



pain and numbness in his left leg while lifting a hamper in the cargo area of a two-ton truck. The Office accepted appellant's claim for a lumbar strain and subsequently expanded the acceptance of appellant's claim to include a herniated disc at L3-4.

On November 21, 1995 appellant returned to full-time limited-duty work as a supervisor based on his physical restrictions. On November 27, 2001 appellant filed a claim alleging that he sustained a recurrence of disability on November 12, 2001 and he submitted medical evidence in support thereof. Appellant stopped work on the date of the alleged recurrence. By letter dated January 10, 2002, the Office accepted appellant's recurrence claim.

Based on the medical evidence of record providing that appellant was capable of performing modified work on the one hand and that he was disabled on the other hand, and the recommendation of a field nurse assigned to appellant's case, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Anthony Salem, a Board-certified orthopedic surgeon, for a second opinion medical examination to clarify the extent of appellant's employment-related disability by letter dated May 3, 2002.

Dr. Salem submitted a June 6, 2002 report providing a history of appellant's family background, employment injury and medical treatment. He also provided his findings on physical and objective examination. Dr. Salem reviewed appellant's medical records, which included, among other things, the results of three magnetic resonance imaging (MRI) scans performed on June 15 and September 15, 1995 and November 14, 2001 demonstrating that appellant had long-standing degenerative changes at L3-4, L4-5 and L5-S1 that existed at the time of his June 9, 1995 employment injury and a September 18, 1995 electromyogram (EMG) revealing irritation, more on the left side, at L4 that was not traumatic but neurologically normal. He diagnosed lumbosacral degenerative discogenic disease from L3 to the sacrum with instability and recurrent sciatica. Dr. Salem stated that this was an underlying condition and appellant's episode of distress in 1995 only exacerbated this situation, but did not materially change anything. Dr. Salem stated that the injury-related factors of disability were the underlying arthritic changes demonstrated by the objective findings of the 1995 MRI and EMG tests. He further stated that appellant's subjective complaints were consistent with his objective findings. Dr. Salem related that there was a nonindustrial and preexisting disability based on the underlying condition of appellant's back and he did not know the reason for it. He opined that appellant was not suffering from residuals of the June 9, 1995 work injury because he had multiple levels of disease at the time of this incident as evidenced by apophyseal joint hypertrophy and congenital spinal stenosis. He further opined that appellant was an unlucky guy and the work injury irritated his condition, noting that from 1995 until 2001 appellant had some episodes of recurrent discomfort as a result of his underlying back condition. Dr. Salem stated that appellant's prognosis was guarded, but that he was capable of performing modified work as a supervisor. He recommended additional medical treatment and specific physical activities for appellant's back condition. Dr. Salem stated that appellant's physical restrictions were attributable to his preexisting degenerative discogenic disease at three levels. In an accompanying work capacity evaluation dated June 6, 2002, Dr. Salem indicated that appellant could work eight hours a day with certain physical limitations.

By letter dated June 18, 2002, the Office requested that Dr. Richard Balderston, appellant's treating Board-certified orthopedic surgeon, review Dr. Salem's report. Dr. Balderston did not respond.

The Office received a July 11, 2002 attending physician's report from Dr. Ronald A. Codario, appellant's treating Board-certified internist, who indicated with an affirmative mark that appellant's recurrence of back pain was caused by an employment activity.

The Office also received a narrative report of the same date from Dr. Philip M. Maurer, a Board-certified anesthesiologist, noting appellant's right leg and back pain, a history of appellant's medical, social and family background, his findings on physical examination and a review of a November 2001 MRI scan. He diagnosed chronic low back and right lower extremity pain and recommended a new MRI scan since it had been eight months since an MRI had been performed.

A July 23, 2002 MRI scan revealed evidence of degenerative changes and stenosis bilaterally at the lower three levels exacerbated by a central to left-sided herniation at L3-4 and central herniations at L4-5 and L5-S1.

In an August 8, 2002 letter, the Office issued a notice of proposed termination of appellant's compensation based on Dr. Salem's June 6, 2002 medical report. The Office provided 30 days in which appellant could respond to this notice.

