



In a report dated March 31, 1992, Dr. David Anderson, Board-certified in psychiatry and neurology, noted appellant's comments that all of the doctors who had treated her following her back injury had been unable to provide her with any help. Dr. Anderson advised that appellant was experiencing a major depression which was significantly contributing to her ongoing disability. He opined that, without resolution of the psychiatric condition, there was little hope of having significant resolution of the spinal pain. Dr. Anderson opined that "all of this significant emotional conflict is contributing to and augmenting her significant dependency in relationship to her pain."

In a handwritten memorandum dated June 1, 1992, the Office recommended authorization of psychiatric treatment for appellant's chronic pain syndrome.

In order to determine appellant's current physical condition, the Office referred appellant to Dr. Elton G. Welke. In an April 22, 1994 report, Dr. Welke indicated that there were no objective findings indicating any current diagnosis of lumbosacral strain. He opined that there was no reason why appellant could not return to her date-of-injury job for eight hours per day.

In an August 29, 1994 report, Dr. Jerome Schofferman, Board-certified in internal medicine and appellant's treating physician, noted appellant's continuing complaints of low back pain and stated that results of a magnetic resonance imaging (MRI) scan showed multilevel degenerated discs with a central herniation at L2-3, L3-4 and L4-5. Dr. Schofferman also stated that appellant had significant psychological factors affecting her physical condition, with significant impairment and disability from a psychiatric standpoint. He concluded that appellant had a permanent partial disability due to her degenerative disc condition as shown by MRI scan.

The Office determined that there was a conflict in the medical evidence regarding whether appellant was still totally disabled due to her January 1990 employment injury, and therefore referred the case to Dr. John Becker, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated November 9, 1994, Dr. Becker stated:

"[Appellant] sustained a lumbar sprain injury at work in 1990. She has mild degenerative disc disease on an orthopedic basis.

"In response to specific questions raised by the claims examiner, [appellant's] lumbosacral strain has resolved. In fact, I would not call this a strain but rather a sprain since it occurred on one occasion. This injury is a soft tissue injury and while symptoms may persist for a long period of time, the tissues actually injured heal in six weeks to three months. The relationship of appellant's present symptoms to her original injury is obscure. It is not related to lack of healing of the tissues originally injured. The obvious culprits are the preexisting degenerative disc disease with its natural history, progression of worsening and the psychological factors [alluded] to above. Since from an orthopedic standpoint appellant is not suffering from residuals of a work injury, the question [of] whether she is capable of performing her duties at the [employing establishment] should be addressed to a specialist who more clearly understands the disabling subjective symptoms she continues to exhibit.

“I cannot attribute causation of these complaints nearly five years after injury to the lifting injury which was a sprain injury which occurred in January, 1990.... With regard to causation, I find that the sprain injury did result in a ‘lighting up’ of her symptoms. I believe for this reason that the present disability is 90 percent related to nonindustrial factors and 10 percent related to her industrial injury of January 1990.”

In a supplemental report dated December 20, 1994, Dr. Becker reiterated that appellant had no residuals from her lumbrosacral sprain of January 1990. He also stated, however, that appellant was not capable of working an eight-hour day. By letter dated January 13, 1995, the Office asked Dr. Becker to comment on the opinions of Drs. Schofferman<sup>1</sup> and Welke and to clarify his opinion regarding whether appellant’s preexisting degenerative disc disease was aggravated by the accepted low back sprain and, if so, whether the aggravation was temporary or permanent. Dr. Becker, however, did not respond to this second request.

In order to determine appellant’s current condition and to ascertain whether she still suffered residuals from her accepted lumbosacral strain, the Office referred appellant for a second opinion examination with Dr. Henry Suckle, a Board-certified neurosurgeon. In a report dated March 3, 1997, Dr. Suckle stated that appellant’s current symptoms were not consistent with the lumbar sprain/strain that occurred six years ago. He believed that appellant’s symptoms were compatible with pain from the natural progression of the lumbar degenerative disc disease. Dr. Suckle further stated that a lumbar musculotendinous strain clears within four to six weeks and that a continuation of her symptoms was due to degenerative disc disease or arthritic changes in the affected spine or affected joints. He opined that any physical limitations appellant had were due to the underlying degenerative disc disease, and concluded that she could return to gainful employment.

