

FACTUAL HISTORY

On May 31, 2005 appellant, then a 55-year-old mail handler, filed a traumatic injury claim alleging that she felt a pull and burning sensation in her lower back on that date as a result of throwing a sack. She stopped work the same day. By letter dated August 17, 2005, the Office accepted appellant's claim for lumbar neuritis/radiculitis.

In an August 2, 2005 medical report, Dr. Mark A.P. Filippone, an attending Board-certified physiatrist, stated that an electromyogram (EMG) and nerve conduction study (NCS) revealed radiculopathy at right L3-4 and L5-S1 and electrically mild lumbosacral radiculopathy at left L5-S1. He opined that the diagnosed conditions were causally related to the accepted May 31, 2005 employment injury. Dr. Filippone further opined that appellant remained totally disabled and that continued physical therapy was necessary for 12 weeks. During the period October 24, 2005 to October 6, 2006, appellant underwent physical therapy and a lumbar discography and she received lumbar epidural steroid injections. Dr. Filippone noted her continuing lumbar conditions and total disability. On April 18, 2006 he recommended that appellant undergo minimally invasive surgery to be performed by Dr. A.R. Sahed Bakhaty, a specialist in pain management. On September 6, 2006 Dr. Bakhaty requested that the Office authorize a lumbar percutaneous discectomy to treat her lumbar disc herniation, concordant pain at L4-5 and L5-1 and lumbar radiculopathy at right L3-4 and left L5-1. He stated that appellant had not responded to a prolonged course or conservative treatment, including medications, physical therapy and a repeated series of epidural and facet blocks.

By letter dated September 20, 2006, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed to Dr. David I. Rubinfeld, a Board-certified orthopedic surgeon, for a second opinion medical examination.

In an October 7, 2006 report, Dr. Rubinfeld reviewed a history of appellant's May 31, 2005 employment injury, medical treatment and employment. On orthopedic examination, he reported normal findings regarding range of motion of both hips, knees, ankles and feet. Dr. Rubinfeld also reported normal motor strength in both lower extremities and equal bilateral thigh and leg circumferential measurements. He further reported decreased range of motion regarding the thoracolumbar spine. Dr. Rubinfeld stated that appellant was status post lumbosacral radiculitis and that she suffered from degenerative disease of the lumbosacral spine. He opined that the accepted employment-related condition had resolved and that appellant had fully recovered from the effects of this condition. Dr. Rubinfeld further opined that no additional orthopedic treatment was necessary, appellant's prognosis was fair and she had no work-related restrictions. He stated that her arthritis of the lumbosacral spine and obesity, which resulted in limitations and restrictions, should be considered in identifying another job position.

On November 16, 2006 the Office determined that a conflict in the medical opinion evidence arose between Dr. Filippone and Dr. Rubinfeld as to whether appellant had any residuals or disability causally related to her May 31, 2005 employment injury. It referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed to Dr. Robert Dennis, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a January 18, 2007 report, Dr. Dennis reviewed a history of appellant's May 31, 2005 employment injury, medical treatment and employment, nonvocational activities and social background. He noted her complaints of persistent stabbing and burning pain in the lower back, which radiated into her bilateral lower extremities in the proximal area of both the anterior and posterior thighs. Appellant described her thigh pain as a burning sensation, right-sided greater than the left and her quality of life as diminished. On physical and neurological examination of the bilateral hips and knees, Dr. Dennis reported normal findings. He stated that appellant's subjective complaints of pain at L1 or L2 were not represented by any aspect of his clinical physical examination. Dr. Dennis reported essentially normal findings on examination of the lumbar spine with the exception of approximately 50 percent diminished range of motion in all planes. He provided a detailed review of appellant's medical records. Dr. Dennis stated that his equal and symmetric calf measurements were not any different than Dr. Filippone's measurements. He also stated that, contrary to Dr. Bakhaty's January 25, 2006 finding of diminished sensation to the pinprick of L3-4 and L5-S1, he found normal vibratory sensation and symmetric strength and no evidence of radiculopathy. Dr. Dennis diagnosed atypical leg pain not identifiably documentable as being specific for radiculopathy or radiculitis at that time. He also diagnosed significant degenerative changes based on a magnetic resonance imaging (MRI) scan, herniated discs based on an x-ray and herniated discs based on MRI and computerized tomography (CT) scans that were not consistent with any clinical findings and did not produce any clinical manifestations at that time consistent with radiculitis. Dr. Dennis stated that there were no neurological deficits or other findings in either lower extremity. He noted that appellant denied any neck pain related to the May 31, 2005 employment injury. Dr. Dennis opined that the accepted employment-related injury temporarily aggravated preexisting degenerative changes of the lumbar spine which had resolved. He could not document any formal current evidence of neuritis or radiculopathy. Dr. Dennis stated that appellant could return to her preinjury work level with no restrictions. He further stated that she was not totally or permanently disabled due to the accepted employment injury.

