

the medical evidence established that appellant had any disability or residuals after November 30, 2007 causally related to his employment injury.²

FACTUAL HISTORY

On May 1, 2007 appellant, then a 60-year-old safety and health inspector, filed a traumatic injury claim alleging that he sustained a neck injury while riding on a track-mounted jeep on April 30, 2007. His claim was accepted for a neck sprain and he was paid compensation benefits from September 17 through November 6, 2007.

Appellant was treated by Dr. Wladyslaw Bobak, a Board-certified internist. On August 1, 2007 Dr. Bobak stated that he had sustained a severe work-related cervical spine injury on April 30, 2007. He indicated that, as a result of the injury, appellant had severely limited range of motion (ROM) and opined that he was unable to work. Dr. Bobak diagnosed cervical sprain with radiculopathy.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Stephen Bailey, a Board-certified orthopedic surgeon, for a second opinion examination. It asked Dr. Bailey to render an opinion as to whether he continued to experience residuals due to his accepted injury and, if so, whether he was disabled as a result of those residuals.

The record contains an August 7, 2007 report of a computerized tomography scan of the head. The record also contains a report of an August 7, 2007 electromyogram (EMG) and nerve conduction study (NCS).

In a September 14, 2007 report, Dr. Bailey described the history of injury and treatment. He stated that an August 9, 2007 EMG and NCS reflected peripheral polyneuropathy, but no specific electrophysiological evidence for focal compressive neuropathy or cervical radiculopathy in the areas evaluated. Dr. Bailey also indicated that a May 10, 2007 magnetic resonance imaging (MRI) scan of the cervical spine showed no evidence of a herniated disc, spinal stenosis, spinal cord or thecal sac impingement and no evidence of any trauma to the cervical spine. The study did show multilevel mild degenerative changes, "but nothing present that could in [his] opinion explain [appellant's] symptoms," which included headache, pain and numbness in both arms and weakness in his hands. Dr. Bailey's neurological examination of both upper extremities revealed reflexes of 1 to 2+ bilaterally. Sensory examination to pin and light touch was normal in both upper extremities. Manual motor testing is essentially intact. Palpation of the neck revealed no spasm or tenderness. ROM testing demonstrated restricted ROM, with 10 degrees of flexion, 25 degrees of extension and less than 20 degrees of tilting and rotation. Dr. Bailey was unable to explain appellant's restricted ROM, given the fact that he observed no muscle spasm and there was no MRI scan evidence of any significant cervical spine pathology affecting both upper extremities. He stated that he found no objective evidence of

² On appeal, appellant's representative states that he has had prior accepted work injuries that bear on the injury in this case. He requests that the case be remanded for consolidation and further development of the medical evidence on the issue of causal relationship.

impairment or of a cervical sprain. Dr. Bailey opined that appellant was capable of working full duty as a mine inspector without restrictions.

In a September 20, 2007 report, Dr. Shobha Asthana, a Board-certified neurologist, diagnosed severe cervical sprain and cervical spasm following an April 30, 2007 work injury. He stated that it was unclear why appellant's symptoms persisted so long after the injury.

By letter dated October 2, 2007, the Office issued a notice of proposed termination of appellant's compensation and medical benefits. It found that the weight of the medical evidence was represented by Dr. Bailey's September 14, 2007 report, which established that appellant's accepted condition had resolved and that he was able to return to his date-of-injury job without restrictions. The Office provided 30 days during which appellant could respond to the notice.

The record contains October 2, 2007 reports of an x-ray and an MRI scan of the cervical spine. The record also contains physical therapy notes from July 11 to October 31, 2007.

In an October 24, 2007 report, Dr. Bobak stated that he had examined appellant on a biweekly basis since May 7, 2007. Examination revealed a severe cervical sprain, which produced a stiff neck; limited ROM; severe muscle spasms; constant headaches; unrelenting pain radiating to both shoulders; and numbness in the arms and fingers. Dr. Bobak opined that appellant was totally disabled from work.

