

sprains and paid appropriate compensation. Appellant stopped work on August 28, 1995 and did not return.

Appellant submitted treatment notes from Dr. Bruce J. Ammerman, a Board-certified orthopedist, dated May 30, 1995 to February 26, 1996, who treated appellant for her work-related low back injury. Dr. Ammerman also noted appellant's history was significant for a motor vehicle accident on April 4, 1991 in which she sustained a herniated lumbar disc at L4-5 and underwent a partial hemilaminectomy at L4-5 on August 10, 1992 and a partial hemilaminectomy of the right L4-5, excision of herniated disc and lumbar fusion on April 26, 1994.¹ He diagnosed work-related post-traumatic cervical and lumbar radiculopathy and advised that appellant was disabled from work. On February 26, 1996 Dr. Ammerman indicated that appellant reached maximum medical improvement but could not work. A magnetic resonance imaging (MRI) scan of the lumbar spine dated February 29, 1996 revealed postoperative and degenerative changes at L4-5.

In a March 1, 1996 report, Dr. Arthur I. Kobrine, a Board-certified orthopedist and an Office referral physician, discussed appellant's history and noted findings. He indicated that appellant sustained a mild strain or sprain of the cervical and lumbar area as a result of the May 5, 1995 accident which would have resolved in six weeks. Dr. Kobrine opined that appellant did not have residuals or disability of the work injury and could return to her previous job. The Office found that a conflict of medical opinion between Dr. Ammerman and Dr. Kobrine regarding whether appellant had disability or residuals of her work injuries.

The Office referred appellant to Dr. Lawrence Fink, a Board-certified orthopedist, to resolve the medical conflict. On May 3, 1996 Dr. Fink noted reviewing the record, noted a history of appellant's work-related injury and examined her. He noted that appellant's history was significant for a lumbar laminectomy which was performed in 1987, a partial hemilaminectomy at L4-5 performed on August 10, 1992 and a partial hemilaminectomy of the right L4-5, excision of herniated disc and lumbar fusion performed on April 26, 1994. Dr. Fink indicated that the neurological examination revealed multiple signs of symptom magnification, deficit elaboration and antalgic underperformance. He noted examination of the spine revealed healed surgical incisions, tenderness of the entire axial spine and right leg, the lumbar range of motion was moderately reduced in flexion and cervical range of motion was minimally restricted in all planes. The motor examination revealed normal strength, tone and function and the sensory examination revealed stocking glove hypesthesia of the right upper and lower extremities. Dr. Fink opined that appellant sustained a soft tissue injury in May 1995 which resulted in no focal neurologic deficit and no attributable ratable impairment. He indicated that appellant could return to work in her previous employment capacity.

On December 11, 1996 the Office proposed to terminate all benefits for appellant's accepted cervical and lumbar sprains on the grounds that Dr. Fink's report dated May 3, 1996 established no residuals of the work-related employment injury.

¹ Dr. Ammerman noted that appellant was involved in an automobile accident on April 25, 1985 and underwent a lumbar laminectomy which was performed by Dr. Guy W. Gargour, a Board-certified orthopedist, in 1987.

Appellant submitted a report dated January 17, 1997 from Dr. Ammerman who opined that the May 5, 1995 work incident significantly aggravated appellant's lumbar radicular complaints and cervical complaints. Dr. Ammerman indicated that appellant was not physically or emotionally capable of returning to gainful employment and recommended disability retirement.

By decision dated March 24, 1997, the Office terminated appellant's compensation benefits effective the same date on the grounds that the weight of the medical evidence as established by Dr. Fink established that appellant had no continuing disability resulting from her accepted employment injury.

Appellant requested an oral hearing which was held on March 26, 1998. She submitted reports from Dr. Ammerman dated April 23, 1997 to April 1, 1998 who continued to opine that appellant was totally disabled due to the May 5, 1995 work injury. A September 30, 1997 MRI scan of the lumbar spine revealed a mild decrease in height of the intervertebral disc, and a moderate size diffuse disc bulge impinging on the bilateral exiting L4 nerve roots.

