

On October 20, 1988 appellant, then a 45-year-old clerk typist, filed a traumatic injury claim alleging that on October 11, 1988 she fell and sustained injuries to her right foot and head. By letter dated November 28, 1988, the Office accepted her claim for a head contusion and an aggravation of lumbar radiculopathy. Dr. Stanley Mandell, an attending Board-certified psychiatrist and neurologist, concluded that appellant had persistence of severe pain in her back radiating to her left leg, that this was causally related to her October 11, 1988 employment injury. Due to the persistence of pain, appellant remained totally disabled. He noted that, unless appellant had a laminectomy, her disability was permanent. In a medical report dated December 15, 2000, Dr. Patrick Hughes, a Board-certified psychiatrist and neurologist to whom the Office referred appellant for a second opinion, noted that there were no current objective findings that appellant's work-related accepted conditions were still active or causing disability. He found that she was capable of performing her full duties. In a report dated November 14, 2001, Dr. Steven Birnbaum, a chiropractor, stated that he first saw appellant on May 11, 1991 and that she was currently disabled from her job and her disability was causally related to the employment injury of October 11, 1988. In a work restriction form dated January 15, 2001, Dr. Mandell noted that appellant could not work an eight-hour day and, in fact, was limited to zero hours a day of sitting, walking, lifting, bending and standing. He noted that appellant had a herniated disc and that he did not anticipate any recovery unless she had surgery, which she declined. In order to resolve the conflict in medical opinion, appellant was referred to Dr. Jeffrey S. Oppenheim, a Board-certified neurosurgeon, for an impartial medical examination. In a medical report dated September 7, 2001, Dr. Oppenheim noted that appellant had no evidence of neurologic deficits and that there was evidence of symptom amplification and magnification. He indicated that appellant was capable of performing her date-of-injury job of clerk/typist. In a decision dated November 29, 2001, the Office terminated appellant's benefits as of December 2, 2001. In a decision dated December 5, 2002, the Board affirmed the Office's termination of benefits based on Dr. Oppenheim's report.²

On June 9, 2003 appellant underwent an anterior cervical discectomy with decompression of spinal cord at C5-6 and C6-7, arthodesis and bony fusion with allograft, C5-6 and C6-7 and internal fixation with Zephyr titanium plate, C5 to 7.

On November 13, 2003 appellant requested reconsideration and submitted evidence.

In a July 8, 2003 report, Dr. Birnbaum issued an addendum to his prior report. He noted that appellant was originally seen by him on May 11, 1992 and provided a history of work-related injury on October 11, 1988. Dr. Birnbaum treated appellant approximately 200 times. He noted the following diagnoses: L5-S1 subluxation; chronic lumbar sprain/strain with marked muscle spasm; lumbar intervertebral disc syndrome; lumbar radiculopathy; cervical subluxation C4-5, C5-6, C6-7; chronic cervical sprain/strain with muscle spasm; and cervical radiculopathy. Dr. Birnbaum concluded that appellant's employment injury was the proximate cause of her medical condition and that she was totally disabled.

In a medical report dated September 8, 2003, Dr. Susan M. Jensen noted that appellant continued to have weakness of her right arm, right shoulder and right side and was unable to use

² Docket No. 02-1638 (issued December 5, 2002).

her hand properly. Appellant continued to live with acute and chronic pain. Dr. Jensen stated, “[M]y opinion is that [appellant] is disabled since 1988 because of acute and chronic pain that began when she was injured at work.”

In a decision dated March 4, 2005, the Board found that the Office improperly denied appellant’s request for reconsideration by failing to consider the September 8, 2003 medical report of Dr. Jensen. It remanded the case as it constituted pertinent new and relevant evidence.³

In a decision dated July 14, 2005, the Office considered Dr. Jensen’s opinion and noted that as she did not submit a rationalized opinion as to how appellant’s condition was causally related to the work injury of October 11, 1988. Accordingly, the Office found that Dr. Jensen’s opinion was insufficient to modify the prior termination of benefits.

On May 16, 2006 appellant, through her attorney, filed a request for reconsideration. Appellant submitted a July 8, 2003 report from Dr. Birnbaum that had previously been considered. In an October 24, 2005 report, Dr. Birnbaum clarified that he conducted x-rays in his Office on July 29, 2003 and that he diagnosed subluxations.

By decision dated November 15, 2006, the Office denied modification of its prior decisions.

LEGAL PRECEDENT

Where the Office meets its burden of proof in justifying termination of compensation benefits, the burden is on the claimant to establish that any subsequent disability is causally related to the accepted employment injury.⁴

ANALYSIS

In the instant case, the Office found that appellant sustained a head contusion and lumbar radiculopathy as a result of the October 11, 1988 employment injury. The Office terminated her benefits effective December 2, 2001 based on the opinion of Dr. Oppenheim, the impartial medical examiner, who found that appellant had no objective findings of a work-related accepted condition that was causing disability or residuals. On December 5, 2002 the Board affirmed this decision.

Appellant submitted a September 8, 2003 report from Dr. Jensen who noted that she had residuals from the 1988 injury consisting of right arm and shoulder weakness. However, her brief opinion did not contain a rationalized explanation as to why she attributed appellant’s current condition to the 1988 injury. Dr. Jensen’s report is not sufficient to overcome the special weight given to the well-rationalized opinion of Dr. Oppenheim, the impartial medical examiner. Dr. Birnbaum related appellant’s current condition to her work injury and indicated that he diagnosed subluxation in x-rays taken by him on July 22, 2003. Dr. Birnbaum had treated

³ Docket No. 04-1182 (issued March 4, 2005).

⁴ *Darlene R. Kennedy*, 57 ECAB ___ (Docket No. 05-1284, issued February 10, 2006).

appellant for over 10 years prior to that date and there were no x-rays at the time of these treatments to establish that appellant had a subluxation.⁵ The x-ray was taken over 14 years after the injury, so Dr. Birnbaum's conclusion, without rationale explaining the nexus between his findings and the October 11, 1988 employment injury is speculative. In *Linda L. Mendenhall*,⁶ the Board noted that the greater the time period between diagnostic testing and the date of the alleged injury, a physician must provide a well-rationalized report to support the affirmative opinion offered. The greater the delay in testing, the greater the likelihood that an event not implicated by the employee has worsened the claimed injury. When the delay becomes so significant it may call into question the validity of the opinion offered. Accordingly, as appellant did not establish any continuing employment-related disability or residuals, the Office properly denied her request for modification of its termination decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 15, 2006 is affirmed.

Issued: September 19, 2007
Washington, DC

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

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

⁵ Under section 8101(2) of the Federal Employees' Compensation Act, chiropractors are only considered physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2); see *Jack B. Wood*, 40 ECAB 95, 109 (1988).

⁶ 41 ECAB 532 (1990).