

of medical opinion between appellant's treating physician and the Office referral physician. The Board concluded that the Office abused its discretion in denying his cervical surgeries of July 9 and 18, 2001 without having resolved the conflict. The facts and circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.²

To resolve the conflict the Office referred appellant to Dr. Julius E. Ciembroniewicz, a Board-certified neurosurgeon, who indicated, in a report dated March 10, 2004, that he reviewed the records provided and performed a physical examination. Dr. Ciembroniewicz noted a history of appellant's work-related injury. He also noted his history as a competitive weight lifter and having developed a bulging cervical disc in 1999. Physical examination of the neck revealed a good range of motion with slight limitation of flexion and extension, the cranial nerves were intact and appellant displayed tremor of both hands. Dr. Ciembroniewicz noted excellent strength in all muscle groups of the upper and lower extremities, no atrophy and significant hyperreflexis in both the upper and lower extremities. The sensory system was intact, straight leg raises were negative, with mild restriction of the lumbodorsal area. Appellant's gait was normal. Dr. Ciembroniewicz diagnosed significant progressive degenerative disc disease at multi-levels, especially the level of C5-6 and C6-7. He opined that this condition was present prior to appellant's employment as a sweeper. Dr. Ciembroniewicz reviewed the written information and photographs on the ergonomic requirements of a sweeper and found that a few months of activity in this position could not result in the cervical disc protrusion, the development of degenerative changes or a significant aggravation of the preexisting severe cervical spondyloarthritis. At most, the job could result in mild myofascial injury to the neck and shoulder muscle groups. Dr. Ciembroniewicz opined that, based on his review of the available medical information, interviewing and examining appellant and reviewing limited diagnostic studies his neck surgery, specifically the two-level interbody fusion at C5-6 and C6-7, was not causally related to his occupational activities at the employing establishment. He further opined that the need for surgery was causally related to progressive degenerative cervical disc disease and represented the natural progression of the disease. Dr. Ciembroniewicz indicated that his opinion was based on his extensive personal experience and on the fact that weight lifters, such as appellant, were prone to develop cervical disc disease and he had a history of cervical radiculopathy.

In a decision dated March 30, 2004, the Office denied appellant's claim for cervical surgery on the grounds that it was not causally related to his accepted work-related condition.

By letter dated July 23, 2004, appellant requested reconsideration and submitted additional evidence. He disagreed with the opinion of Dr. Ciembroniewicz and believed that the physician improperly mentioned his history as a body builder. Appellant submitted several magnetic resonance imaging (MRI) scans already of record, dated September 22, 1999 to July 18, 2001. In a report dated April 10, 2001, Dr. William F. D'Angelo, a Board-certified neurologist, noted that appellant was unchanged neurologically with good strength and sensation. He also advised that appellant was a body builder. Dr. D'Angelo recommended conservative treatment including a cortisone epidural and opined that it would be unwise to rush into surgery. Counseling notes from a licensed social worker, dated December 11, 2002 to March 31, 2004,

² Docket No. 03-2034 (issued December 18, 2003).

noted appellant's treatment for depression and post-traumatic stress disorder due to his worker's compensation claim and social security claim. Also submitted was a Social Security Administration (SSA) decision dated October 31, 2003, which noted that he was considered disabled and entitled to benefits. In reports dated April 13 and 28, 2004, Dr. William W. Dexter, a Board-certified family practitioner, noted treating appellant for multiple orthopedic and psychiatric issues, many of which were related to his worker's compensation claim. He diagnosed anxiety, degenerative disc disease, depression, plantar fasciitis, hypercholesterolemia, status post carpal tunnel surgery, status post cervical disc surgery and status post division plantar fascia/muscle. Other treatment notes from Dr. Dexter dated July 23, 2004 reported an essentially normal physical examination with decreased range of motion of the trunk, difficulty in squatting, pain in the right foot and mild depression. Appellant also submitted several articles describing the duties and health hazards of a sweeper.

