



denied appellant's claim on the grounds that the medical evidence was not sufficient to meet his burden of proof. Appellant requested reconsideration and the Office denied modification of its prior decision on August 15, 2005. He again requested reconsideration and, by decision dated May 30, 2006, the Office declined to reopen his claim for consideration of the merits. Appellant appealed the merit and nonmerit decisions to the Board. In a November 6, 2006 decision, the Board found that appellant did not submit sufficient medical opinion evidence to establish a traumatic injury on March 11, 2004 and that the Office properly declined to reopen his case for review of the merits.<sup>1</sup> The facts of the case are set out in the Board's prior decision and incorporated herein by reference.

Appellant performed light-duty work from June 8 until October 1, 2005 when he elected disability retirement. In a report dated June 15, 2007, Dr. Christopher B. Ryan, Board-certified in physical medicine and rehabilitation, opined that appellant had experienced a worsening of his back condition and an aggravation of his underlying degenerative disc disease due to his employment activities of March 11, 2004. He identified appellant's back condition as the formation of scar tissue and the lack of articulations in the lumbar spine due to his surgical fusion. Dr. Ryan noted that due to the fusion, extra stresses were placed on appellant's sacroiliac joints and nonfused vertebra. He stated that walking down stairs had irritated appellant's facet and sacroiliac joints which were made more susceptible to injury by his surgeries. Dr. Ryan attributed appellant's permanently worsened back condition to the March 11, 2004 employment incident. He described the process of how walking down the stairs aggravated appellant's back condition through overuse. Appellant, through his attorney, subsequently requested reconsideration.

In a December 13, 2007 decision, the Office accepted appellant's claim for temporary aggravation of preexisting lumbar spondylosis, L4-S1. Appellant requested compensation benefits from September 1, 2005 through May 6, 2008. In a letter dated May 13, 2008, the Office requested additional information from appellant prior to addressing his claim for compensation.

On June 26, 2008 the Office referred appellant for a second opinion evaluation with Dr. John D. Douthit, a Board-certified orthopedic surgeon. In a July 25, 2008 report, Dr. Douthit described appellant's back condition and lumbar surgeries. He noted that appellant continued to experience back pain after surgeries in 1999, 2002 and 2003. Dr. Douthit described appellant's employment incident of walking down 544 steps when an elevator was broken in the air traffic tower. Appellant stated that, following this incident, he was no longer able to work as air traffic controller due to the medications prescribed and worked light duty. Dr. Douthit reviewed the medical history and performed a physical examination. He found that appellant was overweight and poorly conditioned with strong large quadriceps musculature and good powerful muscles in his legs. Dr. Douthit noted that appellant had no sensory loss with brisk reflexes and normal gait. He stated that appellant was tremulous when examined with pain behavior. Dr. Douthit found deconditioning of appellant's back musculature. He diagnosed a history of lumbar degenerative disc disease, lumbar fusion of L4 through S1 and multifactorial chronic pain syndrome as well as seroma and fibrosis of the lumbar spine. Dr. Douthit opined that appellant's

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<sup>1</sup> Docket No. 06-1524 (issued November 6, 2006).

pain was from preexisting back injuries and not related to the on-the-job injury. He stated that it was medically improbable that appellant experienced a permanent aggravation of the lumbar spine disease from walking down the stairs and only sustained a temporary aggravation of two weeks. Dr. Douthit stated that there were no physical findings or diagnostic tests which substantiated a permanent aggravation. He stated that there were no neurological findings to support appellant's chronic pain.

The Office proposed to terminate appellant's benefits in a letter dated August 14, 2008 based on Dr. Douthit's report. Appellant's attorney objected and asserted that there was a conflict of medical opinion evidence.

By decision dated February 2, 2009, the Office terminated appellant's compensation effective January 28, 2009.

Appellant requested an oral hearing that was held on June 25, 2009. He described the employment incident as well as his activity level before and after the injury.

On July 31, 2009 Dr. Ryan advised that appellant's March 11, 2004 work injury of walking down several flights of stairs caused an aggravation of his lumbar spondylosis from L4 to S1. He opined that this aggravation was permanent based on appellant's increased need for medication, his decreased activity level and changed sleeping pattern.

By decision dated September 8, 2009, the Office hearing representative affirmed the Office's February 2, 2009 decisions finding that Dr. Douthit's report was entitled to the weight of the medical evidence and established that appellant had sustained only a temporary aggravation of his underlying back condition. The hearing representative determined that the Office properly terminated appellant's entitlement to medical benefits effective January 28, 2009 and properly denied his claim for wage-loss compensation beginning September 1, 2005.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>2</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>3</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>4</sup>

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of the Federal Employees' Compensation Act which 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

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<sup>2</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>3</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>4</sup> *Id.*

appoint a third physician who shall make an examination and resolve the conflict of medical evidence.<sup>5</sup> 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.<sup>6</sup>

### ANALYSIS

The Office accepted that appellant sustained a temporary aggravation of preexisting lumbar spondylosis, L4-S1, on December 13, 2007. By decision dated February 2, 2009, the Office terminated appellant's compensation benefits effective January 28, 2009 relying on the report of Dr. Douthit, second opinion physician. He completed a report on July 25, 2008, reviewed appellant's history of injury and medical history and opining that appellant sustained only a temporary aggravation of his back condition which ceased within two weeks of the date of injury on March 11, 2004.

On appeal, appellant's attorney argued that there was an unresolved conflict of medical opinion evidence between Dr. Douthit, the Office's second opinion physician, and appellant's physician, Dr. Ryan. The Board finds that there is an unresolved conflict in medical opinion. Dr. Douthit provided a detailed opinion and concluded that the aggravation of appellant's back condition was temporary. Dr. Ryan also provided detailed reports finding that appellant sustained a permanent aggravation of his lumbar spine condition due to walking down several flights of stairs in the performance of duty. He described how the employment activity aggravated appellant's preexisting back fusion and opined that based on appellant's continuing need for medication, reduced activity level and changed sleep patterns that the aggravation continued and was permanent. Each physician based his report on a proper factual background and provided medical reasoning for the divergent conclusions. The Board finds that the reports are of equal weight and that there is an unresolved conflict of medical opinion. For this reason, the Office did not meet its burden of proof to terminate appellant's compensation benefits.

### CONCLUSION

The Board finds that the Office has not met its burden of proof to terminate appellant's benefits.

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<sup>5</sup> 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

<sup>6</sup> *R.C.*, 58 ECAB 238 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of Office of Workers' Compensation Programs dated September 8, 2009 is reversed.

Issued: November 4, 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