

On November 10, 2006 Dr. Terry Struck, an attending Board-certified physical medicine and rehabilitation physician, advised that appellant was able to return to work and provided permanent work restrictions. The restrictions allowed work of 4 hours a day with 2 to 4 hours of sitting, walking, and standing (alternating positions); no reaching above the shoulders, twisting, bending, stooping, climbing and kneeling; 15 to 20 minutes a day operating motor vehicle at work; 30 minutes (only a couple of minutes at a time) repetitive movements of wrists and elbows; 10 pounds occasionally (few minutes at a time) pushing and pulling, 5 pounds occasionally (few minutes at a time) lifting; occasionally squatting; and taking a break every 30 minutes for 10 to 15 minutes.¹

In an April 18, 2007 report, Dr. Hendrick J. Arnold, III, a Board-certified orthopedic surgeon who served as an Office referral physician, stated that appellant had disabling residuals from her work-related injuries of cervical strain and degenerative cervical disc disease. He released her to work with permanent restrictions of 4 hours a day; 10-pound lifting restriction; and a 10-minute break each hour. Dr. Arnold also indicated that appellant's lack of improvement was largely due to a psychological condition.

Due to the conflict in medical opinion between Dr. Struck and Dr. Arnold regarding the medical diagnoses and the extent of appellant's ability to work, she was referred for an impartial medical examination to Dr. Jeffrey Sabin, a Board-certified orthopedic surgeon.

In a July 16, 2007 report, Dr. Sabin concluded that there were no objective findings on examination and that appellant no longer had a medical condition or disability as a result of her accepted employment injuries. He agreed with Dr. Arnold's opinion that there was a psychological issue affecting appellant's recovery. Dr. Sabin provided the diagnoses of no objective orthopedic findings, fibromyalgia, myofascial pain syndrome, and no evidence of carpal tunnel disease. He advised that appellant was capable of working in her usual job with no restrictions or limitations.² Dr. Sabin noted that according to the statement of accepted facts, appellant's condition had been accepted for chronic neck pain and headaches. He indicated that there were no objective findings of chronic neck pain or headaches and stated that it seemed to be an "unusual diagnosis" to be accepted, as it was not an objective issue. Dr. Sabin stated that pain was not an objective finding and therefore there were no residuals that he could ascertain objectively. He noted that appellant had several preexisting conditions but posited that they only would have been aggravated on a temporary basis.

With respect to her psychological condition, appellant was referred for a second opinion examination with Dr. Arthur C. Roberts, a Board-certified psychiatrist. In an April 16, 2008 report, Dr. Roberts found that appellant did not have a diagnosable psychiatric disorder. He did not provide any psychiatric work restrictions.

In a June 6, 2008 letter, the Office advised appellant that it proposed to terminate her compensation because the report of the impartial medical specialist, Dr. Sabin, showed that she

¹ Dr. Struck also provided work restrictions pertaining to a psychological condition. He stated that the psychological restrictions were based on recommendations made by Trudy C. Dawson, a licensed social worker.

² Dr. Sabin stated that appellant "feels subjective findings of fibromyalgia and myofascial pain."

no longer had residuals of her accepted employment injuries. It provided appellant 30 days from the date of the letter to submit evidence and argument contesting the proposed termination of her compensation.

In a July 17, 2008 decision, the Office terminated appellant's compensation effective July 17, 2008 on the grounds that she had no disability due to her employment injuries after that date.

In an April 27, 2009 statement, counsel requested reconsideration on appellant's behalf. He took issue with the termination of appellant's compensation, asserting that there was no true conflict in the medical evidence and that Dr. Sabin did not adequately evaluate appellant's pain-related conditions. In a February 2, 2009 report, Dr. Thomas W. Higginbotham, an attending osteopath and Board-certified occupational and environmental medicine physician, reported findings on examination of appellant. He concluded that she had a continuing myofascial pain condition that had been accepted by the Office under the names myalgia and myositis and which continued to cause disability. Although appellant might not have exhibited evidence of orthopedic findings, *i.e.*, fractured bones or limitation with range of motion, she had evidence of a long-standing soft tissue disorder. Dr. Higginbotham asserted that Dr. Sabin's opinion was inconclusive and misleading with respect to appellant's condition and that Dr. Sabin demonstrated his lack of understanding of the consequences of myofascial pain by noting that it was an "unusual diagnosis." Dr. Higginbotham stated that this "unusual diagnosis" was a well-accepted medical condition.

In a June 25, 2009 decision, the Office affirmed its July 17, 2008 decision noting that the weight of the medical evidence continued to rest with the opinion of Dr. Sabin.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,³ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁴ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁵ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

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."⁷ In situations

³ 5 U.S.C. §§ 8101-8193.

⁴ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁵ *Id.*

⁶ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁷ 5 U.S.C. § 8123(a).

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.⁸

ANALYSIS

In the present case, the Office accepted that appellant sustained cervical/thoracic subluxation, cervical strain, myalgia, myositis, myofascial pain syndrome and other bursitis on the right. It determined that there was a conflict in the medical evidence between Dr. Struck, an attending Board-certified physical medicine and rehabilitation physician, and Dr. Arnold, a Board-certified orthopedic surgeon who served as an Office referral physician. The Office referred appellant, pursuant to section 8123(a) of the Act, to Dr. Sabin, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding continuing work-related residuals.⁹

On appeal, counsel argued that there was no conflict in the medical evidence at the time of referral to Dr. Sabin and that his opinion was not based on a complete and accurate factual and medical history because he did not accept that appellant had several work-related pain conditions.

The Board finds, however, that there was no conflict in the medical evidence at the time of the referral to Dr. Sabin and therefore Dr. Sabin served as an Office referral physician rather than an impartial medical specialist. There was no conflict in the medical evidence between Dr. Struck and Dr. Arnold regarding the main issue of the present case, *i.e.*, whether appellant continued to have residuals of her accepted employment injuries because both physicians agreed that appellant had continuing residuals.

The Board further finds that the July 16, 2007 report of Dr. Sabin is not sufficiently well rationalized to establish that appellant had no disability due to her accepted employment injuries after July 17, 2008. Dr. Sabin's report is not based on a complete and accurate factual and medical history in that he questioned the acceptance of several of the soft tissue conditions. He questioned whether a pain-based condition could be a legitimate diagnosis when appellant's claim was accepted for several pain-related conditions. Further confusion is caused by the fact that Dr. Sabin diagnosed appellant with myofascial pain syndrome and therefore suggested that appellant continues to have residuals of this accepted employment injury.¹⁰

For these reasons, the Office did not meet its burden of proof to terminate appellant's compensation effective July 17, 2008.

⁸ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁹ *See supra* notes 7 and 8 and accompanying text.

¹⁰ Moreover, there is other medical evidence of record which suggests that appellant has continuing work-related residuals. In a February 2, 2009 report, Dr. Higginbotham, an attending osteopath and Board-certified occupational and environmental medicine physician, concluded that appellant had a continuing myofascial pain condition that had been accepted by the Office under the names myalgia and myositis and which continued to cause disability.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective July 17, 2008 on the grounds that she no longer had residuals of her employment injuries after that date.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 25, 2009 is reversed.

Issued: September 17, 2010
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