

recurrence of total disability. On October 8, 2001 appellant underwent an anterior cervical discectomy and fusion at C5-6. She returned to part-time work on January 14, 2002 but stopped work on October 22, 2002 and did not return.

In a progress report dated August 14, 2007, Dr. Jeffrey F. Linder, an attending orthopedic surgeon, diagnosed status post cervical fusion with symptoms exacerbated by a functional capacity evaluation, another protruding disc, C6 radiculopathy and bilateral carpal tunnel syndrome due to her February 20, 1996 employment injury. He found that appellant was disabled from employment.

On August 24, 2007 OWCP referred appellant to Dr. Brad K. Cohen, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated September 5, 2007, Dr. Cohen diagnosed cervical strain with a left paracentral disc herniation at C5-6 status post anterior spinal fusion. He found that the cervical strain and C5 disc herniation had resolved and attributed her continued complaints to degenerative changes with a possible psychiatric element.

OWCP determined that a conflict in medical opinion arose between Dr. Linder and Dr. Cohen regarding whether appellant had continued residuals of her accepted work injury. It referred her to Dr. Harry Lambe, a Board-certified orthopedic surgeon, for an impartial medical examination. On April 24, 2008 Dr. Lambe discussed appellant's history of a February 20, 1996 motor vehicle accident. On physical examination he found negative Spurling's maneuvers with no muscle spasm and full strength and sensation of the upper extremities. Dr. Lambe noted appellant's history of subsequent motor vehicle accidents in March 1996 and September 2007. He stated:

“In my opinion it is possible, but unlikely that the cervical disc herniation at C5-6 was caused by the minor motor vehicle accident of February 20, 1996, but that in any event that that injury has been resolved by [appellant's] surgical fusion, and should no longer be causing any pain or disability. [Appellant's] subsequent MRI [magnetic resonance imaging] [scan] findings of protrusions at C4-5 and C6-7 are likely due to ongoing cervical degenerative disc disease and not a result of this accident, but in any even should not be disabling.”

Dr. Lambe further found that the May 2002 function capacity evaluation (FCE) did not cause disc abnormalities. He concluded that appellant did not have any physical limitations due to her accepted work injury and could resume her usual employment as a letter carrier.

On September 3, 2008 OWCP notified appellant that it proposed to terminate her compensation and authorization for medical benefits based on Dr. Lambe's findings.

On September 25, 2008 appellant's attorney argued against terminating her compensation. Counsel submitted a September 25, 2008 report from Dr. Linder who found that MRI scan and electrodiagnostic studies showed “worsening cervical disease as a whole with the major contributing cause being directly related to the worker[s'] compensation injury of February 20, 1996 and with additional worsening in the least due to a[n] FCE.” He advised that the initial injury caused cervical dysplasia at levels above and below the injury as a result of greater stress. Dr. Linder stated, “The involvement of C6 and C7 nerve roots and all other

cervical dysplasia, surgery(ies), pain, treatment, and/or restrictions, by history, are the result of the work[ers'] comp[ensation] injury of February 20, 1996, as the major contributing cause.”²

By decision dated April 3, 2009, OWCP terminated appellant’s compensation and authorization for medical benefits effective April 12, 2009. It determined that Dr. Lambe’s report represented the weight of the evidence and established that she had no residuals of her accepted employment injury.

On April 14, 2009 appellant requested a telephone hearing, held on August 4, 2009. Dr. Linder asserted that MRI scan studies showed the development of disc protrusions at C4-5 and C6-7, above and below the cervical fusion constituted objective evidence that the work injury caused damage beyond the initial injured disc. He related, “Once you remove that disc, as we said, the stress risers created by a plate and fusion absolutely create more stress and strain on a daily basis immediately above and through -- and immediately below the spine, and throughout the spine.” Dr. Linder concluded that appellant’s C6 and C7 nerve root problems and cervical dysplasia were due to her February 26, 1996 employment injury. He stated, “Dr. Lambe has isolated the fact that the disc is removed, so, yes, that disc that [is] no longer in her body can[not] possibly cause pain. But everything around it can.”³ Appellant’s attorney contended at the hearing that Dr. Lambe did not explain his finding that her C4-5 and C6-7 disc protrusions were due to degenerative disc disease rather than her employment injury.

By decision dated November 2, 2009, OWCP’s hearing representative affirmed the April 3, 2009 termination decision after finding that the opinion of Dr. Lambe, the impartial medical examiner, represented the weight of the evidence. He found, however, that OWCP should further develop the issue of whether appellant’s cervical fusion caused stress on the disc levels around the surgical cite resulting in a consequential injury of C4-5 and C6-7 disc protrusions.

