



through 31, 1999.<sup>1</sup> The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.<sup>2</sup>

By decision dated October 4, 2006, the Office set aside its prior decisions denying appellant's claim for wage-loss compensation for the periods March 1 through 4, July 6 through 22 and December 9 through 31, 1999 and paid her appropriate compensation. It found that a June 6, 2006 medical report of Dr. Rudyard U. Smith, a Board-certified internist, was sufficient to establish that she was totally disabled during the claimed periods.

On February 23, 2007 appellant filed claims for compensation for the period commencing January 1, 2000. By letter dated March 13, 2007, the Office advised her of the factual and medical evidence needed to establish her claim.

In a March 24, 2007 medical report, Dr. Ranjit S. Wahl, an attending pain medicine specialist, opined that appellant had residuals of her November 19, 1997 employment-related back condition. He advised that she sustained a recurrence of disability commencing December 9, 1999 and that she could not perform her limited-duty position. Dr. Wahl stated that appellant's work factors caused and contributed to her disabling and current conditions. He stated that her limited-duty position which included prolonged sitting, throwing mail in a case, stamping mail and carrying light trays of mail, were the triggering factors of her disability. Dr. Wahl characterized appellant's duties as excessive as they required movements of appellant's lower back that were repetitious. He stated that based on these work factors the subsequent progression of her November 19, 1997 employment injury was inevitable.

By letter dated May 8, 2007, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Edward S. Forman, an orthopedic surgeon, for a second opinion medical examination. In a May 10, 2007 report, Dr. Forman found that she sustained a lumbar strain. He opined that the accepted employment injury temporarily aggravated appellant's preexisting back condition. Dr. Forman advised that, although she could not perform her preinjury position, she could perform limited-duty work with restrictions. He stated that appellant's subjective complaints outweighed his objective

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<sup>1</sup> Docket No. 04-1839 (issued January 27, 2005).

<sup>2</sup> On November 19, 1997 appellant, then a 37-year-old distribution clerk, sustained a lumbar sprain and a contusion on the right side of her body when her foot became caught in a rug and she fell. The Office accepted the claim for a lumbar strain. Appellant returned to full-duty work on February 2, 1998 and two days later she was placed on limited duty. The Office subsequently paid her wage-loss compensation for intermittent total disability. On October 28, 1999 appellant accepted the employing establishment's job offer for a full-time limited-duty distribution clerk position and worked intermittently. The position did not require lifting, stooping, bending and overhead reaching and standing more than five minutes. Appellant was allowed to use a chair with back support. On June 21, 2001 the employing establishment issued a notice of removal due to her absence without official leave. On August 22, 2001 appellant was separated from the employing establishment.

findings on physical examination. Dr. Forman noted that, following the examination, she got up and walked out of his office without any discomfort, carrying her cane.<sup>3</sup>

On September 12, 2007 the Office found a conflict in the medical opinion evidence between Dr. Wahl and Dr. Forman as to whether appellant had any continuing employment-related residuals or disability. By letter dated September 21, 2007, it referred her, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Edward J. Goldberg, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a November 26, 2007 report, Dr. Goldberg reviewed the history of appellant's November 19, 1997 employment injury and medical treatment. On physical examination, he reported that she appeared to be in mild distress. Appellant gait was slightly bizarre and antalgic. Dr. Goldberg reported 5/5 motor strength from L3-S1, a negative straight leg raise for radicular pain and diminished sensation in the right L5 distribution compared to all the dermatomes at L3-S1. He stated that appellant's Achilles and patellar reflexes were 2+. Appellant's lumbar spine had 50 degrees of flexion with pain, 20 degrees of extension and 20 degrees of bilateral bending. Dr. Goldberg found no atrophy or long tract findings. He reviewed an October 31, 2007 magnetic resonance imaging (MRI) scan which showed minimal disc degeneration with a small annular tear at L5-S1 and no herniation or stenosis. Dr. Goldberg stated that the November 24, 1997 employment injury may have aggravated appellant's preexisting degenerative disc disease. He believed that her original pain was due to the work-related injury and that it appeared to be permanent in nature secondary to her ongoing symptoms. Dr. Goldberg stated that he could not comment on whether the aggravation was temporary in nature as he evaluated appellant approximately 10 years following the accepted employment injury. He opined that she could not return to her original position which required her to lift 70 pounds. Dr. Goldberg advised that appellant could return to work in a position with a 15-pound lifting restriction based on the August 14, 2007 FCE results.