In a decision dated October 5, 2004, the Office denied modification of the decision.

By letter dated April 28, 2004, appellant requested reconsideration and submitted additional medical evidence. He asserted that Dr. Ciembroniewicz made false statements in an attempt to deny him compensation. Appellant submitted a letter of guidance dated February 18, 2005, from the Maine Board of Licensure in Medicine (hereinafter referred to as the "Board of Licensure") which was issued as an expression of concern about Dr. Ciembroniewicz's action in appellant's case. Dr. Ciembroniewicz's report noted that he was in "superb physical condition" which the Board of Licensure determined was an incorrect description of his condition. The Board of Licensure noted that the letter of guidance did not constitute an adverse disciplinary action and was not reportable to any bank. The Board of Licensure further noted that Dr. Ciembroniewicz's behavior did not rise to a level of misconduct sufficient to warrant disciplinary action and urged him to take more care in the process of doing individual examinations and to his use of language regarding physical findings. Appellant also submitted excerpts from the Code of Medical Ethics.

By decision dated June 21, 2005, the Office denied modification of the October 5, 2004 decision.

LEGAL PRECEDENT

Section 8103(a) of the Federal Employees' Compensation Act provides that, the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.³ The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from

³ 5 U.S.C. § 8103(a).

established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.⁴

Proof of causal relationship must include supporting rationalized medical evidence. In order for cervical surgery to be authorized, a claimant must submit medical evidence to show the necessity for surgery as treatment for a condition causally related to the employment injury and that surgery is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.⁵

ANALYSIS

The Office accepted that appellant developed an aggravation of cervical spondylosis. He did not stop work, but returned to an administrative position. The Board determined that a conflict of medical opinion arose over whether his cervical surgeries of July 9 and 18, 2001 were warranted and causally related to the accepted condition. Dr. Robert Runyon, a Board-certified orthopedic surgeon, diagnosed cervical spondylosis of long duration and advised that the primary cause for the decompressive procedure, without evidence of a new injury, would be the underlying cervical spondylosis and associated reactive change. He concluded that the surgery was not warranted and necessary because of the aggravation occurring in May 2000. By contrast, Dr. Edward Woodard, a Board-certified neurologist and appellant's surgeon, diagnosed two-level cervical disc disease at C5-6 and C6-7. He noted that appellant was treated conservatively without success, therefore, recommended the cervical decompression surgery as warranted. Dr. Woodward supported the cervical decompression surgery as related to his work-related aggravation. The Office properly referred appellant to Dr. Ciembroniewicz, a Board-certified neurologist, for an impartial medical examination.

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.⁶

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Ciembroniewicz. After reviewing appellant's complaints, medical history, the medical records and conducting a physical examination, he opined that appellant had very significant progressive degenerative disc disease at multi-levels of the cervical spine, especially the level of C5-6 and C6-7. Dr. Ciembroniewicz noted the degenerative disease was present prior to appellant's employment as a sweeper. He advised that his work as a sweeper would not result in the cervical disc protrusion, the development of degenerative changes or produce significant aggravation of the preexisting severe cervical spondyloarthritis. Dr. Ciembroniewicz opined that the job could cause mild myofascial injury to the neck and shoulder muscle groups. He discussed his review of the available medical information, interviewing and examining appellant and review of the limited diagnostic studies.

⁴ *Francis H. Smith*, 46 ECAB 392 (1995); *Daniel J. Perea*, 42 ECAB 214 (1990).

⁵ *Cathy B. Mullin*, 51 ECAB 331 (2000).

⁶ *Solomon Polen*, 51 ECAB 341 (2000).

