

Appellant worked intermittently thereafter. The Office accepted his claim for aggravated lumbar degenerative disc disease. It paid appellant appropriate compensation.

In a March 16, 2007 attending physician's report, Dr. Richard Larson, Board-certified in family medicine, noted that appellant had injured his back "some years ago" in a motor vehicle accident that resulted in lumbar degenerative disc disease and L4-5 nerve root impingement. He stated that appellant was treated for the accident at a Veterans Affairs (VA) hospital. Dr. Larson noted that appellant was injured at work on two occasions. He diagnosed degenerative disc disease with left radiculopathy, lumbar spine chronic back pain and multiple back injuries. Dr. Larson found that appellant was partially disabled from January 5 to February 5, 2007 and totally disabled since March 5, 2007. He advised that appellant was unable to resume any form of work. In April 11 and July 23, 2007 reports, Dr. Larson reiterated that appellant was permanently disabled.

In an April 2, 2007 statement, appellant advised that he was injured on November 1, 2006 when "nerves burnt in his back at the VA Hospital." On November 29, 2006 he was hit in the back by an all-purpose container (APC) full of mail, but he did not stop work.¹ Appellant reported being struck on the front left side of his hip on December 13, 2006 by a hamper of mail. He submitted additional reports from Dr. Larson.

On November 20, 2007 the Office referred appellant with a statement of accepted facts to Dr. Richard Sheridan, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a January 28, 2008 report, Dr. Sheridan examined appellant's lumbar spine and found normal sitting and standing stations and no abnormal rotation or flexion. He also noted that appellant walked with a left leg limp. Upon examination of the lower extremities, Dr. Sheridan found that supine straight leg raising signs elicited complaints of low back pain on the respective sides. He also found full motion of the hip and no evidence of alopecia or pedal edema. Dr. Sheridan reviewed appellant's lumbar spine x-ray from April 13, 2007 that revealed broad left paracentral disc protrusion at L5-S1. He opined that there were no objective findings to support residuals from the accepted medical condition which had resolved without residuals. Dr. Sheridan stated that appellant's symptoms were indicative of a temporary aggravation that had subsided. He advised that there were no objective findings to support disability from the compensable injury and that appellant was able to perform his regular duties as a mail handler with respect to the accepted condition. Dr. Sheridan opined that there was no need for further treatment of the accepted injury.

In a March 26, 2008 duty status report, Dr. Larson found muscle spasm and pain to the left hip, upper thigh and left buttock. He found that appellant had lost 90 percent range of motion of his lumbosacral spine and advised that appellant could not perform his job even with restrictions. On June 3, 2008 Dr. Larson opined that appellant's upcoming consultation with an

¹ Appellant alleges that he filed a traumatic injury claim for the November 29, 2006 incident. However, the record contains no evidence pertaining to any such claim.

independent medical examiner, an orthopedist, was inappropriate as appellant had a neurologic, muscular and soft tissue problem, not an orthopedic problem.²

On May 13, 2008 the Office referred appellant with a statement of accepted facts to Dr. Edward Kahn, a Board-certified orthopedic surgeon, for a referee examination to resolve the conflict in medical opinion between Drs. Larson and Sheridan regarding appellant's work-related residuals and disability.

In a July 3, 2008 report, Dr. Kahn provided a detailed summary of appellant's injury and medical treatment. He noted that appellant was struck by a container of mail while at work on November 29 and December 13, 2006. Dr. Kahn also noted that appellant reported being involved in a motor vehicle accident in May 2004 from which he developed low back pain and left leg pain that were essentially the same as he currently experienced except worse. Appellant reported that he was treated for a motor vehicle accident in June 2004 at the VA Hospital and continued to be treated for chronic pain, including epidural and facet joint injections. Dr. Kahn noted that appellant's low back pain preceded his work-related injury. He noted that appellant complained of low back pain localized primarily to the left buttock and front and back thigh pain that tingled into his left foot. Upon examination, Dr. Kahn found that appellant walked with an exaggerated limp using a cane and could not heel or toe walk secondary to complaints of pain. Appellant's back was straight with normal lumbar lordosis, but that palpation elicited pain out of proportion to the amount of pressure applied to the skin. Palpation did not reveal any muscle spasm. Dr. Kahn reported that applied axial pressure elicited loud complaints of pain localized to the low back, but that during the examination appellant was able to twist around several times to show exactly where the back pain was located. Manual muscle testing of dorsiflexors and plantar flexors of the ankle were normal.

