

Office accepted the claim for a lumbosacral sprain and disorders of the sacrum. Appellant worked intermittently until April 9, 1991, when she stopped and did not return.

In a report dated January 11, 2008, Dr. Ashish Sharma, an attending internist, found that appellant was “permanently disabled due to her degenerative disc disease at multiple levels in her back, causing severe pain and limited motion and movement.”

The Office referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion examination. On January 29, 2008 Dr. Swartz opined that there were no objective findings of either lumbosacral sprain or disorders of sacrum. He listed findings of possible symptom magnification and somatoform disorder. Dr. Swartz found that appellant could perform sedentary work. He attributed her limitations to her age and nonemployment-related thoracolumbar scoliosis, multilevel degenerative arthritis disease and psychological condition.

On March 4, 2008 the Office notified appellant of its proposed termination of her compensation and medical benefits. On March 31, 2008 her attorney challenged the proposed termination. Counsel submitted a December 28, 2007 report from Dr. Sharma, who related that appellant remained disabled from her employment-related lumbosacral strain and disorders of the sacrum.

The Office determined that a conflict in medical opinion arose between Dr. Swartz and Dr. Sharma regarding whether appellant had any residuals of her accepted work injury. On August 12, 2008 the Office referred her to Dr. Mark J. Rosen, a Board-certified orthopedic surgeon, for an impartial medical examination.

On September 8, 2008 Dr. Rosen reviewed the history of injury and the medical reports of record. On physical examination he found no objective weakness or muscle spasm and a negative straight leg raising sign but pain to touch in the back. Dr. Rosen stated:

“[Appellant] has had persistent subjective pain since her original injury in 1990. Her lawyer states this must be related to the industrial injury because she has such pain. However, it is my task to determine whether or not this is reasonable. Clearly, it is not reasonable to expect that a sprain suffered in 1990 from a slip and fall in this patient should still be responsible for the severe disabling pain of which she is now complaining. Given her other findings and diagnostic tests, it is more reasonable to expect that the pain she is now suffering from in the lower back is secondary to the severe degenerative disc disease and scoliosis present on x-ray, these objective findings are not related to any accident.”

He related, “There are no objective findings related to the accepted condition.” Dr. Rosen found no objective findings of fibromyalgia and that there was no basis to attribute either a diagnosis of fibromyalgia or pain disorder to her accepted work injury. He concluded:

“[Appellant] is suffering from degenerative disease of the cervical spine. There is no medical reason to attribute this to the September 17, 1990, injury event. The record does not document complaints of neck pain contemporaneous to that accident.”

In a work restriction evaluation, Dr. Rosen found that appellant was unable to perform her usual employment but could work four hours with restrictions.

By decision dated September 23, 2008, the Office terminated appellant's compensation and medical benefits effective September 28, 2008. It found that Dr. Rosen's report constituted the weight of the evidence and established that she had no residuals of her accepted work injury.

On October 16, 2008 appellant requested a telephone hearing. At the hearing, held on February 11, 2009, she asserted that the Office informed her in 1992 that it had accepted fibromyalgia as employment related. Appellant's attorney argued that the impartial medical examiner did not address whether the accepted condition of disorders of the sacrum had resolved. Counsel contended that the diagnosis of disorders of the sacrum was the same as a diagnosis of degenerative disc disease.

By decision dated June 24, 2009, the hearing representative affirmed the September 23, 2008 termination.

On appeal appellant's attorney asserts that the Office had a duty pursuant to 5 U.S.C. § 8124 to determine whether appellant sustained fibromyalgia and a psychological condition as a consequence of her employment injury prior to terminating her benefits. Counsel also argues that the medical evidence did not adequately address the accepted condition of disorders of the sacrum.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.¹ The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.²

Section 8123(a) provides that, 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.³ The implementing regulations state 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, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁴

¹ *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

² *Gewin C. Hawkins*, 52 ECAB 242 (2001).

³ 5 U.S.C. § 8123(a).

⁴ 20 C.F.R. § 10.321.

