



1992 he injured his back moving heavy trash bags filled with asbestos.<sup>1</sup> The Office accepted his claim for lumbosacral strain on November 13, 1992. On March 1, 1993 it entered appellant on the periodic rolls.

Dr. Merylee E. Werthan, a Board-certified neurologist, found in a December 18, 1992 report, that a November 24, 1992 magnetic resonance imaging (MRI) scan showed a small L3-4 herniated disc. He noted that this herniation was not present on appellant's July 23, 1991 MRI scan. Dr. Werthan also diagnosed degenerative disc disease at L3-4, L4-5 and L5-S1.

The Office referred appellant for a second opinion evaluation with Dr. Stephen M. Horowitz, a Board-certified orthopedic surgeon, who examined appellant on June 13, 1994 and reviewed the diagnostic testing. Dr. Horowitz diagnosed strain superimposed on degenerative arthritis of the lumbar spine and found symptom-magnification during the examination. The Office referred appellant for an impartial medical examination with Dr. Herbert Stein, a Board-certified orthopedic surgeon, who reported on October 18, 1994 that appellant's current diagnoses were herniated disc at L3-4 and degenerative disc disease at L3-4, L4-5 and L5-S1. Dr. Stein opined that appellant was restricted from heavy lifting and concluded that he had no surgical lesion.

The Office terminated appellant's compensation benefits effective January 2, 2000 by decision dated December 20, 1999 based on the findings of Dr. Martin A. Blaker, a Board-certified orthopedic surgeon, acting as an impartial medical examiner. The Branch of Hearings and Review affirmed on September 5, 2000. The Office declined to reopen appellant's claim for merit review on June 8, 2001. The Board reviewed these decisions and found that the Office had failed to meet its burden of proof to terminate appellant's compensation benefits because of the impartial medical examiner's previously documented incidents of perjury. The Board reversed the Office's September 21, 2000 decision.<sup>2</sup>

On October 15, 2003 the Office made a preliminary determination that appellant had forfeited his compensation benefits for the period July 7, 1997 to October 7, 1998 in the amount of \$28,928.26. The Branch of Hearings and Review affirmed the findings of fact and amount of overpayment and denied waiver on October 26, 2004. The Board issued a decision and order on June 17, 2005 which found that appellant had received an overpayment of compensation because of underwithholding of life insurance contributions between November 28, 1992 and January 1, 2000, that he forfeited his compensation benefits from July 7, 1997 to October 7, 1998, and that appellant received an overpayment of \$28,928.36 due to this forfeiture for which he was at fault.<sup>3</sup> The Board remanded the claim for the Office to determine the amount of the overpayment attributable to underwithholding life insurance premiums. The facts and the circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

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<sup>1</sup> Appellant had a previous employment injury on October 7, 1992 when he slipped and fell down 14 steps landing on his back.

<sup>2</sup> Docket No. 01-1661 (issued June 30, 2003).

<sup>3</sup> Docket No. 05-310 (issued June 17, 2005).

The Office issued a final overpayment decision on October 27, 2005 finding that appellant had received an overpayment in the amount of \$912.55 due to the underwithholding of life insurance premiums. It determined that appellant was without fault in the creation of the overpayment, but that waiver was not warranted.

Appellant's attending physicians Dr. Jerry London and Marry Montague, osteopaths, continued to support appellant's disability for work covered by his accepted employment injuries. These physicians diagnosed lumbar myositis, sciatic radiculopathy and sacroiliitis. Appellant was treated with massage therapy and injections. The Office referred him for a second opinion evaluation on February 8, 2007 with Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon. In a March 7, 2007 report, Dr. Hanley described appellant's accepted employment injury and noted that, although his claim was accepted for a lumbar strain, his MRI scan had supported a right disc herniation. On physical examination, appellant had limited range of motion of his low back and Dr. Hanley diagnosed degenerative lumbar disc disease. He stated, "[Appellant's] presentation today is not the presentation of a residual lumbosacral strain but rather the presentation of someone with degenerative disc disease which is progressive and associated with the aging process. It is my belief that he had long since recovered from any lumbosacral strain that might have occurred." Dr. Hanley stated that appellant could return to work if only his employment injury was involved. Appellant's degenerative disc disease prevented him from working. Dr. Hanley opined that appellant's current medical treatment regime was not appropriate either for the accepted condition or for chronic degenerative disc disease.

The Office also referred appellant for a psychiatric second opinion, with Dr. Maurie D. Pressman, a Board-certified psychiatrist, on March 15, 2007. In his March 30, 2007 report, Dr. Pressman diagnosed major depressive disorder, single episode, severe. He noted that appellant had experienced suicidal ideation and risk. Dr. Pressman attributed this to appellant's employment injury and found him totally disabled for any kind of work. He recommended treatment with antidepressant and anti-anxiety medication as well as psychotherapy. The Office requested a supplemental report and on April 11, 2007, Dr. Pressman again opined that psychological factors could produce very real pain and downhill course even if the underlying physical injury has resolved. The Office accepted appellant's claim for major depressive disorder on April 17, 2007. Dr. Harry A. Doyle, a Board-certified psychiatrist, supported this diagnosis in a report dated May 1, 2007.

