



medical evidence of record implicated that appellant's employment duties caused or contributed to her diagnosed lumbar condition and was sufficient to require additional development by the Office. The facts and circumstance of the case as set forth in the Board's prior decision are incorporated herein by reference.

The Office referred appellant for a second opinion evaluation on January 26, 2007 with Dr. Robert Sciortino, a Board-certified orthopedic surgeon. In a report dated February 9, 2007, Dr. Sciortino noted her July 2004 spinal decompression surgery and June 2006 lumbar spine surgery. He performed a physical examination and reviewed appellant's diagnostic studies. Dr. Sciortino diagnosed failed back syndrome. He noted that appellant attributed her back condition to repetitive lifting. Dr. Sciortino stated, "[I]f the [appellant] does have degenerative disease of the lumbar spine, then a job which requires heavy lifting can certainly aggravate this condition and may cause this condition to become more symptomatic." He diagnosed degenerative disc disease at the L4-5 level with mild spondylolisthesis and disc bulging. Dr. Sciortino stated that this condition was related to appellant's age and genetic predisposition. He found that she gradually developed symptoms over time and that her work certainly could have caused her to become more symptomatic. Appellant developed failed back syndrome following her spinal surgery and Dr. Sciortino concluded that her preexisting degenerative condition was aggravated by her work. Dr. Sciortino stated that her surgery was related to her preexisting degenerative condition which was aggravated by her lifting at work.

On March 22, 2007 the Office accepted appellant's claim for aggravation of degenerative lumbar disease with a disc at L4-5. Appellant filed a claim for compensation on May 2, 2007 requesting wage-loss compensation from April 12, 2004. In a letter dated May 22, 2007, the Office requested additional information in support of her claim. By letter dated June 19, 2007, it opened for the payment of medical benefits.

In a July 2, 2007 report, Dr. Kevin D. Rutz, a Board-certified orthopedic surgeon, noted that he examined appellant on April 18, 2006. He diagnosed cervicgia, lumbar radiculopathy and possible nonunion. Dr. Rutz performed a revision of her spinal fusion from L3 to L5 on June 14, 2006. He noted that he did not have information regarding the issue of causation. Dr. Rutz stated, "My presumption is that the indications for [appellant's] original surgery, prior to seeing me; from which she had developed a nonunion, were for a work[-]related incident and if this is the case, then her need for revision of that fusion to obtain a solid union would be work related. [If] her original indication of her lumbar fusion was not work related then her need for revision of her fusion would be not work related either."

On August 14, 2007 the Office requested a supplemental report from Dr. Sciortino. As to whether appellant's mail handler duties materially altered the course of her degenerative disease process resulting in the need for surgery in July 2004. The Office also asked what organic change occurred to her degenerative disc disease based on objective findings as a result of the performance of her work duties. Finally, it inquired whether appellant's low back condition would have naturally progressed to require surgery regardless of the extent of exposure to the mail handler duties. On September 5, 2007 Dr. Sciortino stated that the question as to whether her mail handling duties actually altered the course of her disease process was unanswerable. He also stated that he was unable to answer whether appellant's back condition would have naturally

progressed to the point where it required surgery with or without exposure to her mail handler duties. Dr. Sciortino found that the questions were hypothetical.

The Office determined that a second opinion examination was necessary and referred appellant to Dr. Jack C. Tippett, a Board-certified orthopedic surgeon, on October 22, 2007. In a report dated November 13, 2007, Dr. Tippett reviewed her history of injury, medical treatment and provided findings on physical examination. He opined that her employment duties did not materially alter her degenerative disease process. Dr. Tippett stated that it was unlikely that appellant's condition in July 2004 was anything other than the normal progression of her low back condition. He opined that any employment-related aggravation of her degenerative disc disease ended on June 16, 2002, the date she last worked as a mail handler.

