



she was diagnosed with lumbar contusion but was released to work the following day and appears to have worked intermittently thereafter.<sup>1</sup>

In support of her claim, appellant provided several medical documents. A June 7, 2002 duty status report, on which the signature is illegible, diagnosed lumbar contusion. Appellant also submitted several treatment notes from Dr. Arsen H. Manugian, a Board-certified orthopedic surgeon, from examinations between June 10 and July 14, 2002. Dr. Manugian diagnosed right arm tendinitis as well as cervical and thoracic myofascial strains superimposed on mild preexisting early spondylotic changes. He also noted that appellant's lumbar x-rays which were taken in the emergency room were "normal for acute injury." Appellant submitted the x-ray report prepared on June 7, 2002 by Dr. Robert Yarborough<sup>2</sup> who noted no acute bone or joint abnormalities of the lumbar spine. The Office accepted her claim for lumbar sprain/strain.

In an August 29, 2002 magnetic resonance imaging (MRI) scan report, Dr. Robert A. Duke, a Board-certified radiologist, diagnosed central herniated nucleus pulposis at C4-5 and diffuse posterior disc protrusion at C5-6. In a November 19, 2002 report, Dr. Gary L. Kellett, a neurosurgeon, noted appellant's history of injury and continuing complaints, concluding that appellant's course of conservative care had not yielded results and diagnosing cervical ruptured discs at C4-5. On November 25, 2002 Dr. Manugian recommended cervical epidural injections. In a December 9, 2002 MRI scan of appellant's lumbar spine, Dr. Duke diagnosed disc desiccation at L5-S1 and mild left foraminal stenosis at L4-5. On December 9, 2002 Dr. Manugian noted lumbar MRI scan results revealing degenerative changes as well as mild diffuse bulging at L5-S1. In a December 16, 2002 report, he noted that appellant's lumbar MRI scan revealed degenerative changes and with no evidence of herniated nucleus pulposis or central spinal canal stenosis. Appellant underwent a lumbar epidural block on January 9, 2003.

In a January 24, 2003 functional capacity evaluation, David M. Brick, an occupational therapist, noted that appellant had full mobility and normal strength in her cervical spine but had some limited trunk mobility. However, he reported that he was unable to provide work restrictions because appellant displayed submaximal effort during the functional capacity testing. On January 30, 2003 Dr. Manugian referenced the functional capacity evaluation and Mr. Brick's finding that appellant displayed submaximal effort and concluded that she could return to full duty. However, on January 31, 2003 he noted that appellant was "apparently unable to return without pain, to her work, stating that going upstairs has been causing increasing amounts of back pain."

In an undated reply to an Office questionnaire, Dr. Kellett stated that appellant's diagnosed cervical ruptured discs were caused by her work injury. He stated that the ruptured

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<sup>1</sup> Appellant did not claim any compensation until April 24, 2003. The record reflects that the Office paid compensation for intermittent time lost from April 24 to May 12, 2003 under the present claim but in a September 18, 2003 memorandum noted that appellant had another claim, Office file number 06208377, accepted for cervical strain. The Office noted that it had incorrectly processed appellant's payment under the present claim and accordingly "zeroed out" the payment and transferred it to the proper claim 062083377. Claim No. 062083377 is not before the Board on the present appeal.

<sup>2</sup> Dr. Yarborough's specialty is not discernible from the record.

discs and corresponding symptoms were permanent, but also indicated that appellant's prognosis was excellent.

In an April 9, 2003 telephone memorandum, the Office noted that appellant had requested that her cervical herniated nucleus pulposus be accepted. The Office did not accept a cervical condition but authorized a "one time only" cervical block treatment.<sup>3</sup> In an April 28, 2003 telephone memorandum, it noted inconsistencies in appellant's statement of the circumstances of her injury and again indicated that no cervical condition had been accepted. In a May 5, 2003 memorandum, the Office reiterated that it had not accepted a cervical condition. On May 9, 2003 it referred appellant for a second opinion examination regarding her present status and appropriate treatment.

