



1998 when her vehicle was struck from behind by another vehicle.<sup>1</sup> Appellant stopped work on that day. The Office accepted that she sustained neck and lumbosacral sprains and paid compensation for periods of disability.<sup>2</sup>

In March 1999, the Office referred appellant to Dr. Steven J. Valentino, an osteopath and Board-certified orthopedic surgeon, for an evaluation of her neck and back conditions. In a report dated March 18, 1999, Dr. Valentino stated that his examination of appellant revealed normal neurological findings and normal range of motion of her neck, back and upper extremities. He diagnosed resolved cervical and lumbar strains and indicated that appellant had degenerative changes in her cervical spine, which were not employment related. Dr. Valentino determined that appellant had no limitations related to her September 16, 1998 employment injury.

In late April 1999 appellant began working in a limited-duty position for the employing establishment for four hours per day and later increased her hours to eight hours per day. On May 5, 1999 appellant returned to her regular full-time position with the employing establishment. Appellant stopped work on June 24, 1999 and alleged that she sustained a recurrence of total disability on that date due to her September 16, 1998 employment injury. She asserted that she had continuously experienced neck, shoulder and back pain since September 16, 1998 and indicated that she noticed an increase in her symptoms while she was on travel duty in mid June 1999.

Appellant submitted a June 28, 1999 form report in which Dr. Ira S. Cantor, an attending Board-certified internist, diagnosed cervical strain, cervical degenerative joint disease and lumbosacral strain and indicated that she was disabled from work until July 28, 1999. Dr. Cantor stated that appellant's condition was due to her September 16, 1998 injury. In a report dated July 26, 1999, Dr. Cantor stated that on examination appellant's cervical range of motion was severely limited due to pain and that her back motion was limited as well. He indicated that appellant was tender to palpation in her neck and back and noted that her neurological examination was normal. Dr. Cantor asserted that all of appellant's symptoms were related to her September 16, 1998 employment injury and indicated that she was totally disabled from work.

In September 1999, the Office determined that there was a conflict in the medical evidence between Dr. Valentino and Dr. Cantor, regarding appellant's ability to work on or after June 24, 1999 and referred the case to Dr. Edward J. Resnick, a Board-certified orthopedic surgeon, for an impartial medical evaluation regarding the matter.<sup>3</sup>

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<sup>1</sup> Appellant's position was essentially sedentary in nature but involved periodic travel duties.

<sup>2</sup> The Office previously accepted that on December 10, 1985 appellant sustained cervical and lumbar strains when she was involved in a vehicular accident at work. The Office also accepted that on September 30, 1988 appellant sustained aggravation of preexisting asthma and allergic rhinitis due to exposure to chemicals at work. The files for both of these claims were closed prior to the time appellant filed the present claim.

<sup>3</sup> In a September 24, 1999 report, Dr. Cantor continued to indicate that appellant was totally disabled due to her September 16, 1998 employment injury.

In a report dated September 28, 1999, Dr. Resnick stated that appellant's complaints and responses during the attempted physical examination, including range of motion testing, appeared to be markedly out of proportion to his objective findings. Dr. Resnick noted that appellant was capable of performing at least part-time sedentary work, but recommended a work hardening program with possible return to work in one or two months. He stated:

"I am unable to state whether her present subjective complaints are medically connected to the work injury or the factors of employment, nor am I able to state definitely that there is any direct cause, aggravation, precipitation or acceleration of the original cervical and lumbar strains by the recent event."<sup>4</sup>

The Office requested that Dr. Resnick provide a supplemental report and, in a report dated November 3, 1999, he indicated that he considered appellant's responses on examination to be subjective but acknowledged that another examiner might consider the findings to be objective. He stated that appellant's present subjective symptoms were not medically connected to the September 16, 1998 employment injury and stated that the effects of the September 16, 1998 injury "had probably resolved by the time she returned to full-time work, that is April 18, 1999 and even more probably or certainly by the time she returned to active duty on May 5, 1999."

By decision dated December 2, 1999, the Office denied appellant's claim that she sustained a recurrence of total disability on or after June 24, 1999, due to her September 16, 1998 employment injury. The Office found that the weight of the medical evidence rested with the opinion of the impartial medical specialist, Dr. Resnick.<sup>5</sup>

Appellant requested a hearing before an Office hearing representative, which was held on April 11, 2000. She submitted a January 17, 2000 report in which Dr. Cantor indicated that he disagreed with the opinion of Dr. Resnick and noted that in addition to her cervical and lumbosacral strains she had post-traumatic fibromyalgia due to her September 16, 1998 injury, which rendered her totally disabled. By decision dated June 15, 2000 and finalized June 20, 2000, the Office hearing representative affirmed the Office's December 2, 1999 decision.

