

caused pain to the left knee and upper and lower leg. Appellant was lifting and handling rod stock when he felt pain in his left leg in the rear knee area.¹ The Office accepted appellant's claim for a herniated lumbar disc at L5-S1 and he received appropriate compensation.

The Office received numerous medical reports from Dr. Gregory A. Nelson, appellant's attending internist, finding that he was totally disabled due to his employment-related herniated lumbar disc at L5-S1.

By letter dated November 10, 1996, the Office referred appellant, together with medical records and a statement of accepted facts, to Dr. Gary W. Muller, a Board-certified orthopedic surgeon, for a second opinion medical examination. Dr. Muller submitted a December 17, 1996 report, finding that appellant had a herniated disc at L5-S1 on the left but no objective findings of disability. He stated that appellant had reached maximum medical improvement and did not require any further medical treatment. Dr. Muller opined that appellant could perform light-duty work with lifting restrictions. Dr. Muller also submitted a work capacity evaluation dated December 3, 1996, indicating that appellant could work eight hours a day within specified physical restrictions.

On January 5, 1999 the Office found a conflict in the medical opinion evidence between Dr. Nelson and Dr. Muller as to whether appellant was totally disabled due to his accepted condition. The Office referred appellant, together with a statement of accepted facts and the medical records, to Dr. Martin A. Blaker, a Board-certified orthopedic surgeon, for an impartial medical examination. The Office's statement of accepted facts provided a history of appellant's July 30, 1992 employment injury and medical treatment and a description of his machinist position. The Office also provided Dr. Blaker with an addendum statement of accepted facts indicating that appellant's claim had been accepted for herniated nucleus pulposus at L5-S1 and that appellant was receiving nonsurgical medical treatment from Dr. Mark T. Allen.

Dr. Blaker submitted an April 2, 2001 report which reviewed a history of appellant's medical treatment, physical activities and complaints of pain in his back and left leg and foot. The physician noted that appellant denied any other accidents or injuries since the original "alleged" injury on July 30, 1992 and that he was unable to specifically describe what occurred on that date. He provided his findings on physical examination. Dr. Blaker reviewed magnetic resonance imaging (MRI) scan reports noting that the first report dated May 15, 1997, did not indicate the presence of a herniation of appellant's back. He opined that the objective findings were completely negative throughout regarding the lower back and both lower extremities. He diagnosed:

"(1) History suggestive of strain of the left popliteal area sustained on July 30, 1992 with negative objective findings at the present time.

"(2) History suggestive of lumbar strain, with negative objective findings at the present time.

¹ Appellant was separated from the employing establishment effective April 11, 1995, based on his physical inability to perform the duties of a machinist.

“(3) History submitted of depression, not related to alleged accident of July 30, 1992.

“(4) No clinical findings pertaining to lumbar disc disease.

“(5) No clinical finding pertaining to a diagnosis of herniated disc.”

Dr. Blaker stated:

“Once again, in this recent examination, I have noted a completely negative objective picture. This is similar to findings of several other examiners who have seen [appellant] on your behalf before. The subjective complaints given here are not associated with any objective findings. The original MRI [scan] was negative any herniated disc. The subsequent passage of several years during which he remained active is associated with a new MRI [scan] in which a diagnosis has been given of herniated disc. I have reviewed the films on both occasions carefully and I can see no finding indicative of herniated disc. He has some minor degenerative changes entirely in keeping with his age group; however, I stated again that the objective findings were completely negative throughout with regards to the lower back and the lower extremities.”

Dr. Blaker noted that appellant was active in his home and performed many types of household duties. He stated that appellant was more active in his home than he would be at a sedentary job which indicated that he was not disabled. Dr. Blaker opined that appellant was fully capable of performing sedentary-work duties and that he was not disabled. He stated that appellant was not receiving appropriate medical treatment from Dr. Sofia Lam, Board-certified in pain medicine and anesthesiology, for a herniated disc. Dr. Blaker further stated that he could not verify the diagnosis of a herniated disc as the initial MRI scan was negative and the second MRI scan performed years after the original “alleged” accident demonstrated a herniated disc. He correlated the findings of an MRI scan to his clinical findings and concluded that a herniated disc was not present and that the circumstances of the “alleged” injury were not consistent with continued complaints for more than eight years.

In a May 25, 2001 letter, the Office issued a notice of proposed termination of appellant’s compensation based on Dr. Blaker’s April 2, 2001 report. The Office provided 30 days for appellant to respond to this notice. By letter dated June 4, 2001, appellant’s attorney submitted a memorandum outlining Dr. Blaker’s dishonest and biased propensity as an expert medical witness and copies of several court cases finding that Dr. Blaker was not a credible expert witness.