On June 15, 1998 a hearing representative affirmed the March 24, 1997 decision finding that the Office met its burden of proof to terminate compensation benefits. The hearing representative noted, however, that appellant had submitted additional medical reports and diagnostic testing at her hearing that warranted further development. The hearing representative directed that the Office seek a supplemental report from Dr. Fink addressing whether this medical evidence submitted after the termination caused any change in his opinion regarding whether appellant had any continuing employment-related disability.

On June 8, 1999 appellant submitted an April 8, 1999 deposition of Dr. Ammerman. She further advised that Dr. Fink was a party in a lawsuit in which she was a plaintiff and requested that he be disqualified from providing an opinion because of potential bias. In the April 4, 1999 deposition, Dr. Ammerman opined that the May 5, 1995 injuries permanently aggravated appellant's preexisting cervical and lumbar condition. He advised that appellant was permanently and totally disabled from all gainful employment after March 24, 1997 as a result of the aggravation of her preexisting condition caused by the May 5, 1995 injuries. Appellant continued submitting reports from Dr. Ammerman noting appellant's status.

Due to Dr. Fink's participation in a third-party matter in which appellant was the opposing party, the Office determined that it was necessary to refer appellant to a new impartial medical specialist. On May 9, 2000 it referred appellant to Dr. Guy W. Gargour, a Board-certified orthopedist. However, the Office disqualified Dr. Gargour as a referee physician after appellant confirmed that he treated her and performed back surgery on her in 1987. It subsequently referred appellant to Dr. Joel L. Falik, a Board-certified orthopedist. However, Dr. Fink was disqualified as he provided an opinion with respect to a nonwork-related fall in 1996 and was nonresponsive to the Office's request for clarification.

On September 29, 2003 the Office referred appellant to Dr. Mark S. Klein, a Board-certified orthopedist. In a November 20, 2003 report, Dr. Klein noted reviewing the record, noted a history of appellant's work-related injury and examined appellant. He noted that appellant's history was significant for a lumbar laminectomy which was performed in 1987, a

partial hemilaminectomy at L4-5 performed on August 10, 1992, arthroscopic knee surgeries in 1997 and 1999 and a total knee replacement in 2002. Physical examination revealed healed cervical and lumbar laminectomy scars, marked reduction in range of motion of both the cervical and lumbar areas. The neurological examination revealed normal motor and sensory findings in the upper and lower extremities. Dr. Klein indicated that he found no evidence to support appellant's work injury involving a collapsed disk would result in more than a lumbosacral myoligamentous injury which would have resolved in a year's time. He noted that appellant underwent a fusion of her lumbar spine and multiple discectomy at the L4-5 level and did not believe appellant was a candidate for additional surgery. Dr. Klein opined that appellant was disabled from work; however, he advised that he did not believe the fall of 1995 was the overall cause of appellant's disability.

On February 13, 2004 the Office denied appellant's claim for continuing work-related disability after March 24, 1997, finding that Dr. Klein's report established that she had no continuing disability resulting from her accepted employment injury after March 24, 1997.

Appellant requested an oral hearing which was held on December 8, 2004. She submitted a report from Dr. Ammerman dated March 7, 2001 who treated appellant for increasing pain in the neck, shoulder and right upper extremity and diagnosed residual cervical radiculopathy on the right.

On March 28, 2005 the hearing representative set aside the February 13, 2004 decision and remanded the case for further development. The hearing representative instructed the Office to refer the case record to Dr. Klein with the MRI scan films from February 29, 1996 and September 30, 1997 and request that he address the results of these tests. The hearing representative further requested that Dr. Klein review Dr. Ammerman's deposition testimony and provide an opinion as to whether the 1995 work injury aggravated or accelerated appellant's preexisting retrolisthesis and degenerative disc disease and, if so, provide an explanation as to if the aggravation was permanent or temporary and if any aggravation ceased.

The Office requested a supplemental report from Dr. Klein and, on August 9, 2005, he noted reviewing the February 29, 1996 and September 30, 1997 lumbar MRI scans and the deposition of Dr. Ammerman. Dr. Klein opined that within a reasonable degree of medical probability appellant's injury did not aggravate any preexisting retrolisthesis or degenerative disc disease which existed prior to 1995. He further noted that any aggravation would have been temporary. Dr. Klein advised that appellant would have had residuals of chronic pain syndrome secondary to the multiple injuries she sustained and surgeries performed.