By decision dated November 7, 2007, the Office found that the weight of the medical evidence, encompassed in Dr. Bailey's report, established that appellant had no residuals from the accepted condition. Accordingly, it terminated his medical and wage-loss compensation benefits effective November 7, 2007. The Office stated that Dr. Bailey's opinion, in light of his expertise as an orthopedist, was entitled to greater weight than, the opinion of Dr. Bobak, who was an internal medicine specialist. It also noted that Dr. Bobak had not addressed appellant's preexisting cervical condition.

On December 12, 2007 appellant, through his representative, requested reconsideration. In a January 2, 2008 statement, he indicated that he was totally disabled due to his work-related injury.

Appellant submitted physical therapy notes from Colony A. Hopkins, DPT, from October 24 to December 27, 2007. On December 27, 2007 Mr. Hopkins stated that appellant had full passive ROM, but required restrictions due to pain and muscle tightness in the upper trapezius.

In a report dated December 10, 2007, Dr. Bobak stated that he had been treating appellant for a severe cervical sprain with muscle spasms on a biweekly basis since May 7, 2007, following an April 30, 2007 work-related neck injury. He indicated that appellant was engaged in ongoing physical therapy and that his therapist noted restrictions on active ROM secondary to pain and muscle tightness. Dr. Bobak disagreed with Dr. Bailey's conclusion that the accepted cervical sprain had resolved. He noted the results of an October 2, 2007 MRI scan, which revealed abnormal cervical lordosis; multiple-level disc degeneration, which was most prominent at C5, 6 and 7; significant narrowing of the disc spaces; small posterior osteophytes noted indenting the thecal sac; and an irregularly contoured left paracentral complex which showed

encroachment into the neuroforamina. October 2, 2007 x-rays of the cervical spine revealed disc space narrowing with marginal spurring at C5 to 7 and degenerative disc disease of the cervical spine. An August 9, 2007 EMG revealed peripheral polyneuropathy affecting both upper extremities.

Dr. Bobak addressed the deficiencies in his previous reports identified by the Office in its November 7, 2007 decision. He stated that appellant was not aware that he had a preexisting cervical condition and that, although, he experienced several back injuries, which required treatment over the years and has jammed his head into the mine roof on occasions too numerous to count, he never required medical treatment for any cervical spine disability. Dr. Bobak indicated that he continued to experience severe muscle spasms of the neck on palpation and no movement capabilities. He also noted that appellant was experiencing some numbness in his arms and fingers. Dr. Bobak stated that his review of diagnostics, his examinations, reports from physical therapy and the neurologist confirmed that appellant's accepted condition was ongoing and that his physical condition, constant headaches and unrelenting pain prevent him from performing any work. He opined that appellant's history of repeated trauma to his neck accounted for his degenerative disc disease and that this preexisting condition was aggravated by the April 30, 2007 injury. Dr. Bobak suspected that he had cervical radiculopathy, which would help to explain his slow improvement, severe pain and continuing cervical muscle spasms.

Appellant submitted a January 14, 2008 report from Dr. Mark E. Baratz, a Board-certified orthopedic surgeon, who diagnosed degenerative joint disease of the cervical spine, with evidence of cervical radiculopathy. On examination, he had difficulty rotating his head or bending forward or backward. With side bending, appellant experienced numbness radiating to his thumbs and fingers. He noted that an August 9, 2007 EMG suggested peripheral polyneuropathy and an MRI scan showed evidence of arthritis, with changes in cervical lordosis.