By letter dated February 6, 2007, the Office issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on the medical opinion of Dr. Dennis. It allowed her 30 days to respond to this notice.

In a February 5, 2007 letter, received by the Office February 12, 2007, appellant stated that Dr. Dennis examined her for only 15 minutes and he refused to provide her with his findings. She requested an explanation as to how he could conclude that she could return to work despite her physical limitations. Appellant also requested that the Office schedule her medical treatment in the Jersey City/Newark, New Jersey area since she used public transportation.

In a February 15, 2007 form report, Dr. Filippone stated that appellant's lumbosacral neuritis was caused by the accepted employment injury. He opined that she was totally disabled.

In a February 27, 2007 letter, appellant disagreed with the Office's proposed action. She contended that she did not suffer from a preexisting back condition and that she did not have any back problems prior to her May 31, 2005 employment injury. Appellant had worked as a mail handler at the employing establishment for 22 years and could not imagine performing the required heavy workload with back problems. She believed that Dr. Rubinfeld and Dr. Dennis

did not perform fair examinations. Appellant stated that her attending physicians were in a better position to determine her back condition. She noted her continuing back pain which radiated down to her legs. Appellant stated that Dr. Rubinfeld and Dr. Dennis did not perform legitimate medical examinations because they were not conducted in their own offices.

By letter dated February 28, 2007, appellant's attorney objected to the selection of Dr. Rubinfeld and Dr. Dennis. He contended that Dr. Rubinfeld was not impartial since he had performed many examinations for which he received income from the Office. Counsel further contended that Dr. Rubinfeld's office was not located near appellant's home and he was not qualified to examine her because he was not a back surgeon. He also contended that Dr. Dennis' examination was not performed in a location near her home and that the location was not listed on Dr. Dennis' office letterhead. Counsel argued that Dr. Dennis' opinion that appellant did not suffer from radiculopathy was contradicted by all of her attending physicians and objective test results, diagnosing this condition. He further argued that Dr. Rubinfeld and Dr. Dennis failed to provide rationale in support of their opinion that she no longer suffered from employment-related residuals or disability.

In a February 15, 2007 narrative report, Dr. Filippone stated that an EMG/NCS revealed evidence of bilateral lumbosacral radiculopathy that was more extensive on the right although there was no suggestion of any polyneuropathy. He disagreed with the Office's proposed action and Dr. Dennis' opinion that appellant could perform her usual work duties with no restrictions.

In an undated supplemental report, Dr. Dennis stated that his examination of appellant was conducted over one and one-half hours. He reviewed voluminous medical records and drafted a 27-page report, which he stated could not have been completed without devoting an extraordinary amount of time.

In reports dated March 1 and 15, 2007, Dr. Filippone stated that appellant's disc herniations and desiccation at T12-L1, L4-5 and L5-S1 were causally related to the accepted employment injury.

By decision dated April 12, 2007, the Office terminated appellant's compensation for wage-loss and medical benefits with regard to her accepted employment injury, effective that date. It found that she no longer had any residuals or disability causally related to her accepted employment injury.

By letter dated April 20, 2007, appellant, through her attorney, requested an oral hearing before an Office hearing representative regarding the April 12, 2007 decision.

In a May 11, 2007 decision, the Office issued a clarification to its April 12, 2007 decision by amending the termination date of appellant's wage-loss compensation and medical benefits to April 15, 2007.

In a January 3, 2007 report, Dr. Marc A. Cohen, a Board-certified orthopedic surgeon, recommended that appellant undergo surgery for her symptomatic herniated disc at L4-5 and L5-S1 and positive provocative discography with causative pain at L4-5 and L5-S1 with internal disc disruption disease.

In reports covering the period April 10 to October 18, 2007, Dr. Filippone reiterated his prior opinion that appellant's disc herniations and desiccation at T12-L1, L4-5, bilateral lumbar radiculopathy and total disability were caused by the accepted employment injury.

In reports dated February 13 to August 21, 2006, Dr. Bakhaty stated that appellant received lumbar epidural steroid injections. In a July 26, 2006 progress note, he stated that she was stable for discharge following an epidural steroid injection she received on that date.

An April 10, 2006 CT scan of Dr. John S. Lyons, a radiologist, revealed mild left paracentral L5-S1 herniation.