In order to determine whether appellant’s accepted condition had a psychological component, the Office referred appellant for an examination with Dr. Edward Fiorella, Board-certified in psychiatry and neurology. In an April 20, 1997 report, Dr. Fiorella stated:

“[Appellant’s] mental and emotional condition is directly related to her back problem. I do not see any substantial psychiatric symptoms contributing to this physical problem.

“[Appellant] has no disability or limitation from a psychiatric standpoint. She does have pain complaints, but these do not cause any psychiatric limitation. . . . [Appellant] has no psychiatric condition that is related to her federal employment, and she would be able to work full time.”

Dr. Fiorella further stated that he was unable to elicit any psychiatric period of total disability stemming from her January 1990 work injury.

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<sup>1</sup> Dr. Schofferman continued to submit periodic treatment reports regarding appellant’s low back condition from 1995 through 2002. These reports essentially reiterated Dr. Schofferman’s opinion that appellant’s condition remained unchanged throughout this period.

The Office determined there was a conflict in the medical evidence between the opinions of Dr. Suckle and Dr. Schofferman regarding whether appellant had residuals from her accepted January 16, 1990 work injury, and in order to resolve the conflict, the Office referred appellant for an impartial medical examination with Dr. J.L. Izzo, a Board-certified neurosurgeon. In a report dated October 7, 1997, Dr. Izzo stated that appellant still had residuals from her work injury, but that she was at most partially, and not totally, disabled, and was capable of some form of gainful employment. He outlined physical limitations of no prolonged sitting more than 30 minutes, no standing more than 30 minutes, and no walking more than 15 to 20 minutes, with no lifting, twisting and bending.

In a report dated April 14, 1998, Dr. Schofferman advised that the possibility of a successful return to work for someone who has been off work for more than six years, such as appellant, was less than one percent. He stated that appellant was not able to return to gainful employment even in a part-time capacity. Appellant, however, returned to work with the employing establishment on an intermittent, part-time basis from September through November 1998.

On March 2, 2000 the employing establishment offered appellant a light-duty, sedentary job based on her physical restrictions. A copy of the offer was sent to Dr. Schofferman, who stated in a May 3, 2000 report that appellant would be unable to accept the position on the grounds that she was physically unable to perform it. Appellant rejected the job offer on May 12, 2000.

In a report dated September 13, 2000, Dr. Schofferman stated that appellant was permanently and totally disabled from working at the employing establishment.

In order to determine appellant's current condition and to ascertain whether she still suffered residuals from her accepted lumbosacral condition, the Office referred appellant for a second opinion examination with Dr. Stanley Baer, a Board-certified orthopedic surgeon. In a report dated February 6, 2002, Dr. Baer stated that appellant was not totally disabled and was able to work with modifications. He advised that, although appellant displayed subjective residuals from the January 1990 work, injury such as minimal back pain, there were no residual, significant objective factors.

On March 29, 2002 the Office issued a notice of proposed termination of compensation to appellant. The Office found that the weight of the medical evidence, as represented by Dr. Baer's referral opinion, established that she had no residuals from her accepted, employment-related strain injury of January 1990. The Office stated that there was no objective evidence in the record to support appellant's continuing complaints of disabling low back pain. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

In a report dated April 3, 2002, Dr. Schofferman stated:

“With all due respect to Dr. Baer, I feel his diagnosis is not correct. The correct diagnosis is multilevel painful degenerative disc disease. With all due respect again, I feel there is no such diagnosis as “chronic lumbar strain.” The disability

that [appellant] suffers from is totally subjective. That is to say, she has a pain problem, not a neurological problem. The subjective complaints of pain are consistent with her objective findings on x-ray and scan.

