

myelopathy. Appellant returned to work on June 5 2006 and thereafter worked light-duty intermittently.

Appellant was referred to Dr. Robert Choi, a specialist in neurology, who stated that she developed involuntary shaking movements of her head on September 1, 2006. Dr. Choi advised that she had a hyperkinetic movement disorder but was not certain as to the cause.

In an October 24, 2006 report, Dr. Matthew Brodsky, a movement disorder physician, opined that appellant had signs of a psychogenic tremor. He advised that the tremor was easily distractible, varied considerably in frequency and amplitude and was occasionally not present at all. Dr. Brodsky stated that none of this was consistent with essential tremor or another organic neurologic disease and informed appellant that she did not have a neurodegenerative disease.

The Office referred appellant for a second opinion examination with Dr. Stephen J. Thomas, Board-certified in orthopedic surgery, and Dr. M. Sean Green, a Board-certified neurologist. In a July 24, 2007 report, the physicians found that she still had cervical symptoms. Appellant developed a nonwork-related psychogenic tremor and a conversion reaction; which were the factors preventing her from returning to work, not her accepted cervical strain. Drs. Thomas and Green noted a normal neurological examination of the upper extremities. Given the psychological component to her condition, the physicians recommended that she undergo a psychiatric evaluation.²

On February 15, 2008 appellant filed a claim alleging a recurrence of disability commencing February 6, 2008 causally related to her accepted cervical conditions. She had returned to work in September 2007 with restrictions of no lifting above 25 pounds and minimal reaching above the shoulder. Appellant stopped work on February 6, 2008 and noted the use of sick and annual leave.

On February 7, 2008 Dr. K. Annette Weller, Board-certified in physical medicine and rehabilitation, stated that appellant was being examined on a semi-urgent basis due to symptoms which flared up the prior day. Appellant was unsure as to what triggered her symptoms, which included increased neck and right arm pain and increased right arm and leg numbness and weakness. Dr. Weller noted appellant's symptoms of tremors and her history of cervical strain and C5-6 disc herniation secondary to the June 1, 2006 work injury.

In a February 15, 2008 report, Dr. Peter S. Kosek, a Board-certified pain management physician and anesthesiologist, reviewed appellant's history of repeated tremors with neck, bilateral shoulder and back pain. Appellant experienced a reappearance of pain, numbness and weakness with tremors on February 6, 2008 while picking up tubs of mail and performing her normal duties. Dr. Kosek advised that she had been treated with stellate ganglion blocks for her symptoms which may have been exacerbated by work activities.

² Appellant submitted Forms CA-7 for wage loss from September 23, 2006 to August 8, 2007. By decisions dated May 7, June 14 and August 8, 2007, the Office denied appellant's claims. It found that appellant did not submit sufficient medical evidence to support disability due to her accepted cervical conditions for the dates claimed.

On March 14, 2008 the Office found a conflict in medical opinion as to whether appellant was disabled for work due to her cervical strain and protruded cervical disc for the periods claimed. It also found a conflict regarding her hyperkinetic tremor relationship to the June 1, 2006 employment injury. The Office referred appellant, the medical record and the statement of accepted facts to Dr. Timothy R. Borman, Board-certified in orthopedic surgery, for an impartial medical examination.

On March 31, 2008 Dr. Choi noted that Dr. Weller obtained a repeat magnetic resonance imaging (MRI) scan of the cervical spine. When compared to appellant's 2006 cervical study, there was marked worsening of the small disc herniation at the C5-6 level. Dr. Choi stated that this appeared to be worse and causing some myelopathic changes. Appellant's symptoms included neck pain radiating down into the right arm with some numbness on the third and fourth digits. There was some numbness on the left side and head tremors. The disc herniation at C5-6 appeared more severe and was causing spinal stenosis and some myelopathic changes. Dr. Choi recommended a surgical consultation.

In a May 7, 2008 report, Dr. Borman provided a review of the medical records and findings on examination. He noted the statement of accepted facts that described appellant's work duties as letter carrier. Dr. Borman found that her accepted cervical strain and disc displacement at C5-6 had resolved. He noted that the June 21, 2006 cervical MRI scan showed a disc osteophyte complex at C5-6 in combination with a focal central disc protrusion. Dr. Borman advised, however, that there was no neurologic compromise of the nerve roots or the spinal cord.

