

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KURT E. HOSTETTER and DEPARTMENT OF COMMERCE,  
NATIONAL WEATHER SERVICE, Coral Gables, FL

*Docket No. 99-2490; Submitted on the Record;  
Issued February 17, 2000*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective March 28, 1998; and (2) whether appellant met his burden of proof to establish that he had any disability after March 28, 1998 causally related to his employment injury.

On February 18, 1994 appellant, then a 43-year-old electronics technician sustained an employment-related lower back strain and herniated discs at L4-5 and L5-S1. He stopped work that day, received appropriate continuation of pay and compensation and has not worked since.

The Office developed the claim and on October 23, 1995 referred appellant to Dr. Howard Kurzner, a Board-certified orthopedic surgeon, for a second-opinion evaluation. Finding that a conflict in the medical opinion existed between the opinions of Drs. Kurzner and Harris Mones, appellant's treating osteopathic physician, on February 7, 1997, the Office referred him to Dr. Elliot N. Lang, a Board-certified orthopedic surgeon, to resolve the conflict.<sup>1</sup> By letter dated September 18, 1997, the Office informed appellant that it proposed to terminate his compensation, based on the opinion of Dr. Lang. Appellant disagreed with the proposed termination and submitted additional reports from Dr. Mones. By decision dated March 18, 1998, the Office terminated his benefits, effective March 28, 1998, on the grounds that the work-related disability had ceased.

Appellant requested a review of the written record and submitted additional medical evidence. The record indicates, however, that the medical evidence was mailed to the district office and not to the Branch of Hearings and Review. In a decision dated October 7, 1998 and finalized on October 9, 1998, an Office hearing representative affirmed the prior decision, crediting the weight of the medical opinion to the impartial examiner, Dr. Lang. Appellant requested that the Branch of Hearings and Review reconsider this decision as the medical evidence submitted had not been considered and submitted additional medical evidence. In a

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<sup>1</sup> Both Drs. Kurzner and Lang were provided with the medical record and a statement of accepted facts that included the physical requirements of appellant's regular job duties.

decision dated June 3, 1999 and finalized June 4, 1999, the Office hearing representative affirmed the prior decisions. The instant appeal follows.

The Board finds that the Office met its burden of proof to terminate appellant's compensation.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.<sup>2</sup> Furthermore, 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>3</sup>

The medical evidence relevant to the termination of appellant's compensation includes a magnetic resonance imaging (MRI) scan dated March 14, 1994 that demonstrated a large ventral and left lateral disc herniation at L5-S1 and a small ventral disc herniation at L4-5. In an October 31, 1995 report, Dr. Kurzner, who provided a second opinion for the Office, advised that appellant showed almost no evidence of a neurological deficit. He stated that while the MRI scan showed changes on the left, appellant's reflex changes were on the right and concluded that from a clinical point of view, appellant could return to normal activity. A February 24, 1996 MRI scan of the lumbosacral spine demonstrated a small central herniated disc at L5-S1. Dr. Kurzner submitted a supplementary report dated April 24, 1996 in which he advised that he had compared the 1994 and 1996 MRI scans and that on the 1996 study, the large lesion seen in 1994 was no longer present. He concluded that at the present time there appeared to be no large lesion and no encroachment and so no contraindication to him returning to his normal activities and placing him on an exercise program.

Dr. Mones, submitted numerous reports.<sup>4</sup> In an October 9, 1997 report, he stated that appellant had been under his care since 1980 and had been seen on a regular basis since the February 18, 1994 employment injury. Dr. Mones advised that appellant had difficulty bending, lifting heavy objects and standing or sitting for "any lengthy period of time." He concluded that it was his "absolute opinion that [appellant] suffers from low back pain secondary to discogenic disease and is in no way capable of gainful employment."

In a comprehensive report dated March 17, 1997, Dr. Lang stated that he saw no objective findings regarding the February 18, 1994 employment injury. He, too, noted that while appellant had a decreased reflex on the right, the MRI scan findings were on the left and advised that the 1996 MRI scan indicated that there was no longer any direct contact with neural structures at the L5-S1 level. Dr. Lang opined that appellant could return to his work duties with a 30-pound weight limitation, no repetitive bending and no climbing and should use a lumbar

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<sup>2</sup> See *Patricia A. Keller*, 45 ECAB 278 (1993).

