

compensation for total disability beginning January 9, 2008. The record establishes that appellant previously sustained injuries at work, including a cervical intervertebral disc displacement under file number xxxxxx770 and multiple left knee conditions under file number xxxxxx586.

In a work restriction evaluation dated May 12, 2008, Dr. Jeffrey L. Tedder, a Board-certified orthopedic surgeon, diagnosed a contusion and strain of the right arm and found that appellant could work four hours a day with restrictions. On June 2, 2008 Dr. Tedder found that she was unable to work pending further notice due to multiple work injuries.¹

On June 13, 2008 the Office referred appellant to Dr. Jeffrey M. Oettinger, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated July 1, 2008, Dr. Oettinger diagnosed chronic right shoulder pain and a small bone spur. He found restricted range of motion of the shoulder, possibly related to effort. Dr. Oettinger advised that the right shoulder strain and contusion had resolved and found that appellant could work eight hours a day in a modified position.

The Office determined that a conflict in medical opinion arose between Dr. Tedder and Dr. Oettinger regarding appellant's disability for work. It referred her to Dr. Robert Henderson, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a psychological evaluation dated September 15, 2008, Dr. Harold R. Linde, a licensed clinical psychologist, noted that appellant had numerous complaints of pain as a result of her work injury. He diagnosed an adjustment disorder with mixed anxiety and depression and recommended that she resume part-time modified duty. On September 26, 2008 Dr. Anthony P. Moreno, a Board-certified orthopedic surgeon, discussed appellant's history of multiple work injuries after an initial injury on April 21, 2006. He recommended an anterior cervical discectomy.

In a report dated October 7, 2008, Dr. Henderson discussed appellant's history of a right shoulder injury on November 24, 2007 and a previous neck injury. He reviewed the medical evidence of record, including the results of diagnostic studies. On examination, Dr. Henderson found full range of motion of the shoulder. He diagnosed a resolved shoulder sprain, a cervical disc protrusion with radiculopathy, status post anterior cruciate ligament reconstruction and possible lumbar disc disease. Dr. Henderson found that the objective findings and appellant's subjective complaints supported a finding of a herniated disc. He opined that her right shoulder contusion had resolved and that her shoulder and arm complaints arose from her cervical injury. Dr. Henderson asserted that appellant probably required surgery for her cervical disc condition. He concluded, "I believe her right shoulder condition has resolved. The pain she is having is from the cervical disc which is a previous injury. I see no specific medical treatment to do for the shoulder; however, she does need to have her cervical disc addressed."

¹ In a report dated August 4, 2008, Dr. Tedder diagnosed chronic post-traumatic cervical spine syndrome, upper trapezius strain, right knee capsular strain and right shoulder impingement syndrome, bursitis and rotator cuff tendinitis.

On December 18, 2008 the Office notified appellant that it proposed to terminate her compensation and authorization for medical benefits for her right shoulder injury.

In a report dated January 15, 2009, Dr. Moreno diagnosed a cervical disc herniation due to a work injury and recommended surgery. In a disability certificate dated January 15, 2009, Dr. Tedder opined that appellant was unable to work. He asserted that her cervical injury had exacerbated her right shoulder condition.²

By decision dated February 24, 2009, the Office terminated appellant's compensation and entitlement to medical benefits effective that date. It found that Dr. Henderson's opinion constituted the weight of the medical evidence and established that she had no residuals of her November 24, 2007 shoulder injury.

On March 4, 2009 appellant, through her attorney, requested a telephone hearing. In a letter dated March 9, 2009, appellant related that her neck condition was aggravating her right shoulder and hand. She contended that the Office had not considered all of her work injuries.

In progress reports dated March 16 and April 27, 2009, Dr. Tedder treated appellant for radiating cervical and lumbar pain. He diagnosed cervical and lumbar radiculopathy, a right upper trapezius strain and a right shoulder bone spur.

By letter dated May 1, 2009, the Office informed appellant that she was currently receiving compensation for disability under file number xxxxxx770. It advised her that it had terminated her compensation under file number xxxxxx655 because the evidence showed that she had no residuals of the contusion and right shoulder strain sustained on November 24, 2007.

At the hearing, held on June 11, 2009, appellant attributed her current condition and disability to the 2006 injury to her back and neck, under file number xxxxxx770. She asserted that she sustained a psychological condition due to that injury. Counsel requested that the hearing representative dismiss the request for a telephone hearing as appellant believed that her shoulder strain had resolved and that her problems resulted from her 2006 cervical injury.

On June 11, 2009 the Office informed appellant that it had accepted her request for withdrawal of the hearing. On June 22, 2009 appellant requested reconsideration. She related, "My shoulder is still giving me problems. It is a result from my neck injury. My right hand also is giving me problems. I need to know when my right hand and nerve damage of my right hand is going to be accepted as part of my claim."

By decision dated July 10, 2009, the Office denied appellant's request for reconsideration after finding that the evidence was insufficient to warrant reopening her case for further merit review under section 8128.

² The record indicates that appellant received treatment at the emergency room on February 2, 2009 for back pain.