The Office found a conflict of medical opinion evidence between appellant's attending physicians and Dr. Hanley, the second opinion physician, and on June 18, 2007 referred appellant for an impartial medical examination with Dr. Bong S. Lee, a Board-certified orthopedic surgeon. On June 20, 2007 appellant's attorney requested information about Dr. Lee's selection as the impartial medical examiner and alleged that claimants were being "hand-picked" to be examined by physicians with known biases.

The record contains a screen printout that Dr. Stuart Tager, a Board-certified orthopedic surgeon, was bypassed as he was "not available at this time." Dr. Theodore Ganley, a Board-certified orthopedic surgeon, was bypassed as he was a "children d[octo]r" Dr. John Garland, a Board-certified orthopedic surgeon, was bypassed as he had no impartial medical examiner appointments.

Dr. Lee's report, dated July 10, 2007, described appellant's history of injury and reviewed the medical history. On examination, he found limited range of motion of the low back with normal strength and sensory examination of the lower extremities. Dr. Lee noted that appellant's x-rays demonstrated early degenerative change in the mid and lower lumbar spine and that a November 24, 1992 MRI scan demonstrated L3-4 disc herniation which was not evident on a computerized tomography scan of July 23, 1991. He opined that appellant's initial employment injury was a lumbar sprain superimposed on preexisting degenerative discogenic disease. Dr. Lee stated that L3-4 disc herniation was preexisting and was not caused by the employment incident. He found that appellant failed to demonstrate clinical evidence of lumbar radiculopathy and he concluded that appellant's original sprain had resolved with no residuals. Dr. Lee concluded that appellant did not require any further medical treatment for his orthopedic injuries sustained on October 7, 1992. He stated, "His present diagnosis of degenerative discogenic disease is not medically connected to the work injury by direct cause, aggravation, precipitation or acceleration, but is from a normal aging condition."

In a report dated July 17, 2007, Dr. Boris Nemirovsky, a physician Board-certified in pain management, conducted electrodiagnostic studies of both lower extremities which were suggestive of bilateral chronic radiculopathy at L4 and L5. He recommended additional neurologic evaluation.

The Office proposed, by letter dated September 13, 2007, to terminate appellant's medical benefits due to his orthopedic condition based on Dr. Lee's report. Appellant's attorney responded on October 11, 2007 and alleged that the Office was not properly selecting impartial medical examiners. Appellant's counsel stated that the list of appropriate physicians was inadequate and that appellant had received his appointment in advance of another claimant. He reported his concern that the Office was "mixing and matching the selection of physicians with claimants." By decision dated November 19, 2007, the Office terminated appellant's medical benefits due to his orthopedic condition effective November 25, 2007 based on Dr. Lee's report.

Appellant, through his attorney, requested a review of the written record on November 25, 2007. He alleged that Dr. Lee was not appropriately selected using the Office rotational system and the physicians directory system. Appellant's attorney also alleged that the medical evidence established that appellant had sustained a herniated disc as a result of his accepted employment injury, citing Dr. Stein's 1994 report. By decision dated November 6, 2008, the hearing representative found that the Office met its burden of proof to terminate appellant's medical and compensation benefits for his orthopedic conditions based on Dr. Lee's report. The hearing representative found that Dr. Lee was properly selected, that the Office had never accepted that appellant sustained a herniated disc causally related to his employment injury and that he had no orthopedic residuals from his 1992 employment injury.

On appeal, appellant's attorney again alleged that Dr. Lee was not properly selected as the impartial medical examiner. He also argued that in 1994 Dr. Stein found that appellant's claim should be accepted for herniated disc and aggravation of degenerative disc disease. Appellant's attorney argued that the termination should be reversed and the case updated to include additional conditions.

## 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 establishing that disability ceased or that it was no longer related to the employment.<sup>5</sup> Its burden of proof in termination compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement of disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which require further medical treatment.<sup>7</sup>

## ANALYSIS

The Office accepted that appellant sustained a lumbar strain as a result of his October 15, 1992 employment injury. On appeal and before the Branch of Hearings and Review, appellant's attorney alleged that the Office should have accepted appellant's claim for the additional condition of herniated disc at L3-4 based on the report of Dr. Stein, a Board-certified orthopedic surgeon, selected to resolve a conflict of medical opinion evidence in 1994. The conflict Dr. Stein was asked to resolve involved different diagnoses and opinions regarding the physical condition of appellant's spine. Dr. Werthan identified a herniation at L3-4. Dr. Horowitz found only a strain superimposed on degenerative arthritis. He did not identify a herniation. Dr. Stein provided diagnoses of herniated disc at L3-4 and degenerative disc disease at L3-4, L4-5 and L5-S1. He further opined that appellant was restricted from heavy lifting and concluded that appellant had no surgical lesion. Dr. Stein's impartial medical examination report does not purport to address whether appellant's herniated disc was caused or aggravated by his employment injury. The report does not provide any statement on causal relationship. Dr. Stein's report merely contains a diagnosis without an opinion as to causation. There is no evidence showing that the Office has accepted appellant's herniated disc as a result of the 1992 employment injury, Dr. Stein's report is not sufficient to require the Office to do so.