In response, appellant submitted an August 8, 2002 attending physician's report from Dr. Codario, who indicated with an affirmative mark that appellant had recurrent back pain due to an employment activity. Appellant also submitted a copy of the July 23, 2002 MRI results and Dr. Maurer's July 11, 2002 form report. In a September 5, 2002 letter, Dr. Codario disagreed with the Office's conclusion that appellant was ready to return to work. He stated that appellant continued to experience back pain and was advised not to return to work by Dr. Balderston, who had scheduled appellant for a series of epidural steroid injections to be administered by Dr. Maurer on September 18, 2002. Dr. Codario requested that the Office reconsider its decision in light of appellant's continued pain and treatment plan outlined by his orthopedic surgeon. In a September 6, 2002 letter, Dr. Maurer advised the Office that appellant was under his care for continued treatment and follow-up for his lower back pain and disability. He noted that new x-rays and an MRI scan presented by appellant on September 5, 2002 revealed disc herniations at L3-4, L4-5 and L5-S1 levels. Dr. Maurer further noted that appellant was scheduled for an epidural injection on September 18, 2002 and that he would remain out of work until he returned for a follow-up visit after the injection.

By decision dated September 10, 2002, the Office finalized its proposed termination of appellant's compensation effective that date. The Office found the medical evidence submitted by appellant insufficient to establish that he had residuals or disability caused by his June 9, 1995 employment injuries and accorded greater weight to Dr. Salem's June 6, 2002 report.

Subsequent to its September 10, 2002 decision, the Office received a copy of the July 23, 2002 MRI results. The Office also received a September 5, 2002 attending physician's report from Dr. Codario indicating that appellant had recurrent back pain. A February 14, 2003

progress note from Dr. Balderston indicated that appellant continued to have right leg pain and that x-rays and a myelogram demonstrated pressure on the right S1 nerve. Dr. Balderston recommended that appellant consider decompressive surgery which had a 95 percent chance of significantly improving his pain. He noted that appellant was advised about the risks associated with the surgery.

In an August 26, 2003 letter, appellant requested reconsideration.<sup>1</sup> His request was accompanied by an August 7, 2003 medical report from Dr. Balderston. In this report, Dr. Balderston stated that he reviewed Dr. Salem's June 6, 2002 report. He further stated that at the time of the June 1995 work injury, appellant complained of low back pain and noted that among the other injuries he had was an abnormality of L5-S1 that was read as a bulging central disc. Dr. Balderston reported that this disc subsequently went onto frank herniation requiring surgery in 2003. He opined that the initial injury to the disc occurred at the time of the work injury in June 1995. He noted that he had previously recommended nonoperative care, but the L5-S1 disc weakened further to the point where appellant had severe pain radiating down his right leg and, thus surgery was required. He further noted that appellant was still convalescing and remained disabled. Dr. Balderston concluded that with a reasonable degree of medical certainty, appellant's initial June 1995 injury caused the L5-S1 disc to weaken to the point where routine activities of daily living over a period of time caused the disc to further deteriorate and subsequently require surgery in 2003.

By decision dated December 4, 2003, the Office denied appellant's request for modification based on a merit review of the claim. The Office found the evidence submitted by appellant insufficient to establish that he continued to suffer from residuals or disability due to his June 9, 1995 employment injuries and again accorded greater weight to Dr. Salem's June 6, 2002 medical opinion.

### **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.<sup>2</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>3</sup> If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.<sup>4</sup>

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<sup>1</sup> The Board notes that it appears appellant's request for reconsideration is dated August 26, 2003 and it was received by the Office on September 5, 2003.

<sup>2</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>3</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>4</sup> *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

## ANALYSIS

In terminating appellant's compensation, the Office relied on the June 6, 2002 report of Dr. Salem, an Office second opinion specialist. In this report, Dr. Salem provided an accurate factual and medical background. He conducted a thorough medical examination and a detailed review of appellant's medical records. Dr. Salem diagnosed lumbosacral degenerative discogenic disease from L3 to the sacrum with instability and recurrent sciatica as an underlying condition. He opined that appellant had a nonindustrial and preexisting disability based on his underlying back condition although he did not know the cause of this condition. Dr. Salem further opined that appellant no longer had any residuals of his June 9, 1995 employment injury. He explained that at the time of the June 9, 1995 employment injury, appellant had multiple levels of disease as demonstrated by apophyseal joint hypertrophy and congenital spinal stenosis and that the employment injury irritated or exacerbated appellant's underlying back condition from 1995 until 2001 but did not materially change it. Dr. Salem concluded that appellant was capable of performing the duties of his modified supervisory position with certain physical restrictions that were attributable to his preexisting degenerative discogenic disease at three levels.

