

on the lumbar spine revealed no protrusion, herniation or degeneration. Dr. Randall Rogalsky, a Board-certified orthopedic surgeon, removed appellant from work on February 2, 2004.² On April 19, 2004 the Office accepted appellant's claim for lumbar radiculopathy. The Office also assigned, a registered nurse, Rita Darrough, to help in the recovery process.

On April 26, 2004 Dr. Rogalsky diagnosed pain in appellant's low back and right buttock and prescribed epidural blocks and physical therapy. In the final physical therapy report, dated July 21, 2004, it was noted that appellant had an excellent response to the exercises and had no remaining complaints of back pain. On July 29, 2004 Ms. Darrough reported that appellant had completed the series of lumbar epidural injections with Dr. Thomas Brummett, a Board-certified anesthesiologist. She stated, however, that appellant had cancelled a scheduled follow-up appointment with Dr. Rogalsky on July 26, 2004 because she was having problems with her back and wanted another injection from Dr. Brummett before meeting with him. In a report dated August 27, 2004, Ms. Darrough stated that appellant had made an appointment with Dr. Brummett for August 18, 2004, but that he had refused to see her because the visit was not approved. She also reported that Dr. Rogalsky had refused to see appellant because he had not received payment for treatment rendered for an unrelated workers' compensation claim. Ms. Darrough noted that appellant was off work without medical rationale and could not be released to work unless she could be seen by Dr. Rogalsky.

On September 22, 2004 the Office referred appellant to Dr. Donald Brancato, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Brancato examined appellant on October 7, 2004 and found that her subjective complaints of pain were not linked to any objective abnormalities. He noted that she had undergone physical therapy, but no work hardening rehabilitation, which would prepare her to return to regular activities. Dr. Brancato found no specific neural abnormalities other than a slightly decreased pinprick sensation on the mid-calf of the right leg. He opined that appellant's injury was based on a stretched muscle because she felt pain over the sacroiliac joint, without bending or stretching, with the posterior extension of the right leg. Dr. Brancato stated that there might be some nerve root irritation as a result of the stretched muscle, but that there were no objective findings to support any of her complaints. He recommended work hardening rehabilitation, but did not provide any work restrictions because he noted no specific limitations physically or functionally.

By letter dated October 27, 2004, the Office informed appellant that an appointment with an impartial medical examiner would be scheduled to resolve a conflict in medical opinion between Dr. Rogalsky, who had not released her to work, and Dr. Brancato, the second opinion specialist, who found no objective evidence of continued disability. On November 23, 2004 Dr. Lukasz Curylo, a Board-certified orthopedic surgeon, examined appellant and conducted a review of the medical history related to her employment injury.³ On December 2, 2004 he opined that the causal relationship between appellant's current condition and the employment injury was "questionable." Based on MRI scans of her lumbar spine, Dr. Curylo stated that she

² The record indicates that appellant may have been off work from the time of the accident on January 20, 2004.

³ The Office asked Dr. Curylo to determine whether appellant's current condition could be linked to either her January 20, 2004 work injury or her previous, January 3, 2003 work injury. As this case involves only the accepted injury of lumbar radiculopathy, only the evidence related to that condition will be discussed.

“obviously has no significant lumbar spine pathology.” Dr. Curylo suspected that she might have thoracic herniation related to a 2003 employment injury, but could not make this determination without an MRI scan of her thoracic spine. He stated that, if the MRI scan came back negative, he would find that appellant’s condition was “chronic lumbar sprain with significant symptomatic magnification.”

On June 23, 2005 the Office sent a request to both appellant and Dr. Rogalsky asking for an MRI scan of the thoracic spine. Dr. Rogalsky informed the Office on July 8, 2005 that he was no longer appellant’s attending physician. Appellant did not respond. On November 18, 2005 the Office informed appellant of her need to provide updated medical information to justify her claim of total disability and her responsibility for providing the requested MRI scan. On the same date, it informed Dr. Curylo that it had been unable to obtain an MRI scan of appellant’s thoracic spine and asked for a supplemental report explaining his opinion of whether appellant could return to work, given the lack of objective evidence of a herniated disc in her thoracic spine. Dr. Curylo did not respond to this request. Appellant contacted the Office on December 6, 2005 and stated that she had been unable to find a doctor to treat her back or order the MRI scan without a release from Dr. Rogalsky.

On March 3, 2006 the Office informed appellant that she had been referred to another impartial medical examiner to resolve the conflict between Dr. Rogalsky and Dr. Brancato. On March 29, 2006 Dr. Marvin Mishkin, a Board-certified orthopedic surgeon, examined appellant and conducted a thorough evaluation of her medical history. On April 4, 2006 he reported that appellant had complained of intermittent pain in the upper back and neck that included back spasms and a “catching sensation” and, occasionally, pain down her back to her buttocks. Appellant did not complain of pain in either leg. Dr. Mishkin’s examination of her lumbosacral spine and legs revealed no sensory changes, motor weakness, pain, or diminished range of motion when standing, sitting or lying supine. He found that deep tendon reflexes were equal and active at both knees and both ankles and that the leg raising test was negative. Dr. Mishkin noted that appellant changed positions easily and walked without a limp. He took x-rays of her lumbar, thoracic and cervical spine, which were normal in spacing and alignment with the exception of some mild degenerative changes in the cervical spine at C5-6 and C6-7. Dr. Mishkin diagnosed subjective complaints of pain that were not supported by objective evidence of injury. He opined that there was no evidence of injury related to the employment injury of January 20, 2004. Dr. Mishkin noted that appellant’s subjective complaints were vague and nonspecific and did not correlate with the lack of objective clinical or diagnostic findings. He found that it would be advisable to obtain an MRI scan of appellant’s thoracic spine as it had been recommended by two other physicians, but stated that, in the absence of such a study, appellant was still capable of returning to her regular occupational duties without restrictions.

