

conditions as including lumbosacral strain, spondylolisthesis and a T11-12 disc herniation. She thereafter claimed recurrences of disability commencing August 8 and 29, 1994. On July 19, 1995 Dr. Fraser C. Henderson, a Board-certified neurosurgeon, opined that appellant would be disabled indefinitely until she received surgery for her central T6-7 herniated disc with myelopathy. On January 25, 1996 the Office authorized a T6-7 trans-thoracic discectomy for her. However, this surgery did not occur. In September 1996, the Office terminated appellant's compensation entitlement effective October 13, 1996 due to her failure to accept suitable employment.

On March 10, 1997 the Office noted, in a statement of accepted facts, that it had accepted the conditions of lumbosacral strain, L5-S1 spondylolisthesis and a T11-12 disc herniation. On March 11, 1997 appellant's benefits were reinstated. However, on August 12, 1997 the Office proposed to terminate her compensation based upon the report of a second opinion medical examiner, Dr. Richard J. Sternberg, a Board-certified orthopedic surgeon, finding no objective disability.¹ On October 10, 1997 this termination was finalized. Thereafter, appellant requested an oral hearing and later changed the request to a review of the written record. Upon review of the written record, on February 1, 1999 the hearing representative reversed the Office's October 10, 1997 termination decision, finding that Dr. Sternberg's opinion was tainted by improper contact with the employing establishment. He ordered appellant's compensation benefits reinstated and directed the Office to obtain a new second opinion examination. The Office, however, referred appellant for an impartial medical examination.

On April 15, 1999 the Office again proposed to terminate appellant's compensation benefits entitlement on the medical grounds that appellant had insufficient objective findings to support any continuing disability and, thus, appellant's current condition was unrelated to the June 24, 1994 employment injury. This action was based on an April 6, 1999 report from Dr. Victor N. Guerrero, a Board-certified orthopedic surgeon, which stated that there was a paucity of objective findings to support any continuing disability. The proposed termination decision was finalized on August 5, 1999. However, on August 24, 1999 appellant requested an oral hearing on the termination of her benefits.

Appellant also submitted several 1999 and 2000 medical reports from Dr. Ian D. Gordon, a Board-certified orthopedic surgeon,² which noted that she had severe painful disc degeneration, a black disc on magnetic resonance imaging (MRI) scan, positive discography and no response to conservative treatment. Dr. Gordon also disagreed with the diagnosis from Dr. Guerrero of lumbar strain, as he found it inconsistent with appellant's documented history of severe disc degeneration and pain over several years.

An oral hearing was held on February 11, 2000 at which appellant testified. By decision dated April 5, 2000 and finalized April 7, 2000, the Office hearing representative affirmed the

¹ By report dated May 8, 1997, Dr. Sternberg noted that appellant had only subjective complaints of low back pain without significant objective pathology, indicated that appellant's spinal condition was not related to the June 24, 1994 employment injury and completed a work restriction evaluation form noting that he found no evidence that she had any impairment or restrictions from duty causally related to the June 24, 1994 incident. However, appellant's benefits were thereafter reinstated.

² Dr. Gordon does not appear in the 1997 or 1996 AMA Directory of Physicians as being Board-certified.

termination of benefits, finding it correct when issued, but noting that post termination further evidence was received which created a conflict after benefits had been terminated. The hearing representative remanded the case for further development based upon evidence received after the termination was finalized.

Due to a conflict in medical opinion evidence between Dr. Guerrero and Dr. Gordon on whether or not appellant's back problem was causally related to her June 24, 1994 work injury, the Office referred appellant together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Adel S. Kebaish, a Board-certified orthopedic surgeon, for an impartial examination and for resolution of the conflict. In the statement of accepted facts, the Office specifically noted that it accepted appellant's claim for lumbosacral strain, spondylolisthesis at L5-S1, and a T11-12 disc herniation. By report dated July 31, 2000, Dr. Kebaish reviewed appellant's factual and medical history and history of injury, reported examination results and diagnosed chronic low back pain and degenerative disc disease. He opined that appellant deserved another MRI scan since the old one was six years old. On February 28, 2001 the Office sought clarification from Dr. Kebaish regarding his impartial medical examination. In a March 21, 2001 report, he again reviewed appellant's factual and medical history, noted the results of his physical examination, mentioned the age of the old radiographic studies and provided the following opinions: Dr. Kebaish did not believe that appellant's current condition of mild degenerative disc disease was related to or had anything to do with her accepted work injury of June 24, 1994, but was instead a result of the natural aging process. He opined that appellant could perform many regular and vigorous activities and that she was not partially disabled from the job she held at the time of injury. Dr. Kebaish also opined that appellant did not have a permanent condition, but had a natural condition for her age which should improve with time with complete resolution and a return to normal activities. He further opined that additional medical treatment was not needed, that appellant had reached maximum medical improvement from her simple lumbosacral strain and that her only work restriction was on lifting more than 50 to 60 pounds, no climbing stairs and no kneeling.

The Office then determined that Dr. Kebaish's well-rationalized report constituted the weight of the medical opinion evidence and resolved the conflict regarding whether or not appellant's back problem was causally related to her June 24, 1994 work injury.

By decision dated April 9, 2001, the Office claims examiner affirmed the termination of appellant's compensation benefits finding that the Office had met its burden of proof to terminate through reliance on Dr. Kebaish's narrative report and supplemental answers to questions. The Office found Dr. Kebaish's report sufficiently well rationalized to be entitled to special weight to resolve the conflict and to establish that appellant's current back condition was not causally related to her June 24, 1994 work injury.