In a letter dated September 26, 2005, appellant asserted that Dr. Klein's report was incomplete as he failed to mention whether he reviewed the deposition of Dr. Ammerman prior to formulating his opinion. She requested that the Office seek a supplemental report from Dr. Klein addressing Dr. Ammerman's deposition testimony.

In a decision dated September 28, 2005, the Office denied appellant's claim for continuing work-related disability after March 24, 1997 on the grounds that the weight of the medical evidence by Dr. Klein established that appellant had no continuing disability after

March 24, 1997 resulting from her accepted employment injury. On October 20, 2005 appellant requested a hearing which was held on August 16, 2006.

In a decision dated November 2, 2006, the hearing representative set aside the decision dated September 28, 2005 and remanded the matter for further development. The hearing representative instructed the Office to refer the case record to Dr. Klein and provide a copy of Dr. Ammerman's deposition testimony and request that he address whether the 1995 work injury aggravated or accelerated appellant's preexisting cervical and lower back conditions. The Office was also to seek clarification from Dr. Klein with regard to whether the 1995 work injury contributed to appellant's chronic pain syndrome and, if so, whether this condition still contributed to her chronic pain syndrome.

The Office requested a supplemental report from Dr. Klein and, on May 14, 2007, he noted reviewing the February 29, 1996 and September 30, 1997 MRI scans, the deposition of Dr. Ammerman and reports from him dated April 30 and August 30, 2004. Dr. Klein indicated that within a reasonable degree of medical probability appellant had a temporary aggravation of her existing cervical and lumbar condition manifested by a mild cervical and lumbar strain sustained at work on May 5, 1995. He further opined that the incident of May 5, 1995 did not contribute to appellant's chronic low back syndrome, chronic cervical pain syndrome and radiculopathy. Dr. Klein noted that appellant had three lumbar discectomy at the L4-5 level in 1987, 1992 and 1994 and experienced ongoing symptoms following the surgeries. He opined that the incident of May 5, 1995 caused a temporary aggravation of appellant's condition and did not accelerate or exacerbate appellant's disability.

In a decision dated June 7, 2007, the Office denied appellant's claim for continuing work-related disability after March 24, 1997 on the grounds that the weight of the medical evidence by Dr. Klein established that appellant had no continuing disability resulting from her accepted employment injury after March 24, 1997. On October 15, 2007 it reissued the June 7, 2007 decision because appellant's attorney was not sent a copy of the formal decision.

LEGAL PRECEDENT

Where the Office meets its burden of proof in justifying termination of compensation benefits, the burden shifts to the claimant to establish that any subsequent disability is causally related to the accepted employment injury.²

To establish a causal relationship between the condition, as well as any disability claimed and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual background, supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.

² *Darlene R. Kennedy, 57 ECAB 414 (2006).*

The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.³

Section 8123(a), in pertinent part, provides: "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 an examination."⁴ Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁵

ANALYSIS

The Office accepted appellant's claim for cervical and lumbar sprains and paid benefits. In a March 24, 1997 decision, it terminated compensation benefits based on the opinion of an impartial specialist, Dr. Fink. On June 15, 1998 the hearing representative affirmed the termination of benefits.⁶ The hearing representative also noted that evidence submitted at the hearing necessitated a supplemental opinion from the impartial medical specialist, Dr. Fink, regarding whether appellant had continuing work-related disability after March 24, 1997. As Dr. Fink, after his examination of appellant as an impartial specialist, became involved in a legal action involving appellant, the Office properly referred appellant to another impartial specialist and, subsequently, the Office properly referred appellant to Dr. Klein to resolve the conflict.⁷

In a report dated November 20, 2003, Dr. Klein reviewed the entire case record and statement of accepted facts. He examined appellant thoroughly and related his clinical findings. Dr. Klein indicated that he found no evidence to support appellant's work injury involving a collapsed desk would result in more than a lumbosacral myoligamentous injury which would have resolved in a year's time. In an August 9, 2005 report, in response to an Office clarification

³ See *Connie Johns*, 44 ECAB 560 (1993); *James Mack*, 43 ECAB 321 (1991).

⁴ 5 U.S.C. § 8123(a).

⁵ *Solomon Polen*, 51 ECAB 341 (2000).

⁶ The Board notes that appellant did not appeal the March 24, 1997 termination of benefits.