Appellant's attending physicians, Drs. London and Montague, osteopaths, continued to support appellant's disability for work and ongoing medical conditions due to his accepted injury of lumbar strain. The Office referred appellant for a second opinion evaluation with Dr. Hanley, a Board-certified orthopedic surgeon, who found that appellant had no ongoing disability or medical residuals of his accepted condition. The Federal Employees' Compensation 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>8</sup> The implementing regulations state that, if a conflict exists

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<sup>4</sup> *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

<sup>5</sup> *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

<sup>6</sup> *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001).

<sup>7</sup> *Mary A. Lowe*, *supra* note 5.

<sup>8</sup> 5 U.S.C. §§ 8101-8193, 8123.

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>9</sup> The Board finds that the Office properly determined that there was a conflict of medical opinion evidence between appellant's attending physicians and the second opinion physician regarding appellant's continuing disability and medical residuals. In order to resolve this conflict of medical opinion evidence the Office referred appellant to Dr. Lee, a Board-certified orthopedic surgeon to act as the impartial medical examiner.

Appellant's attorney objected to the selection of Dr. Lee on the grounds that he was not selected in accordance with the Office's procedures. 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>10</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>11</sup> The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.<sup>12</sup> The PDS database of physicians is obtained from the American Board of Medical Specialties (ABMS) which contains the names of physicians who are Board-certified in certain specialties.

The Board has required, "An appropriate notation should be made in the Directory when a specialist indicates his/her unwillingness to accept a case or when, for other valid reasons (other than a previous connection with the claim under consideration) it is not advisable or practicable to use his/her services."<sup>13</sup>

The Office bypassed three Board-certified orthopedic surgeons prior to determining that Dr. Lee should act as the referee physician in this case. The record establishes that Dr. Tager, a Board-certified orthopedic surgeon, was "not available at this time" and was therefore bypassed. The Office bypassed Dr. Ganley, a Board-certified orthopedic surgeon, as he was a "children

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<sup>9</sup> 20 C.F.R. § 10.321.

<sup>10</sup> *B.P.*, 60 ECAB \_\_\_\_ (Docket No. 08-1457, issued February 2, 2009).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7 (September 1995, May 2003).

<sup>13</sup> *David Peisner*, 39 ECAB 1167 (1988).

d[octo]r” It also bypassed Dr. Garland, a Board-certified orthopedic surgeon, as he had no impartial medical examiner appointments. In each instance, the Office utilized the PDS and recorded an appropriate notation explaining why it was not appropriate or practicable to use the physicians bypassed. The Board finds that there is no evidence that Dr. Lee was not appropriately selected as the impartial medical specialist in this case.

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>14</sup> Dr. Lee provided a detailed report based on a proper factual and medical background. He opined that appellant’s initial employment injury was a sprain of the lumbar spine which was superimposed on preexisting degenerative discogenic disease. Dr. Lee opined that L3-4 disc herniation was not the result of the 1992 employment incident, a preexisting condition resulting from appellant’s degenerative disc disease. He stated that appellant’s degenerative disc disease was not causally related to the employment injury, but was due to aging. Dr. Lee also found that appellant failed to demonstrate clinical evidence of lumbar radiculopathy. He concluded that appellant’s original sprain had resolved with no residuals and that appellant’s current work restrictions were not due to his accepted employment injury, but instead to the aging process. Dr. Lee opined that appellant require no further medical treatment for his orthopedic injuries sustained on October 7, 1992.

The Board finds that Dr. Lee was properly selected as the impartial medical specialist and that his report is entitled to special weight. Dr. Lee provided findings on physical examination a complete medical history and offered medical reasoning for his conclusions that appellant had no medical residuals or disability due to the accepted condition of lumbar strain. He found that appellant had no clinical signs of radiculopathy and offered his medical opinion that appellant’s degenerative disc disease was the cause of appellant’s herniated disc and that this condition was not causally related to appellant’s accepted employment injury in 1992. For these reasons, the Board finds that the Office met its burden of proof to terminate appellant’s compensation and medical benefits.

### **CONCLUSION**

The Board finds that the Office met its burden of proof to terminate appellant’s compensation and medical benefits, effective November 25, 2007, because the residuals from his accepted condition of lumbar strain had resolved.

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<sup>14</sup> *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

**ORDER**

**IT IS HEREBY ORDERED THAT** November 6, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 16, 2009  
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