

FACTUAL HISTORY

On August 1, 2006 appellant, then a 51-year-old transportation security screener, alleged that she sustained low back pain from standing, bending and lifting at work.¹ She stopped work on July 31, 2006. The Office accepted her claim for lumbar radiculitis. Prior to filing the present claim, appellant filed a traumatic injury claim alleging that on November 9, 2005 she developed muscle spasms while wandng and lifting bags. This was developed as claim number xxxxxx902. The Office accepted this claim for lumbar sprain and strain. Appellant stopped work on the date of injury but returned to light duty on November 13, 2005 with some intermittent absences until she stopped work on July 31, 2006.² The claims were combined.

Appellant submitted treatment notes dated between February 9 and August 15, 2006 from Dr. G. Michael Elkanich, a Board-certified orthopedic surgeon, who diagnosed low back pain with left leg sciatica and L4-5 disc degeneration and loss of disc space and noted that appellant's condition was work related. Dr. Elkanich stated that appellant was totally disabled from July 31 to August 23, 2006 and could resume light duty on August 23, 2006. Appellant also submitted reports from Dr. Daniel Kim, Board-certified in pain medicine and anesthesiology, who treated her for lumbar radiculopathy and chronic pain syndrome.

On May 18, 2007 the Office referred appellant with a statement of accepted facts to Dr. Aubrey Swartz, a Board-certified orthopedic surgeon, for a second opinion. In a June 25, 2007 report, Dr. Swartz reviewed appellant's history of injury and her complaint of low back pain at the lumbosacral level and in the left lower extremity. Dr. Swartz diagnosed lumbar disc protrusion at L4-5 with degenerative changes at the L4-5 segment in addition to a disc protrusion of four to five millimeters without nerve root displacement at the L4-5 level. He noted no evidence of radiculopathy and found inconsistent neurologic testing results from the sensory examination, which suggested symptom magnification. Dr. Swartz found normal lumbar spine range of motion, normal motor and reflex examinations and no atrophy in the lower extremities. He opined that appellant had recovered from the lumbar strain injury and had evidence of preexisting degenerative disc disease in the lumbar spine at the L4-5 level. Dr. Swartz advised that the degenerative disc disease was aggravated by appellant's work activities. He noted that the aggravation was temporary and had ceased at the time of his examination as he found a normal physical examination. There were objective findings of disability and Dr. Swartz opined that the subjective complaints were not industrially related. He advised that appellant required no further treatment. Dr. Swartz noted a 25-pound lifting capacity on a nonindustrial basis. In an attached work capacity evaluation form, he indicated that appellant could not perform her usual job, but could work full time with permanent restrictions due to her underlying degenerative disease.

¹ Appellant actually filed a claim for a recurrence of disability beginning on July 31, 2006 due to a November 9, 2005 original injury in claim number xxxxxx902. The Office treated this as a new occupational disease claim as appellant indicated her condition was due to repetitive work.

² Initial medical reports in claim number xxxxxx902 diagnosed and treated appellant for lumbar strain. Subsequent treatment records indicated that she was being treated for radiculopathy into the right leg and a herniated disc or disc degeneration at L4-5.

On August 8, 2007 the Office issued a proposed notice of termination of compensation, finding that the weight of the medical evidence established that appellant no longer had any residuals or disability due to her accepted conditions.

Appellant submitted May 23 and April 25, 2007 reports from Dr. Kim who noted treating appellant for low back pain, lumbar radiculopathy and chronic pain syndrome.

In a September 13, 2007 decision, the Office terminated appellant's compensation benefits effective that day.

On October 3, 2007 appellant requested a review of the written record. She noted that she worked at the employing establishment for three years before injuring her back. Appellant's job required lifting heavy bags by which she injured her back in 2005. She asserted that her back condition did not improve and that her disc protrusion occurred at work on November 9, 2005.

In a September 10, 2007 report, Dr. Elkanich noted treating appellant since February 9, 2006 for left lower extremity radiculopathy, L4-5 disc protrusion and stenosis. Appellant was injured at work on November 9, 2005 and that her back condition had improved. Currently, she complained of significant left lower extremity radiculopathy from the posterior gluteal region. Dr. Elkanich last saw appellant on August 8, 2007, after the second opinion evaluation with which he disagreed. He advised that appellant had lumbar degenerative disc disease at L4-5 that was work related and an aggravation of her preexisting degenerative condition. Dr. Elkanich stated that appellant might need injections or microdiscectomy decompression.

