

¹ On appeal, appellant submitted new medical evidence. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1). The Board may not consider this evidence for the first time on appeal.

FACTUAL HISTORY

On June 2, 2005 appellant, then a 55-year-old human resources assistant, filed a traumatic injury claim alleging that, on June 1, 2005, during the course of her federal employment, she was going down stairs with a cake in her hand and slipped and fell onto her knees and then onto her head. She listed her injuries as fractured tibia, bruised forehead and bruise under her right eye. On August 10, 2005 the Office accepted appellant's claim for fracture left upper end fibula, closed; bilateral contusion of knee/lower leg; and contusion of face, scalp and neck. On October 25, 2006 it also accepted her claim for rotator cuff syndrome right shoulder. On March 29, 2007 appellant underwent right rotator cuff repair shoulder surgery.

On January 11, 2008 the Office referred appellant to Dr. Raghuram Kolanu, a Board-certified neurologist, for a second opinion. In a January 25, 2008 report, Dr. Kolanu stated that she suffered a left leg injury and contusions as a result of a fall in June 2005. He noted that neurological examination was essentially unremarkable except for some restriction of back movement. Dr. Kolanu opined that appellant's work-related conditions of left fibular fracture, contusion of knee and leg, contusion of face, scalp and neck and rotator cuff syndrome had resolved with no residuals. He did not believe that she required any restrictions as a result of the June 1, 2005 employment injury.

The Office sent the report of Dr. Kolanu to appellant's treating Board-certified neurologist, Dr. Kenneth Lazarus, for comments. In an October 2, 2008 report, Dr. Lazarus stated that she was currently suffering from fibromyalgia syndrome, depression, obstructive sleep apnea syndrome and cervical spondylosis. He noted that these work conditions had not resolved and were still medically present and disabling. Dr. Lazarus also noted that appellant had a history of shoulder surgery from rotator cuff syndrome. He stated that he did not anticipate any significant improvement or resolution in her fibromyalgia syndrome or resultant depression and stated that she was currently disabled for work and did not appear to be capable of performing work with restrictions.

On February 19, 2009 the Office referred appellant to Dr. Mark Irwin Harris, a Board-certified neurologist, for an impartial medical examination to resolve the conflict between the opinion of appellant's physician, Dr. Lazarus, and the second opinion physician, Dr. Kolanu, with regard to her continuing residuals from her employment injury. In an April 13, 2009 report, Dr. Harris assessed appellant with postconcussion syndrome secondary to the employment injury. He noted that most likely the majority of her symptoms are due to the postconcussion syndrome. Dr. Harris also noted post-traumatic headaches but also noted 30 years of preexisting history of migraine headaches. He stated that, with regard to generalized pain, there appeared to be a fair amount of symptom magnification. Dr. Harris stated that, if appellant did have fibromyalgia, the relationship of this to the injury was deferred to rheumatology. He recommended referral to a rheumatologist to determine if the fibromyalgia was related to her work injury and the best course of treatment for her fibromyalgia. Dr. Harris noted that appellant had right shoulder pain but deferred any comments regarding shoulder pain and its relationship to her work injury to orthopedic physicians. He opined that as a result of her employment injury she had several injuries including multiple contusions, fibular fracture and rotator cuff injury, all of which have resolved. Dr. Harris did note that appellant was continuing to complain of headaches. From a neurological viewpoint, he believed that she could return to work with no

restrictions. In response to questions from the Office sent on April 16, 2009, Dr. Harris stated that the on-the-job injury aggravated appellant's headaches. He noted that the aggravation of the headaches at this point may be permanent.

By letter dated April 23, 2009, the Office referred appellant to Dr. Michael Friedman, a Board-certified internist and rheumatologist, and Dr. Alexander Doman, a Board-certified orthopedic surgeon, for second opinion examinations.

In a May 7, 2009 report, Dr. Doman noted a normal orthopedic evaluation. He opined, "It is my firm and definite opinion that [appellant's] work-related condition of contusion of her knees, legs and rotator cuff syndrome have fully and completely resolved. There are no objective findings to support any residual conditions relating to her injury." Dr. Doman also opined that there were no objective findings that appellant's current condition was the result of her work factors. He explained that any subjective complaints that she had were related to fibromyalgia, which is not work related. Dr. Doman also noted that appellant's subjective complaints outweighed the objective findings and, in fact, there were no objective findings to substantiate her complaints. He noted that she had no medical restrictions as a result of her June 1, 2005 work injury. Dr. Doman noted his firm belief that appellant's work-related conditions of contusion of her knees, legs and rotator cuff syndrome have fully and completely resolved.