The record contains a January 12, 2008 report from Dr. Mark R. Foster, a Board-certified orthopedic surgeon, who stated that appellant sustained a work-related whiplash injury on April 30, 2007, while riding through a mine in a rail cart. Startled by a noise, appellant apparently twisted his head around to see what was going on, when the driver hit his brakes, causing the neck injury. Dr. Foster's examination of the cervical spine revealed what he described as almost no ROM -- 5 to 10 degrees of lateral rotation; 5 degree lateral bend; extension to about 10 degrees; and flexion to about 15 degrees. He noted that appellant had a negative Spurlings. Dr. Foster diagnosed cervical sprain with underlying severe cervical spondylosis and a torn rotator cuff with abduction on the left side of approximately 60 degrees preexisting the accepted injury. His examination revealed numbness from polyneuropathy, which he stated was not injury related. Dr. Foster opined that appellant was disabled due to spasms, severe restrictions in motion and axial pain without radiculopathy. He also opined that appellant's underlying chronic degenerative joint disease was exacerbated by the accepted cervical sprain.

The employing establishment forwarded a copy of Dr. Foster's January 12, 2008 report to Dr. Neal L. Presant, a Board-certified family practitioner, for an opinion as to whether appellant was capable of performing the duties of a mine inspector. Noting that appellant had been "off work" since suffering a neck injury in April 2007, he stated that Dr. Presant's examination was intended to resolve a conflict between his treating physician and the Office's second opinion

physician regarding his ability to work as an inspector. The medical history reflected that he suffered from chronic severe pain, causing major restrictions on his ability to perform activities of daily living, let alone perform heavy physical labor. On examination, Dr. Presant found an extremely limited ROM in the head and neck, consistent with appellant's medical history. Noting that the inspector position required continuous physical activity, including walking, stooping, crawling, climbing ladders and lifting weights up to 50 pounds, he opined that appellant was permanently "not fit for duty as a Mine Safety and Health Inspector" and recommended an Office of Personal Management disability retirement if his claim was rejected by the Office.

By decision dated February 26, 2008, the Office denied modification of its previous decision, finding that the weight of the medical evidence was encompassed in Dr. Bailey's second opinion report. The claims examiner stated that appellant's treating physicians provided inaccurate facts as to how the accepted injury occurred; failed to address his preexisting cervical condition; and did not explain why his cervical sprain and spasms continued for such a long period of time, when normal sprains are resolved within eight weeks. The Office stated that appellant had "severe preexisting conditions," as evidenced by medical reports contained in a previous claim (File No. xxxxxx874).³

On April 22, 2008 appellant, through his representative, requested reconsideration. He stated that he was unaware that he had a preexisting cervical spine condition at the time he filed this claim, because he was previously treated for a lower back condition. Appellant alleged that he was unable to work due to his April 30, 2007 injury, which exacerbated his neck condition.

In an April 21, 2008 report, Dr. Bobak stated that he had reviewed several accident reports, which had previously been unavailable to him, including a report of a September 25, 2003 injury of the cervical and lumbar spine. Appellant informed Dr. Bobak that he was not aware that he was being treated for injury to his cervical spine as a result of that accident. Diagnostic reports of that injury showed that he suffered from some loss of disc height at C5-6 and C6-7, as well as some degenerative spondylosis; increased activity involving the left side of the mandible, which represented changes related to periodontal disease and/or trauma; and mild peripheral neuropathy. On March 5, 2004 Dr. Platto reportedly released him to his regular inspection duties. Appellant returned to his work and continued to work daily until his twisting whiplash injury on April 30, 2007. To his knowledge, he never experienced any effects from the diagnosis of peripheral neuropathy.