“[Appellant’s] pain has been exacerbated each and every time she has attempted to return to work.... Appellant is not able to engage in meaningful work in the competitive workplace.”

By decision dated May 3, 2002, the Office terminated appellant’s compensation.

In a letter received by the Office on May 29, 2002, appellant requested an oral hearing, which was held on May 14, 2003.

Dr. Schofferman submitted reports dated May 9, June 11 and September 2002 reports in which he essentially reiterated his previous findings and conclusions pertaining to appellant’s low back condition.

Appellant submitted a May 23, 2002 report from Dr. Kimeron Hardin, a Ph.D in psychology, who stated that appellant had a secondary major depressive disorder in response to the pain and limited functioning. He recommended psychotherapy treatment and pain management program.

In a report dated January 28, 2003, Dr. Schofferman stated that appellant had sustained a work-related injury which triggered her degenerative disc condition and resulted in her total disability. He advised that this condition had continued into the present with significant increases in appellant’s symptoms. Dr. Schofferman concluded that due to her continued low back pain appellant was not physically capable of working at her usual job or performing modified duty with the employing establishment.

By decision dated August 5, 2003, an Office hearing representative affirmed the May 29, 2002 termination decision.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden to justify termination or modification of compensation benefits.<sup>2</sup> After it has determined that an employee has a disabling condition causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment.<sup>3</sup>

### **ANALYSIS**

The Board finds that the Office properly found that Dr. Baer’s referral opinion negated a causal relationship between appellant’s current condition and her January 16, 1990 employment

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<sup>2</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>3</sup> *Id.*

injury. Dr. Baer found that she had no residual, objective findings from the January 1990 employment injury, which was accepted for lumbar strain. After a careful review of appellant's physical examination findings, as well as the medical evidence of record, Dr. Baer explained that appellant had a multitude of nonorganic findings, and that her subjective symptoms were not supported by objective findings. He also noted that appellant had degenerative changes in the cervical, thoracic and lumbar spine, with minimal pain. His report is sufficiently probative, rationalized and based upon a proper factual background. The Office properly accorded greater weight to the opinion of Dr. Baer, a Board-certified orthopedic surgeon, than to that of Dr. Schofferman, the attending physician and Board-certified in internal medicine. The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.<sup>4</sup>

Although Dr. Schofferman sent periodic reports indicating that appellant was still totally disabled from residuals from her January 1990 work injury, he failed to provide a rationalized, probative medical opinion relating appellant's current condition to her January 16, 1990 accepted employment injury. Dr. Schofferman stated that appellant experiences symptoms of low back pain caused by an underlying degenerative disc disease, which was triggered by the 1990 work injury. However, he never explained how pathophysiologically the lumbar strain injury would have caused degenerative disc disease of the cervical, thoracic and lumbar spines. Further, appellant never filed a claim nor did the Office ever any accept any claim based on a degenerative disc condition. Based on these facts, therefore, the Office properly found that Dr. Baer's opinion finding that appellant had no residuals from her 1990 employment injury constituted the weight of the medical evidence.<sup>5</sup> The Board finds that Dr. Baer's opinion constituted sufficient medical rationale to support the Office's May 3, 2002 decision terminating appellant's compensation.<sup>6</sup>

Once the Office properly terminated appellant's compensation in its May 3, 2002 decision, the burden of proof shifted to appellant to establish a continuing employment-related disability.<sup>7</sup> Appellant requested a hearing and submitted reports from Drs. Schofferman and Hardin. Dr. Schofferman's reports did not contain countervailing, probative medical evidence that appellant continued to have residual disability from her accepted lumbar strain injury. Dr. Schofferman stated that appellant remained disabled due to complaints of pain in her low

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<sup>4</sup> See *Anna C. Leanza*, 48 ECAB 115 (1996).