On October 13, 2006 the Office issued a notice of proposed termination of appellant’s medical and wage-loss benefits. Based on the report of Dr. Mishkin, it found that appellant had no residuals or disability from work arising from her accepted lumbar radiculopathy.

On October 25, 2006 appellant responded to the notice of proposed termination with a letter alleging that her inability to properly document her condition, particularly her failure to procure an MRI scan of her thoracic spine, was the result of the Office’s mismanagement of her case.

By decision dated November 14, 2006, the Office terminated appellant's medical and wage-loss benefits effective November 26, 2006. The Office found that appellant had not presented any evidence or arguments sufficient to overcome the opinion of the impartial medical examiner that she was able to return to work without restrictions regardless of whether a thoracic MRI scan was conducted.

LEGAL PRECEDENT

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 disability has ceased or that it is no longer related to the employment injury.⁵

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁶

The Federal Employees' Compensation Act provides that, if there is a disagreement between a physician making an examination for the United States and the physician of the employee, the Secretary must appoint a third physician to make an examination.⁷ Likewise, 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 or an Office medical adviser or consultant, the Office must appoint a third physician to make an examination. This is called a referee examination and the Office is required to select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁸ 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.⁹

In a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹⁰ If the impartial medical specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the

⁴ *Elaine Sneed*, 56 ECAB ___ (Docket No. 04-2039, issued March 7, 2005).

⁵ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

⁶ *James F. Weikel*, 54 ECAB 690 (2003).

⁷ 5 U.S.C. §§ 8101-8193, 8123(a).

⁸ 20 C.F.R. § 10.321.

⁹ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

¹⁰ *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.¹¹

ANALYSIS

The Office accepted appellant's claim of traumatic injury on January 20, 2004 for lumbar radiculopathy. Appellant's treating physician, Dr. Rogalsky, a Board-certified orthopedic surgeon, removed her from work on February 2, 2004 but did not release her to return to work before terminating her as a patient in August 2004. Second opinion physician, Dr. Brancato, a Board-certified orthopedic surgeon, found that there was no objective evidence to support any of appellant's complaints of pain. He recommended work-hardening physical therapy, but provided no work restrictions, noting that she had no physical or functional limitations.

The Office properly found a conflict of the medical evidence regarding appellant's disability for work. Appellant was referred to an impartial medical examiner, Dr. Curylo, a Board-certified orthopedic surgeon, who found on December 2, 2004 that the causal relationship between appellant's condition and her accepted employment injury was questionable. However, he declined to make a final determination because he did not have diagnostic evidence of the condition of appellant's thoracic spine. On November 18, 2005 the Office properly requested that Dr. Curylo supplement his previous report with an opinion about appellant's ability to return to work in the absence of objective evidence of thoracic injury. Dr. Curylo did not respond.

Because the first impartial medical examiner, Dr. Curylo, did not respond to the Office's request for a supplemental report, the Board finds that the Office properly referred appellant to another impartial specialist to resolve the conflict between Dr. Rogalsky and Dr. Brancato. On March 29, 2006 Dr. Mishkin, a Board-certified orthopedic surgeon, conducted a thorough physical examination of appellant and made a review of her medical history. He found no sensory changes, numbness, pain, weakness or diminished range of motion in her legs or lumbar spine. The x-rays that Dr. Mishkin took revealed mild degenerative changes in appellant's cervical spine, but showed normal spacing and alignment in the lumbar and thoracic spine. Dr. Mishkin found that there was no objective evidence to support appellant's vague and nonspecific complaints of pain. He stated that there was no physical or diagnostic evidence of injury or residual symptoms related to the accepted employment injury of January 20, 2004. Dr. Mishkin opined that work-hardening physical therapy would be beneficial in returning appellant to work, but stated that she was capable of returning to work without restriction. The Board finds that the opinion of Dr. Mishkin is entitled to the special weight of the medical evidence because it is well rationalized and based on a thorough physical examination and review of the medical history.

On the basis of Dr. Mishkin's opinion, the Office proposed termination of appellant's compensation under the Act. The Board finds that the Office properly relied on the medical opinion of Dr. Mishkin that appellant had no residual or disability related to her accepted January 20, 2004 lumbar strain. Dr. Mishkin's report constitutes the special weight of the

¹¹ *Harold Travis*, 30 ECAB 1071, 1078 (1979).

medical evidence afforded an impartial medical examiner. Thus, the Office met its burden of proof to terminate appellant's compensation benefits for wage-loss and medical benefits.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation for wage-loss and medical benefits effective November 26, 2006.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 14, 2006 is affirmed.

Issued: June 1, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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