Dr. Bobak compared diagnostic studies associated with appellant's September 25, 2003 cervical spine injury to the May 10 and October 2, 2007 studies. He found no obvious evidence of any normal progression of his preexisting condition that would explain his current disabling symptoms. Dr. Bobak reviewed appellant's treatment history, including Dr. Foster's January 12, 2008 report, which reflected findings of muscle spasms, severe restricted ROM with axial pain

³ The claims examiner identified and discussed the following reports contained in (File No. xxxxxx874): reports dated October 27, 30 and December 23, 2003 from Dr. Michael Platto, who reported that appellant had underlying degenerative joint disease and a right rotator cuff injury; an October 30, 2003 report of a bone imaging examination, reflecting a preexisting cervical spine condition; and a report from Dr. George C. Schmieler, who indicated that appellant had pain behavior and symptom magnification.

and a cervical strain with underlying severe cervical spondylosis. He opined that appellant's preexisting cervical condition was aggravated by his April 30, 2007 twisting whiplash injury accident. Dr. Bobak stated that appellant was suffering from extremely limited ROM to his head and neck with severe neck pain, which radiated to his shoulders and experienced continuous, severe muscle spasms, numbness in his right arm and fingers and a constant headache, with no ability to concentrate. He further opined that appellant was unable to perform any type of work. Dr. Bobak opined that his whiplash injury caused the disc at C5-6 and C6-7 to bulge, which in turn is responsible for constant muscle spasms. He recommended that the previously diagnosed condition of neck sprain be amended to include the conditions of cervical spondylosis, degenerative disc disease and bulging disc in the cervical area.

By decision dated June 16, 2008, the Office denied modification of its previous decisions, on the grounds that the medical evidence was insufficient to demonstrate that appellant was disabled or had residuals from his work-related injury and that the evidence did not support the expansion of the claim to include another cervical condition.⁴

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁵ It may not terminate compensation without establishing that the disability has ceased or that it is 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 Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁸ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁹

⁴ Although Dr. Bobak recommended that appellant's previously diagnosed condition of neck sprain be amended to include the conditions of cervical spondylosis, degenerative disc disease and bulging disc in the cervical area and the Office stated that the evidence did not support expansion of the claim, the record does not contain a formal request by appellant or his representative for an expansion of the claim. The Board notes that, on appeal, counsel requested a new second opinion evaluation on the issue of causal relationship between appellant's diagnosed conditions and his work injury. However, the Board cannot consider a request for expansion of the claim for the first time on appeal.

Appellant submitted additional evidence after the Office's June 16, 2008 decision; however, the Board cannot consider such evidence for the first time on appeal. The Board's review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 10.501.2(c) (2007).

⁵ See *Beverly Grimes*, 54 ECAB 543 (2003).

⁶ *Id.*

⁷ *James M. Frasher*, 53 ECAB 794 (2002).

⁸ See *Beverly Grimes*, *supra* note 5. See also *Franklin D. Haislah*, 52 ECAB 457 (2001).

⁹ See *Beverly Grimes*, *supra* note 5.

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary of Labor shall appoint a third physician who shall make an examination.¹⁰ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.¹¹

ANALYSIS -- ISSUE 1

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation and medical benefit as there remains an unresolved conflict in medical opinion evidence. Therefore, the Office's decisions terminating those benefits must be reversed.

Appellant's treating physician opined that he was disabled from any type of work due to residuals of his accepted cervical sprain. On August 1, 2007 Dr. Bobak diagnosed cervical sprain with radiculopathy and opined that he had severely limited ROM and was unable to work as a result of the accepted April 30, 2007 injury. On October 24, 2007 he again opined that appellant was totally disabled from work due to the accepted injury, noting that he had examined him on a biweekly basis since May 7, 2007. Examination revealed a severe cervical sprain, which produced a stiff neck; limited ROM; severe muscle spasms; constant headaches; unrelenting pain radiating to both shoulders; and numbness in the arms and fingers.

