

appellant's attending physician, Dr. Charles E. Wilkins, Jr., a Board-certified internist, and the Office second opinion physician, Dr. Steven Valentino, an osteopath, regarding whether appellant's neck condition on and after December 15, 1999 was causally related to her accepted employment injury of cervical strain. The Board remanded the case for the Office to undertake further development of the medical evidence by referring appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician for an impartial medical examination to resolve the issue of causal relationship. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

The Office referred appellant, the statement of accepted facts and list of questions to Dr. Menachem M. Meller, a Board-certified orthopedic surgeon, on April 9, 2003. The initial statement of accepted facts dated April 3, 2003 described appellant's initial employment injury and treatment and her return to work on January 31, 2000. The Office noted her alleged recurrence of disability on April 3, 2000 and her treatment with Dr. Wilkins. The Office stated that Dr. Wilkins released appellant to return to regular duty on August 31, 2000 and that she then sought treatment from Dr. Eric I. Mitchell, an orthopedic surgeon, who released appellant to return to part-time work on December 4, 2000 and eight hours a day on March 8, 2001 according to the statement of accepted facts. Appellant then sought additional treatment from Dr. Wilkins on March 21, 2001. The statement of accepted facts noted that she had a history of pain in the neck, shoulder and right arm in August 1995 including x-rays.

The Office amended the statement of accepted facts on April 14, 2003. The amended statement of accepted facts did not contain the statement regarding Dr. Wilkins' opinion that appellant could return to work on August 31, 2000. The April 14, 2003 statement of accepted facts noted that appellant returned to part-time work in December 2000 after the release by Dr. Mitchell and that she returned to full-time work on March 8, 2001 as allowed by him.

In a report dated May 19, 2003, Dr. Meller noted reviewing the statement of accepted facts dated April 3, 2003 and recited this statement of the facts in his report, including the release by Dr. Wilkins on August 31, 2000. He noted that appellant mentioned that her current condition included arm pain in the C5-6 distribution. Dr. Meller reviewed the August 2000 magnetic resonance imaging scan and found a mild spondylotic spur/hard disc at C5-6 and a "very mild" degenerative disc bulge at C6-7. He noted that appellant was not currently experiencing pain and could not recall the last time she had symptoms. Dr. Meller stated, "In point of fact the description of the symptoms were entirely consistent with normal for age arthritis rather than an acute injury which in fact does not subside to a pain free state for long periods and does simply not allow gardening or other types of fairly enduring types of activities."

Dr. Meller performed a comprehensive physical examination and reported no positive findings. He concluded that appellant had a completely normal clinical examination. Dr. Meller diagnosed arthritic neck with spondylotic spurs and stated that her subjective complaints were consistent with age-related degeneration, "a typical middle aged stiff neck."

Dr. Meller opined that lifting boxes, as in appellant's original employment injury, stresses the shoulders and upper extremities rather than the neck. He stated that lifting was not the sort of injury that would be likely to cause a disc herniation in the cervical spine. Dr. Meller did not attribute appellant's objective cervical spine findings to her accepted employment injury,

instead, he concluded that her December 15, 1999 employment injury was a cervical sprain and strain. He found that her April 3, 2000 symptoms were not due to her accepted employment injury, but to a “spontaneous flare-up of the underlying cervical spine osteoarthritis.” Dr. Meller completed a work capacity evaluation on June 2, 2003 and found that appellant could work with no restrictions.

By decision dated July 14, 2003, the Office denied appellant’s claim for a recurrence of disability on April 3, 2000 based on Dr. Meller’s report. Appellant, through her attorney, requested an oral hearing by letter dated July 22, 2003. She testified at the oral hearing on September 28, 2004 and stated that the period of her recurrence of total disability was April 3 through December 18, 2000. Appellant noted that Dr. Meller used the April 3, 2003 statement of accepted facts which was amended at her request on April 14, 2003.

By decision dated December 6, 2004, the hearing representative vacated the Office’s July 14, 2003 decision and remanded appellant’s claim to the Office to provide Dr. Meller with the corrected statement of accepted facts dated April 14, 2003 and to request a supplemental report from Dr. Meller. He then directed the Office to issue a *de novo* decision on appellant’s claim.

