

included an accepted back injury in August 2000 and a back injury from a nonwork-related motor vehicle accident in 1998. In a January 16, 2001 report, Dr. Judith Esman, an orthopedist, wrote that appellant presented with pain located primarily in the lower back and right buttock. On examination she found a full range of motion at the hips with some tenderness around the sacroiliac, right greater than left. Dr. Esman found that appellant had markedly decreased range of motion of forward flexion of the spine and bending sideways was accompanied by pain. She reported that a magnetic resonance imaging (MRI) scan showed a small herniation and decreased signal intensity and midline bulge at L5-S1 with a possibility of a small amount of disc material to the right of the midline at L5-S1. Dr. Esman diagnosed primarily lower back pain secondary to degenerative disc and or a small herniation. In a March 8, 2001 decision, the Office accepted the claim for a thoracic and lumbar strain. On that same date, the Office also referred appellant for a second opinion.

In a March 28, 2001 report, Dr. Stephen Bailey, an orthopedist, wrote that appellant presented with low back pain, worse on the right. On examination he found that appellant ambulated normally and was in no apparent distress. He stated that he found that appellant had normal reflexes, normal sensation, normal manual motor testing and negative straight leg raising, indicating no evidence of root tension. Dr. Bailey wrote that appellant showed no tenderness to palpation but described a nonanatomic area of discomfort to light palpation over the right lower back and buttock area. He opined that there is no objective evidence of impairment to substantiate her complaints and no indication of spasm or spinal list. Dr. Bailey wrote that a review of the lumbar myelogram revealed no evidence of disc herniation or neurologic compromise. He opined that appellant could return to work full time with no restrictions. In a May 23, 2001 letter, the Office proposed terminating appellant's compensation based on the report of Dr. Bailey and provided her with her procedural rights.

In a May 31, 2001 report, Dr. Mark R. LoDico, an orthopedist, wrote that a provocative discogram revealed a sensitized disc at the L5-S1 level with imaging evidence of an annular tear. During provocation of this disc, appellant's usual pain was reproduced. He noted that the L3-4 and L4-5 discs were normal in appearance but insensitive to pressurization triple that produced at the L5-S1 level. Dr. LoDico indicated that the discogram provided objective evidence of a condition that was missing from Dr. Bailey's report. He stated that appellant should not return to work until further treatment. In a June 20, 2001 letter, the Office found a conflict in the medical evidence and referred appellant for an impartial medical examination.

In a September 26, 2001 report, Dr. Mark Foster, a Board-certified orthopedist serving as the independent medical examiner, wrote that appellant presented with no muscle spasm and very limited forward flexes, though he noted that she came forward at a brisk pace then stopped abruptly, suggesting a volitional endpoint. Dr. Foster noted that appellant extended her back at less than five degrees and had a negative Gillet test for sacroiliac problems. Appellant also had a negative Trendelenburg and a straight leg raising test with normal reflexes. Dr. Foster noted that x-rays revealed significant disc degeneration with a retrolisthesis note. A myelogram showed excellent filling of all the nerve roots. He added that there was a question of a possible high intensity zone, but this disc protrusion, which is partly the annulus displaced posteriorly by retrolisthesis, shows slight lateralization to the right side. Dr. Foster further wrote that by appellant's admission her cervical sprain had resolved and he considered her to have an

aggravation of an underlying degenerative spinal condition which was evident in the MRI scan from the extent of degeneration which would have preexisted this accepted injury. He opined that the underlying medical condition is unrelated to the work injury, which was preexisting, but was temporarily aggravated by the lifting incident. Dr. Foster wrote that he saw no basis to assess that the underlying condition is different than it would have been prior to the accepted injury. He noted that an annular tear is a common finding with degenerative disc disease and would have been expected given her extensive deterioration. Dr. Foster added that he found appellant's examination and records consistent with a significant degree of symptom magnification noting that appellant lacked the physical correlation and impression of the very bad pain she described and that appellant had fluid motion which bad pain usually prohibits. He stated that the fact that appellant was worse at the time of the examination than when she was at the start, though she works less and does light duty, was an indication that her underlying condition is independent of the accepted injury progressing. He added that he found no objective evidence to support appellant's complaints and concluded that her limitations were not related to the work injury but to her preexisting condition and there were no residuals. In a December 12, 2001 decision, the Office finalized the proposed termination relying on Dr. Foster's report.

