

work. She stopped work on October 27, 2003 and returned to light-duty work for the employing establishment in March 2004. It paid appellant compensation for periods of disability.

Appellant received treatment from Dr. Louis C. Rose, a Board-certified orthopedic surgeon, who diagnosed lumbar radiculopathy secondary to multiple disc bulges. The findings of March 12, 2004 magnetic resonance imaging (MRI) scan testing of her lumbar spine revealed bulging discs at L2-3, L3-4 and L5-S1 with impingement on the thecal sac at L5-S1. In early 2005 appellant began to be treated by Dr. John Olewski, a Board-certified orthopedic surgeon. On January 22, 2007 he indicated that range of motion of her lumbar spine reproduced axial-type back pain and noted that paravertebral muscle spasms were observed. Dr. Olewski determined that appellant was totally disabled from her previous job duties due her accepted employment injury.

On June 7, 2007 Dr. Isaac Cohen, a Board-certified orthopedic surgeon who served as an Office referral physician, stated that appellant complained of upper and lower back pain which radiated down both legs with spasms. He indicated that examination of her thoracolumbar spine revealed some limitation of back motion and hypersensitivity upon palpation but indicated that strength was satisfactory and sensation was intact. There were no muscle spasms or trigger points upon palpation. Dr. Cohen diagnosed chronic thoracolumbar spine syndrome, by history, and stated, "There were no objective findings upon clinical evaluation today to establish a causally related disability." He indicated that he would assess appellant's ability to work after he obtained the results of a repeat MRI scan study of her lumbar spine.

On July 13, 2007 Dr. Cohen noted that the repeat MRI scan study of the lumbar spine he obtained on July 5, 2007 showed multilevel disc degeneration but no evidence of pathologic marrow replacement, compression fracture or listhesis. It showed a small left paracentral disc protrusion at L5-S1 without evidence of significant central or lateral stenosis. He stated that the MRI scan study revealed no evidence of neurological involvement and showed evidence of multilevel degenerative disc disease which preexisted appellant's October 27, 2003 injury.¹ Dr. Cohen stated:

"Based on a review of the repeat MRI scan [study] and based on the physical evaluation performed in my office on June 7, 2007, which did not reveal any objective evidence of any causally related residual findings, there is no causally related orthopedic disability. It is my opinion that the claimant is able to return to full[-]duty work, without any causally related work restrictions."

On July 26, 2007 Dr. Olewski stated that examination of appellant's lumbar spine revealed that back flexion and extension reproduced axial pain with paravertebral spasms and a reversal of rhythm. He noted that three levels of concordant back pain were reproduced on discography and indicated that she had 5/5 strength in all extremities.² Dr. Olewski determined that appellant was totally disabled from her previous job duties.

¹ The record contains a copy of the July 5, 2007 MRI scan study.

² The discography was performed on June 1, 2005 and showed pain reproduction at L2-3, L3-4 and L5-S1.

The Office determined that there was a conflict in the medical opinion between Dr. Olewski and Dr. Cohen regarding whether appellant continued to have residuals of her October 27, 2003 employment injury.³ In order to resolve the conflict, it referred appellant, pursuant to, Dr. Arnold M. Illman, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

On September 5, 2007 Dr. Illman described appellant's October 27, 2003 work injury and discussed the diagnostic testing of record. He noted that on examination of her lower back the slightest touch of her skin caused her to complain of pain. This sensitivity of skin was noted to be from the base of the neck all the way down to the sacrum. Dr. Illman indicated that he did not palpate any muscle spasm and that appellant did not complain of sciatic notch tenderness on palpation. Appellant demonstrated 30 degrees of lateral movement of her back and 0 degrees of extension and stated that it hurt her too much to move forward more than a few degrees. Dr. Illman noted that straight leg raising to 90 degrees with both ankles manually placed in dorsiflexion elicited no pain. Appellant had normal light-touch sensation of both legs and the strength of dorsiflexion and plantar flexion in both ankles was +5.

Dr. Illman determined that appellant was capable of returning to work as a secretary for the employing establishment. He noted that the MRI scan studies did not show any herniated discs and indicated that she did not have a radiculopathy as she had not been complaining of any leg discomfort. Dr. Illman stated that he could not find an orthopedic cause for appellant's symptomatology. He indicated that she had a normal neurologic examination without abnormalities which would cause her to walk in a shuffling type of gait. Dr. Illman was unable to explain from an orthopedic point of view why there was hypersensitivity to the skin on appellant's lower back to the extent that she complained of pain when he barely touched her skin. He indicated that he could not find an orthopedic disability to her lower back and determined that she was not restricted from her normal work as a secretary for the employing establishment.