In a letter dated January 31, 2005, the Office requested that Dr. Meller review the corrected statement of accepted facts dated April 14, 2003 and opine whether his opinion was altered based on the new facts presented. Dr. Meller responded on February 9, 2005 and stated that he reviewed the amended statement of accepted facts and the changes as highlighted by the Office. He noted that he reviewed the August 21, 2000 MRI scan and felt that this test revealed a mild spondylotic spur/hard disc C5-6 and very mild degenerative disc bulge at C6-7. Dr. Meller again stated that this test was essentially normal for appellant’s age. He reviewed the additional factual amendments and stated that the changes did not alter his opinion.

By decision dated July 28, 2005, the Office denied appellant’s claim for a recurrence of disability beginning April 3, 2000. The Office found that Dr. Meller’s reports were entitled to be accorded the weight of the medical evidence and established that appellant had not sustained a recurrence of total disability on April 3, 2000 causally related to her accepted December 15, 1999 employment injury.

Appellant, through her attorney, requested an oral hearing on August 8, 2005. Counsel appeared at the oral hearing on December 15, 2005 and argued that Dr. Meller’s report was not sufficient to constitute the weight of the medical opinion evidence. He alleged that Dr. Meller failed to follow the statement of accepted facts, that he disagreed that appellant’s initial injury could have resulted in her diagnosed condition and that, therefore, the reports lacked probative value.

By decision dated March 1, 2006, the hearing representative affirmed the Office’s July 28, 2005 decision finding that Dr. Meller’s reports included a proper history of injury, definitive diagnosis and an unequivocal opinion regarding the lack of causal relationship which was supported by medical reasoning. He noted that Dr. Meller found that appellant had sustained a cervical strain/sprain as a result of her accepted employment injury on December 15, 1999 and that neither the Office nor Dr. Meller attributed appellant’s herniated disc to this injury.

LEGAL PRECEDENT

A recurrence of disability is the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment which caused the illness. The term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.² Where an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury. The burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concluded that the condition is causally related to the employment injury. Moreover, sound medical reasoning must support the physician's conclusion.³

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury. In this regard, medical evidence of bridging symptoms between the recurrence of the accepted injury must support the physician's conclusion of a causal relationship. While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.⁴

The Federal Employees' Compensation Act provides that, if there is a 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.⁵ The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁶

² 20 C.F.R. § 10.5(x).

³ *Ricky S. Storms*, 52 ECAB 349 351-52 (2001).

⁴ *Id.*

⁵ 5 U.S.C. §§ 8101-8193, 8123.

⁶ 20 C.F.R. § 10.321.

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.⁷

ANALYSIS

In the February 11, 2003 decision, the Board found that there was a conflict of medical opinion evidence regarding whether appellant's current condition was due to her accepted employment injury of cervical strain. The Office referred appellant to Dr. Meller, a Board-certified orthopedic surgeon, to resolve this conflict, along with a statement of accepted facts and a list of questions. The hearing representative found that the April 3, 2003 statement of accepted facts contained errors and remanded the case for Dr. Meller to issue a supplemental report following his consideration of the April 14, 2003 statement of accepted facts. Dr. Meller reviewed the April 14, 2003 statement of accepted facts on February 9, 2005 and again opined that appellant's current condition was age-related rather than due to her accepted cervical strain.

Dr. Meller was properly selected as an impartial medical specialist, he based his February 9, 2005 report on a proper factual background and opined that appellant's current condition was due to her age-related arthritis rather than the accepted employment injury of cervical strain. He also supported his opinion with medical reasoning. Dr. Meller noted that appellant's MRI scan revealed a mild degenerative disc bulge which he did not attribute to her accepted employment injury, noting that, while she sustained a cervical strain as accepted by the Office due to lifting in the performance of duty, lifting was not likely to result in a disc herniation in the cervical spine. He concluded that her symptoms on and after December 15, 1999 were likely due to arthritis rather than the accepted employment injury. Dr. Meller opined that appellant's condition was not due to her employment injury, offered medical rationale that an injury such as appellant was unlikely to cause cervical disc herniation and concluded that her condition was age related. His well-reasoned report is entitled to the weight of the medical opinion evidence. As Dr. Meller did not attribute appellant's symptoms and conditions to her accepted employment injury, his report does not support her claim for recurrence of disability.

CONCLUSION

The Board finds that, as the impartial medical specialist did not attribute appellant's condition or disability after December 15, 1999 to her accepted employment injury, the weight of the medical evidence fails to support that appellant sustained a recurrence of disability and the Office properly denied her claim.

⁷ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2006 and July 28, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 1, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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