In a June 10, 2003 second opinion report, Dr. Carl W. Huff, a Board-certified orthopedic surgeon, reviewed appellant's medical history and diagnostic testing results and conducted a physical examination. He noted a slight narrowing at the C5-6 and L5-S1 levels of appellant's spine, along with minimal osteoarthritis findings that he concluded were normal for appellant's age, but otherwise found her spine generally normal. Dr. Huff diagnosed neck pain radiating to the right upper extremity and lower back pain radiating to the right lower extremity. He explained that "the basis for [appellant's] complaints is not obvious," as the work injury had caused sprains and contusions which should have resolved with treatment. Dr. Huff noted that he was unable to find "any evidence of ongoing impairment of function due to residuals of the reported injury." He opined that appellant's current complaints were not related to her original work injury and that she was able to return to full duty without further treatment. In a work capacity evaluation, prepared the same day, Dr. Huff reiterated that appellant was able to return to full duty without restrictions.

On April 17, 2004 appellant filed a recurrence of disability claim alleging that she experienced right leg pain while climbing stairs on the same day. The employing establishment controverted the recurrence of disability claim. On June 3, 2004 the Office denied appellant's recurrence of disability claim.

In a July 26, 2004 report, Dr. Autry J. Parker, a Board-certified anesthesiologist, diagnosed herniated cervical disc and cervical radiculopathy, sciatica and possible herniated lumbar disc. He stated that appellant reported being "pinned between a pallet carrier and a wall" on June 6, 2002 to which he attributed her cervical symptoms. Dr. Parker noted that the diagnostic testing results indicated that appellant had a herniated cervical disc at C4-5 with mild cord effacement and mild to moderate spinal canal stenosis. He opined that appellant's symptoms "could be" caused by her work-related injury. On January 7, 2005 Dr. Parker noted that appellant continued to complain of neck and back pain and "she emphatically insists that she is unable to go back to work."

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<sup>3</sup> On April 13, 2003 appellant filed a new traumatic injury claim for a cervical condition. She stopped work on April 24, 2003. The Office assigned appellant's new claim file number 062083377 and accepted it for cervical strain. *See supra* note 1.

On March 1, 2005 appellant requested reconsideration of the Office's denial of her recurrence of disability claim. On November 17, 2005 the Office denied modification of its June 3, 2004 decision denying appellant's recurrence of disability claim.

On January 18, 2006 the Office noted that appellant's claim was currently accepted only for lumbar sprain/strain and denied authorization of cervical/thoracic injections. The Office noted that it had not accepted a cervical condition and that appellant had the burden of proving any condition not yet accepted.

In a February 7, 2005 report, Dr. William Clay Jackson, a Board-certified family practitioner, stated that appellant's back pain, which she described as an aching sensation, was chronic and related to her employment injury. He indicated that appellant stated that her pain interfered with the activities of daily living and reported experiencing little to no relief from physical therapy.

On February 1, 2006 the Office referred appellant to Dr. Michael J. Heck, a Board-certified orthopedic surgeon, for a second opinion examination. In an accompanying statement of accepted facts, the Office noted that it had not accepted cervicalgia, right cervical radiculopathy, cervical herniated nucleus pulposis or sciatica as being work related.

Dr. Heck examined appellant and provided a report on March 21, 2006. He reviewed the diagnostic testing results and conducted a physical examination on which he noted that appellant complained of pain with hip and knee flexing to 90 degrees, yet had a completely normal lumbar straight leg raise. Based on a lumbar MRI scan, Dr. Heck diagnosed mild degenerative changes at L5-S1 but noted that appellant's spine was otherwise normal. He explained that he did not find signs of acute muscle strain and that appellant's complaints did not seem to be based on any sciatic stress. Dr. Heck concluded that appellant's lumbar strain had resolved and that she could return to work as a distribution clerk without restrictions.

On April 12, 2006 the Office issued a notice of proposed termination of appellant's compensation benefits. It based its proposed termination on Dr. Heck's March 21, 2006 second opinion report.

Following the notice of proposed termination appellant submitted numerous progress and treatment notes and form reports which duplicated notes that had already been received into the record. She also provided an April 20, 2006 progress note from Dr. Jackson which did not discuss her continuing residuals.

By decision dated May 25, 2006, the Office finalized its termination of appellant's compensation benefits effective the same day.