The Board finds that Dr. Salem's opinion is entitled to greater weight in finding that appellant no longer has any residuals or disability due to his June 9, 1995 employment injuries as it is sufficiently rationalized and based on a proper factual and medical background.

Subsequent to Dr. Salem's June 6, 2002 report and the Office's August 8, 2002 notice of proposed termination, appellant submitted Dr. Codario's July 11 and August 8, 2002 attending physician's reports indicating with an affirmative mark that he had recurrent back pain due to an employment activity. The Board has held that form reports indicating with an affirmative mark that a condition was caused or aggravated by employment activity are insufficient to discharge a claimant's burden of proof because such forms lack the necessary medical discussion explaining the basis of the physician's opinion.<sup>5</sup> Dr. Codario did not explain how or why appellant's recurrent back pain was caused by the June 9, 1995 employment injuries. Further, he did not specifically indicate or provide a description of the employment activity that caused appellant's condition. Therefore, Dr. Codario's reports are insufficient to outweigh the probative value of Dr. Salem's second opinion medical report, which specifically concluded that appellant no longer had any residuals or disability causally related to his accepted employment injuries.

Similarly, Dr. Codario's September 5, 2002 letter revealing that appellant continued to experience back pain and was advised not to return to work by Dr. Balderston is insufficient to establish appellant's burden. Dr. Codario did not address whether appellant's back pain was caused by the June 9, 1995 employment injuries.

Appellant also submitted Dr. Maurer's July 11, 2002 report finding that he had chronic low back and right lower extremity pain based on a November 2001 MRI scan. Dr. Maurer recommended that a new MRI scan be performed. The July 23, 2002 MRI scan revealed degenerative changes and stenosis bilaterally at the lower three levels exacerbated by a central to

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<sup>5</sup> *E.g., Lillian M. Jones*, 34 ECAB 379 (1982).

left-sided herniation at L3-4 and central herniations at L4-5 and L5-S1. In his September 6, 2002 letter, Dr. Maurer stated that appellant was being treated for lower back pain and disability. He noted that a September 5, 2002 MRI scan demonstrated disc herniations at L3-4, L4-5 and L5-S1 levels and opined that appellant would remain out of work until he returned for a follow-up visit after an epidural injection scheduled for September 18, 2002. Dr. Maurer's report and letter, and the July 23, 2002 MRI scan are not sufficient to outweigh the probative value of Dr. Salem's June 6, 2002 report as they failed to address whether appellant's conditions were caused by his June 9, 1995 employment injuries.

After the Office's September 10, 2002 decision terminating his compensation, appellant submitted additional medical evidence. Given that the Board has found that the Office properly relied on the opinion of Dr. Salem in terminating appellant's compensation effective September 10, 2002, the burden shifts to appellant to establish that he is entitled to compensation after that date.

The medical evidence submitted subsequent to the September 10, 2002 decision terminating appellant's compensation, includes a September 5, 2002 attending physician's report of Dr. Codario, and a February 14, 2003 progress note and August 7, 2003 report of Dr. Balderston. Neither the reports nor the progress note submitted by appellant are sufficient to support his burden of proof establishing that he has any continuing residuals or disability due to his accepted June 9, 1995 employment injuries. In his September 5, 2002 attending physician's report, Dr. Codario did not address whether appellant's recurrent back pain was caused by the June 9, 1995 employment injury.

Dr. Balderston's February 14, 2003 progress report, noting that appellant's right leg pain and pressure on the right S1 nerve as demonstrated by x-rays and a myelogram were caused by the June 9, 1995 employment injuries, failed to explain how or why these conditions were caused by the accepted employment injuries. Similarly, Dr. Balderston's August 7, 2003 opinion that appellant's June 1995 employment injury caused his L5-S1 disc to weaken and deteriorate over a period of time, resulting in the need for surgery in 2003 and that appellant remained disabled, failed to explain how appellant's current residuals and disability were related to his accepted employment injuries. The Board finds that as neither Dr. Codario nor Dr. Balderston provided a rationalized medical opinion, their reports and progress note are insufficient to create a conflict with Dr. Salem's opinion that appellant no longer had any residuals due to his accepted employment injuries. Accordingly, as appellant has not submitted additional probative medical opinion evidence establishing that he had continuing residuals or disability causally related to his accepted June 9, 1995 employment injuries, he has not met his burden of proof.

### **CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation effective September 10, 2002 on the grounds that he no longer had any residuals or disability causally related to his June 9, 1995 employment injuries.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 4, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 23, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member