By letter dated March 5, 2008, the Office issued a notice of proposed termination of compensation based on Dr. Goldberg's medical opinion. It provided 30 days in which appellant could respond to this notice.

An October 31, 2007 MRI scan report of Dr. Ann M. Kieran, a Board-certified radiologist, stated that appellant sustained minimal disc protrusion at L4-5 and L5-S1 with evidence of neural compromise. Dr. Kieran noted that the MRI scan was otherwise essentially negative.

In a March 17, 2008 letter, appellant contended that the Office failed to establish that her work-related injury had resolved. She also alleged that Dr. Smith's June 6, 2006 report and the

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<sup>3</sup> Dr. Forman recommended a functional capacity evaluation (FCE), which was performed on August 14, 2007, to evaluate appellant's lifting functions for permanent restrictions secondary to her chronic low back pain. The FCE revealed that, based on the inconsistency in appellant's performance during the test, a true functional profile could not be determined. It was determined that she could perform sedentary light level work. Appellant was limited to lifting 15 pounds occasionally and 10 pounds or less frequently. She could sit for 1 to 2 hours, stand for 20 to 30 minutes and walk short distances with breaks.

employing establishment's withdrawal of her limited-duty position established that she sustained a recurrence of disability causally related to her accepted employment injury. Appellant alleged that Dr. Forman's May 10, 2007 report was speculative regarding the nature of the aggravation of her back condition. She also stated that he failed to offer an opinion as to whether her accepted work-related injury had resolved or whether her disabilities were no longer related to this injury. Appellant contended that Dr. Goldberg's November 28, 2007 report established that she continued to suffer from residuals of her accepted employment injury.

By decision dated April 23, 2008, the Office terminated appellant's compensation for wage loss effective that date, but found that she was entitled to continuing medical treatment for her accepted employment injury.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>4</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>5</sup>

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>6</sup>

The Office accepted appellant's claim for a lumbar strain.

### **ANALYSIS**

The Office found that a conflict in the medical opinion evidence arose between Dr. Wahl, an attending physician, and Dr. Forman, an Office referral physician, as to whether appellant had any continuing residuals or disability causally related to her accepted November 19, 1997 employment injury. Dr. Wahl opined that appellant suffered from continuing employment-related residuals and disability. Dr. Forman opined that appellant's employment-related injury temporarily aggravated her preexisting back condition and that she could return to limited-duty work with restrictions.

The Office properly referred appellant to Dr. Goldberg as the impartial medical specialist. The Board finds, however, that Dr. Goldberg's report is insufficient to establish that appellant had no further employment-related residuals or disability effective April 23, 2008. In a November 26, 2007 report, Dr. Goldberg reviewed a history of appellant's November 19, 1997

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<sup>4</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>5</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>6</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001).

employment injury and medical treatment. On physical examination, he stated that she appeared to be in mild distress and she had a slightly bizarre and antalgic gait. Dr. Goldberg reported limited range of motion and diminished sensation of the lumbar spine. He also reported a negative straight leg raise for radicular pain and no atrophy or long tract findings. Dr. Goldberg stated that the October 31, 2007 MRI scan demonstrated minimal disc degeneration with a small annular tear at L5-S1. He stated that there was no evidence of herniation or stenosis. After reporting his essentially minimal findings on physical and objective examination and reviewing appellant's medical records, Dr. Goldberg opined that the November 24, 1997 employment injury may have aggravated appellant's preexisting degenerative disc disease. Appellant's original pain was due to the work-related injury and appeared to be permanent in nature secondary to her ongoing symptoms. Dr. Goldberg could not comment on whether the aggravation was temporary in nature as he evaluated appellant approximately 10 years following the accepted employment injury. Although appellant could not return to her original position, which required her to lift 70 pounds, she could return to work in a position with a 15-pound lifting restriction based on the August 14, 2007 FCE results.

Dr. Goldberg opined that appellant could work with a lifting restriction. He did not find that appellant no longer had residuals of her accepted employment-related lumbar strain. Additionally, Dr. Goldberg opined that, although he could not determine whether the aggravation of appellant's preexisting degenerative disc disease by the accepted employment injury was temporary in nature, her continuing and permanent pain was due to the accepted employment injury. He set forth work restrictions due to her accepted employment injury and found that she continued to experience employment-related residuals. Dr. Goldberg's opinion does not support the termination of appellant's compensation benefits. The Office failed to meet its burden of proof to establish that appellant had no employment-related residuals or disability effective April 23, 2008.

### **CONCLUSION**

The Board finds that the Office improperly terminated appellant's compensation for wage loss effective April 23, 2008.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 23, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 29, 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