#### **LEGAL PRECEDENT**

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>4</sup> The Office may not terminate compensation without

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<sup>4</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

establishing that the disability ceased or that it was no longer related to the employment.<sup>5</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

### ANALYSIS

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits as the weight of the medical evidence established that she no longer had residuals of her employment injury.<sup>7</sup> The Office based its determination on Dr. Heck's March 21, 2006 second opinion report. He examined appellant and noted a discrepancy in her subjective complaints; she did not complain of pain during a seated straight leg raise or when her sciatic area was pressured, but did complain of pain when flexing her hip and knee to 90 degrees. Dr. Heck concluded that he was unable to find an objective basis for explaining appellant's subjective complaints and noted that her contusions and lumbar sprain should have resolved. He also explained that appellant's mild degenerative changes at L5-S1 were normal for her age and, therefore, her back condition was no longer related to employment.<sup>8</sup> The Board notes that Dr. Huff, in a June 10, 2003 second opinion report, also concluded that appellant's injuries should have resolved and was unable to find an objective basis for her continuing symptoms.

Meanwhile, although Dr. Parker supported that appellant had continuing symptoms, he stated an inaccurate medical history in his July 26, 2004 report. He indicated that appellant's cervical complaints began when she was pinned to the wall by a "pallet jack." However, the record reflects that appellant did not claim a cervical condition related to that event at the time of her injury and that the Office consistently noted that it had not accepted any cervical conditions as work related.<sup>9</sup> Accordingly, Dr. Parker's July 26, 2004 report does not establish that appellant had continuing residuals from her accepted lumbar sprain/strain. Dr. Jackson's February 7, 2005 report was also of diminished probative value; although he opined that appellant's back pain continued to affect her activities of daily living and indicated that her symptoms were work related he did not provide a full discussion of the back complaints to which he referred. He did not indicate whether appellant's "back pain" was located in her lumbar, cervical and thoracic

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<sup>5</sup> *Id.*

<sup>6</sup> *See Del K. Rykert*, 40 ECAB 284, 295-296 (1988).

<sup>7</sup> The record reflects that appellant submitted additional medical evidence following the Office's termination of her compensation benefits. The Board, however, notes that it cannot consider this evidence for the first time on appeal because the Office did not consider this evidence in reaching its final decision. The Board's review is limited to the evidence in the case record at the time the Office made its final decision. 20 C.F.R. § 501.2(c).

<sup>8</sup> The Board notes that appellant had requested that her cervical spine condition be accepted and the record reflects that the Office did pay for certain cervical treatments, despite maintaining that it had not accepted a cervical condition. However, pursuant to Board precedent in *James F. Aue*, 25 ECAB 151 (1974) and *Gary L. Whitmore*, 43 ECAB 441 (1992), the mere gratuitous payment of compensation does not constitute an acceptance. The record does not reflect that the Office accepted a cervical condition in the present claim. Accordingly, the issue before the Board is whether the Office met its burden of proof in terminating appellant's compensation benefits for her accepted lumbar sprain/strain.

<sup>9</sup> *See Vernon R. Stewart*, 5 ECAB 276, 280 (1953) (where the Board held that medical opinions based on histories that do not adequately reflect the basic facts are of little probative value).

spine, did not provide a full discussion of her continuing symptoms and did not fully explain the reasoning behind his conclusion that appellant's symptoms were work related. Dr. Manugian and Dr. Kellett who submitted several medical reports did not address the issue of appellant's continuing residual symptoms from her accepted lumbar sprain/strain and consequently their reports did not establish that appellant was entitled to compensation at the time the Office terminated her benefits.

Following the notice of proposed termination appellant submitted numerous progress and treatment form notes contemporaneous with Dr. Heck's second opinion report. The notes did not provide any discussion of the issue of appellant's continuing work-related residuals. Moreover, with the exception of a form note from Dr. Jackson dated April 20, 2006, the notes were duplicative of documents previously received into the record. The April 20, 2006 note was simply a record of treatment and did not address whether appellant had continuing work-related residuals. Accordingly, the Board finds that the weight of the medical evidence supported the Office's decision to terminate appellant's compensation benefits effective May 25, 2006.

**CONCLUSION**

The Board finds that the Office met its burden of proof in terminating appellant's medical benefits and wage-loss compensation effective May 25, 2006.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 25, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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