On December 14, 2009 OWCP requested that Dr. Lambe review Dr. Linder’s September 24, 2008 and hearing testimony and address whether appellant sustained a consequential injury to her discs at C4-5 and C6-7 due to her C5-6 surgery. On December 29, 2009 Dr. Lambe disagreed with Dr. Linder’s findings. He stated:

“Specifically with respect to the question of whether [appellant’s] disc herniation and surgery at C5-6 subsequently caused the degenerative disc disease and protrusions at C4-5 and C6-7, I would note that while it is accepted that a single level cervical fusion can increase the probability of degenerative changes occurring at the levels above and below, this generally is an effect that is gradual and takes place over the course of many years. The fact that [her] disc irregularities at those levels were noted on MRI scans 10 months after her cervical fusion indicates to me that the most likely cause of those protrusions is her preexisting degenerative disease and not the long term effect of a cervical fusion.

² Dr. Linder continued to submit progress reports.

³ Dr. Linder also diagnosed bilateral carpal tunnel syndrome. Counsel noted that appellant had a separate claim for carpal tunnel syndrome and requested that the claims be combined for disability purposes.

Consequently I do not believe they were related to the alleged injury of February 20, 1996. Regardless of their causation, at the time I saw [appellant] I did not find any evidence that these disc abnormalities were disabling to her or should prevent her from performing the duties of a letter carrier, or that they should require any ongoing treatment.”⁴

By decision dated October 14, 2010, OWCP found that appellant’s compensation should remain terminated based on Dr. Lambe’s opinion that her cervical disc protrusions were unrelated to her cervical fusion.

On appeal appellant argues that Dr. Lambe did not provide a fair opinion and was not her attending physician.

LEGAL PRECEDENT

The basic rule respecting consequential injuries is that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent, intervening cause. Once the work-connected character of an injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent, nonindustrial cause.⁵

Section 8123(a) of FECA 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.⁶ 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 OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁷

ANALYSIS

OWCP accepted that appellant sustained cervical strain and a herniated disc at C5-6 as a result of a February 20, 1996 motor vehicle accident. Appellant underwent an anterior cervical discectomy and fusion at C5-6 on October 8, 2001. She stopped work on October 22, 2002 and did not return.

⁴ By letter dated March 3, 2010, appellant’s attorney reviewed Dr. Lambe’s report and argued that it was speculative and unsupported.

⁵ See *Kathy A. Kelley*, 55 ECAB 206 (2004); *Carlos A. Marerro*, 50 ECAB 170 (1998).

⁶ 5 U.S.C. § 8123(a).

⁷ 20 C.F.R. § 10.321.

OWCP determined that a conflict arose between appellant's attending physician, Dr. Linder, and Dr. Cohen, a referral physician, regarding whether she had continued disability and the need for medical treatment due to her cervical strain and C5-6 disc herniation. It referred her to Dr. Lambe for resolution of the conflict. In a report dated April 24, 2008, Dr. Lambe found that appellant had no residuals from her C5-6 disc herniation as it was "resolved by her surgical fusion and should no longer be causing any pain or disability." He attributed the findings on MRI scan study of C4-5 and C6-7 disc protrusions to degenerative disc disease. Dr. Lambe advised that appellant could resume her usual employment and required no further medical treatment.

In a September 25, 2008 report, Dr. Linder attributed appellant's cervical dysplasia above and below her C5-6 disc fusion to stress caused by the initial injury and surgery. At the hearing, he explained that diagnostic studies showed C4-5 and C6-7 disc protrusions which developed due to the stress created by the original injury and fusion.

Based on Dr. Lambe's impartial medical examination, OWCP terminated appellant's compensation. A hearing representative affirmed the termination but determined that further development was required regarding whether she sustained a consequential injury to her C4-5 and C6-7 discs due to her work injury and resulting surgery. OWCP requested that Dr. Lambe provide an opinion regarding whether appellant sustained a consequential injury at C4-5 and C5-6 due to her disc fusion at C5-6. In a report dated December 29, 2009, Dr. Lambe attributed the cause of appellant's disc protrusions at C4-5 and C6-7 to preexisting degenerative disc disease rather than her cervical fusion. Based on his report, OWCP found that she had not established a consequential injury.

The Board finds that a new conflict exists between Dr. Linder and Dr. Lambe on the issue of whether appellant sustained a consequential injury to her cervical discs at C4-5 and C6-7. Dr. Lambe cannot be considered an impartial medical examiner with regard to the cause of appellant's C4-5 and C6-7 disc injuries as his opinion was solicited with regard to disability and the need for further medical treatment due to a C5-6 employment injury, rather than whether she sustained a consequential employment injury to her C4-5 and C6-7 discs. There is an unresolved conflict in medical opinion on this issue. On remand, OWCP should refer appellant to an appropriate physician to resolve the issue of whether she sustained a consequential injury to her cervical discs at C4-5 and C6-7 causally related to her accepted employment injury.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 27, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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