In a June 25, 2001 letter, appellant’s attorney reiterated that Dr. Blaker was an inappropriate choice for an impartial medical examiner. He argued that Dr. Blaker’s opinion did not constitute the weight of the medical opinion evidence. Appellant’s attorney’s letter was accompanied by a June 21, 2001 report from Dr. Lam, finding that appellant’s disc herniation at L5-S1 on the left side, disc bulge at L3-4, degenerative disc disease throughout the lumbar spine and lumbosacral radiculopathy were related to the July 30, 1992 employment injury. She opined that appellant was disabled due to these conditions.

The Office also received a July 10, 2001 report of Dr. R. Scott Scheer, an osteopath, providing the results of an MRI scan finding loss of axial stature and hydration signal intensity from within all intervertebral discs between L2 and S1 and evidence of facet sclerosis with hypertrophy at multiple levels, especially between L3 and S1 without evidence of acquired central or lateral canal stenosis. Dr. Scheer also found no evidence of focal or diffuse protrusion of disc material extending into the central canal. A July 30, 2001 report of Dr. Murray D. Robinson, a neurosurgeon, revealed that appellant continued to have left sided lumbar radiculopathy although the disc herniation had resolved.

By decision dated September 17, 2001, the Office finalized its proposed termination of compensation for appellant's orthopedic condition.²

In a September 19, 2001 letter, appellant, through his attorney, requested a review of the written record before an Office hearing representative.

In a January 31, 2002 decision, the Office hearing representative affirmed the Office's September 17, 2001 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴ If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.⁵

Section 8123 of the Federal Employees' Compensation Act provides that if there is a disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict.⁶ When a case is referred to an impartial medical specialist for the purpose of resolving a conflict of medical evidence, the opinion of such specialist, if sufficiently well rationalized and based on a proper medical background, must be given special weight.⁷

² In its September 17, 2001 decision, the Office also accepted appellant's claim for dysthmic disorder based on its development of the case regarding appellant's emotional condition and granted appellant monetary and medical compensation for this condition.

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

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

⁵ *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

⁶ 5 U.S.C. § 8123; *see Robert D. Reynolds*, 49 ECAB 561 (1998).

⁷ *See Sherry Hunt*, 49 ECAB 467 (1998); *Wiley Richey*, 49 ECAB 166 (1997).

ANALYSIS

In this case, the Office properly determined that a conflict existed in the medical opinion evidence as to whether appellant had any continuing disability due to his accepted July 30, 1992 employment-related orthopedic injury. Dr. Nelson, appellant's treating physician, opined that appellant was disabled due to his accepted employment injury while Dr. Muller, an Office referral physician, opined that appellant was not disabled.

The Office relied on the April 2, 2001 report of Dr. Blaker, an impartial medical examiner, in terminating appellant's compensation. The Board finds, however, that Dr. Blaker's opinion is of diminished probative value and thus, does not represent the weight of the medical evidence. The Office provided Dr. Blaker with a statement of accepted facts indicating that it had accepted that appellant sustained a work-related herniated nucleus pulposus at L5-S1 on July 30, 1992. To assure that the report of a medical specialist is based upon a proper factual background, the Office provides information to the physician through the preparation of a statement of accepted facts.⁸ The Office procedure manual provides as follows:

“When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.”⁹

Dr. Blaker found no objective findings of lumbar disc disease or a herniated disc. He opined that appellant was not disabled and that he could perform sedentary-work duties. In discussing the factual background of appellant's case, Dr. Blaker consistently referred to appellant's July 30, 1992 employment injury as the “alleged” injury indicating that appellant was unable to specifically describe what occurred on July 30, 1992 and that he neither believed the circumstances of the injury were consistent with continued complaints for eight years nor the results of a MRI scan demonstrating a disc herniation. This, however, is at odds with the fact that the Office accepted that appellant sustained a herniated disc at L5-S1 on July 30, 1992.

As Dr. Blaker's opinion is outside the framework of the Office's statement of accepted facts, it is based on an inaccurate factual background and it is not well rationalized, it is not sufficient to resolve the conflict of medical opinion in this case. Accordingly, the Office did not meet its burden of proof in terminating appellant's compensation.

⁸ *Helen Casillas*, 46 ECAB 1044, 1052 n.15 (1995); *see also Henry J. Smith, Jr.*, 43 ECAB 524 (1992), *reaff'd on recon.*, 43 ECAB 892 (1992).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600(3) (October 1990).

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation for his orthopedic condition on the grounds that he no longer had any disability causally related to his July 30, 1992 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2002 and September 17, 2001 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: July 22, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
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