

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective May 8, 2006; and (2) whether appellant had any continuing disability on or after May 8, 2006 causally related to her accepted employment injury; and (3) whether the Office properly refused to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 11, 2004 appellant, then a 43-year-old letter carrier, filed a traumatic injury claim alleging that she was injured in a motor vehicle accident on that date. The Office accepted her claim for neck strain and right shoulder strain.

Appellant's attending physician, Dr. Neil A. Beinhaker, a Board-certified orthopedic surgeon, supported her partial disability for work due to restriction of cervical motion. The Office referred appellant for a second opinion evaluation with Dr. David B. Lotman, a Board-certified orthopedic surgeon, on July 15, 2005. In a report dated August 3, 2005, Dr. Lotman reviewed the statement of accepted facts, the medical history and performed a physical examination. He found that appellant had normal cervical lordosis with normal strength and sensation. Dr. Lotman diagnosed cervical strain resolved and right shoulder strain resolved. He noted that appellant had no objective findings on examination and no objective evidence of residuals.

In a note dated July 26, 2005, Dr. Beinhaker stated that appellant's examination still revealed spasm and restriction of motion.

The Office found a conflict of medical opinion evidence and referred appellant, a statement of accepted facts and a list of questions, to Dr. Alan S. Routman, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated October 10, 2005, Dr. Routman described appellant's employment injury and medical treatment. On physical examination, he found no spasm in the paracervical musculature, inconsistent effort in range of motion testing and normal shoulder range of motion with no impingement syndrome or rotator cuff tendinitis. Dr. Routman stated that appellant had no objective findings to establish an ongoing injury. He noted that appellant's behavior during the examination was inconsistent with her objective clinical findings and raised the possibility of symptom magnification. Dr. Routman stated that appellant had no work-related disability and was capable of performing the duties of her date-of-injury position.

Dr. Beinhaker supported appellant's continued medical residuals and disability for work due to spasm with limitation of cervical motion through a series of notes.

The Office proposed to terminate appellant's compensation benefits in a letter dated March 28, 2006, finding that Dr. Routman's report was entitled to the weight of the medical evidence. Appellant submitted additional treatment notes from Dr. Beinhaker dated February through April 2006 stating that she experienced neck pain and stiffness with restriction of range of motion.

By decision dated May 11, 2006, the Office terminated appellant's claim for medical and wage-loss benefits effective May 8, 2006.

Appellant requested an oral hearing on May 16, 2006. She submitted additional notes from Dr. Beinhaker. In a note dated March 15, 2007, Dr. Lisa I. Banchik, a neurologist, noted that appellant reported neck and right shoulder pain since her employment injury. She diagnosed cervical radiculitis, bilateral carpal tunnel syndrome and internal derangement of the right

shoulder. Dr. Banchik stated that appellant had a markedly abnormal magnetic resonance imaging (MRI) scan of the right shoulder with evidence supraspinitis tendon tendinitis as well as bilateral carpal tunnel syndrome due to her employment.

By decision dated April 27, 2007, the hearing representative affirmed the May 11, 2006 termination decision.

Appellant requested reconsideration on June 13, 2007. On May 21, 2007 Dr. Banchik stated that appellant's work-related motor vehicle accident caused her right shoulder injury. She reviewed appellant's February 28, 2007 right shoulder MRI scan and advised that her findings were indicative of a chronic injury to her right shoulder. Appellant's March 2, 2007 electromyogram (EMG) scan also revealed evidence of chronic denervation in her right abductor pollicis brevis muscle indicative of right C5-6 radiculopathy. Dr. Banchik opined that appellant's injuries were a direct result of her employment injury.

By decision dated September 11, 2007, the Office denied modification of the May 11, 2006 termination decision. It found that Dr. Bankchik's report was not based on an accurate history of injury.

In a report dated August 19, 2007, Dr. Banchik stated that appellant's previous testing did not include a shoulder MRI scan and that she believed that her current shoulder conditions were due to her employment injury. She reviewed the medical records and again stated that her diagnostic testing was consistent with an old neck injury and indicative of a chronic right shoulder injury resulting from the September 11, 2004 employment injury. Dr. Banchik stated, "I feel these injuries are a direct result of [appellant's] work-related motor vehicle accident" Appellant requested reconsideration on September 25, 2007.

By decision dated December 27, 2007, the Office declined to reopen appellant's claim for reconsideration of the merits. It found that Dr. Banchik's report was repetitious.

Appellant requested reconsideration on March 10, 2008 by checking a box on an appeals right form. By decision dated March 28, 2008, the Office declined to reopen appellant's claim for consideration of the merits.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.²

The Federal Employees' Compensation Act provides that, if there is a 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.³ The

¹ *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

² *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

³ 5 U.S.C. §§ 8101-8193, 8123.

implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, it shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁴

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.⁵

ANALYSIS -- ISSUE 1

Appellant's attending physician, Dr. Beinhaker, a Board-certified orthopedic surgeon, examined appellant following her September 11, 2004 employment-related motor vehicle accident. He supported appellant's partial disability for work and described medical residuals consisting of a restricted range of motion in her cervical spine and cervical spasm. The Office referred appellant for a second opinion evaluation with Dr. Lotman, a Board-certified orthopedic surgeon. Dr. Lotman found that appellant had no medical residuals or continuing disability due to her employment injury. Due to this conflict of medical opinion evidence regarding the nature and extent of appellant's medical condition and resulting disability, the Office properly referred her for an impartial medical examination with Dr. Routman, a Board-certified orthopedic surgeon.