In a November 13, 2007 decision, an Office hearing representative affirmed the September 13, 2007 decision terminating benefits, but noted that Dr. Elkanich supported that the work injury caused an ongoing aggravation of appellant's degenerative disc disease while Dr. Swartz opined that the work injury caused a temporary aggravation, which had ceased. The hearing representative found a conflict in the medical evidence between Drs. Swartz and Elkanich regarding whether appellant continued to have residuals of her accepted employment injury. The hearing representative remanded the case for further development.

On February 19, 2008 the Office referred appellant with a statement of accepted facts to Dr. Anthony Serfustini, a Board-certified orthopedic surgeon, for a referee evaluation. In a March 27, 2008 report, Dr. Serfustini reviewed appellant's history of injury and treatment. Appellant was currently working light duty, could stand and walk for 1 hour at a time, and could sit for 30 minutes at a time. On examination, Dr. Serfustini found no evidence of pain behavior, symptom magnification or incongruity signs. He advised that appellant's gait and stance were normal. There was no evidence of any asymmetry of either leg and no muscle atrophy or fasciculation. Range of motion in the legs was normal. Dr. Serfustini diagnosed acute lumbosacral sprain and strain, soft tissue injury and aggravated degenerative disc disease at the L4-5 level with continuing symptoms. He stated that nonaccident-related diagnoses included degenerative disc disease at L4-5, broad-based posterior central and paracentral disc protrusion, narrowing of central spinal canal at L4-5, and congenitally short pedicles of lumbar spine at L4-5. Dr. Serfustini noted that appellant's degenerative disc disease was an ongoing industrial aggravation, related to her employment and aggravated by her work duties. He advised that there was no objective evidence that there was any acceleration of appellant's preexisting

degenerative disc disease as temporary and permanent aggravation can continue without causing irreversible change to the underlying condition. Dr. Serfustini noted that continued degeneration was time dependent and would progress not on the basis of any aggravation but on the basis of the degenerative process itself. He described this process as natural aging where the normal load of spine would shift from the lumbosacral disc to the facets. Dr. Serfustini advised that this process had no direct relationship to the November 9, 2005 work injury. He opined that the work activities were an aggravation of the ongoing November 9, 2005 work injury. Dr. Serfustini opined that there were no nonindustrial or preexisting disability factors. He advised that appellant was not able to return to full duty, rather she should continue light duty with lifting restrictions. Dr. Serfustini indicated that there was no work-related disability as she was employed full time with modification of her activities. Appellant's restrictions were due to the aggravation of her preexisting condition and she was unable to return to full duty. Dr. Serfustini advised that appellant would not need further medical treatment for the November 9, 2005 injury. In an attached work restriction form, he advised that appellant could not work her usual job due to permanent aggravation of L4-5 disc disease but could work full time with restrictions.

On April 30, 2008 the Office requested clarification from Dr. Serfustini on whether the diagnosed conditions were causally related to the 2005 or 2006 injuries and whether appellant had residuals of either injury. It also asked whether any work-related aggravation of L4-L5 degenerative disc disease was temporary or permanent. In a May 19, 2008 supplemental report, Dr. Serfustini stated that the July 31, 2006 claim was a permanent aggravation of the November 9, 2005 injury, which prevented her from returning to full duty despite repeated attempts. Regarding appellant's residuals, Dr. Serfustini indicated that flare-ups of her lumbosacral spine discomfort occurred when she tried to increase her work activities. He attributed this to both injuries.

On May 21, 2008 the Office requested further clarification from Dr. Serfustini. It advised Dr. Serfustini that it accepted the November 9, 2005 injury for a lumbar sprain/strain and the 2006 injuries for lumbar radiculitis. The Office asked him to address whether appellant continued to have lumbar radiculitis or whether it had resolved, whether appellant sustained a permanent aggravation of her preexisting degenerative disc disease at L4-L5 and whether the lumbar sprain/strain of November 9, 2005 resolved. In a June 2, 2008 report, Dr. Serfustini opined that appellant had radiculitis but no objective evidence, such as neurodiagnostic studies, suggested lumbar radiculopathy. Radiculitis was a clinical diagnosis not a neurodiagnostic diagnosis. Dr. Serfustini determined that the 2006 aggravation was not a new injury. He also noted that he did not provide objective findings regarding appellant's permanent aggravation to her lumbar spine as his opinion derived from the clinical course of appellant's lumbosacral spine. Dr. Serfustini based his opinion on appellant's repeated attempts to return to work to her usual duties without success. He advised that appellant's spinal stenosis and degenerative changes of the lower two lumbar levels precluded her from performing the type of work she performed when injured. Dr. Serfustini opined that her November 9, 2005 lumbar sprain had resolved as well as her acute soft tissue sprain from July 31, 2006.