Dr. Borman noted that appellant did not present with a valid physical examination which supported objective findings of an active cervical disc injury. Appellant's severely limited cervical spine range of motion was nonphysiologic and her balance difficulties and gait abnormalities were unrelated to the June 1, 2006 work incident. Dr. Borman advised that if her disc condition had progressed to cause spinal cord dysfunction, other findings would be present such as a change in reflexes, reliable sensory deficits and/or the loss of muscle strength. These findings were not present either on examination or in the medical records. Dr. Borman found no evidence of spinal cord impingement, peripheral nerve entrapment or musculoskeletal deficit to explain appellant's tremors and head bobbing. He opined that these symptoms had a psychogenic etiology.

Dr. Borman stated that the June 1, 2006 employment injury disabled appellant from September 27, 2006 through August 8, 2007, but only due to the psychogenic aspect of her condition that he characterized as perhaps "hysterical" behavior. Appellant was not able of returning to regular duty as a letter carrier without restrictions. Based upon a reasonable degree of medical certainty, Dr. Borman could not relate her psycho emotional impairment to the June 1, 2006 incident. Appellant had significant conditions which severely impacted her activities of daily living and precluded returning to any type of work activity. Dr. Borman found that her tremor and head bobbing were not related to her cervical spine condition or any neurological condition. He concluded that any relationship between appellant's cervical spine and her apparent abnormal behavior, such as tremors and head bobbing, would be due to a psychiatric condition, not a neurological condition. Dr. Borman did opine, however, that with a symptomatic cervical disc injury, some restriction in physical activity could be expected.

In a June 4, 2008 supplemental report, Dr. Borman stated that the cervical spine paravertebral strain had resolved. On examination, appellant had no tenderness in her cervical spine. The accepted displaced cervical disc at C5-6 with myelopathy had also resolved based on a nonorganic and invalid physical examination. Dr. Borman opined that there were no objective findings to support the C5-6 displaced disc. He advised as to appellant's medical restrictions. Dr. Borman reiterated that any inability to work from September 27, 2006 through August 27, 2007 was due to her psychogenic issues. Appellant's right arm and upper extremity tingling and head weaving were due to psychogenic complaints and not to her accepted conditions.

In a report dated July 22, 2008, Dr. Borman stated that appellant's accepted conditions of cervical strain and displaced cervical disc became medically stationary and stable as of June 16, 2007, when she returned to work and reached maximum medical improvement. He did not anticipate her condition to improve with the passage of time or further medical treatment. Dr. Borman advised that the June 1, 2006 incident did not permanently aggravate appellant's C5-6 degenerative disc disease. Although not specifically questioned, it was his opinion that she did not acutely injure her C5-6 disc on June 1, 2006. At most, appellant exacerbated her preexisting degenerative disease at C5-6 but this injury resolved by June 16, 2007, when she returned to work. Any work restrictions after June 16, 2007 were unrelated to the June 1, 2006 employment injury. Appellant's inability to work after that date was due to a psychogenic condition or factors unrelated to the accepted injury. Dr. Borman did not specifically address whether she sustained a recurrence of disability as of February 6, 2008.

In an August 18, 2008 report, Dr. Weller advised that appellant had head tremors, which were related to pain and a possible dysreflexic component. Due to increased weakness and pain, appellant underwent a cervical spine MRI scan on March 28, 2008, which showed an increased disc protrusion at the C5-6 level. Dr. Weller opined that this explained the worsening of appellant's condition, including increased neck tremors, weakness in the right upper extremity, some reduced sensation in the right arm and reduced cervical range of motion. She stated that appellant had not been able to work since February 7, 2008.

By decision dated August 20, 2008, the Office found that Dr. Borman's referee medical opinion established that appellant's accepted conditions had resolved, her head tremors were not related to the accepted June 1, 2006 employment injury and the current physical restrictions were not related to accepted injury. It also found that the period of disability appellant claimed after June 16, 2007 were not causally related.³

Appellant requested reconsideration of this decision, which the Office denied in a September 25, 2009 nonmerit decision. She filed a separate appeal of the September 25, 2009 decision, which the Board denied by order dated February 4, 2010 under Docket No. 10-1228.⁴

³ The Board notes that all of the facts pertaining to both appeals in the instant case are contained in the same case file under claim number xxxxxx064.

⁴ Docket No. 10-1228 (issued February 4, 2011).

In a September 2, 2008 decision, the Office denied appellant's recurrence of disability claim. It found that she failed to submit medical evidence sufficient to establish that the claimed disability of February 6, 2008 was caused or aggravated by the accepted cervical conditions.