In an October 10, 2005 report, Dr. Routman found no objective findings on physical examination as well as inconsistent effort on range of motion testing. Based on this examination, he concluded that appellant had no work-related disability and was capable of performing the duties of date-of-injury position. Dr. Routman's report is based on a proper history of injury and contains the necessary medical reasoning explaining why he believed that appellant's conditions had ceased with no medical residuals or disability. He explained that there were no objective findings to support appellant's claims for continued disability and residuals. The Board finds that this well-reasoned report is entitled to the special weight of the medical evidence and is sufficient to meet the Office's burden of proof to terminate appellant's compensation benefits.

Appellant submitted a report dated March 15, 2007 from Dr. Banchik, a neurologist, diagnosing cervical radiculitis, bilateral carpal tunnel syndrome and internal derangement of the right shoulder. Dr. Banchik opined that these conditions were due to appellant's employment. This report is not sufficient to overcome the weight of Dr. Routman's report as Dr. Banchik did not provide a detailed history of injury including the September 11, 2004 motor vehicle accident and did not offer any medical reasoning in support of her opinion that appellant's current conditions were due to her employment.

Appellant also submitted notes from Dr. Beinhaker through March 30, 2006. These notes contained only the limited findings of restricted cervical range of motion and intermittent

⁴ 20 C.F.R. § 10.321.

⁵ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

cervical spasm. Dr. Beinhaker did not provide any detailed medical reports containing a history of injury, detailed physical findings and an opinion on the causal relationship between appellant's continuing condition and her employment these notes are not sufficient to establish continuing residuals or disability. Further, as he was on one side of the conflict that Dr. Routman resolved, the additional report from Dr. Beinhaker is insufficient to overcome the weight accorded Dr. Routman as the impartial medical examiner or to create a new conflict.⁶

LEGAL PRECEDENT -- ISSUE 2

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that she had disability causally related to her accepted employment injury.⁷ To establish a causal relationship between the condition, as well as any disability claimed and the employment injury, the employee must submit rationalized medical opinion evidence based on a complete factual background, supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized 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 condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁸

ANALYSIS -- ISSUE 2

Following the May 11, 2006 and April 27, 2007 decisions of the Office, appellant submitted a May 21, 2007 report from Dr. Banchik, who noted appellant's accepted employment incident of September 11, 2004 and stated that the motor vehicle accident caused both her right shoulder injury and cervical radiculopathy. Dr. Banchik reviewed electrodiagnostic studies from 2007 and stated that these studies provided evidence of chronic injury in the shoulder and chronic C5-6 radiculopathy which were consistent with the September 11, 2004 employment injury. While this report provides a history of injury as well as an opinion on the causal relationship between appellant's current condition and her employment injury, the report does not contain sufficient medical reasoning explaining how and why appellant would have such conditions without corresponding findings on physical examination. This report is therefore not sufficient to meet appellant's burden of proof and the Office properly denied her claim for continuing disability.

⁶ *Jaja K Asaramo*, 55 ECAB 200, 205 (2004).

⁷ *George Servetas*, 43 ECAB 424, 430 (1992).

⁸ *James Mack*, 43 ECAB 321 (1991).

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁹ the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁰ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.¹¹

ANALYSIS -- ISSUE 3

Appellant requested reconsideration on September 25, 2007 and submitted a report from Dr. Banchik dated August 19, 2007. Dr. Banchik again opined that appellant's current condition as demonstrated by electrodiagnostic studies were causally related to her accepted employment injury. This report is repetitious of the May 21, 2007 report reviewed by the Office. Dr. Banchik did not provide any additional medical findings, opinions or reasoning. As this report does not constitute relevant and pertinent new evidence, the Office properly declined to reopen appellant's claim for consideration of the merits on December 27, 2007.

Appellant again requested reconsideration on March 10, 2008, but failed to submit any evidence or argument in support of her request. As she did not attempt to comply with the requirements of the Office's regulations, it properly denied her request by decision dated March 28, 2008.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits. The Board further finds that appellant failed to submit the necessary rationalized medical opinion evidence to establish continuing disability on or after May 8, 2006. Finally, the Board finds that the Office properly declined to reopen appellant's claim for consideration of the merits on December 27, 2007 and March 28, 2008.

⁹ 5 U.S.C. §§ 8101-8193, § 8128(a).

¹⁰ 20 C.F.R. § 10.606(b)(2).

¹¹ 20 C.F.R. § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 28, 2008, December 27, September 11 and April 27, 2007 are affirmed.

Issued: April 9, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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