In a May 24, 2009 report, Dr. Friedman opined that appellant's problem was primarily fibromyalgia and that this represents a chronic, debilitating disabling condition that will never be resolved. When asked if the fibromyalgia was related to her work injury, he indicated that the cause of the fibromyalgia was unknown and can therefore not be ascribed to any specific event. Dr. Friedman believed that appellant's restrictions were based on arthritis, which was a separate condition. He opined that she was suffering from an undiagnosed and untreated inflammatory arthropathy. Dr. Friedman noted that this entity is actually what is perpetuating appellant's work disability and is of fairly recent onset. He noted that her case was complicated by the presence of some type of painful neuropathy, perhaps related to her diabetes.

On January 26, 2010 the Office proposed to terminate appellant's medical benefits and compensation for wage loss. On February 25, 2010 the proposed termination of benefits was made final effective March 13, 2010.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion

² *I.J.*, 59 ECAB 408 (2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

³ *Vivien L. Minor*, 37 ECAB 541 (1986).

evidence based on a proper factual and medical background.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, the Office must establish that the claimant no longer has residuals of an employment-related condition, which requires further medical treatment.⁵

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.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

The Office accepted appellant's claim for fracture of the left upper end tibia; bilateral contusions of the knee, lower leg; contusions of the face, scalp and neck and rotator cuff syndrome. Appellant's physician, Dr. Lazarus, stated that appellant continued to suffer from fibromyalgia syndrome, depression, obstructive sleep apnea and cervical spondylosis. Dr. Kolanu, the second opinion physician, opined that her work-related conditions of left fibular fracture, contusion of the knee and leg, contusion of face, scalp and neck and rotator cuff syndrome had resolved with no residuals. Accordingly, he believed that appellant's accepted work injuries had resolved.

As there was a difference in opinion between appellant's treating physician and the second opinion physician as to whether appellant had any residuals from her employment-related injury, the Office referred her for an impartial medical examination with Dr. Harris, who opined that as a result of her employment injury she had several injuries including multiple contusions, fibular fracture and rotator cuff injury, all of which have resolved. Dr. Harris noted that her subjective complaints were markedly disproportionate to her physical findings. He opined that appellant continued to suffer from headaches that were related to her employment injury. Although Dr. Harris indicated that it was very common for a head injury to trigger or exacerbate migraine-type headaches in appellant, he did not explain why he believed that the work injury was still the cause of the headaches in her case. He indicated that he would defer to a rheumatologist with regard to whether her fibromyalgia was related to her work injury and would defer to an orthopedic physician with regard to the relationship between her shoulder pain and her injury. The Office then referred appellant to Dr. Doman for an orthopedic evaluation. Dr. Doman opined that her work-related condition of contusion of her knees, legs and rotator cuff syndrome had fully resolved. The Office also referred appellant to Dr. Friedman for a rheumatology report. Dr. Friedman found that he was uncertain as to the cause of her

⁴ *T.P.*, 58 ECAB 524 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁵ *E.J.*, 59 ECAB 695 (2008).

⁶ 5 U.S.C. § 8123(a).

⁷ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

fibromyalgia, but believed that her restrictions were based on arthritis. The Office determined that the reports of Drs. Harris, Friedman and Doman established that appellant's accepted conditions of left fractured fibula in both knees, leg contusions, face contusion and right shoulder rotator cuff syndrome had ceased or were no longer injury related and terminated benefits.

In terminating appellant's benefits, the Office failed to follow its procedures. Dr. Harris, the impartial medical examiner, indicated that he would defer to a rheumatologist and an orthopedist to resolve issues with regard to the causal relationship between appellant's employment and her fibromyalgia and shoulder pain. The Office referred her for these appointments to Dr. Doman and Dr. Friedman for second opinions. However, the Office's procedure manual clearly states that if a referral physician needs information from another provider he should make subsidiary referrals as necessary. The impartial medical examiner will then write a summary report discussing any discrepancies among the physician's viewpoints so that the questions posed by the Office are fully answered.⁸

In the instant case, the Office gave undue weight to the opinions of Drs. Doman and Friedman, who are second opinion physicians, not impartial medical examiners. If there is an unresolved conflict, the conflict must be resolved by an impartial medical examiner, not a second opinion physician. The Office erred in terminating appellant's compensation benefits based in part on the opinions of second opinion physicians who could not resolve the conflict in the medical evidence. The conflict in medical evidence with regard to remaining residuals due to her employment injury remains unresolved.

In the instant case, as there remains an unresolved conflict with regard to remaining residuals from the accepted injury, the Board finds that the Office has not met its burden to justify the termination of compensation.

CONCLUSION

The Board finds that the Office improperly terminated appellant's wage-loss compensation and medical benefits.

⁸ *I.H.*, 60 ECAB ____ (Docket No. 08-1352, issued December 24, 2008); *Harold Travis*, 30 ECAB 1071 (1979); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations, Referee Examinations*, Chapter 3.500.4 (May 2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 25, 2010 is reversed.

Issued: February 14, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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