



## **FACTUAL HISTORY**

On January 17, 1999 appellant, then a 22-year-old distribution clerk, filed a traumatic injury claim alleging that on January 9, 1999 she hurt her upper and lower back while lifting a tub of flats. The Office accepted her claim for a low back strain, herniated disc at L5-S1, bilateral sciatica with radiculopathy, and a bulging disc at L4-5. Appellant was found totally disabled until August 25, 2001, when she returned to part-time limited-duty work with restrictions. The Office accepted that she had a recurrence of disability on or about February 28, 2002 based on the opinion of Dr. Azra Omerovic, a Board-certified internist. She opined that her magnetic resonance imaging (MRI) scan showed herniated discs at L4-5 and L5-S1 with signs of bilateral radiculopathy. Appellant was placed on the periodic rolls on August 2002.

The Office referred appellant, together with the case record, a statement of accepted facts and a series of questions, to Dr. Leonard R. Smith, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a November 13, 2002 report, he noted the history of injury and presented his findings on examination. Dr. Smith found no indication of any definitive disc herniation at the L5-S1 level and opined that the MRI scan represented preexisting and degenerative changes which may be considered to be a normal variant. He reported that appellant exhibited no clinical evidence of radiculopathy or spinal nerve root irritation and opined that she had recovered from the low back strain or sprain. Dr. Smith opined that appellant was able to return to her modified assignment of August 25, 2001 and that the restrictions imposed were based upon the preexisting degenerative changes.

The Office determined that there was a conflict of medical opinion evidence between Dr. Omerovic and Dr. Smith. Appellant was referred, together with a statement of accepted facts, a list of questions and the case record, to Dr. Jaroslaw B. Dzwinyk, a Board-certified orthopedic surgeon, for an impartial medical examination. In a June 26, 2003 report, he reviewed her medical records and reported that the MRI scans of the lumbosacral spine from March 1999 and July 2000 did not reveal evidence of a frank disc herniation or central or foraminal stenosis but only mild degenerative changes which consisted of dehydration and bulging at the L4-5 and L5-S1 levels. X-rays of the lumbosacral spine performed in November 2002 were noted as being normal. Based on her history, physical examination and diagnostic tests, Dr. Dzwinyk opined that appellant had nonspecific pain syndrome based on subjective complaints of pain with essentially no physical findings. He opined that her current condition of chronic low back pain was not related to the January 9, 1999 work injury since the degenerative disc changes present on the MRI scan of February 1999 preexisted the injury. Dr. Dzwinyk also noted that there was no evidence of any type of acute spinal injury on the MRI scans, x-rays or on any of the evaluations contained in the medical record. He opined that appellant's injuries of January 1999 and February 2002 were lumbar strains and possibly a temporary aggravation of the preexisting degenerative disc disease, which had since resolved as her current subjective complaints of low back pain were not consistent with the objective findings, which were minimal to nonexistent. Dr. Dzwinyk opined that appellant was capable of returning to regular duties provided proper physical conditioning and adherence to body mechanics were maintained. He further stated that the physical limitations on appellant's function were not related to the injuries sustained at work, but were due to her preexisting or concurrent condition of lumbar degenerative disc derangement.

On October 10, 2003 the Office issued a proposed notice of termination of compensation to appellant on the grounds that her employment-related conditions had resolved based on Dr. Dzwinyk's June 26, 2003 report.

In response, appellant submitted results of an MRI scan conducted November 6, 2003, which noted a mild disc protrusion at L5-S1 and a November 19, 2003 note from Dr. Omerovic which stated that her MRI scan had not changed. In a November 24, 2003 report, Dr. John McClellan, a Board-certified orthopedic surgeon, noted the history of injury, presented his examination findings and provided an impression of degenerative disc disease, herniated nucleus pulposus at L5-S1 (central) and chronic right and chronic left low back pain. He opined that appellant should not work pending treatment and rehabilitation. No opinion was provided regarding the cause of the diagnosed conditions.

By decision dated December 4, 2003, the Office terminated appellant's compensation, effective that date, finding that Dr. Dzwinyk's opinion constituted the weight of the medical evidence in establishing that she had recovered from the accepted work-related conditions.

In a letter dated December 10, 2003, appellant requested that an Office hearing representative review the written record. She submitted a progress report dated December 10, 2003 from Dr. McClellan, which reiterated the physician's November 24, 2003 report. In a February 26, 2004 progress report, Dr. McClellan noted that the August 30, 2002 MRI scan report indicated no disc herniation, no spondylolisthesis and probable pars interarticularis defects, bilateral L5. He further noted that the recent MRI scan revealed a mild protrusion at L5-S1 and opined that this was most likely a continuation of the symptoms appellant had since 1999 and was consistent with the history given by appellant.