On the other hand, the Office's second opinion physician found no objective evidence of impairment or of a cervical sprain. On September 14, 2007 Dr. Bailey opined that appellant was capable of working full duty as a mine inspector without restrictions. He noted that an August 9, 2007 EMG/NCS reflected peripheral polyneuropathy, but no specific electrophysiological evidence for focal compressive neuropathy or cervical radiculopathy in the areas evaluated. Dr. Bailey also indicated that a May 10, 2007 MRI scan showed no evidence of a herniated disc, spinal stenosis, spinal cord or thecal sac impingement and no evidence of any trauma to the cervical spine. The study did show multilevel mild degenerative changes, "but nothing present that could in [his] opinion explain [appellant's] symptoms," which included headache, pain and numbness in both arms and weakness in his hands. Palpation of the neck revealed no spasm or tenderness and ROM testing demonstrated restricted ROM, with 10 degrees of flexion, 25 degrees of extension and less than 20 degrees of tilting and rotation. Dr. Bailey was unable to explain appellant's restricted ROM, given the fact that he observed no muscle spasm and there was no MRI scan evidence of any significant cervical spine pathology affecting both upper extremities.

The Board finds that at the time of the termination a conflict existed in the medical opinion evidence between appellant's treating physicians, who opined that appellant was disabled as a result of residuals from his accepted injury, and the Office's second opinion examiner, who opined that his accepted condition had resolved. The Office stated that Dr. Bailey's opinion, in light of his expertise as an orthopedist, was entitled to greater weight

¹⁰ 5 U.S.C. § 8123(a).

¹¹ *William C. Bush*, 40 ECAB 1064, 1075 (1989).

than the opinion of Dr. Bobak, who was an internal medicine specialist. Although the Board has found that the opinions of physicians who have training and knowledge in a specialized medical field have greater probative value concerning medical questions peculiar to that field than do the opinions of other physicians,¹² no individual factor standing alone necessarily determines the weight of the medical evidence.¹³

Dr. Bailey's expertise as an orthopedist does not automatically trump the opinion of Dr. Bobak, a Board-certified internist, who treated appellant on a weekly basis following his accepted injury and whose physical findings were supported by those of Dr. Asthana, Dr. Foster, and Dr. Baratz. The Office stated that Dr. Bobak did not address appellant's preexisting cervical condition. However, in his April 21, 2008 report, Dr. Bobak opined that appellant's preexisting cervical condition was aggravated by his April 30, 2007 twisting whiplash injury accident. The Board notes that Dr. Bailey did not have the benefit of reviewing the reports of the October 2, 2007 x-ray or MRI scan of the cervical spine, thereby diminishing the probative value of his September 14, 2007 report. On the other hand Dr. Bobak's more recent report of December 10, 2007 included a discussion of the October 2, 2007 reports, which revealed abnormal results. The Office also stated that Dr. Bobak failed to explain why appellant's sprain and spasms were still present. The record reflects, however, that on December 17, 2007, Dr. Bobak opined that appellant had cervical radiculopathy, which he stated would explain his slow improvement. The Board finds that the opposing reports of Dr. Bailey and Dr. Bobak are of virtually equal weight and rationale. Therefore, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence as to whether appellant has any residuals from his accepted condition and, if so, whether he was disabled as a result of those residuals as of November 7, 2007.¹⁴

In its June 16, 2008 decision, the Office found that the medical evidence was insufficient to demonstrate that appellant was disabled or had residuals from his work-related injury. The Board finds that the Office improperly placed the burden on appellant. Once the Office accepted appellant's claim, it had the burden of proving that his disability has ceased or lessened in order to justify termination or modification of his compensation benefits¹⁵ and to establish that he no longer had residuals of his employment-related condition in order to terminate authorization for medical treatment.¹⁶

¹² *Mary S. Brock*, 40 ECAB 461 (1989).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.4b (October 2005) *see Michael S. Mina*, 57 ECAB 379 (2006) (in assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality; the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

¹⁴ *William C. Bush*, *supra* note 11.

¹⁵ *See Beverly Grimes*, *supra* note 5.

¹⁶ *Id.*

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate compensation for wage-loss and medical benefits effective November 7, 2007, as there remains an unresolved conflict in the medical evidence.¹⁷

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 16 and February 26, 2008 and November 7, 2007 are reversed.

Issued: July 10, 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

¹⁷ In light of the Board's ruling on the first issue, the second issue is moot.