In a June 5, 2008 decision, the Office terminated appellant's compensation benefits effective September 13, 2007 finding that Dr. Serfustini's reports failed to provide any objective findings that appellant had permanent aggravation of preexisting lumbar degenerative conditions

due to her 2006 or 2005 injuries. It also found that Dr. Serfustini did not provide any objective evidence supporting that the 2006 injury caused temporary or permanent aggravation of her preexisting condition.

On June 13, 2008 appellant requested an oral hearing, which was held on October 15, 2008.³

In a December 10, 2008 decision, a hearing representative affirmed the June 5, 2008 decision finding that the weight of the medical evidence rested with Dr. Serfustini who determined that appellant no longer experienced any residuals of the accepted work injury.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, the Office must establish that the claimant no longer has residuals of an employment-related condition, which requires further medical treatment.⁷

Section 8123(a) 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. 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 Office medical adviser, 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 no prior connection with the case.⁸

³ On October 29, 2008 appellant filed a schedule award claim. On November 18, 2008 the Office denied appellant's schedule award claim. Appellant has not appealed the November 18, 2008 decision.

⁴ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986).

⁶ *T.P.*, 58 ECAB ___ (Docket No. 07-60, issued May 10, 2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁷ *E.J.*, 59 ECAB ___ (Docket No. 08-1350, issued September 8, 2008).

⁸ *R.H.*, 59 ECAB ___ (Docket No. 07-2124, issued March 7, 2008); *see also* 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321.

ANALYSIS

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits at the time of termination on September 13, 2007. The Office accepted that appellant's work duties caused lumbar radiculitis and a lumbar sprain and strain. It subsequently referred appellant to Dr. Swartz for a second opinion evaluation.

In a June 25, 2007 report, Dr. Swartz explained there was no evidence of radiculopathy and that inconsistent neurologic testing results suggested symptom magnification. He advised that his neurologic examination was normal. Dr. Swartz further explained that he found normal lumbar range of motion, normal motor and reflex examinations and no atrophy in the lower extremities. He opined that, based on normal physical examination findings, appellant had sustained temporary aggravated degenerative disc disease from the 2006 injuries but that this had resolved no later than the time of his examination. Dr. Swartz opined that she had recovered from the lumbar straining injury. He opined that, as there were no objective findings of disability and normal findings on examination, no further treatment was necessary and there were no residuals from the work injury. Dr. Swartz indicated that appellant's continuing subjective symptoms were not due to the accepted work injuries.

The Board finds that Dr. Swartz's report represents the weight of the medical evidence and that the Office properly relied on his report in terminating appellant's compensation benefits on September 13, 2007. Dr. Swartz's opinion is based on proper factual and medical history as he reviewed a statement of accepted facts and referenced appellant's prior treatment. He also related his comprehensive examination findings in support of his opinion that all work-related conditions had resolved.

While the record contains reports from Dr. Elkanich dated between February 9 and August 15, 2006 that provide some support for continuing causal relationship, these reports are insufficient to create a conflict or overcome Dr. Swartz's report. Dr. Elkanich's August 15, 2006 report opined that appellant's condition was work related, and he noted that appellant was totally disabled between July 31 and August 23, 2006 and partially disabled beginning August 23, 2006 with the ability to resume light duty. However, he did not explain whether appellant's disability continued to be caused by a work-related injury or was due to a preexisting medical condition.⁹ Additionally, Dr. Kim's reports noted treatment for low back pain, lumbar radiculopathy and chronic pain syndrome, but did not address the cause of any of these conditions.¹⁰

There was no other medical evidence contemporaneous with the termination of appellant's benefits which supported that appellant had any continuing employment-related condition. Consequently, at the time the Office terminated benefits, on September 13, 2007, the weight of the medical evidence rested with Dr. Swartz and established that appellant had no

⁹ *T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship, which is unsupported by medical rationale).

¹⁰ *S.E.*, 60 ECAB ___ (Docket No. 08-2214, issued May 6, 2009) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

residuals due to her accepted lumbar radiculitis condition or lumbar sprain and strain. Therefore, the Office met its burden of proof to terminate appellant's compensation benefits.