<sup>5</sup> Although the case was referred to two independent medical examiners, Dr. Becker and Dr. Izzo, these reports were submitted in 1994 and 1997, and thus do not constitute contemporaneous medical evidence.

<sup>6</sup> The Board notes that the Office hearing representative stated that on two different occasions in its August 5, 2003 decision that the opinions of two physicians who submitted reports prior to the Office's May 3, 2002 termination decision, Dr. Schofferman and Dr. Becker were of insufficient probative value to satisfy appellant's burden of proof. As stated above, it is the Office's burden to terminate appellant's compensation. However, this error is harmless, as the hearing representative properly found that the Office's May 3, 2002 termination decision found that the Office had met its burden to establish termination, and that appellant, to whom the burden of proof had been shifted, failed to submit medical evidence sufficient to modify the May 3, 2002 termination decision.

<sup>7</sup> *Talmadge Miller*, 47 ECAB 673, 679 (1996); see also *George Servetas*, 43 ECAB 424 (1992).

back and her degenerative disc condition, and was not capable of returning to either her usual job or a modified job with the employing establishment. In his January 28, 2003 report, Dr. Schofferman stated that appellant had sustained a work-related injury which triggered her degenerative disc condition and resulted in her total disability. He advised that this condition had continued into the present with significant increases in appellant's symptoms. Dr. Schofferman concluded that due to her continued low back pain appellant was not physically capable of working at her usual job or performing modified duty with the employing establishment. Although Dr. Schofferman's January 2003 report was based on a more recent evaluation of appellant than those reflected by his previous examinations, the report was essentially a restatement of Dr. Schofferman's previous opinions, which the Office had previously rejected, and is not sufficient to negate Dr. Baer's referral opinion.

Thus, the reports from Dr. Schofferman submitted after the Office's May 3, 2002 termination decision did not satisfy appellant's burden of proof to submit medical evidence sufficient to warrant modification of its decision, which properly found that Dr. Baer's referral opinion constituted the weight of the medical evidence. Accordingly, the record contains no current or recent medical evidence sufficient to establish that appellant still has the accepted condition of lumbar sprain.

With regard to appellant's alleged psychological condition, Dr. Anderson stated in 1992 that appellant was experiencing a major depression which was significantly contributing to her ongoing disability. He advised that, without resolution of the psychiatric condition, there was little hope of having significant resolution of the spinal pain. The Office recommended authorization of psychiatric treatment for chronic pain syndrome in its June 1992 memorandum and referred appellant for examination by Dr. Fiorella, a psychiatrist. In his April 20, 1997 report, however, Dr. Fiorella advised that appellant did not have any substantial psychiatric symptoms which contributing to her physical conditions and stated that appellant had no disability or limitation from a psychiatric standpoint. He concluded that although appellant had pain complaints, they did not cause any psychiatric limitation and opined that appellant had no psychiatric condition or periods of total disability stemming from her January 1990 work injury. In addition, Dr. Hardin submitted his May 23, 2002 psychological report in which he stated that appellant had a secondary major depressive disorder in response to the pain and limited functioning and recommended psychotherapy treatment and pain management program. This report, however, is of limited probative value in that it is generalized and equivocal and did not sufficiently explain or describe the process by which appellant's lumbar sprain condition would have been competent to cause the claimed psychological condition.<sup>8</sup> Therefore, the record does not contain sufficient medical evidence to support a causal relationship between appellant's accepted back condition and a consequential psychological injury. Moreover, appellant did not submit nor did the Office ever accept a claim based on an emotional or psychological condition. The Office therefore properly found that there were no physical or psychological residuals stemming from appellant's 1990 work injury. Accordingly, the Board affirms the Office's August 5, 2003 decision, affirming the May 3, 2002 termination decision.

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<sup>8</sup> *William C. Thomas*, 45 ECAB 591 (1994).

**CONCLUSION**

Under the circumstances described above, the Board finds that the Office met its burden to terminate appellant's compensation benefits.

**ORDER**

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

Issued: March 14, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member