In a letter dated November 27, 2007, the Office informed appellant that there was a conflict in medical opinion evidence between Dr. Tippett and Dr. Rahman regarding whether her July 28, 2004 back surgery was employment related. It referred her to Dr. Michael Ralph, a Board-certified orthopedic surgeon, to resolve this conflict. Appellant's attorney objected to the selection of Dr. Ralph on December 18, 2007. He contended that the American Board of Medical Specialist (ABMS) listed two Board-certified orthopedic surgeons located within 10 miles from appellant's home and requested information explaining why these physicians were bypassed.

Dr. Ralph completed a report on December 19, 2007 and requested a copy of the actual magnetic resonance imaging (MRI) scan of June 8, 2004. He opined that the need for surgical treatment was unrelated to any sort of work activity. Dr. Ralph stated, "[Appellant] had spinal stenosis, which is a combination of facet arthritis, a congenitally narrowed canal, as well as a [G]rade 1 spondylolisthesis which is degenerative in nature." He opined that her spinal stenosis was clearly not related to repetitive activity. Although the Office accepted an aggravation of degenerative disc disease, appellant's employment-related condition should have resolved by September 23, 2001. On January 10, 2008 Dr. Ralph submitted a supplemental report and noted that he had only received and reviewed digitalized films of the MRI scan. He stated, "I see nothing on the films furnished to me to show that [appellant] had any sort of traumatic injury to her lumbar area and I, therefore, feel that regardless [of] whether or not the surgery was indicated, it was not related to her employment...."

By decision dated January 22, 2008, the Office denied appellant's claim for compensation and for approval of the July 28, 2004 back surgery.

In letters dated February 13 and 18, 2008, appellant's attorney noted that the Office stated that no physicians were bypassed in the selection of Dr. Ralph as the impartial medical examiner. He again inquired as to the two physicians located closer to her home. Appellant's attorney also argued that Dr. Ralph did not base his decision on the statement of accepted facts as he opined that there was never a work-related aggravation.

By decision dated April 11, 2008, the Office hearing representative noted that Dr. Ralph requested to review the actual MRI scan or an appropriate disc copy and remanded the case for the Office to provide the physician with this evidence.

On May 15, 2008 Dr. Ralph stated that he had received the actual MRI scan of June 8, 2004. He found significant spinal stenosis at L4-5 with a narrowing of the spinal canal secondary to a broad-based disc herniation which was degenerative in nature as well as marked degenerative changes in the facets. Dr. Ralph stated that the findings on MRI scan had nothing to do with work activity. He concluded, “At this time I do not consider the surgical treatment or the abnormalities noted at the L3-4 or L4-5 levels to be in any way related to her employment at the [employing establishment.]”

By decision dated May 22, 2008, the Office denied appellant’s claim for compensation from April 12, 2004 and surgery on July 28, 2004. Appellant, through her attorney requested a telephonic hearing on June 2, 2008 which was held on October 1, 2008. He disagreed with the selection of Dr. Ralph and with his determination that there was no aggravation of the degenerative disc disease.

In a letter dated October 2, 2008, counsel argued that Dr. Ralph’s office was located 35 miles from appellant’s home while two other physicians had office’s within 10 miles of her home. He contended that the Office should have gradually extended the geographic search before reaching Dr. Ralph. Appellant’s attorney noted that it was possible that these physician’s had been eliminated from the rotation, but that the Office had not provided documentation.

By decision dated December 10, 2008, the hearing representative found that Dr. Ralph’s report was entitled to the weight of the medical evidence, that he was appropriately selected and that no physicians were bypassed in his selection.

