



her head by a chair while working. The Office accepted the claim for concussion and contusion of the head. Appellant stopped work on April 4, 2000 and returned to work on August 2, 2000 working three days for four hours per day. The Office accepted a recurrence of disability on January 18, 2001. By letter dated August 30, 2001, appellant was placed on the periodic rolls for temporary total disability.

In a report dated January 25, 2001, Dr. Clem A. Ciccarelli, a treating Board-certified family practitioner, noted that appellant had a fall on January 12, 2001. He reported that appellant “continues to have telegraphic speech, with dropping of prepositions” and a January 16, 2001 scan “showed no evidence of acute intercranial trauma.” Under impression, Dr. Ciccarelli stated that appellant “has a history of post concussive syndrome” and “her present symptoms are much more prolonged than one would normally expect in post concussive syndrome.”

In a January 26, 2001 report, Dr. Richard B. Brown, a Board-certified internist and neurologist, diagnose concussion causally related to appellant having struck her head at work and a preexisting condition of fibromyalgia stemming back to 1986, which was aggravated. Dr. Brown concluded that appellant remains disabled.

In a report dated September 8, 2001, Dr. Michael S. Miller, a second opinion Board-certified neurologist, concluded that appellant had no disability or residuals due to her accepted concussion and contusion of the head. With regards to any disability, Dr. Miller opined that appellant “would have been expected to have a brief period of rest followed by return to work in her usual capacity,” which he stated would be one to two weeks. Additionally the doctor reported that there were no neurologic residuals of the employment injury, no physical limitations and no neurologic basis for her inability to perform daily activities. He pointed out that appellant’s current disability was nonemployment related and her “bizarre speech” is suggestive of a psychological component.

In a report dated April 11, 2002, Dr. Ernest M. Baran, a treating Board-certified psychiatrist, opined that appellant had “not fully recovered from her closed head injury” and requested that appellant be referred to a cognitive brain injury training program. He noted:

“The electrophysiologic studies and clinical examination support a mild to moderate left brachial plexopathy and on the right, mild. The physical examination also demonstrated a left upper extremity action tremor that is most likely secondary to the patient’s closed head injury.”

In a June 20, 2002 report, Dr. Ciccarelli diagnosed “closed head injury contusion and is off indefinitely.” He stated that appellant had been recently diagnosed with thoracic outlet syndrome and the information he received “shows a significance of a peripheral nerve electromyogram studies, which are positive.” A physical examination revealed a left upper extremity tremor, which he attributed to the closed head injury. Dr. Ciccarelli noted that Dr. Baran suggested that appellant “had a cognitive brain injury and has a left brachial abnormality.”

On September 25, 2002 the Office referred appellant to Dr. Charles S. Yanofsky, a Board-certified neurologist, to resolve the conflict in the medical opinion evidence between Dr. Miller and Dr. Ciccarelli as to whether appellant had fully recovered from her accepted March 27, 2000 employment injury.

In a November 4, 2002 report, Dr. Yanofsky, based upon a review of the medical and factual evidence, statement of accepted facts and physical examination, concluded “that apart from purely psychological affects,” appellant had recovered from her March 27, 2000 employment injury. He further stated that “much of her current disability is not related to a concussion or head contusion” and attributed “a good deal” of her current disability to her preexisting conditions of thoracic outlet syndrome and fibromyalgia. A physical examination revealed “her speech was rather telescopic lacking articles and prepositions in particular.” He reported her neck range of motion was slightly reduced and “there was no tenderness in the posterior cervical spine or the trapezius area.” With regards to her disability, Dr. Yanofsky stated:

“On the basis of multiple objective parameters, the severity of her head injury is felt to be minimal in that she had no prolonged alteration of consciousness from the incident, did not have demonstrable internal brain or external injuries and had no prolonged retrograde amnesia. Her specific condition is medically connected to the work injury, but the severity of the injury appears to have been very minimal. After this apparent minimal injury, she has had a prolonged disability. The extent of her disability and the prolonged nature and severity of her medical complaints is inexplicable on the basis of her injury as described. Some factors which likely contributed include a previous diagnosis of fibromyalgia and headache syndrome.”

As to appellant’s return to work, the physician suggested easing appellant back into her employment by “starting with shorter hours and minimal physical demands,” and concluded that appellant “is not totally disabled.”

