

federal duties.¹ In support of his claim, appellant submitted a July 27, 2001 report from Dr. Raymond Kurzner, an orthopedic surgeon, who stated that he presented with sharp pain in his neck that he first noticed on July 6, 2001 while stacking boxes at work. On examination Dr. Kurzner reported spasms in the scapulothoracic muscles on the right and left and acute pain to palpation. He diagnosed bilateral scapulothoracic myositis and told appellant to remain off work for two weeks. In an August 17, 2001 report, Dr. Kurzner stated that appellant's condition, which had resolved, was caused by repetitive arm, head and neck motions climaxed by packing boxes. On September 14, 2001 the Office accepted the claim for scapulothoracic myositis.

On March 4, 2002 appellant filed a recurrence of disability claim stating that his neck condition had stabilized until February 27, 2002, when he began to experience pain. In a March 1, 2002 report, Dr. Kurzner stated that appellant was placed on outside-duty processing mail and on February 27, 2002 he had a recurrence. Appellant presented with neck, right hand and low back pain. On examination Dr. Kurzner found pain on palpation of the carpometacarpal right hand (thumb) joint, positive lumbosacral vertebral compression, negative Patrick's test, local pain on palpation at L5-S1 and cervical spine pain on palpation at C5-6, left. He also noted that extremes of passive and active motion yielded pain and lateral tilt yields pain. Dr. Kurzner diagnosed right carpometacarpal sprain and lumbosacral sprain and cervical sprain. On March 29, 2002 the Office accepted a recurrence of scapulothoracic myositis and noted that this was the only condition accepted as Dr. Kurzner did not attribute the other conditions to appellant's employment.

Appellant was placed on the periodic rolls for total disability. In an October 2, 2002 form report, Dr. Kurzner added depression to his diagnosis. In an October 9, 2002 letter, the Office referred appellant to Dr. Richard Goodman, a Board-certified orthopedic surgeon, for a second opinion. On an October 21, 2002 recurrence form, appellant stated that he had suffered a consequential injury from his accepted July 6, 2001 condition.²

Appellant submitted a July 29, 2002 report from Dr. Shalom Feinberg, Board-certified in psychiatry and neurology, who stated that he had seen appellant for three months for increasing anxiety and depressive symptoms that developed after he reinjured his neck in February 2002 and was subsequently involved in a stressful interaction with his supervisor. Dr. Feinberg noted that appellant experienced increased irritability, depressed mood, anxiety as well as decreased stress tolerance and obsessional ruminations and difficulty concentrating and sleeping due to recurrent nightmares. He diagnosed major depressive, anxiety and personality disorders and exacerbation of a previous neck injury. Dr. Feinberg stated that these conditions were chronic and that appellant was totally disabled.

In an October 30, 2002 report, Dr. Goodman stated that his physical examination of appellant found limited cervical motion to 5 degrees flexion and extension, 10 degrees of left and right rotation and 0 degrees right lateral flexion and 5 degrees left lateral flexion. He noted limited lumbar motion to 15 degrees flexion, 10 degrees of extension and 15 degrees flexion, 10

¹ At the time of his injury, appellant was working limited duty due to a 1998 work-related elbow injury. He also had a nonindustrial degenerative arthritis condition.

² Appellant also filed a traumatic injury claim (Claim No. 022026014) related to his emotional condition.

degrees of extension, 15 degrees of right rotation and 10 degrees of left rotation. Dr. Goodman found appellant's biceps, triceps and forearm reflexes were two plus and symmetrical. He stated that there was no evidence of any organic orthopedic conditions and no organic disability and no orthopedic reason why appellant could not return to his date-of-injury job. Dr. Goodman added that the other medical facts were a psychiatric disturbance, which he stated was outside his area of expertise.

In a November 19, 2002 letter, the Office proposed terminating appellant's compensation based on Dr. Goodman's report. In a December 3, 2002 report, Dr. Kurzner noted that appellant had no back pain, but complained of constant neck pain that radiated into the left shoulder, awakened him nightly and was aggravated by elevating his arms. He found that appellant had left weakness of grasp, 40 degrees right and left rotation with pain at extremes both active and passive and noted a lateral tilt left yields pain. Dr. Kurzner diagnosed residual cervical sprain with radiculitis herniated nucleus pulposus (HNP) type of findings and stated that appellant is totally disabled.

In a February 13, 2003 decision, the Office terminated appellant's compensation, finding the weight of the medical opinion was represented by the October 30, 2002 report of Dr. Goodman.

In a July 21, 2003 letter, appellant requested reconsideration and submitted several progress notes from Dr. Kurzner, who found that he was totally disabled due to a residual cervical sprain with radiculitis and HNP-type findings. In an April 23, 2003 letter, Dr. Kurzner disagreed with Dr. Goodman's conclusions. The record also contains an undated statement from appellant that described the circumstances he went through to have his recurrence claim processed.

In an October 20, 2003 decision, the Office denied modification of the November 19, 2002 decision.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,³ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁴ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁵ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

³ 5 U.S.C. § 8101 *et seq.*

⁴ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁵ *Id.*

⁶ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

Section 8123(a) of the Act provides in pertinent part: “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.”⁷ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.⁸

ANALYSIS

The Board finds that the Office did not meet its burden of proof to terminate appellant’s compensation due to a conflict in the medical evidence between Dr. Goodman and Dr. Kurzner regarding whether appellant’s accepted neck condition had resolved.

In terminating appellant’s compensation, the Office relied on Dr. Goodman’s October 30, 2002 report. He noted several physical limitations to motion in appellant’s neck as demonstrated on examination, but concluded that he had no orthopedic basis for not returning to his date-of-injury job. Dr. Goodman concluded that appellant’s accepted condition did not disable him from returning to work. He noted that appellant’s psychiatric condition was outside his area of expertise.

Dr. Kurzner found that appellant was totally disabled due to work-related back and neck conditions. In a December 3, 2002 report, he stated that appellant had no back pain, but persisted with complaints of constant neck pain that radiated into the left shoulder and was aggravated by elevating his arms. Dr. Kurzner added that appellant had left weakness of grasp, 40 degrees right and left rotation with pain at extremes both active and passive and noted a lateral tilt left yields pain. Dr. Kurzner diagnosed a residual cervical sprain with radiculitis stated that appellant was totally disabled. In his July 29, 2002 report, Dr. Feinberg diagnosed multiple emotional disorders and an exacerbation of a neck injury that was chronic and left appellant totally disabled. The Board finds that there is an unresolved conflict in the medical evidence. The Office has not met its burden of proof to terminate appellant’s compensation.

CONCLUSION

The Office did not meet its burden of proof to terminate appellant’s compensation effective February 23, 2003.

⁷ 5 U.S.C. § 8123(a).

⁸ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 14, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member