Dr. Kahn reviewed the x-rays of record and found that disc spaces were generally well maintained with no instability or fractures. A lumbar spine magnetic resonance imaging (MRI) scan from May 13, 2007 showed mild degeneration of the L5-S1 disc with facet arthropathy at L5-S1 and some narrowing of neural foramen on the left side. A repeat MRI scan dated April 7, 2008 showed mild degeneration of L5-S1 disc and some narrowing of neural foramen on the left side secondary to facet overgrowth. Dr. Kahn diagnosed lumbar sprain. He advised that neither of the accepted work incidents caused a new onset of pain but an exacerbation of a preexisting problem from the May 2004 motor vehicle accident. Dr. Kahn noted signs of symptom magnification and an inconsistent physical examination with grossly positive Waddell signs. While appellant had some degree of pain, it was difficult to determine what was real. The MRI scans were primarily degenerative with no acute processes occurring and did not correlate with appellant's subjective complaints. Dr. Kahn advised that there were no objective findings to support residuals from appellant's accepted condition as his complaints related to preexisting problems following the May 2004 motor vehicle accident. He found no evidence of ongoing injury as a result of the November 29 or December 13, 2006 incidents at work. Dr. Kahn advised that complaints related to the motor vehicle accident should have been resolved by this time. He determined that appellant's work capacity was unsupported by objective findings as his psychosocial overlay clouded whether he could return to work. Dr. Kahn stated that a functional

² Dr. Larson retired on June 13, 2008. Dr. Shelley Stanko, Board-certified in family medicine, became his new treating physician beginning August 2008.

capacity evaluation would not be beneficial as it would find the same inconsistencies making it impossible to determine appellant's actual work capacity. He concluded that there were no residuals of either the November or December 2006 injuries. Appellant's ongoing complaints were based on the 2004 motor vehicle accident injury for which he recommended continued pain treatment and psychological counseling. Ongoing medical treatment for the accepted injury was not necessary.

On August 12, 2008 the Office issued a notice of proposed termination of compensation benefits, finding that the weight of medical evidence, resting with Dr. Kahn, established that the accepted medical condition had resolved without the need for additional medical treatment.

In an August 12, 2008 duty status report, Dr. Stanko diagnosed degenerative disc disease with radiculopathy. She determined that appellant was not able to work. In a work status report, Dr. Stanko noted that appellant was excused from work indefinitely due to his work-related injury.

On August 28, 2008 appellant disagreed with the proposed termination. He noted that the 2004 motor vehicle accident occurred two and a half years prior to the November 2006 work injury at which time his problems had stabilized allowing him to perform his usual job. Appellant also noted continuing treatment at the VA Hospital for pain but never sought treatment there for his work injuries. He objected to the manner in which the second opinion and referee examinations were conducted.

In a September 26, 2008 decision, the Office terminated appellant's compensation benefits effective that date finding that the report of Dr. Kahn represented the weight of medical opinion.

On October 9, 2008 appellant requested a review of the written record. He objected to Dr. Kahn being considered the weight of medical opinion, asserting that he had not been properly examined. Appellant submitted reports from Dr. Stanko.

In an April 29, 2009 decision, an Office hearing representative affirmed the September 26, 2008 decision, finding the weight of the medical evidence properly rested with Dr. Kahn.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his 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.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ The right to medical benefits for

³ *Id.*; *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986).

