

improperly reduced appellant's compensation benefits to zero as a result of her refusal to cooperate in connection with vocational rehabilitation. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.

By a letter dated March 16, 2004, the Office requested appellant's treating physician, Dr. Jin Xiao, a Board-certified orthopedist, provide an opinion as to whether appellant remained disabled due to her work-related injury of October 13, 1999.

On March 25, 2004 the Office referred appellant for vocational rehabilitation. In a report dated April 17, 2004, the rehabilitation counselor advised that she would pursue a modified position for appellant at the employing establishment subject to the restrictions set forth by her treating physician.

On May 4, 2004 the Office referred appellant to an Office referral physician, Dr. Kent H. Azaren, a Board-certified orthopedic surgeon, who in a report dated May 13, 2004, stated that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's work-related injury. Dr. Azaren noted that appellant had intermittent drainage from her lower abdomen every three months and thinning of the skin in the lower abdomen possibly related to the site of intermittent drainage. He diagnosed ventral hernia status post repair, recurrent ventral hernias status post repair, chronic right abdominal pain and right upper quadrant pain with no objective findings to support the pain, history of draining wound, and a possible infected mesh anterior abdominal wall. Dr. Azaren noted that appellant's chronic right abdominal pain was a subjective complaint that was related to her injury and repair of her injury and was directly related to her current disability. He opined that her hernia and recurrent ventral hernias were directly related to her work-related injury and that were the result of heavy lifting. Dr. Azaren advised that appellant's chronic right abdominal pain occurred only after her repair of the multiple ventral hernias with mesh. He stated that appellant had a degree of disability secondary to her chronic abdominal pain that was exacerbated by work. Dr. Azaren noted that appellant had subjective right abdominal pain exacerbated by activity such as lifting and twisting and deferred to an occupational medicine expert for a determination as to the degree of disability. He noted that the hernias were well healed and there was no evidence of recurrence and there was no physical reason why appellant could not return to full normal unrestricted activities. Dr. Azaren opined that appellant's hernia repairs were intact and strong and should not limit appellant's ability to do heavy lifting or any other type of activity.

In a letter dated May 28, 2004, Dr. Xiao advised that appellant cancelled several appointments and he was unable to provide an updated status of her condition at this time. By a letter dated June 22, 2004, the Office requested Dr. Xiao comment on the report and findings of the Office referral physician, Dr. Azaren.

On August 2, 2004 the Office issued a notice of proposed termination of compensation benefits on the grounds that Dr. Azaren's report dated May 13, 2004 established no residuals of the October 13, 1999 employment injury.

Subsequently, appellant submitted a report from Dr. Xiao dated August 24, 2004, who noted findings upon physical examination of an irregular thin scar around the abdomen,

subjective numbness, and mild tenderness on palpation. He diagnosed multiple ventral hernias, post several surgical repairs, chronic abdominal pain, history of chronic infection of the abdominal wall and prominent scars on the abdominal wall. Dr. Xiao opined that appellant's current physical impairment and work limitations were directly related to her initial work injury. He indicated that appellant should be restricted from lifting, pushing or pulling more than five pounds, from twisting, bending or stooping more than two hours per day intermittently during an eight-hour shift, and no standing or walking more than four hours intermittently during an eight-hour work shift. He disagreed with Dr. Azaren's assessment that appellant could return to full unrestricted duties and opined that appellant should be permanently precluded from heavy lifting, repetitive bending, pushing or pulling as these activities increase pressure on the abdominal wall and pressure inside the abdominal cavity may lead to recurrent ventral hernia given the fact that appellant has a predominant irregular scar and has had seven abdominal wall surgeries due to recurrent hernias. Dr. Xiao opined that appellant's current physical impairment and work limitations were directly related to her initial work injury and subsequent injury as well as complications associated with the injuries. In a supplemental report dated September 9, 2004, Dr. Xiao advised that appellant should be permanently precluded from heavy lifting, repetitive pushing/pulling, twisting and bending on a prophylactic basis to prevent possible development of recurrent ventral hernia.

By decision dated September 28, 2004, the Office terminated appellant's monetary benefits effective October 2, 2004 on the grounds that the weight of the medical evidence established that appellant had no continuing disability resulting from her October 13, 1999 employment injury.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² 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.³

ANALYSIS

The Office accepted that appellant sustained a ventral epigastric hernia and obstructive incisional hernia and authorized surgery. Appellant returned to full-time light duty in May 2000 and stopped on September 5, 2002 and did not return. The Office terminated appellant's compensation effective October 2, 2004 based on Dr. Azaren's examination and report. The Board finds, however, that there is a conflict in medical opinion between Dr. Azaren, the Office referral physician, and Dr. Xiao, appellant's treating physician, both of whom are Board-certified specialists in their respective fields.

² *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

³ *Mary A. Lowe*, 52 ECAB 223 (2001).

In his report, Dr. Azaren opined that appellant had no residuals of the work injury. He noted that the hernias were well healed and there was no evidence of recurrence and there was no physical reason why appellant could not return to full normal unrestricted activities. The physician opined that appellant's hernia repairs were intact and strong and should not limit appellant's ability to do heavy lifting or any other type of activity. By contrast, in a report dated August 24, 2004, Dr. Xiao, appellant's treating physician, noted findings upon physical examination of an irregular thin scar around the abdomen, subjective numbness, and mild tenderness on palpation. He diagnosed multiple ventral hernias, postsurgical repairs, chronic abdominal pain, history of chronic infection of the abdominal wall and prominent scars on the abdominal wall. Dr. Xiao advised that appellant should be permanently precluded from heavy lifting, repetitive bending, pushing and pulling. He opined that appellant's current physical impairment and work limitations were directly related to her initial work injury.⁴ Dr. Xiao has consistently supported work-related disability related to appellant's ventral epigastric hernia and obstructive incisional hernia, while Dr. Azaren found that appellant has no work-related residuals of the accepted injury and could return to unrestricted work. The Board therefore finds that a conflict in medical opinion has been created.

Section 8123 of the Act⁵ provides that if there is a disagreement between the physician making the examination for the United States and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁶ The Board finds that because the Office relied on Dr. Azaren's opinion to terminate appellant's compensation without having resolved the existing conflict,⁷ the Office has failed to meet its burden of proof in terminating compensation on the grounds that disability had ceased.

CONCLUSION

The Board finds that the Office has not met its burden of proof to terminate benefits effective October 2, 2004.⁸

⁴ Although, Dr. Xiao, in his supplemental report dated September 9, 2004, indicated that appellant should be permanently precluded from heavy lifting, repetitive pushing/pulling twisting and bending on a prophylactic basis, in his report of August 24, 2004, he provided a reasoned opinion on causal relationship noting that appellant's current physical impairment and work limitations were directly related to her work injury of October 13, 1999 and that his specific restrictions were not based on fear of future injury.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 39 (1994).

⁷ See *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

⁸ The record indicates that, after the filing of the instant appeal on October 25, 2004, the Office issued a decision regarding an overpayment of compensation on November 5, 2004. As this decision, on a separate issue, was rendered after the filing of the instant appeal, the Board does not currently have jurisdiction over the overpayment decision as the Board's jurisdiction extends only to those Office decisions issued within a year prior to the filing of an appeal. See 20 C.F.R. §§ 501.2(c), 501.3(d). Because this decision pertains to an issue separate from the termination issue before the Board, it is not null and void. See *Russell E. Lerman*, 43 ECAB 770 (1992) and *Douglas E. Billings*, 41 ECAB 880 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Worker's Compensation Programs dated September 28, 2004 is reversed.

Issued: April 11, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member