### **LEGAL PRECEDENT**

Appellant for each period of disability claimed, has the burden of proving by a preponderance of the reliable, probative and substantial evidence that she is disabled for work as a result of her employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be provide by preponderance of the reliable probative and substantial medical evidence.<sup>2</sup>

Generally, findings on examination are needed to justify a physician’s opinion that an employee is disabled for work. The Board has stated that, when a physician’s statements regarding an employee’s ability to work consist only of a repetition of the employee’s complaints that he or she hurts too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>3</sup>

Section 8103 of the Federal Employees’ Compensation Act<sup>4</sup> provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office

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<sup>2</sup> *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

<sup>3</sup> *Id.*

<sup>4</sup> 5 U.S.C. §§ 8101-8193, 8103.

considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation.<sup>5</sup> In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under section 8103, with the only limitation on the Office's authority being that of reasonableness.<sup>6</sup> Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>7</sup> In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.<sup>8</sup>

Proof of causal relationship in a case such as this must include supporting rationalized medical evidence. Thus, in order for a surgery to be authorized, appellant must submit evidence to show that the requested procedure is for a condition causally related to the employment injury and that it is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.<sup>9</sup>

### ANALYSIS

Dr. Rahman performed arthrodesis, posterior lumbar interbody fusion, pedicle screw fixation and bilateral discectomy at L3-4 and L4-5 on July 28, 2004. He opined that appellant's "repetitive push/pull type activity" at the employing establishment contributed to her problems in the neck and spine. Dr. Rahman stated, "I think there is a direct relationship and that the pathology present in the lumbar spine is work related." The Board found Dr. Rahman's reports were sufficient to require additional development on the part of the Office.

The Office referred appellant for a second opinion evaluation with Dr. Sciortino, a Board-certified orthopedic surgeon, who concluded on February 9, 2007 that her preexisting degenerative condition was aggravated by her work. Dr. Sciortino also stated that her 2004 surgery was related to her preexisting degenerative condition, which was aggravated by her lifting at work. The Office accepted appellant's claim for aggravation of degenerative lumbar or lumbosacral intervertebral disc at L4-5 based on Dr. Sciortino's report.

Appellant then requested wage-loss compensation beginning April 12, 2004. In support of her claim, she submitted reports from Dr. Rutz. A Board-certified orthopedic surgeon, who performed a revision of appellant's spinal fusion from L3 to L5 on June 14, 2006. Dr. Rutz stated that he was unable to determine if appellant's original surgery was due to her accepted employment injuries. These reports do not contain the necessary medical opinion evidence to

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<sup>5</sup> 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

<sup>6</sup> *James R. Bell*, 52 ECAB 414 (2001).

<sup>7</sup> *Claudia L. Yantis*, 48 ECAB 495 (1997).

<sup>8</sup> *Cathy B. Millin*, 51 ECAB 331 (2000).

<sup>9</sup> *Joseph P. Hofmann*, 57 ECAB 456 (2006).

meet her burden of proof and establish that her disability and surgeries were due to her accepted aggravation of degenerative disc disease.

The Office requested a supplemental report from Dr. Sciortino addressing whether appellant had a temporary or permanent aggravation of her underlying degenerative disc disease and whether her surgery in 2004 was due to a permanent aggravation or to the underlying condition. In a report dated September 5, 2007, Dr. Sciortino stated that he was unable to answer the questions posed and asserted that the questions asked by the Office were hypothetical. Appellant's attorney agreed with this argument. The Board finds that the Office attempted to discover whether appellant's employment duties resulted in a temporary or permanent aggravation of underlying condition was appropriate. When employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation. However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.<sup>10</sup> As Dr. Sciortino was not able to address whether appellant's underlying condition was permanently aggravated, whether her surgery was due to this permanent aggravation and whether she had any continuing disability due to the permanent aggravation, the Board finds that the Office properly determined that a new referral to a second opinion physician was appropriate.

The Office referred appellant for a second opinion evaluation with Dr. Tippett, a Board-certified orthopedic surgeon, who completed a report on November 13, 2007 and opined that her employment duties did not materially alter her degenerative disease process. Dr. Tippett opined that her surgery was due to the normal progression of her low back condition and that the employment-related aggravation of her degenerative disc disease ended on June 16, 2002, the last date appellant worked as a mail handler.