In January 10, 2002 letter, appellant requested a review of the written record by the Branch of Hearings and Review and argued that there was no objective evidence documenting degenerative changes or an annular tear prior to the accepted injury. Appellant also submitted two reports from Dr. Esman. In her December 12, 2001 report, Dr. Esman wrote that appellant's symptoms were *status quo*; she complained of back spasms and paresthesia in the feet and difficulty sleeping at night. She stated that on physical examination the straight leg test was negative bilaterally and manual muscle testing and reflexes were within normal limits. Dr. Esman stated that she found markedly reduced lumbar forward flexion with pain as well as some tenderness in the lumbar spine. In a January 2, 2002 report, Dr. Esman diagnosed discogenic low back pain. She noted that there may be some evidence of a preexisting problem in that appellant had lower back pain that was treated on two occasions prior to the accepted injury, but there were no MRI scans or other studies that document preexisting degenerative changes or an annular tear. Dr. Esman stated that she believes that appellant had degenerative changes in that disc previously but it is very likely that appellant sustained the annular tear during the accepted incident. She concluded that appellant has either an annular tear in the L5-S1 disc precipitated by the lifting incident or an exacerbation of degenerative disc disease. Dr. Esman added that in either case appellant is disabled secondary to her lifting incident. In a March 5, 2003 decision, the hearing representative affirmed the termination.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,¹ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ The Office's burden of proof includes the necessity of

¹ 5 U.S.C. § 8101 *et seq.*

² *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

³ *Id.*

furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

ANALYSIS

The Office properly determined that there was a conflict in the medical evidence between Dr. LoDico, an orthopedist and appellant's attending physician, and Dr. Bailey, a Board-certified orthopedist acting as an Office referral physician, regarding whether appellant continued to have residuals of the November 30, 2000 employment injury. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Foster for an impartial medical examination and an opinion on the matter.⁵

In situations where there exist 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 upon a proper factual background, must be given special weight.⁶

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Foster, the impartial medical specialist selected to resolve the conflict in the medical opinion. The September 26, 2001 report of Dr. Foster establishes that appellant had no disability due to her November 30, 2000 employment injury.

The Board has carefully reviewed the opinion of Dr. Foster and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. His opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Foster provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.⁷ He provided medical rationale for his opinion by explaining that he could find no objective evidence to support appellant's complaints, that appellant showed signs of symptom magnification and noted that appellant lacked the physical correlation and impression of the very bad pain she described. He added that appellant had fluid motion which bad pain usually prohibits. Dr. Foster further explained that appellant's accepted sprains had resolved while her ongoing pain was related to her preexisting conditions, not the accepted injury. He stated that he found no basis to find that the underlying condition is different than it would have been prior to the accepted injury and that an annular tear is a common finding with degenerative disc disease and would have been

⁴ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ Section 8123(a) of the Act provides in pertinent part: "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." 5 U.S.C. § 8123(a).

⁶ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁷ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

expected given her extensive deterioration. Finally, he stated that the fact that appellant is now worse than when she was at the start, though she works less and does light duty, was an indication that her underlying condition is independent of the accepted injury progressing.

The December 12, 2001 report from Dr. Esman simply reviews appellant's status and adds nothing new to the issue of whether her work-related injury had resolved. In her January 2, 2002 report, Dr. Esman wrote that appellant did likely have a preexisting back condition but she considers it very likely that her current pain is related to the accepted incident. This report is speculative and insufficiently rationalized to overcome the special weight given the impartial medical examiner's report. Dr. Esman's statement that it is likely that appellant's current pain is related to the accepted condition lacks sufficient medical certainty. More important, Dr. Esman fails to explain why appellant's accepted strains would not have resolved more than a year later or why she feels the pain is related to the accepted injury and not the preexisting condition.

CONCLUSION

For these reasons the Board finds that the Office met its burden of proof to terminate appellant's compensation effective December 12, 2001.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 5, 2003 is affirmed.

Issued: February 17, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member