By decision dated November 30, 2007, an Office hearing representative affirmed the April 12 and May 11, 2007 decisions. He found that the Office properly selected Dr. Rubinfeld and Dr. Dennis from the Physician's Directory System (PDS). The hearing representative further found the evidence submitted by appellant insufficient to outweigh Dr. Dennis' impartial medical opinion.

In a letter dated February 26, 2008, appellant, through counsel, requested reconsideration of the November 30, 2007 decision. In support of the request on reconsideration, appellant submitted reports covering the period October 18, 2007 to March 26, 2008 from Dr. Filippone regarding her continuing symptoms related to her back. Dr. Filippone reiterated that she remained totally disabled.

By decision dated May 23, 2008, the Office denied modification of the November 30, 2007 decision. It found the evidence submitted by appellant insufficient to outweigh Dr. Dennis' impartial medical opinion.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.² Furthermore, 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 a claimant no longer has residuals of an employment-related condition that requires further medical treatment.³

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

¹ *Jason C. Armstrong*, 40 ECAB 907 (1989).

² *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

³ *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁴

ANALYSIS -- ISSUE 1

The Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation and medical benefits. The Board finds that a conflict existed in the medical evidence between Dr. Filippone, an attending physician, and Dr. Rubinfeld, an Office referral physician, regarding whether she had any continuing employment-related residuals or disability causally related to her accepted May 31, 2005 employment injury. Dr. Filippone opined that appellant continued to suffer from residuals and total disability due to the accepted employment injury. Dr. Rubinfeld opined that her employment-related lumbar neuritis/radiculitis had resolved and she could return to work with restrictions that were not related to the accepted employment injury.

The Office properly referred appellant to Dr. Dennis as the impartial medical specialist. In his January 18, 2007 report, Dr. Dennis reviewed a history of appellant's May 31, 2005 employment injury, medical treatment and employment, nonvocational activities and social background. He found no objective findings of residuals or disability relative to the accepted May 31, 2005 employment-related lumbar neuritis/radiculitis. After reporting essentially normal findings on physical and neurological examination, Dr. Dennis opined that appellant's subjective complaints of pain at L1 or L2 were not represented by any aspect of his clinical physical examination. He also reported normal vibratory sensation and symmetric strength and no evidence of radiculopathy. Dr. Dennis diagnosed atypical leg pain not identifiably documentable as being specific for radiculopathy or radiculitis at that time. He further diagnosed significant degenerative changes, based testing, that were not consistent with any clinical findings and did not produce any clinical manifestations at that time consistent with radiculitis. Dr. Dennis opined that the accepted employment-related injury temporarily aggravated preexisting degenerative changes of the lumbar spine, which had resolved. He explained that he could not document any formal current evidence of neuritis or radiculopathy. Dr. Dennis stated that appellant could return to her preinjury work level with no restrictions based on accepted employment injury. He further stated that she was not totally or permanently disabled due to the accepted employment injury.

In response to appellant's contentions regarding the brevity of the examination, Dr. Dennis submitted a supplemental report stating that he conducted a thorough medical examination as it lasted over one and one-half hours and included a review of her voluminous medical records, resulting in a 27-page report.

The Board finds that Dr. Dennis' opinion is based on a proper factual and medical background and is entitled to special weight. Based on Dr. Dennis' review of the case record, essentially normal findings on physical examination, he found that appellant did not sustain any residuals or disability causally related to her employment-related lumbar neuritis/radiculitis. For

⁴ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

this reason, his report constitutes the special weight of the medical opinion evidence afforded an impartial medical specialist.

Dr. Cohen's January 3, 2007 report recommended that appellant undergo surgery for her symptomatic herniated disc at L4-5 and L5-S1 and positive provocative discography with causative pain at L4-5 and L5-S1 with internal disc disruption disease. Dr. Lyons's April 10, 2006 CT scan revealed mild left paracentral L5-S1 herniation. However, neither Dr. Cohen nor Dr. Lyons specifically opined that appellant's lumbar conditions and the recommended medical treatment were causally related to her accepted employment injury. Therefore, the Board finds that the reports of Dr. Cohen and Dr. Lyons are insufficient to overcome the weight accorded to Dr. Dennis' medical opinion.