The Board finds that the Office properly determined that there was a conflict of medical opinion evidence between Dr. Tippett, the Office's physician who found no relationship between appellant's disability, surgery and her employment, and Dr. Rahman, appellant's physician, who opined that there was a relationship between appellant's low back condition necessitating surgery and her employment duties.

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 an examination.<sup>11</sup> 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 of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.<sup>12</sup>

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<sup>10</sup> *Raymond W. Behrens*, 50 ECAB 221, 222 (1999).

<sup>11</sup> 5 U.S.C. §§ 8101-8193, 8123.

<sup>12</sup> 20 C.F.R. § 10.321.

The Office referred appellant to Dr. Ralph, a Board-certified orthopedic surgeon, to resolve the conflict. Appellant's attorney objected to the selection of Dr. Ralph on the grounds that the Office did not consider other physicians closer within appellant's commuting area. A physician selected by the Office to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for the selection of impartial medical specialists designed to provide safeguards against any possible appearance that the selected physician's opinion is biased or prejudiced. The procedures contemplate that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.<sup>13</sup> The Federal (FECA) Procedure Manual (the procedure manual) provides that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the Physicians Directory System (PDS) should be used for this purpose wherever possible.<sup>14</sup> The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.<sup>15</sup> The PDS database of physicians is obtained from the ABMS which contains the names of physicians who are Board-certified in certain specialties. The Board finds that there is no evidence in the record supporting the allegation that Dr. Ralph was not appropriately selected through the PDS. There is no documentation suggesting that other physician's were bypassed in order to reach Dr. Ralph or that any improper methods were used in selecting him. The record establishes that he was selected on the rotational basis as required by the Board and the Office's procedure manual.

Appellant's attorney has not submitted sufficient evidence to establish error. It is not readily apparent that all physicians listed in the ABMS agree to see claimant's under the federal workers' compensation system or to participate in the PDS. Counsel did not submit information establishing that the two specialist located in Festus, MO are participating physicians.

In his reports dated December 19, 2007; January 10 and May 15, 2008, Dr. Ralph reported appellant's history of injury medical history and physical findings. He opined that the need for surgical treatment was unrelated to any sort of work activity noting that she had spinal stenosis which was degenerative in nature. Dr. Ralph noted that the Office accepted aggravation of degenerative disc disease but disagreed with this finding and concluded that appellant's employment-related condition should have resolved by September 23, 2001. Dr. Ralph reviewed the June 8, 2004 MRI scan and found significant spinal stenosis at L4-5 with a narrowing of the spinal canal secondary to a broad-based disc herniation, which was degenerative in nature as well as marked degenerative changes in the facets. Dr. Ralph stated that the findings on MRI scan had nothing to do with work activity and concluded that neither appellant's surgical treatment nor the abnormalities noted at the L3-4 or L4-5 levels were related to her employment at the employing establishment.

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<sup>13</sup> *B.P.*, 60 ECAB \_\_\_ (Docket No. 08-1457, issued February 2, 2009).

<sup>14</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003).

<sup>15</sup> Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 3.500.7 (September 1995, May 2003).

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 proper factual and medical background must be given special weight.<sup>16</sup> The Board finds that Dr. Ralph's report is based on a proper, factual and medical background and contained findings on examination of appellant and review of diagnostic studies. Dr. Ralph clearly and consistently concluded that her disability and surgeries were not related to her employment but to the underlying condition. He found that appellant had not sustained trauma to her spine, but that her condition was due to her degenerative condition. Dr. Ralph's reports do not support her claim for disability or surgery and the Office, therefore, properly denied her claim.

### **CONCLUSION**

The Board finds that appellant failed to meet her burden of proof in establishing that her disability beginning April 12, 2004 and her surgeries were due to her accepted injuries.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 10, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 9, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>16</sup> *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).