By decision dated April 5, 2004, an Office hearing representative affirmed the December 4, 2003 decision terminating appellant's compensation.

In an April 13, 2004 letter, appellant requested reconsideration. She resubmitted Dr. McClellan's February 26, 2004 report.

In a nonmerit decision dated April 27, 2004, the Office denied appellant's request for reconsideration. The Office found that Dr. McClellan's February 26, 2004 medical note was previously considered and did not constitute a basis for further merit review.

In a letter dated May 20, 2004, appellant requested reconsideration. She submitted a May 20, 2004 letter, in which Dr. McClellan reiterated his findings and listed his impressions as degenerative disc disease L4-5, L5-S1, herniated lumbar disc at L5-S1 central, chronic right and chronic left low back pain. He stated that he did not see appellant again, but that she had sent her MRI scan report of August 26, 2002 which he compared to the MRI scan of November 2003. Dr. McClellan noted that he had previously advised in a February 6, 2004 report, that the November 2003 MRI scan, which revealed a mild protrusion of L5-S1, was most likely a continuation of appellant's symptoms she had since 1999 and was consistent with the history of injury provided by her. A June 2, 2004 progress report from Dr. McClellan noted his treatment and appellant's status.

By decision dated August 18, 2004, the Office denied modification of the April 5, 2004 termination of appellant's compensation benefits. The Office found that she had not provided any medical evidence which outweighed the well-rationalized medical assessment presented by the impartial medical examiner.

In a November 1, 2004 letter, appellant requested reconsideration. In an October 25, 2004 letter, Dr. McClellan reiterated his treatment and findings. He advised that the MRI scan report of August 30, 2000, which indicated no disc herniation, might be in error as, based upon appellant's history and physical examination, she had symptoms consistent with disc herniation at L5-S1, which began based upon her work injury sustained January 9, 1999.

In a nonmerit decision dated January 12, 2005, the Office denied appellant's request for reconsideration, finding that the medical evidence submitted was repetitious and did not warrant further merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>1</sup> The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>2</sup> 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.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

The Office found that a conflict in medical opinion existed between the opinions of appellant's treating physician, Dr. Omerovic, a Board-certified internist, and Dr. Smith, a Board-certified orthopedic surgeon, who had provided a second-opinion examination for the Office. Their medical opinions disagreed on whether appellant continued to have residuals of her accepted back conditions. The Office properly referred appellant to Dr. Dzwinyk, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict.<sup>4</sup>

By report dated June 26, 2003, Dr. Dzwinyk reviewed the history of injury and the medical records. He noted that the MRI scans of the lumbosacral spine from March 1999 and July 2000 showed mild degenerative changes at the L4-5 and L5-S1 levels, with no evidence of a frank disc herniation or central or foraminal stenosis. Dr. Dzwinyk found that the

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<sup>1</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>2</sup> *Gewin C. Hawkins*, 52 ECAB 242 (2001).

<sup>3</sup> *Gloria J. Godfrey*, *supra* note 1.

<sup>4</sup> *See Jack R. Smith*, 41 ECAB 691, 701 (1990).

November 2002 x-rays of the lumbosacral spine were normal. On examination appellant presented minimal to nonexistent objective findings to support her current subjective complaints of low back pain. Dr. Dzwinyk opined that appellant's injuries of January 1999 and February 2002 were lumbar sprains and a possible temporary aggravation of her preexisting degenerative disc disease, which had all resolved. He further opined that she was capable of returning to her regular duties with limitations due to her preexisting degenerative condition. Dr. Dzwinyk opined that appellant's chronic low back pain was not related to the January 9, 1999 work injury since the degenerative changes present on the February 1999 MRI scan preexisted the work injury and there was no evidence of any type of acute spinal injury on the MRI scans, x-rays or on the evaluations contained in the medical record. He found that appellant had nonspecific pain syndrome based on subjective complaints of pain with no physical findings.

The Board has carefully reviewed Dr. Dzwinyk's opinion that appellant does not have any residuals causally related to her January 9, 1999 work injury and finds that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue in the present case. His opinion is based on a proper factual and medical history in that he reviewed the statement of accepted facts prepared by the Office, which specifically advised him of the accepted back conditions and herniated disc at L5-S1 and bulging disc at L4-5. Dr. Dzwinyk provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, he provided a proper analysis of the factual and medical history and his findings on examination and reached conclusions regarding appellant's back condition which comported with this analysis.<sup>5</sup> Dr. Dzwinyk provided medical rationale in support of his opinion by explaining that appellant's current condition and limitations were related to degenerative changes present on the MRI scan of February 1999, which preexisted the January 9, 1999 work injury and that any temporary aggravation of her preexisting or concurrent degenerative condition from the work injury or recurrence had resolved as there were no objective findings on examination. Accordingly, the Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized medical opinion of Dr. Dzwinyk and establishes that appellant no longer has any residuals causally related to her January 9, 1999 work injury.