By letter dated May 4, 2001 appellant requested an oral hearing before an Office hearing representative. An oral hearing was held on October 15, 2001 at which appellant testified. The hearing representative reviewed the case *de novo* as he determined that the first hearing representative had reversed the termination rather than finding that the Office met its burden of

proof to terminate and then finding that subsequent evidence created a new conflict in medical evidence.³

By decision dated January 3, 2002 and finalized January 7, 2002, the Office hearing representative reviewed Dr. Gordon's reports, compared Dr. Kebaish's reports and determined that Dr. Kebaish constituted the weight of the medical evidence of record. The hearing representative found that Dr. Kebaish indicated that appellant's degenerative disc disease was unrelated to her June 24, 1994 employment injury. He noted that Dr. Kebaish found that appellant had no residuals from her 1994 work injury, which was minor and resolved years ago, and that his opinion was entitled to special weight, resulting in it constituting the weight of the medical opinion evidence of record. The hearing representative noted that appellant still complained of pain every hour of every day, had significant levels of muscle tension as determined by the nerve scan and continued under treatment by Dr. Gordon, but he concluded that her complaints were not related to her 1994 injury.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ The Office did not meet its burden in this case.

Ordinarily, 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.⁵

The Board has held that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence, the opinion of such specialist, if sufficiently well rationalized and based on a proper medical background, must be given special weight.⁶ The Board has also held that, in a situation where the Office secures an opinion from an impartial medical specialist and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.⁷

³ This error does not affect the outcome of this case.

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ *James P. Roberts*, 31 ECAB 1010 (1980).

⁶ *Id.*

⁷ *Harold Travis*, 30 ECAB 1071 (1979).

The Board has explained that the purpose of a statement of accepted facts is to allow a physician to form an impression of the individual and evidence to be evaluated. The statement of accepted facts should state the conditions claimed and accepted by the Office, so the physician can assess whether the diagnoses given in the medical evidence to be reviewed, as well as his own diagnoses, are consistent with the conditions for which the claim was filed or accepted.⁸

ANALYSIS

In this case, Dr. Kebaish's original impartial medical examiner's report did not correctly, accurately and fully address the contents of the statement of accepted facts and the Office properly requested a supplemental report addressing the Office's questions. However, the further clarification provided by Dr. Kebaish was insufficient to correct the problem. In the statement of accepted facts, the Office clearly stated that it had accepted not only lumbosacral strain as being employment incident related, but additionally accepted spondylolisthesis at L5-S1 and a T11-12 herniated disc as being employment incident related. However, nowhere in his report or its clarification does Dr. Kebaish address these conditions and whether or not appellant continued to have related symptomatology or residuals. He only addresses low back muscle strain related pain, and did not offer any explanation of why appellant experienced pain on walking, on changing position and on all ranges of lumbar spine motion or on why she had a positive bilateral straight leg raising test or on why her legs hurt and she had hyperreflexia for an extended period of time. Dr. Kebaish opined that appellant had degenerative disc disease at L5-S1 which he found was unrelated to the 1994 incident, yet the Board notes that spondylolisthesis at L5-S1, an advanced manifestation of trauma and/or degenerative disc disease at that level, had been identified as an accepted condition in the Office's statement of accepted facts. Therefore, Dr. Kebaish's opinion is not based upon the statement of accepted facts containing an accurate history⁹ and is of reduced probative value and further it ignores the consequence of several relationships indicated by the statement of accepted facts as being employment related, such as the herniated T11-12 disc and L5-S1 spondylolisthesis.

Additionally, Dr. Kebaish did not discuss the course of treatment or residuals of appellant's accepted T11-12 herniated disc, beyond stating that a neurosurgeon had recommended surgery which appellant did not opt for at that time. Therefore, the Board notes that this employment-related problem is ongoing at the present time and is not due to aging and related degenerative disc disease or thoracic muscular strain injury.

Further, even Dr. Kebaish noted that the radio-diagnostic tests were outdated and were too stale, 1996 - six years old, to be useful for a 2002 accurate diagnosis of a condition or identification of its pathological residuals. The Board has stated that, consistent with case precedent, stale medical evidence cannot form the basis for current evaluation of residual symptomatology or disability determination.¹⁰

⁸ *Gwendolyn Merriweather*, 50 ECAB 416 (1999).

⁹ See *Joseph M. Popp*, 48 ECAB 624 (1997); *Patricia M. Mitchell*, 48 ECAB 371 (1997).

¹⁰ See *Keith Hanselman*, 42 ECAB 680 (1991); *Ellen G. Trimmer*, 32 ECAB 1878 (1981) (Reports almost two years old deemed invalid basis for disability determination and loss of wage-earning capacity).

As Dr. Kebaish did not address the presence or absence of two of the conditions reported in the record as accepted employment-related injuries, his report is incomplete and is not based upon the accurate factual and medical history of appellant. Consequently, Dr. Kebaish's report and its clarifications are of diminished probative value and are insufficient for the Office to base its termination upon.

Therefore, the remainder of the contemporaneous medical evidence of record, including Dr. Gordon's reports, supports that injury-related residuals and disability for work continues at this time.

As there is no further evidence submitted to the record that establishes that appellant's accepted injury-related conditions have ceased or are no longer related to his employment, the Office has not met its burden of proof to terminate appellant's compensation and medical benefits.

CONCLUSION

Under the circumstances described above, the Board finds that the Office has not met its burden of proof to terminate appellant's compensation entitlement.

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Issued: March 26, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member