⁷ The Office properly found that, other designated impartial medical examiners, before Dr. Klein, could not resolve the conflict. Dr. Fink, subsequent to his May 3, 1996 report, was involved as expert in a law suit in which appellant was a plaintiff. Thus, the Office acted properly in not seeking a supplemental report from him. See *Vernon E. Gaskins*, 39 ECAB 746 (1988) (the Office will disqualify a physician from serving as an impartial medical specialist where there is reason to believe that the physician's views may be biased). The Office next referred appellant to Dr. Gargour; however, he was disqualified as appellant confirmed that he treated her in 1987. See *Raymond E. Heathcock*, 32 ECAB (2004) (physicians previously connected with the claim or the claimant, or physicians in partnership with those already so connected may not be used as referees). The Office then referred appellant to Dr. Falik, but the properly sought another referee physician when Dr. Falik's initial report was based on incorrect facts and he was nonresponsive to the Office's request for a supplemental report. See *Nancy Keenan*, 56 ECAB 687 (2005) (when an impartial specialist is unable to clarify or elaborate on his or her original report or if his or her supplemental report is also vague, speculative or lacking in rationale, the Office should refer the claimant to another impartial medial specialist).

request, Dr. Klein opined that appellant's May 1995 injury did not aggravate any preexisting retrolisthesis or degenerative disc disease which existed prior to 1995. He offered another clarifying opinion on May 14, 2007, advising that within a reasonable degree of medical probability appellant had a temporary aggravation of her preexisting cervical and lumbar condition manifested by a mild cervical and lumbar strain sustained at work on May 5, 1995. Dr. Klein advised that the incident of May 5, 1995 did not contribute to appellant's chronic low back syndrome, chronic cervical pain syndrome and radiculopathy. Rather, he opined that appellant's symptoms were the result of multiple surgeries including a lumbar laminectomy in 1987, a partial hemilaminectomy at L4-5 on August 10, 1992 and a partial hemilaminectomy on April 26, 1994. Dr. Klein indicated that the incident of May 5, 1995 caused a temporary aggravation of appellant's condition and did not accelerate or exacerbate her disability.

The Board finds that, under the circumstances of this case, the opinion of Dr. Klein is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant does not have any continuing work-related disability after March 24, 1997. Dr. Klein reviewed the entire case record and statement of accepted facts and had examined appellant. He additionally provided well-reasoned rationale as to why appellant's current conditions were not causally related to her work duties. Although appellant, on appeal, asserts that Dr. Klein did not have an accurate factual background upon which to base his opinion, she provided no specific allegation in support of her argument. The Board notes that the Dr. Klein's reports indicate that he was aware of appellant's history, that the Office properly sought supplemental reports from him to ensure that he resolved the point at issue and that he was responsive to the Office's requests.⁸

After her benefits were terminated, appellant submitted reports from Dr. Ammerman dated April 23, 1997 to March 7, 2001 as well as a deposition from him dated April 4, 1999 who continued to opine that appellant was totally disabled from work due to the May 5, 1995 work injury which significantly aggravated her preexisting cervical and lumbar condition. However, Dr. Ammerman did not provide a rationalized opinion specifically addressing how any continuing medical condition was causally related to the accepted employment injury.⁹ Additionally, he was on one side of a conflict that was resolved by Dr. Klein,¹⁰ and his reports do not otherwise provide new findings or medical rationale sufficient to establish that any continuing condition or disability was causally related to the accepted work injury. Therefore, the reports from Dr. Ammerman are insufficient to overcome that of Dr. Klein or to create a new medical conflict.

⁸ See *Phillip H. Conte*, 56 ECAB 213 (2004) (when the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report).

⁹ See *Jimmie H. Duckett*, 52 ECAB 332 (2001).

¹⁰ See *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990). The Board notes that Dr. Ammerman's reports did not contain new findings or rationale upon which a new conflict might be based.

Appellant did not otherwise submit reasoned medical evidence, after the termination of her benefits, establishing any continuing disability or condition after March 24, 1997 causally related to her employment. Therefore, she has not established that she has any continuing disability or condition causally related to her accepted cervical and lumbar sprains.

CONCLUSION

The Board finds that appellant failed to establish that she had any continuing disability after March 24, 1997.

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board