⁵ *T.P.*, 58 ECAB 524 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

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.⁶

Section 8123(a) of the Act 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.⁷ When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.⁸

ANALYSIS

The Office properly determined that a conflict in medical opinion arose as to whether appellant had any disability or residuals due to his accepted lumbar degenerative disc disease. Appellant's treating physician, Dr. Larson, found that appellant was totally disabled from work due to residuals of his December 13, 2006 injury. He determined that appellant had chronic lumbar back pain, continued pain of the left hip, thigh and buttock and had lost 90 percent range of motion of his lumbar spine. On the other hand, the second opinion physician, Dr. Sheridan, advised that there were no objective findings to support residuals or disability from the accepted injury. He noted that the aggravation of appellant's condition had resolved without the need for further treatment. The Office properly referred appellant to Dr. Kahn for an impartial medical examination to resolve the conflict in medical opinion as to whether appellant had any continued disability or residuals due to the accepted lumbar condition.⁹

In a July 3, 2008 report, Dr. Kahn examined appellant and determined that he had no residuals from the accepted work injury. He reviewed the medical record, reported findings on examination and reviewed diagnostic testing. Dr. Kahn's examination revealed inconsistencies and symptom magnification as appellant's back was straight with normal lumbar lordosis but regarding palpation of the back he complained of pain out of proportion to the amount of pressure applied. During examination, appellant elicited loud complaints of pain when the physician applied axial pressure but appellant was able to twist around several times during examination to show where his back pain was located. Dr. Kahn noted that appellant walked with an exaggerated limp using a cane. Although the x-rays of record revealed mild degeneration of the L5-S1 disc, this finding did not correlate with appellant's subjective complaints as his disc spaces were generally well maintained with no instability or fractures. Furthermore, Dr. Kahn found that work injury caused a temporary exacerbation of a preexisting

⁶ *E.J.*, 59 ECAB ___ (Docket No. 08-1350, issued September 8, 2008).

⁷ *B.P.*, 60 ECAB ___ (Docket No. 08-1457, issued February 2, 2009).

⁸ *Y.A.*, 59 ECAB ___ (Docket No. 08-254, issued September 9, 2008).

⁹ See 5 U.S.C. § 8123(a) (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).

condition from the May 2004 motor vehicle accident. There were no objective findings to support residuals from appellant's accepted work injury and his ongoing complaints were due to his May 2004 injury. Dr. Kahn found that there was no evidence of acute injury as a result of the December 13, 2006 work injury and that appellant's incapacity to work was not due to residuals of his accepted condition. Appellant's ongoing symptoms and need for continued pain treatment were due to the motor vehicle accident and not to residuals of the December 13, 2006 work injury. Dr. Kahn's findings were based on proper factual and medical history as he had a statement of accepted facts and his report accurately summarized relevant medical evidence. He found no basis on which to attribute a continuing condition or disability to the December 13, 2006 work injury.

The Board finds that Dr. Kahn's opinion is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight¹⁰ and establishes that residuals of the employee's accepted conditions had resolved.

The Board also finds that medical evidence submitted by appellant after Dr. Kahn's report is insufficient to overcome the weight of his opinion or to create another conflict. Appellant submitted reports dated August 12, 2008 from Dr. Stanko that diagnosed degenerative disc disease with radiculopathy and advised that appellant was indefinitely unable to work due to his work-related injury. However, Dr. Stanko did not provide a reasoned or rationalized medical opinion supporting that appellant had any continuing condition or disability causally related to the accepted work injury.¹¹ She did not attempt to explain the reasons any continuing condition or disability would be causally related to the December 13, 2006 work injury that was accepted for aggravated lumbar degenerative disc disease. Consequently these reports are insufficient to overcome the report of Dr. Kahn or to create another conflict of medical opinion. Appellant did not provide any other additional medical evidence supporting a continuing work-related condition or disability.

For these reasons, the Office met its burden of proof to terminate appellant's compensation benefits effective September 26, 2008.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits for his lumbar condition effective September 26, 2008.

¹⁰ See *Y.A.*, 59 ECAB ___ (Docket No. 08-254, issued September 9, 2008) (when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight).

¹¹ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated April 29, 2009 and September 26, 2008 are affirmed.

Issued: August 11, 2010
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