



expanded to include cervical radiculitis and March 3 and October 13, 2008 recurrence claims. By letter dated October 19, 2009, OWCP placed appellant on the periodic rolls for temporary total disability effective September 27, 2009.

Dr. Michael J. Katz, a treating Board-certified orthopedic surgeon, concluded that appellant continued to be totally disabled in his reports for the period November 15, 2010 through March 10, 2011. A review of a magnetic resonance imaging (MRI) scan revealed distal cervical root compression. Dr. Katz reported that appellant's cervical range of motion was 70 percent. He also submitted attending physician reports (Form CA-20) and duty status reports (Form CA-17) in which he noted the employment injury, diagnosed cervical radiculopathy and indicated that appellant was totally disabled.

On December 13, 2010 Dr. Robert J. Orlandi, a second opinion Board-certified orthopedic surgeon, reviewed the statement of accepted facts and medical reports and examined appellant on December 13, 2010. He noted the history of the November 5, 2007 employment injury and the medical treatment provided. Diagnoses included a resolved cervical strain. A physical examination of the cervical spine revealed normal range of motion with no abnormalities, swelling or myofascial sprain and normal sensation. Dr. Orlandi noted a reference to a left C6-7 disc herniation and opined that it was rare for bilateral paresthesias and multidermal loss of sensation to be caused by a radicular syndrome. He concluded that appellant was capable of working without restrictions.

On February 17, 2011 OWCP found a conflict in the medical opinion between Drs. Katz and Orlandi and referred appellant for an impartial medical evaluation with Dr. Edward A. Toriello, a Board-certified orthopedic surgeon, to resolve the conflict. It provided a February 11, 2011 statement of accepted facts, which noted that it had accepted a neck sprain which was expanded to include cervical radiculitis as caused by the accepted November 4, 2007 employment injury. On March 10, 2011 Dr. Toriello, based upon a review of the medical evidence and statement of accepted facts and a physical examination, concluded that appellant's chest contusion and cervical sprain had resolved. He further stated that there was no evidence supporting an expansion of appellant's claim to include cervical radiculopathy or any other medical condition. A physical examination of the cervical spine revealed no paracervical muscle atrophy or spasm, no upper extremity sensory or motor deficits, upper extremity vascular examination was within normal limits, no upper extremity muscle atrophy and intact and symmetrical deep tendon reflexes.

On April 4, 2011 OWCP issued a notice of proposed termination of compensation and medical benefits based on Dr. Toriello's March 10, 2011 impartial medical evaluation. It afforded appellant 30 days to submit additional evidence or argument to the extent she disagreed with the proposed termination of benefits.

Subsequent to the proposal to terminate appellant's compensation, OWCP received additional medical evidence including an April 11, 2011 report, CA-17 form and a CA-20 report from Dr. Katz.

By decision dated May 11, 2011, OWCP terminated appellant's compensation and medical benefits effective May 8, 2011. It found that the medical evidence he submitted did not outweigh the impartial medical examiner's opinion.

On May 24, 2011 appellant's representative requested a telephonic hearing before an OWCP hearing representative, which was held on September 14, 2011.

Prior to the hearing, OWCP received an April 22, 2011 MRI scan and an August 26, 2011 disability decision from the Social Security Administration. Findings from the MRI scan revealed cervical degenerative disc disease, left paracentral disc osteophyte complexes at C6-7 and C4-5, central disc osteophyte complexes at C3-4 and C5-6, moderate C6-7 central canal stenosis, mild C3-4, C4-5 and C5-6 central canal stenosis and mild-to-moderate C4-5 and C6-7 left foraminal stenosis.

By decision dated November 21, 2011, an OWCP hearing representative affirmed the termination of appellant's compensation.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.<sup>2</sup> After it has determined that an employee has disability causally related to his federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>3</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>4</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>5</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.<sup>6</sup>

Section 8123(a) of FECA 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."<sup>7</sup> Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of

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<sup>2</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>3</sup> *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>4</sup> *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>5</sup> *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

<sup>6</sup> *Kathryn E. Demarsh*, *supra* note 5; *James F. Weikel*, 54 ECAB 660 (2003).

<sup>7</sup> 5 U.S.C. § 8123(a); *see also S.R.*, Docket No. 09-2332 (issued August 16, 2010); *R.H.*, 59 ECAB 382 (2008); *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.<sup>8</sup>

### ANALYSIS

OWCP accepted appellant's claim for neck sprain and cervical radiculitis due to the November 5, 2007 automobile accident. It placed him on the periodic rolls for temporary total disability by letter dated October 19, 2009. OWCP determined that a conflict existed between Dr. Orlandi, the second opinion physician and Dr. Katz, appellant's attending physician, regarding whether he had any continuing disability or residuals of his accepted employment injury. It referred him to Dr. Toriello for an impartial medical examination. The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation.

The Board finds that Dr. Toriello's report is not sufficiently well reasoned to resolve the medical conflict. Regarding appellant's accepted cervical radiculitis condition, Dr. Toriello indicated that the condition was not related to the work injury of November 5, 2007. However, his condition was accepted for cervical radiculitis and this was reflected on the statement of accepted facts provided to Dr. Toriello. The Board finds that Dr. Toriello's report is of diminished probative value, as his opinion disregarded a critical element of the statement of accepted facts. The Board notes that it is the function of the medical expert to give an opinion only on medical questions, not to find facts.<sup>9</sup> Furthermore, to be given special weight, the opinion of an impartial medical specialist must be based on a proper factual background.<sup>10</sup> As Dr. Toriello did not give due regard to the statement of accepted facts, his opinion was not based on a proper factual background.

### CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

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<sup>8</sup> *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

<sup>9</sup> *Willa M. Frazier*, 55 ECAB 379 (2004); *Paul King*, 54 ECAB 356 (2003).

<sup>10</sup> *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *Darlene R. Kennedy*, *supra* note 8.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 21, 2011 is reversed.

Issued: August 6, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board