In an October 2, 2007 notice, the Office advised appellant of its proposed termination of her disability compensation and medical treatment because she no longer had residuals of her October 27, 2003 employment injury. It stated that its termination was supported by the September 5, 2007 report of Dr. Illman, the impartial medical specialist. It provided her with 30 days to submit additional evidence.

In a November 5, 2007 decision, the Office terminated appellant's compensation effective November 5, 2007 on the grounds that she had no residuals of her October 27, 2003 employment injury after that date. It indicated that the well-rationalized opinion of Dr. Illman represented the weight of the medical evidence with regard to this matter.

³ See 5 U.S.C. § 8123(a).

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,⁴ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁵ It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

Section 8123(a) of the 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."⁸ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is 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.⁹

ANALYSIS

The Office accepted that on October 27, 2003 appellant, then a 38-year-old secretary, sustained a lumbosacral strain and disc displacement at L5-S1 with radiculopathy due to a fall at work. It terminated her disability and medical benefits compensation effective November 5, 2007 on the grounds that she had no residuals of her October 27, 2003 employment injury after that date. It indicated that the termination was justified by the opinion of Dr. Illman, a Board-certified orthopedic surgeon who served as an impartial medical specialist.

The Office properly determined that there was a conflict in the medical opinion between Dr. John Olewski, appellant's attending Board-certified orthopedic surgeon, and Dr. Isaac Cohen, a Board-certified orthopedic surgeon who served as an Office referral physician, on the issue of whether she continued to have residuals of the October 27, 2003 employment injury.¹⁰ In order to resolve the conflict, the Office referred appellant, pursuant to section 8123(a) of the Act, to Dr. Illman for an impartial medical examination and an opinion on the matter.¹¹

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁶ *Id.*

⁷ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ 5 U.S.C. § 8123(a).

⁹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹⁰ In reports dated between early and mid 2007 Dr. Olewski determined that appellant was disabled from her previous secretary work due to her October 27, 2003 employment injury. In contrast Dr. Cohen indicated in a July 13, 2007 report that appellant had no residuals of her October 27, 2003 employment injury.

¹¹ *See supra* note 7 and accompanying text.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Illman, the impartial medical specialist selected to resolve the conflict in the medical opinion.¹² The September 5, 2007 report of Dr. Illman establishes that appellant had residuals of her October 27, 2003 employment injury after November 5, 2007.

On September 5, 2007 Dr. Illman concluded that appellant did not have any objective symptoms of her October 27, 2003 employment injury and indicated that she was capable of returning to her regular work as a secretary for the employing establishment. He noted that on examination the slightest touch of her skin from her neck to her sacrum caused her to complain of pain. Dr. Illman indicated that he did not palpate any muscle spasm and that appellant did not complain of sciatic notch tenderness on palpation. Appellant complained that certain back motions were too painful but straight leg raising to 90 degrees with both ankles manually placed in dorsiflexion elicited no pain. She had normal light-touch sensation of both legs and the strength of dorsiflexion and plantar flexion in both ankles was +5.

The Board has carefully reviewed the opinion of Dr. Illman and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. His opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹³ Dr. Illman provided medical rationale for his opinion by explaining that he could not find an orthopedic cause for appellant's symptomatology and indicated that she had a normal neurologic examination without abnormalities. There were no objective findings to explain her shuffling type of gait and her hypersensitivity to the skin on her lower back to the extent that she complained of pain when he barely touched her skin. He further explained that the MRI scan studies did not show any herniated discs and indicated that appellant did not have a radiculopathy as she had not been complaining of any leg discomfort.¹⁴

For these reasons, the Office properly relied on the opinion of Dr. Illman to terminate appellant's compensation effective November 5, 2007.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective November 5, 2007 on the grounds that she had no residuals of her October 27, 2003 employment injury after that date.

¹² See *supra* note 8 and accompanying text.

¹³ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

¹⁴ The Board notes that appellant did not submit any additional medical evidence after being advised of the proposed termination of her compensation.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 5, 2007 decision is affirmed.

Issued: October 24, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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