By letters dated September 17 and 19, 2008, appellant's attorney requested a hearing, which was held on January 16, 2009. He contended that Dr. Weller's reports supported further development of the claim as Dr. Borman had not reviewed the March 28, 2008 MRI scan study. At the hearing, appellant contended that Dr. Borman's opinion was not well rationalized or merit special weight.

In a January 16, 2009 report, Dr. Weller stated that appellant's condition had stabilized, although she was not yet medically stationary. Appellant's symptoms had increased with regard to neck pain, right arm numbness and subjective complaints of weakness. Dr. Weller reiterated that the March 28, 2008 cervical MRI scan showed an interval increase in size of the central and right paracentral disc herniation at the C5-6 level, which obliterated the cerebrospinal fluid and epidural space. The ventral spinal cord and indented ventral aspect of the spinal cord resulted in a short segment of severe canal stenosis. Dr. Weller attributed the change to appellant's accepted injury of displaced C5-6 disc. She explained that the disc was made up of soft inner material surrounded by fibrous connective tissue. When the outer fiber layer tears, the inner fluid can pass through, resulting in a disc herniation or disc displacement. Once the outer annular fibers tore, they did not repair themselves. Appellant's work injury resulted in a tearing of the annular fibers and the initial disc displacement. Her subsequent work activity, including lifting activities and neck movements, resulted in further displacement of fluid at C5-6 into the spinal canal that caused significant stenosis, resulting in appellant's neck pain and radiating into the right arm. Appellant underwent unsuccessful conservative treatment and would benefit from surgery.

By decision dated April 28, 2009, an Office hearing representative set aside the September 2, 2008 decision. Although Dr. Weller described new work factors, the physician explained how appellant's condition had deteriorated as a progression of the June 2006 injury. This evidence was sufficient to warrant further development of the medical evidence. The Office was requested to obtain further opinion from Dr. Borman.

In a May 27, 2009 report, Dr. Borman reviewed the March 28, 2008 cervical MRI scan study and the reports of Dr. Weller. He reiterated that appellant's clinical findings were not consistent with the degenerative conditions depicted on the 2008 MRI scan studies. There was also no evidence of cervical radiculopathy or spinal cord myelopathy in Dr. Weller's January 16, 2009 report or her prior examination of appellant. Appellant's muscle strength was intact, two-point discrimination was intact to all fingertips and both thumbs and deep tendon reflexes were normal. There was no ankle clonus, no Hoffman sign and she showed Babinski reflex bilaterally demonstrating toes downgoing. Appellant presented with seemingly bizarre subjective complaints of lower extremity numbness with no objective, verifiable clinical evidence of a nerve root or spinal cord impingement or dysfunction. He again found that she had a psychogenic tremor and her clinical findings were consistent with symptomatic complaints without objective evidence. Therefore, the finding of a mild interval increase in the size of the central disc herniation at C5-6 level, by itself, was not supported by verifiable clinical evidence. This failed to establish the diagnosis of a radiculopathy due to nerve root impingement. The

development of head bobbing represented a psychogenic presentation. The medical record did not identify any cervical spine nerve root impingement, radiculopathy or myelopathy and appellant was a very poor surgical candidate.

By decision dated June 18, 2009, the Office denied the recurrence of disability claim commencing February 6, 2008. It found that Dr. Borman's opinion represented the weight of the medical evidence.

On July 7, 2009 appellant requested an oral hearing.

A July 30, 2009 cervical MRI scan noted that appellant had a right posterior paracentral to posterior central disc extrusion of C5-6 with right ventral card compression and moderate spinal stenosis. The report advised that the extrusion had grown slightly since the March 28, 2008 cervical MRI scan study and the cervical condition had become worse.

On August 26, 2009 Dr. Glenn Keiper, a Board-certified neurosurgeon, performed surgery for an anterior cervical discectomy and fusion with decompression of C5-6. He stated that appellant presented with a large herniation compressing the spinal cord.

At the October 14, 2009 hearing regarding the recurrence claim, appellant contended that she was totally disabled as of February 6, 2008 due to her cervical condition. Appellant's attorney argued that Dr. Borman's opinion lacked probative value and did not merit the special weight of a referee medical examiner.

Following the hearing, appellant submitted an October 23, 2009 report from Dr. Keiper who stated Dr. Borman's conclusions regarding she was wrong. He noted that she had objective findings of cervical spinal cord compression at C5-6 due to a disc herniation. While appellant's presentation was somewhat atypical, Dr. Keiper did not find that she was not being genuine. Since surgery, she made a complete recovery, with none of the symptoms that she had prior to surgery. On October 28, 2009 Dr. Weller asserted that, contrary to Dr. Borman's opinion, appellant's clinical findings in her right upper extremity showed a worsening of her June 2006 work injury. The July 2009 MRI scan showed a larger disc extrusion when compared to the March 2008 study. This was consistent with the clinical findings of increased right upper extremity weakness.