In a brief received by the Office in October 2000, appellant's attorney argued that there was no conflict in the medical evidence at the time of the referral to Dr. Resnick because Dr. Valentino's March 18, 1999 report related to appellant's medical condition prior to her claimed recurrence of total disability beginning June 24, 1999.

Appellant submitted additional medical evidence including an April 13, 2001 report of Dr. Thomas J. Whalen, an attending osteopath and Board-certified internist specializing in rheumatology. Dr. Whalen stated that appellant's current diagnoses of cervical and lumbosacral strains and sprains were superimposed over preexisting and asymptomatic degenerative joint

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<sup>4</sup> Dr. Resnick did not clearly identify the "recent event" to which he referred. In an accompanying form report, he indicated that appellant could work four hours per day.

<sup>5</sup> The Office made reference to termination of appellant's compensation, but it does not appear that appellant's compensation was terminated at the time of the decision. The record contains a July 14, 1999 notice of proposed termination of compensation, but this document was produced prior to the referral to Dr. Resnick.

disease. He indicated that appellant's myofascial tender points, headaches, cognitive deficits and other symptoms were consistent with post-traumatic fibromyalgia syndrome. Dr. Whalen indicated that appellant should not work in order to obtain a "better level of functional status with less pain." In a report dated July 16, 2001, Dr. Whalen stated that appellant's cervical and lumbosacral strains and sprains and post-traumatic fibromyalgia syndrome were directly due to her September 16, 1998 employment injury.

Appellant continued to request reconsideration of her claim and the Office performed merit reviews and denied her claim by decisions dated January 22, July 12 and September 20, 2001 and February 20, 2002. The Office indicated that the weight of the medical evidence continued to rest with the opinion of Dr. Resnick and stated that none of the newly submitted medical evidence created a new conflict in the medical evidence.<sup>6</sup>

Appellant submitted a June 11, 2002 report in which Dr. Cantor stated that she was totally disabled and indicated that her cervical and lumbosacral strains and post-traumatic fibromyalgia syndrome were due to the September 16, 1998 employment injury. He also asserted that appellant's December 10, 1985 and September 30, 1988 employment injuries contributed to the fibromyalgia syndrome. In a report dated August 8, 2002, Dr. Cantor stated that he felt appellant sustained a brain injury on September 16, 1998.

In a report dated June 26, 2002, Dr. Joseph I. Tracy, an attending clinical psychologist, stated that in addition to her physical problems appellant had major depression, post-traumatic symptoms, verbal memory and language comprehension problems and other executive function problems, which were most likely related to her September 16, 1998 employment injury. Dr. Tracy indicated that appellant was disabled from her regular work.<sup>7</sup>

In a report dated August 20, 2002, Dr. Sanghoon Kim, an attending physician Board-certified in physical medicine and rehabilitation, indicated that appellant's cognitive deficits might be due to her September 16, 1998 employment injury. Dr. Kim stated that appellant experienced chronic pain due to her cervical and lumbosacral strains, fibromyalgia syndrome and degenerative joint disease.

Appellant requested reconsideration of her claim and the Office performed merit reviews and denied her claim by decisions dated November 19, 2002 and February 21 and October 16, 2003. The Office found that the weight of the medical evidence rested with the opinion of Dr. Resnick and stated that none of the newly submitted medical evidence created a new conflict in the medical evidence.<sup>8</sup>

Appellant again requested reconsideration and submitted a January 26, 2004 report in which Dr. Cantor stated that appellant sustained cervical and lumbosacral strains, fibromyalgia syndrome and brain injury due to the September 16, 1998 employment injury. He asserted that

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<sup>6</sup> In a November 15, 2001 decision, the Office denied appellant's request for merit review of his claim.

<sup>7</sup> In a report dated July 24, 2002, Dr. Marjory J. Levitt, an attending clinical psychologist, diagnosed major depressive disorder and chronic post-traumatic stress disorder and indicated that appellant was totally disabled.

<sup>8</sup> In a February 11, 2003 decision, the Office denied appellant's request for an oral hearing.

the whiplash appellant sustained on that date was sufficient to cause brain injury without blunt force trauma.

By decision dated May 18, 2004, the Office affirmed its prior decisions indicating that the January 26, 2004 report of Dr. Cantor was of limited probative value.

Appellant again requested reconsideration and submitted a February 27, 2004 affidavit in which Dr. Tracy argued that her cognitive difficulties since 1998 showed that she sustained a brain injury due to the September 16, 1998 employment injury.

By decision dated August 3, 2004, the Office affirmed its prior decisions.