LEGAL PRECEDENT -- ISSUE 1

Once the Office 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.³ The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

Section 8123(a) 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.⁵ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office 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 no prior connection with the case.⁶

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.⁷

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a right shoulder contusion and sprain due to a November 24, 2007 work injury. It paid compensation for total disability beginning January 9, 2008. The Office determined that a conflict in medical opinion was created between Dr. Tedder, appellant's attending physician, and Dr. Oettinger, a referral physician, regarding the nature and extent of residual disability due to the November 24, 2007 injury. It referred her to Dr. Henderson for an impartial medical examination.

The Board finds that the opinion of Dr. Henderson, a Board-certified orthopedic surgeon selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. Dr. Henderson accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions about appellant's condition which comported with his findings.⁸ In a report dated October 7, 2008, he reviewed the medical evidence of record, including the results of diagnostic studies. On examination, Dr. Henderson

³ *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁴ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁵ 5 U.S.C. § 8123(a).

⁶ 20 C.F.R. § 10.321.

⁷ *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

⁸ *Manuel Gill*, 52 ECAB 282 (2001).

found full range of motion of the shoulder. He opined that appellant had no further objective findings of her right shoulder contusion and sprain. Dr. Henderson provided rationale for his opinion by noting that her shoulder examination showed essentially normal findings and that her subjective complaints supported a herniated disc. As his report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.⁹ The Office thus met its proof to terminate appellant's compensation benefits for the accepted conditions of a right shoulder contusion and sprain.

The remaining medical evidence submitted prior to the Office's termination of compensation is insufficient to establish that appellant had any further disability due to her November 24, 2007 shoulder injury. Appellant submitted a September 15, 2008 psychological evaluation from Dr. Linde, who found that she complained of pain due to work injuries. Dr. Linde did not attribute any condition to appellant's November 24, 2007 work injury. The Office has not accepted an emotional condition as a result of her November 2007 employment injury. Where appellant claims that a condition not accepted or approved by the Office was due to her employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.¹⁰

On January 15, 2009 Dr. Moreno diagnosed a cervical disc herniation and recommended surgery. He did not address whether appellant was disabled due to her November 24, 2007 work injury. Therefore, Dr. Moreno's opinion is of diminished probative value. In a disability certificate dated January 15, 2009, Dr. Tedder found that appellant could not work and that her cervical condition aggravated her right shoulder condition. He did not, however, provide any rationale for his opinion. Medical conclusions unsupported by rationale are of diminished probative value.¹¹ Accordingly, the Office met its burden of proof to terminate compensation benefits based on the accepted right shoulder injury.

LEGAL PRECEDENT -- ISSUE 2

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹² To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.¹³

ANALYSIS -- ISSUE 2

The Office met its burden of proof to terminate authorization for medical benefits through the opinion of Dr. Henderson, the impartial medical examiner, who found that appellant

⁹ *J.J.*, 60 ECAB ___ (Docket No. 09-27, issued February 10, 2009); *M.S.*, 58 ECAB 328 (2007).

¹⁰ *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

¹¹ *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

¹² *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

¹³ *Id.*

required no further medical treatment for her shoulder injury. Dr. Henderson explained that based on his physical examination and her subjective complaints, she had no further right shoulder condition but instead had pain from a cervical herniated disc. As his opinion is detailed and well rationalized, it is entitled to the special weight accorded an impartial medical examiner and establishes that appellant has no further residuals of her accepted employment injury.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹⁴ the Office's regulations provide that 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) submit relevant and pertinent new evidence not previously considered by the Office.¹⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁶ 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.¹⁷

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁸ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁹ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.²⁰

ANALYSIS -- ISSUE 3

The Office terminated appellant's compensation and medical benefits based on its finding that she had no further residuals of her November 24, 2007 employment injury. Appellant requested a telephone hearing, which was held on June 11, 2009. At the hearing, she asserted that she believed her current condition and disability resulted from her 2006 injury to her back and neck. Appellant's attorney requested that the hearing representative dismiss the hearing request as appellant believed that her shoulder condition had resolved. On June 11, 2009 the Office accepted appellant's request to withdraw her hearing request.

¹⁴ 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

¹⁵ 20 C.F.R. § 10.606(b)(2).

¹⁶ *Id.* at § 10.607(a).

¹⁷ *Id.* at § 10.608(b).

¹⁸ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

¹⁹ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

²⁰ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

On June 22, 2009 appellant requested reconsideration. She argued that her shoulder was still problematic due to her neck injury. Appellant maintained that the Office should accept nerve damage of the right hand. The relevant issue, however, is whether the medical evidence establishes that she has any further disability or need for medical treatment due to her accepted right shoulder contusion and strain. Appellant's lay opinion is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.²¹

In progress reports dated March 16 and April 27, 2009, Dr. Tedder treated appellant for radiating pain from her cervical and lumbar spine. He diagnosed lumbar and cervical radiculopathy, a right upper trapezius strain and a bone spur on the right shoulder. Dr. Tedder did not address the relevant issue of whether appellant has any further disability or condition due to her November 2007 work injury. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.²²

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation and authorization for medical benefits effective February 24, 2009 on the grounds that she had no further residuals of her November 24, 2007 employment injury. The Board further finds that the Office properly denied her request for further review of the merits of her claim under section 8128.

²¹ *Gloria J. McPherson*, 51 ECAB 441 (2000).

²² *P.C.*, 58 ECAB 405 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 10 and February 24, 2009 are affirmed.

Issued: August 3, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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