Dr. Ciembroniewicz concluded that appellant's cervical surgery, specifically the two-level interbody fusion at C5-6 and C6-7, was not causally related to his occupational activities at the employing establishment. He opined that the need for surgery was causally related to the progressive degenerative cervical disc disease and represented a natural progression of the disease. Dr. Ciembroniewicz further noted that his opinion was based on the fact that weight lifters were prone to develop cervical disc disease and the medical history revealed that prior to appellant's employment, he experienced cervical radiculopathy. The Board finds that his report is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight. The Board finds that Dr. Ciembroniewicz's report represents the weight of the medical opinion evidence and establishes that surgical procedures at issue were not necessary treatment for the accepted work injury.⁷

Appellant submitted a report from Dr. D'Angelo dated April 10, 2001. He noted that appellant was unchanged neurologically with good strength and sensation. However, Dr. D'Angelo did not support surgical intervention; rather he recommended conservative treatment, including a cortisone epidural and opined that it would be unwise to rush into surgery. Also submitted were counseling notes from December 11, 2002 to March 31, 2004, from Rita Nugent, a licensed social worker. A nurse is not defined as a physician under the Act and the Board has held that a medical opinion can only be provided by a qualified physician.⁸

Other reports from Dr. Dexter dated April 13 to July 23, 2004 noted treating appellant for multiple orthopedic and psychiatric issues. However, Dr. Dexter report's failed to provide a rationalized opinion regarding the causal relationship of the cervical surgery to the employment injury and address whether this procedure was medically warranted.⁹ Additionally, these reports, which were submitted after the impartial medical examiners report, were similar to his prior reports and were insufficient to overcome that of Dr. Ciembroniewicz or to create a new medical conflict.¹⁰ Other reports including MRI scans from September 22, 1999 to July 18, 2001 failed to address the cervical surgery and failed to provide any medical rationale in support of cervical surgery.

Appellant asserted that Dr. Ciembroniewicz made false statements in his report and provided an opinion without supporting rationale. He further indicated that he was disciplined by the Maine Board of Licensure in Medicine for statements made in his report. Appellant submitted a copy of a letter of guidance from the Board of Licensure dated February 18, 2005,

⁷ *David Alan Patrick*, 46 ECAB 1020, 1023 (1995) (impartial medical examiner's opinion was based on a complete review of the medical record and a thorough examination and was sufficiently rationalized to establish that appellant had no work-related residuals of his diagnoses; thus his opinion was entitled to special weight).

⁸ *See* 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

⁹ *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

¹⁰ *See Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990). The Board notes that Dr. Dexter's report did not contain new findings or rationale upon which a new conflict might be based.

which noted concern about his description of appellant's functional status as "superb physical condition." However, the Board of Licensure specifically noted that the letter of guidance did not constitute an adverse disciplinary action and determined that Dr. Ciembroniewicz's behavior did not rise to a level of misconduct sufficient to warrant disciplinary action. The Board of Licensure merely found fault in his description of appellant's functional status, not in the findings or the substance of his report which found that the need for the cervical surgery was not related to his accepted work-related condition. Therefore, the letter from the Board of Licensure is insufficient to establish substantive error with regard to Dr. Ciembroniewicz's ultimate findings and conclusions.¹¹

Appellant noted that he received a favorable decision from the SSA regarding Social Security benefits and this decision supported his entitlement to benefits for his cervical condition. However, this argument is insufficient to establish entitlement to benefits under the Act for cervical surgery. The Board has held that entitlement to benefits under another Act does not establish entitlement to benefits under the Act.¹² The Board has noted that there are different standards for medical proof on the question of disability under the Act and under the SSA.¹³ Accordingly, the Board finds that the Office properly denied authorization for the requested surgery.¹⁴

CONCLUSION

The Board finds that the Office properly denied appellant's claim for authorization of a cervical surgery.

¹¹ *Solomon Polen*, *supra* note 6.

¹² *Freddie Mosley*, 54 ECAB ____ (Docket No. 02-1915, issued December 19, 2002).

¹³ *Daniel Deparini*, 44 ECAB 657 (1993).

¹⁴ With his request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 21, 2005 and October 5, 2004 are affirmed.

Issued: December 15, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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