When 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.⁵

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained lumbosacral sprain and disorders of the sacrum due to a September 17, 1990 employment injury. Appellant received compensation for total disability beginning 1991. The Office determined that a conflict existed between Dr. Sharma, appellant's attending physician, and Dr. Swartz, an Office referral physician, regarding whether she had any further residuals of her accepted employment injury. On August 12, 2008 the Office referred her to Dr. Rosen for an impartial medical examination.

When the record contains a conflict in medical opinion 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.⁶ On September 8, 2008 Dr. Rosen reviewed the history of injury and medical reports of record. On examination he found no muscle spasm or objective weakness. Dr. Rosen determined that it was "not reasonable" that her lumbosacral sprain from 1990 should cause her complaints of disabling pain. He attributed her pain to severe degenerative disc disease and scoliosis, which he found were unrelated to her employment injury. Dr. Rosen concluded that appellant had "no objective findings related to the accepted condition." The Board finds that, regarding the accepted condition of lumbosacral sprain, Dr. Rosen's opinion is well rationalized and based on a proper factual background. He explained that the diagnostic studies indicated that appellant's pain arose from degenerative disc disease and scoliosis. Dr. Rosen's opinion is thus entitled to the special weight accorded an impartial medical examiner and is sufficient to meet the Office's burden of proof to establish that appellant had no further disability due to her accepted condition of lumbosacral sprain.⁷

The Board finds, however, that Dr. Rosen's report is insufficient to establish that appellant had no employment-related condition or disability as of September 28, 2008 due to her accepted condition of disorders of the sacrum. On appeal appellant's attorney contends that the medical evidence did not adequately address her accepted condition of disorders of the sacrum. Dr. Rosen did not specifically address whether appellant had any further residuals or disability from the accepted condition of disorders of the sacrum. The Office accepted disorder of the sacrum and has the burden to establish that disability related to this condition ceased prior to terminating benefits.⁸ Dr. Rosen attributed appellant's current back pain to nonemployment-related severe degenerative disc disease. He did not, however, provide a determination that she

⁵ *R.C.*, 58 ECAB 238 (2006); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

⁶ *Darlene R. Kennedy*, 57 ECAB 414 (2006).

⁷ *See JaJa K. Asaramo*, 55 ECAB 200 (2004).

⁸ *See David W. Pickett*, *supra* note 5.

had no further residuals due to her sacrum disorder. Consequently, the Office did not meet its burden of proof to terminate compensation benefits.

On appeal appellant's attorney argues that pursuant to section 8124 the Office must issue a decision regarding any consequential injuries prior to terminating benefits.⁹ The Office, however, may terminate compensation for an accepted condition if it meets its burden of proof to show that the condition is no longer disabling.¹⁰

LEGAL PRECEDENT -- ISSUE 2

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹¹ 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.¹²

ANALYSIS -- ISSUE 2

The Office met its burden of proof to terminate authorization for medical benefits for the accepted condition of lumbosacral sprain through the opinion of Dr. Rosen, the impartial medical examiner, who found that appellant had no residuals of this accepted condition. Dr. Rosen provided rationale for his findings by explaining that the findings on physical examination showed no evidence of continuing lumbosacral sprain. As his opinion is detailed and well rationalized, it is entitled to the special weight accorded an impartial medical examiner and establishes that appellant has no further residuals of her accepted employment injury.

The Board finds, however, that the Office failed to meet its burden to terminate medical benefits for the accepted condition of disorders of the sacrum, as Dr. Rosen did not address whether appellant had any residuals of this condition.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation and authorization for medical benefits effective September 28, 2008 for the accepted condition of lumbosacral sprain. The Board further finds that the Office improperly terminated appellant's compensation and authorization for medical benefits effective September 28, 2008 on the grounds that she had no further employment-related condition or disability due to her accepted condition of disorders of the sacrum.

⁹ Section 8124 provides that the Office must "make findings of facts and made an award for or against payment of compensation...."

¹⁰ *J.M.*, 58 ECAB 478 (2007); *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

¹¹ *Pamela K. Guesford*, 53 ECAB 727 (2002).

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 24, 2009 and September 23, 2008 are affirmed in part and reversed in part.

Issued: April 26, 2010
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