Dr. Filippone's reports covering the period February 15 to October 18, 2007 stated that appellant's lumbosacral neuritis, bilateral lumbosacral radiculopathy and disc herniations and desiccation at T12-L1, L4-5 and L5-S1 were causally related to the accepted May 31, 2005 employment injury. He was part of the conflict in medical opinion for which she was referred to Dr. Dennis. The Board has long held that additional reports from a physician on one side of the conflict in medical opinion resolved by the impartial specialist are insufficient to create another conflict or overcome the special weight accorded that specialist's conclusions.⁵ Therefore, the Board finds that Dr. Filippone's reports which were addressed by Dr. Dennis are insufficient to create a conflict or to overcome the well-rationalized medical opinion of Dr. Dennis.⁶

Dr. Bakhaty's February 13 to August 21, 2006 reports, stated that appellant received lumbar epidural steroid injections. In a July 26, 2006 progress note, he stated that she was stable for discharge following her receipt of an epidural steroid injection on that date. Dr. Bakhaty did not address whether the medical treatment appellant received was necessary due to her accepted employment injury. The Board finds that his reports and progress note are insufficient to overcome the weight accorded to Dr. Dennis' medical opinion.

Appellant and her attorney disagreed with the selection of Dr. Rubinfeld and Dr. Dennis. They contended that the physicians did not perform legitimate medical examinations because they were not held in their own offices and the offices were not near her home. Counsel contended that Dr. Rubinfeld was not impartial as he had performed many examinations for the Office and received income. He further contended that Dr. Rubinfeld was not qualified to examine appellant because he was not a back surgeon. Counsel argued that Dr. Dennis' opinion that she did not suffer from radiculopathy was contradicted by her attending physicians and objective test results. The Board finds that these contentions are not supported by the evidence of record.

⁵ *Alice J. Tysinger*, 51 ECAB 638, 646 (2000).

⁶ *See Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael Hughes*, 52 ECAB 387 (2001).

Appellant did not object to the selection of Dr. Rubinfeld and Dr. Dennis at the time the appointments were made⁷ or present any evidence to support her allegation that the Office did not follow its procedures. The Office's procedures provide that the selection of referee physicians are made by a strict rotational system using appropriate medical directories and specifically states that the PDS should be used for this purpose. The procedures explain that the PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations and states that the database of physicians for referee examinations is obtained from the MARQUIS Directory of Medical Specialists.⁸ The Board has reviewed the Office's PDS printout and concludes that there is no evidence the selection process was improper. The fact that Dr. Rubinfeld previously performed examinations for the Office does not render him ineligible to serve as the second opinion physician. No evidence of bias or unprofessional conduct on the part of Dr. Rubinfeld was submitted. Further, there is no evidence that Dr. Rubinfeld, a Board-certified orthopedic surgeon, was not qualified to examine appellant's back. Lastly, as stated above, the Board found that Dr. Dennis' well-rationalized medical opinion that she no longer had any residuals or disability causally related to her May 31, 2005 employment injury constituted the special weight of the medical evidence. Moreover, Dr. Dennis even disputed in writing appellant's uncorroborated allegation that his examination was not comprehensive. For the stated reasons, the Board finds that she did not present any evidence establishing that the selection of Dr. Rubinfeld or Dr. Dennis was improper.⁹

LEGAL PRECEDENT -- ISSUE 2

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had any disability causally related to her accepted injury.¹⁰ To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.¹¹ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹² Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and

⁷ See *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008) (a claimant must timely raise any objection to the selected physician in order to participate in the process in accordance with Office procedures and must provide valid reasons).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7 (May 2003); *Albert Cremato*, 50 ECAB 550 (1999).

⁹ See *L.W.*, 59 ECAB ___ (Docket No. 07-1346, issued April 23, 2008).

¹⁰ See *Manuel Gill*, 52 ECAB 282 (2001).

¹¹ *Id.*

¹² *Elizabeth Stanislav*, 49 ECAB 540 (1998).

must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹³

ANALYSIS -- ISSUE 2

The Board finds that appellant did not establish that she had any continuing employment-related residuals or total disability after April 15, 2007. The relevant medical evidence included Dr. Filippone's reports covering the period October 18, 2007 to March 26, 2008, which stated that she continued to suffer from symptoms related to her back and remained totally disabled. As stated, Dr. Filippone formed one part of the conflict in the medical opinion evidence for which appellant was referred to Dr. Dennis. Therefore, the Board finds that his reports are insufficient to create a new conflict in the medical evidence or to overcome the well-rationalized medical opinion of Dr. Dennis, the impartial medical specialist.¹⁴

The Board finds that appellant did not submit the necessary rationalized medical evidence to substantiate that the claimed continuing lumbar residuals and disability on or after April 15, 2007 were causally related to her accepted employment-related injury.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation for wage-loss and medical benefits effective April 15, 2007 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injury. The Board further finds that she has failed to establish that she had any continuing employment-related residuals or disability after April 15, 2007.

¹³ *Solomon Polen*, 51 ECAB 341 (2000).

¹⁴ See cases cited *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2008 and November 30, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 18, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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