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to the claimant. To prevail, the claimant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability, which continued after termination of compensation benefits.¹¹

Subsequent to the Office's termination of benefits, appellant requested a review of the written record and submitted Dr. Elkanich's September 10, 2007 report, which supported that her employment-related conditions had not resolved and that she also had a work-related aggravation of her degenerative disc disease at L4-5. Consequently, the hearing representative properly found, on November 13, 2007, that, subsequent to the proper termination of benefits, Dr. Elkanich's September 10, 2007 report created a conflict in the medical evidence with the report of Dr. Swartz who found no continuing work-related conditions. The Office properly referred appellant to Dr. Serfustini for a referee evaluation to resolve the conflict in medical opinion as to whether appellant had any employment-related residuals of her lumbar conditions. However, the Board finds that Dr. Serfustini's opinion is insufficient to resolve the conflict in medical opinion over whether appellant continues to have residuals of her employment-related conditions.

In a March 27, 2008 report, Dr. Serfustini indicated that accident-related diagnoses consisted of lumbosacral sprain/strain, soft tissue injury and aggravated degenerative disc disease at L4-5 with continued symptoms. However, he did not identify lumbar radiculitis as an accepted condition. Although this report provided some support for continuing causal relationship, it contained inconsistent statements that both supported and negated continuing residuals of appellant's work-related condition. For example, Dr. Swartz opined that appellant's degenerative disc disease was related to and aggravated by her employment activities. He subsequently stated that this degenerative condition had no direct relationship to either the 2005 or 2006 injuries as it was based on a natural aging process. In addition, Dr. Swartz advised that appellant could not return to full duty as it would increasingly aggravate her preexisting L4-5 condition but he also noted that appellant had no preexisting or work-related disability as she was working full time with modifications.

In light of these unexplained inconsistencies, the Office properly requested clarification from Dr. Serfustini on April 30, 2008 regarding whether the diagnosed conditions related to the 2005 or 2006 injuries and if there were residuals from either injury.¹² It also inquired as to whether the work-related degenerative disc disease aggravation was temporary or permanent. However, Dr. Serfustini's May 19, 2008 supplemental report did not clarify his previous report or clearly address the Office's inquiry. He generally referred to the injuries by the date of the

¹¹ *I.J.*, *supra* note 4.

¹² *B.P.*, 60 ECAB ____ (Docket No. 08-1457, issued February 2, 2009) (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, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report).

claim rather than refer to any specific diagnosed conditions. Dr. Serfustini also did not clearly explain how any of the diagnosed conditions were employment related. He also did not explain how lumbosacral spine flare-ups were residuals attributable to the 2006 injury. In the Office's May 21, 2008 request for further clarification, it inquired whether appellant's lumbar radiculitis or lumbar sprain/strain conditions had resolved. It also requested that Dr. Serfustini explain the basis of his opinion indicating permanent aggravation of a preexisting degenerative disc disease at L4-5. However, Dr. Serfustini's June 2, 2008 report also lacked clear and direct answers as he qualified his finding of radiculitis by indicating it was a clinical, rather than neurodiagnostic diagnosis. He also opined that, although he previously reported permanent aggravation of appellant's lumbar spine, this finding was based on appellant's unsuccessful attempts to return to her usual work duties and not on objective findings. Additionally, Dr. Serfustini opined that appellant's soft tissue injury from 2006 had resolved, despite the fact that the soft tissue injury was not an accepted condition.

Based on the unexplained inconsistencies in Dr. Serfustini's reports, his opinion is insufficient to resolve the conflict in medical opinion. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming, or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question. Unless this procedure is carried out by the Office, the intent of section 8123(a) will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.¹³ Accordingly, the case must be remanded to the Office for referral to another impartial medical specialist to resolve the issue of whether appellant has any continuing employment-related residuals of her lumbar conditions. Following this and such other development as is deemed necessary, the Office shall issue an appropriate merit decision regarding appellant's entitlement to compensation benefits.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on September 13, 2007. The Board further finds that the case is not in posture for decision regarding whether appellant has any employment-related residuals of her low back conditions after September 13, 2007 and must be remanded to the Office for further development.

¹³ *I.H.*, 60 ECAB ____ (Docket No. 08-1352, issued December 24, 2008).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated December 10 and June 5, 2008 are affirmed in part and set aside and remanded in part for further actions consistent with this decision.

Issued: December 15, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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