By decision dated December 30, 2009, an Office hearing representative affirmed the June 18, 2009 Office decision. The hearing representative found that the additional medical evidence did not outweigh Dr. Borman's impartial medical opinion. She found that the medical evidence contemporaneous to the claimed February 6, 2008 recurrence of disability did not establish that appellant's disability was causally related to the accepted cervical conditions.

LEGAL PRECEDENT

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of disability. As part of this burden, the

employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.⁵

The Act provides that, if there is a 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 the examination.⁶ It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁷

ANALYSIS

The Board finds that the case is not in posture for decision.

Appellant's claim was accepted by the Office for a cervical strain and displaced disc at C5-6. She returned to light-duty work in 2006 and stopped as of February 6, 2008, alleging a recurrence of total disability that she attributed to her accepted conditions. In support of appellant's claim, she submitted the reports of Dr. Weller, an attending physician. Diagnostic testing was submitted to the record which Dr. Weller interpreted as showing a progression of appellant's accepted C5-6 cervical disc. When compared with studies obtained in 2006, Dr. Weller advised that the 2008 and 2009 cervical MRI scans showed an increase in the protrusion of the disc at that level. She stated that appellant's cervical and upper extremity symptoms were attributable to this condition. Dr. Weller explained that there was access caused by tearing of the fibrous disc connective tissue which allowed spinal fluid to accumulate and impinge the nerve roots. Following surgery in 2009, Dr. Weller and Dr. Keiper supported that appellant's cervical condition and disability since February 6, 2008 was due to a progression of the accepted disc at C5-6 which necessitated surgery.

Appellant's claim was denied by the Office, based on the finding that the opinion of Dr. Borman was entitled to special weight of an impartial medical specialist. The Board notes, however, that when referral was made to Dr. Borman in 2008, the medical evidence was not in conflict as to her disability commencing February 6, 2008 under the recurrence claim. Rather, Dr. Borman was requested to address intermittent periods of disability from work as of September 23 2006 to August 8, 2007 due to appellant's accepted cervical strain and disc condition and whether her head tremors were related to the accepted injury. The statement of accepted facts prepared for the physician did not address her claim for a recurrence as of February 6, 2008 and the physician's initial report did not provide any opinion on this subject. Based on this evidence, the Board finds that Dr. Borman was not an impartial medical specialist as to appellant's claim of a recurrence of disability and his opinion is not entitled to special weight; rather, his opinion is that of a second opinion referral.⁸

⁵ *Terry Hedman*, 38 ECAB 222 (1986).

⁶ 5 U.S.C. § 8123(a).

⁷ *R.C.*, 58 ECAB 238 (2006).

⁸ *See James C. Ross*, 45 ECAB 424 (1994).

In this regard, Dr. Borman examined appellant and found that her accepted cervical strain displaced cervical disc conditions had resolved without residual disability. While he noted that she was disabled, he attributed this to a psychogenic condition and not to any neurological disorder or deficit. Dr. Borman reported findings on examination, noting that his objective findings did not support radiculopathy or cervical cord compression at C5-6. The Office requested that he review the reports of Dr. Weller and the diagnostic studies of record. On May 27, 2009 Dr. Borman reiterated that appellant's clinical presentation was not consistent with the degenerative condition depicted on diagnostic study. He noted that muscle strength was intact and two-point discrimination and all reflexes were normal to the upper extremities. Dr. Borman characterized appellant's presentation as bizarre without any hard evidence to support cervical nerve root impingement as a cause for her disability for work.

The Board finds that there is a conflict in medical opinion as to whether appellant's disability commencing February 6, 2008 is causally related to her accepted injury and whether the C5-6 displaced condition progressed, necessitating surgery in 2009. Counsel for appellant contended on appeal that Dr. Borman's opinion was not entitled to special weight. For the reasons stated, the Board finds that he is a second opinion examiner on issue of recurrence of disability and the progression of the C5-6 disc condition.

Accordingly, the Office's December 30, 2009 decision will be set aside and the case remanded for referral to an impartial medical specialist. After such further development of the record as the Office deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision due to a conflict in medical opinion.

ORDER

IT IS HEREBY ORDERED THAT the December 30, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for action consistent with this decision of Board.

Issued: March 23, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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