On December 8, 2002 the Office issued a proposed termination of wage-loss and medical benefits based upon the opinion of Dr. Yanofsky, the impartial medical examiner, that she no longer had any residuals or disability due to her accepted March 27, 2000 employment injury. In response to the proposed termination, appellant’s counsel submitted an October 17, 2002 report and October 30, 2002 work restriction form (OWCP-5) by Dr. Ciccarelli. In his report, Dr. Ciccarelli opined that appellant’s preexisting condition of left thoracic outlet syndrome had been aggravated by her employment-related “postconcussion brain syndrome aggravated by nocturnal myoclonus.” The physician concluded that appellant was totally disabled from January 11, 2002 to the present due to her postconcussion syndrome and “chronic disability of her neck thoracic outlet, which is severe pain.” Appellant’s counsel contended Dr. Yanofsky failed to address whether appellant’s preexisting conditions had been aggravated by her employment injury as the physician limited appellant’s ability to return to work. Thus, appellant contended this opinion was insufficient to meet the Office’s burden to terminate appellant’s compensation.

On April 15, 2003 the Office finalized the termination of appellant's compensation benefits effective April 20, 2003.

In an April 21, 2003 letter, appellant, through her attorney, disagreed with the Office's decision and requested a hearing, which took place on November 10, 2003.

By decision dated February 18, 2004, the Office hearing representative affirmed the June 24, 2003 termination decision finding the report of Dr. Yanofsky, the impartial medical examiner, constituted the weight of the medical evidence. He found that the reports by Dr. Cicarelli were insufficient to outweigh or create a conflict with the report of Dr. Yanofsky.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>1</sup> The Office may not terminate or modify compensation without establishing that the disabling condition ceased or that it was no longer related to the employment.<sup>2</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>3</sup> Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>4</sup> 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.<sup>5</sup>

### **ANALYSIS**

In this case, the Office accepted appellant's claim for a concussion and head contusion. The Board finds that the Office properly determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Ciccarelli and Dr. Miller, Office referral physicians, concerning whether appellant had fully recovered from the employment injury and properly referred appellant to Dr. Yanofsky to resolve the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist 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 weight.<sup>6</sup> The

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<sup>1</sup> *LaDonna M. Andrews*, 55 ECAB \_\_\_\_ (Docket No. 03-1573, issued January 30, 2004).

<sup>2</sup> *Jaja K. Asaramo*, 55 ECAB \_\_\_\_ (Docket No. 03-1327, issued January 5, 2004); *Elsie L. Price*, 54 ECAB \_\_\_\_ (Docket No. 02-755, issued July 23, 2003).

<sup>3</sup> *Daniel F. O'Donnell, Jr.*, 54 ECAB \_\_\_\_ (Docket No. 02-1468, issued February 28, 2003).

<sup>4</sup> *LaDonna M. Andrews*, *supra* note 1; *James F. Weikel*, 54 ECAB \_\_\_\_ (Docket No. 01-1661, issued June 30, 2003); *Barbara Johnsen (James C. Johnsen)*, 54 ECAB \_\_\_\_ (Docket No. 03-1738, issued September 30, 2003) (to be of probative value, the physician must provide rationale for the opinion reached).

<sup>5</sup> *Donald T. Pippin*, 54 ECAB \_\_\_\_ (Docket No. 03-205, issued June 19, 2003).

<sup>6</sup> *Solomon Polen*, 51 ECAB 341 (2000).

Board finds, however, that Dr. Yanofsky's report is insufficient to show that appellant had no further employment-related condition or disability effective April 20, 2003. In his November 4, 2002 report, Dr. Yanofsky reviewed a history of appellant's condition and treatment, the results of tests and findings on physical examination. He opined that she had no continuing disability or medical condition causally related to her March 27, 2000 employment injury. He stated that her head injury was minimal as "she had no prolonged alteration of consciousness," there was "no prolonged retrograde amnesia" and she showed no "demonstrable internal brain or external injuries." Dr. Yanofsky indicated that appellant's disability was inexplicable based on the injuries she sustained. He also stated that "much of her current disability is not related to a concussion or head contusion." The Board finds that as Dr. Yanofsky has provided conflicting opinions as to whether appellant continues to have disability and/or residuals from her accepted employment injury as he reports that appellant has no continuing disability or medical condition due to the employment injury, but also provides a statement attributing some of her disability due to her employment injury. Dr. Yanofsky's opinion is equivocal in nature and does not rule out that appellant's disability is related to her concussion or head contusion. Thus, the Board finds that Dr. Yanofsky's opinion is insufficient to meet the Office's burden of proof to establish that appellant had no employment-related condition or disability on or after April 20, 2003.

### **CONCLUSION**

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective April 20, 2003.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 18, 2004 is reversed.

Issued: December 13, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member