-7 as a result of her accepted employment injury of cervical strain and an aggravation of cervical spondylosis. The Office referred appellant to Dr. Sabin for resolution of the conflict.

When there exists a conflict in medical opinion and the case is referred to an impartial medical examiner 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

⁶ *Claudia L. Yantis*, 48 ECAB 495 (1997).

⁷ *Cathy B. Mullin*, 51 ECAB 331 (2000).

⁸ *Id.*

⁹ *See* 5 U.S.C. § 8123; *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

¹⁰ *Terrance R. Stath*, 45 ECAB 412 (1994).

weight.¹¹ The Board finds, however, that Dr. Sabin's opinion is insufficient to resolve the conflict regarding whether appellant's cervical discectomy and fusion was causally related to her employment injury. In a report dated August 2, 2004, Dr. Sabin opined that he needs to review the MRI scan studies to reach a conclusion on causal relationship. He opined that it was unlikely that appellant's computer use for one month resulted in a permanent change but that the MRI scan studies were needed to make a definitive determination. Dr. Sabin concluded: "[I]f I found the MRI [scan] [studies] show the C6-7 disc to be identical before and after September 5, 2000 I would state with a high likelihood that this is a natural progression. If there is change in the size of the disc herniation that is significant at C6-7 then one could state that there has been objective evidence of a change perhaps related to the September 5, 2000 situation."

The Office provided Dr. Sabin with the entire case record. In a September 7, 2004 report, Dr. Sabin reviewed only Dr. Sukin's reports and indicated that appellant's cervical surgery was unrelated to her computer use. On July 27, 2005 the Office provided Dr. Sabin with MRI scan studies dated September 30, 1999, October 2001 and January 20, 2005. Dr. Sabin found that the September 30, 1999 MRI scan study of the cervical spine showed a bulging disc on the right side at C6-7 causing some right nerve compromise. He reviewed an MRI scan of the thoracic spine and found that it was normal and a January 20, 2005 MRI scan of the cervical spine which showed the anterior fusion at C6-7. Dr. Sabin, however, did not review or discuss the August 10, 2001 MRI scan study obtained after appellant's employment injury and prior to her cervical fusion. The August 10, 2001 study revealed a C6-7 disc protrusion causing 10 mm of central canal stenosis and bilateral neural foraminal narrowing which had worsened compared to the September 30, 1999 cervical MRI scan. In his August 2, 2004 report, Dr. Sabin repeatedly emphasized that he needed to compare the MRI scan studies prior to and after the September 2000 injury to determine whether her computer use aggravated her preexisting cervical condition resulting in the need for a cervical fusion. However, in his clarification report, he did not provide any explanation for his failure to compare the August 10, 2001 MRI scan study of the cervical spine or provide any rationale regarding why he was able to reach a conclusion on causal relationship without discussing both of the relevant MRI scan studies. As Dr. Sabin's conclusions are unexplained, his opinion is insufficiently rationalized to resolve the conflict in medical opinion on the issue of whether appellant required a cervical fusion and discectomy at C6-7 due to her employment injury.

When the Office secures an opinion from an impartial medical specialist and the opinion of the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. However, when the impartial medical specialist's statement of clarification or elaboration is not forthcoming or the supplemental report is also vague, speculative or lacks rationale, the Office must refer appellant to a second impartial medical specialist for a rationalized medical report on the issue in question.¹² The Board, consequently, finds that the case must be remanded for the referral of appellant to a second impartial medical examiner for another medical evaluation. The Office should request the impartial medical examiner to review all of the evidence, including the MRI scan studies of the cervical spine and provide an opinion regarding

¹¹ See 5 U.S.C. § 8123; *David W. Pickett*, *supra* note 9.

¹² See *Terrance R. Stath*, *supra* note 10.

the relationship between her employment injury and need for surgery. The Office should additionally request that the impartial medical examiner address the duration of appellant's employment-related disability. After such further development as the Office deems necessary, it should issue a *de novo* decision.¹³

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 6, 2006 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: March 1, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹³ In view of the Board's disposition of the issue of whether appellant required surgery due to her accepted employment injury, it is premature to address the issue of whether her disability beginning February 15, 2002 was employment related.