<sup>3</sup> See *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

<sup>4</sup> Most of the reports consist of brief treatment notes indicating that appellant has undergone physical therapy.

support at all times. He stated that this was because appellant had previous positive MRI scan findings. The Board, therefore, finds that appellant had no employment-related disability on or after March 28, 1998, and the Office met its burden of proof to terminate his compensation benefits on that date.<sup>5</sup>

The Board further finds that appellant failed to establish that he had an employment-related disability after March 28, 1998.

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to him to establish that he had disability causally related to his accepted injury.<sup>6</sup> To establish a causal relationship between the condition, as well as any attendant disability claimed, and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.<sup>7</sup> Causal relationship is a medical issue<sup>8</sup> and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>9</sup>

The evidence submitted by appellant subsequent to the March 18, 1998 Office decision terminating his compensation includes a July 16, 1998 MRI scan of the lumbar spine that demonstrated multiple end plate irregularities of the lower thoracic and entire lumbar spine, degeneration of all lumbar discs with multiple disc protrusions, a broad-based posterior herniated nucleus pulposus at L4-5 and a small focal left paracentral herniated nucleus pulposus at L5-S1. In a report that same day, Dr. Aizik L. Wolf, a Board-certified neurosurgeon, advised that the MRI scan showed a large herniated disc at L5-S1 on the left and a bulging disc at L4-5 on the right. He concluded, "it is clear that [appellant] still has pathology on his MRI scans and should be considered disabled on the basis of this." In an October 14, 1998 report, Dr. Monroe Scheiner, a gastroenterologist, diagnosed herniated disc at L4-5 and advised that it would be difficult for appellant to do any work involving heavy lifting or straining. Dr. Mones provided a November 16, 1998 report in which he noted appellant's complaints with minimal activity of constant severe low back pain with radiation into both buttocks. He stated that appellant's

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<sup>5</sup> See *Harrison Combs, Jr.*, 45 ECAB 716 (1994).

<sup>6</sup> See *George Servetas*, 43 ECAB 424 (1992).

<sup>7</sup> See 20 C.F.R. § 10.110(a); *Kathryn Haggerty*, *supra* note 3.

<sup>8</sup> *Mary J. Briggs*, 37 ECAB 578 (1986).

<sup>9</sup> *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

response to therapy had been minimal and that he had reached maximum medical improvement. He concluded:

“I have restricted [appellant’s] activities as tolerated. These restrictions have been imposed due to the fact that any excessive activity as noted earlier would cause [his] symptoms to become worse. The restrictions are placed for an indefinite period of time.”

In a December 8, 1998 report, Dr. Lazaro Guerra, a Board-certified orthopedic surgeon, noted appellant’s complaints of tenderness on examination with weakness on the left when compared to the right and positive straight leg raising on the left, no sensory deficit and absent Achilles reflex on the right. He diagnosed herniated lumbar disc at L4-5 and L5-S1, based on the July 16, 1998 MRI scan and stated that appellant “will remain with the same degree of disability” and should not be allowed to do any heavy lifting.

In this case, after the Office properly terminated appellant’s compensation benefits, while he submitted additional medical evidence, Dr. Mones merely reiterated his conclusion that appellant was disabled and Drs. Scheiner, Wolf and Guerra did not provide an opinion regarding the cause of appellant’s condition. Furthermore, while the 1998 MRI scan demonstrated positive findings, the scan failed to address the relationship of the reported findings to the 1994 work injury. As the record contains no evidence that appellant continued to be disabled after March 28, 1998 due to the February 18, 1994 employment injury, the Office properly determined that he was not entitled to compensation benefits after that date.

The decisions of the Office of Workers’ Compensation Programs dated June 3, 1999 and finalized June 4, 1999 and October 7, 1998 and finalized October 9, 1998 are hereby affirmed.

Dated, Washington, D.C.  
February 17, 2000

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member