

In order to determine appellant's current condition and to ascertain whether she had residuals, the Office referred her to Dr. Cecil J. Hash, a Board-certified neurological surgeon. In a report dated July 1, 2003, Dr. Hash stated that appellant had no objective evidence of an injury to her brain based on his examination and a magnetic resonance imaging scan performed on June 30, 2003. He advised that her prognosis was excellent and concluded that appellant had already recovered by all physically measurable criteria.

In reports dated August 27 and September 29, 2003, Dr. Jeanne M. Edwards, a specialist in neurological surgery and appellant's treating physician, indicated that appellant continued to experience postconcussive syndrome as a residual of the November 3, 2001 injury.

On February 17, 2004 the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Anthony C. Billings, a Board-certified neurological surgeon, for a second opinion examination. In a report dated March 23, 2004, Dr. Billings stated that appellant was not in acute distress on examination. He serially tested the cranial nerves and found them to be normal. Dr. Billings stated that appellant showed no evidence of increased intracranial pressure, had a normal gait and did not show any lack of coordination of motor movement. He found that appellant had normal sensation in all dermatomal segments, with normal motor strength and no pathological reflexes. Dr. Billings diagnosed headaches which were possibly related to her November 2001 automobile accident. He concluded:

“Based on my examination and review of the medical records, I did not find anything in this patient's physical examination or diagnostic studies based on reports to preclude her from any type of gainful employment. It is my opinion, within reasonably medical certainty, that she may return to work. Her complaints are fairly subjective in nature and, while there is a remote possibility that they are a postconcussion type of headache, I do not find any substantiating evidence to support this diagnosis.”

In a notice of proposed termination dated July 9, 2004, the Office, based on Dr. Billings' opinion, found that the weight of the medical evidence demonstrated that appellant was no longer disabled due to her November 3, 2001 employment injury. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

In reports dated April 26 and June 28, 2004, Dr. Edwards advised that appellant continued to experience postconcussive headaches. In an August 6, 2004 report, Dr. Edwards stated: “I am currently following [appellant] for an injury she sustained while working. She is unable to return to work at this time.”

By decision dated August 16, 2004, the Office terminated appellant's compensation.

By letter dated December 27, 2004, appellant's representative requested reconsideration. He contended that the Office's termination decision was flawed because Dr. Billings relied on an inadequate statement of accepted facts and the Office mischaracterized Dr. Billings as a referee medical examiner under section 8123(a) and, therefore, accorded his opinion disproportionate weight.

By decision dated October 6, 2005, the Office denied modification of the August 4, 2005 termination decision.

By letter dated December 2, 2005, appellant requested reconsideration. Her representative reiterated the arguments he made in his previous request for reconsideration. Mr. Watson also asserted that the Office did not acknowledge or consider these arguments in its October 6, 2005 decision.

By decision dated March 31, 2006, the Office denied modification of the August 4, 2005 termination decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her 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.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

Section 8123(a) provides that, 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.⁴

ANALYSIS

In the present case, there is disagreement between Dr. Billings, the second opinion physician⁵ and Dr. Edwards, appellant's treating physician, as to whether appellant still has residual disability stemming from her accepted concussion condition. Dr. Edwards advised the Office that appellant continued to experience postconcussive headaches and postconcussive

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² *Id.*

³ *See Mary Lou Barragy*, 46 ECAB 781 (1995); *see also Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ *Regina T. Pellecchia*, 53 ECAB 155 (2001).

⁵ The Board notes that the Office erred in characterizing Dr. Billings as an impartial medical specialist. The Office letter indicating that appellant would be examined by Dr. Billings clearly states that appellant will be referred for a second opinion examination.

syndrome. On August 6, 2004 she reported that she was still treating appellant for her November 3, 2001 employment injury and stated that appellant was unable to return to work at that time.

In contrast, Dr. Billings found that there was nothing to preclude appellant from returning to any type of gainful employment. He stated that her complaints were subjective in nature. Dr. Billings, however, noted headaches which were possibly postconcussive and might be related to her November 2001 automobile accident but did not find any substantiating evidence to support this diagnosis.

The conflict of opinion regarding whether appellant has any residual disability causally related to the November 3, 2001 work injury arose prior to the Office's termination of compensation in August 2004. The conflict requires a referral to an impartial medical specialist pursuant to section 8123(a). Because the Office relied on the opinion of Dr. Billings to terminate appellant's compensation without having resolved the existing conflict, it failed to meet its burden of proof in terminating appellant's benefits.

CONCLUSION

The Board finds that the Office has failed to meet its burden of proof in terminating appellant's compensation.

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2006 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 20, 2006
Washington, DC

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

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

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