In support of her contention that she continued to have employment-related residuals, appellant submitted a medical report dated November 24, 2003 from Dr. McClellan, which provided an impression of degenerative disc disease, herniated nucleus pulposus L5-S1 and chronic right and left low back pain. However, this report failed to address whether appellant had any residuals or disability caused by her January 9, 1999 work injury. Similarly, the November 7, 2003 MRI scan report, noting a mild disc protrusion at L5-S1 and Dr. Omerovic's November 19, 2003 note, stating that the MRI scan had not changed compared to the previous MRI scan showing mild disc protrusion L5-S1, did not address whether appellant had continuing residuals or disability causally related to her accepted work injury. These reports do not outweigh Dr. Dzwinyk's opinion that she no longer has any residuals causally related to her January 9, 1999 work injury.

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<sup>5</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987).

The Board, therefore, finds that the Office met its burden of proof to terminate appellant's compensation benefits effective December 4, 2003.

### **LEGAL PRECEDENT -- ISSUE 2**

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that she had any disability causally related to her accepted injuries.<sup>6</sup> To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.<sup>7</sup> Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>8</sup> Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>9</sup>

### **ANALYSIS -- ISSUE 2**

Appellant submitted additional reports from Dr. McClellan in support of her contention that she continues to have employment-related residuals. In reports dated December 10, 2003 and February 26 and June 2, 2004, he noted her progress and, on May 20, 2004 Dr. McClellan summarized his findings on examination. These reports, however, are of limited probative value as the progress reports fail to offer an opinion on the causal relationship of appellant's current condition. Dr. McClellan stated that the November 2003 MRI scan, which revealed a mild protrusion of L5-S1, was most likely a continuation of appellant's symptoms she had since 1999 and was consistent with the history she provided. However, these reports merely offer an opinion regarding appellant's current condition and causal relationship which is couched in indefinite and speculative term and lacks rationale for the physician's stated conclusion. Although the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, such opinion should not be speculative or equivocal.<sup>10</sup> Dr. McClellan merely advised that appellant's symptoms had continued since 1999 and were consistent with the history provided. The mere fact that a disease or condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.<sup>11</sup> Medical conclusions unsupported

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<sup>6</sup> See *Manuel Gill*, 52 ECAB 282 (2001).

<sup>7</sup> *Id.*

<sup>8</sup> *Elizabeth Stanislav*, 49 ECAB 540 (1998).

<sup>9</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>10</sup> *Samuel Senkow*, 50 ECAB 370 (1999).

<sup>11</sup> *Ernest St. Pierre*, 51 ECAB 628 (2000).

by rationale are of diminished probative value and are insufficient to establish causal relation.<sup>12</sup> The Board finds that the additional reports from Dr. McClellan are insufficient to outweigh the well-rationalized report provided by Dr. Dzwinyk.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.<sup>13</sup> Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>14</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>15</sup>

### **ANALYSIS -- ISSUE 3**

Appellant did not contend in her November 1, 2004 reconsideration request that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office.

With her reconsideration request, appellant submitted an October 25, 2004 letter from Dr. McClellan which reiterated prior opinion and findings. The Board has held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.<sup>16</sup> Although he opined that the August 30, 2000 MRI scan report, which indicated no disc herniation, might be in error as appellant's history and physical examination were consistent with disc herniation at L5-S1, this is irrelevant as his report failed to address the causal relationship between her current condition and her work injury. Therefore, under 20 C.F.R. § 10.608(b) the Office properly denied her application for reopening her case for a review on its merits.

### **CONCLUSION**

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective December 4, 2003 and she failed to establish that she continued to be disabled after that date causally related to her employment injury of January 9, 1999. The

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<sup>12</sup> *Albert C. Brown*, 52 ECAB 152 (2000).

<sup>13</sup> 20 C.F.R. § 10.606(b)(2).

<sup>14</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>15</sup> *Annette Louise*, 54 ECAB \_\_\_\_ (Docket No. 03-335, issued August 26, 2003).

<sup>16</sup> *See James E. Norris*, 52 ECAB 93 (2000).

Board further finds that the Office properly refused to reopen her case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 12, 2005 and August 18, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 8, 2005  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board