### **LEGAL PRECEDENT**

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.<sup>9</sup> This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.<sup>10</sup> Where no such rationale is present, medical evidence is of diminished probative value.<sup>11</sup>

Section 8123(a) of the Federal Employees' Compensation 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."<sup>12</sup> 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.<sup>13</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is properly 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.<sup>14</sup>

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<sup>9</sup> *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

<sup>10</sup> *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

<sup>11</sup> *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

<sup>12</sup> 5 U.S.C. § 8123(a).

<sup>13</sup> *William C. Bush*, 40 ECAB 1064, 1975 (1989).

<sup>14</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

## ANALYSIS

The Office accepted that appellant sustained neck and lumbosacral sprains due to a vehicular accident on September 16, 1998.<sup>15</sup> She returned to her regular work for the employing establishment on May 5, 1999 and stopped work on June 24, 1999, alleging that she sustained a recurrence of total disability on that date due to her September 16, 1998 employment injury.

The Board finds that the case is not in posture for a decision regarding appellant's recurrence of disability claim due to an unresolved conflict in the medical evidence. When it initially denied appellant's claim on December 2, 1999 the Office determined that the weight of the medical evidence regarding the nature of appellant's disability rested with the opinion of Dr. Resnick, a Board-certified orthopedic surgeon. In September 1999, the Office determined that there was a conflict in the medical evidence between Dr. Valentino, a Board-certified orthopedic surgeon and an Office referral physician and Dr. Cantor, an attending Board-certified internist, regarding appellant's ability to work on or after June 24, 1999. The Office then referred the case to Dr. Resnick for an impartial medical evaluation regarding the matter.

The reports of Dr. Cantor, which posited the existence of total disability due to the September 16, 1998 employment injury, were dated from late June 1999 onwards and addressed appellant's condition and disability on or after her claimed recurrence of disability starting June 24, 1999. However, Dr. Valentino's March 18, 1999 report, which the Office indicated had formed the other side of the conflict, related to appellant's medical condition prior to her claimed recurrence of total disability beginning June 24, 1999. At the time the conflict was declared, there was no report from an Office physician, which addressed the nature of appellant's employment-related condition or disability on or after June 24, 1999. Therefore, at the time of the referral to Dr. Resnick, there was no conflict in the medical evidence regarding the main issue of the present case, *i.e.*, whether appellant sustained a recurrence of total disability on or after June 24, 1999 due to her September 16, 1998 employment injury.<sup>16</sup> Consequently, Dr. Resnick served as an Office referral physician rather than an impartial medical specialist and conflict was created between Dr. Resnick and Dr. Cantor regarding the nature of appellant's condition and disability on and after June 24, 1999.

Appellant requested reconsideration and submitted reports of attending physicians and the Office denied her recurrence of disability claim finding that the weight of the medical evidence was represented by the opinion of Dr. Resnick. Appellant submitted January 17, 2000, June 11, 2002 and January 26, 2004 reports in which Dr. Cantor indicated that she continued to

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<sup>15</sup> The Office accepted that on December 10, 1985 appellant sustained cervical and lumbar strains and that on September 30, 1988 she sustained aggravation of preexisting asthma and allergic rhinitis, but the files for both of these claims were closed prior to the time appellant filed the present claim.

<sup>16</sup> See generally notes 12 through 14 and accompanying text.

have cervical and lumbosacral strains and total disability related to her September 16, 1999 employment injury.<sup>17</sup>

As there is an unresolved conflict in the medical evidence, the case will be remanded to the Office for referral of appellant to an appropriate impartial medical specialist to determine whether she sustained an employment-related recurrence of total disability on or after June 24, 1999.<sup>18</sup> After such development as the Office deems necessary, the Office should issue an appropriate decision on this matter.

### CONCLUSION

The Board finds that, due to a conflict in the medical evidence, the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she sustained an employment-related recurrence of total disability on or after June 24, 1999. The case is remanded to the Office for referral to an impartial medical specialist to be followed by an appropriate decision.

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<sup>17</sup> Dr. Cantor also indicated that appellant sustained fibromyalgia syndrome and brain injury, due to the September 16, 1998 employment injury. Dr. Cantor's opinion is supported by a July 16, 2001 report in which Dr. Whalen, an attending osteopath and Board-certified internist specializing in rheumatology, indicated that appellant was disabled due to her September 16, 1998 employment injury and by an August 20, 2002 report in which Dr. Kim, an attending physician Board-certified in physical medicine and rehabilitation, provided a similar opinion.

<sup>18</sup> The Board notes that it has not been accepted that appellant sustained fibromyalgia syndrome or a brain injury due to the September 16, 1998 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' August 3 and May 18 and 2004 and October 16, 2003 decisions are set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: July 22, 2005  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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