



## **FACTUAL HISTORY**

On March 20, 1998 appellant, then a 41-year-old maintenance mechanic, sustained a traumatic back injury while in the performance of duty. He stopped working that day. The Office accepted the claim for lumbar strain and appellant received appropriate wage-loss compensation.<sup>2</sup> Appellant returned to full-time, limited-duty work on February 8, 1999. He experienced periods of intermittent disability over the next several months and then total disability beginning June 26, 1999. He was placed on the periodic rolls effective August 15, 1999. Appellant returned to work May 8, 2000 in a part-time, limited-duty capacity. On August 30, 2000 appellant filed a claim for recurrence of disability beginning August 24, 2000. The Office accepted the claim and returned appellant to the periodic compensation rolls effective October 8, 2000.<sup>3</sup>

Over the next three years appellant's treating physician, Dr. Joe G. Gonzales, a Board-certified physiatrist, found him totally disabled due to his employment-related injuries. In a July 7, 2003 report, Dr. Gonzales noted an annular bulge at L5-S1 and disc desiccation at L3-4 and L4-5, complicated by radicular symptoms in both lower extremities.

In January 2004, the Office referred appellant for a second opinion evaluation. Dr. J. Clark Race, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on March 2, 2004. He diagnosed lumbar degenerative disc and joint disease and chronic pain syndrome. Dr. Race stated that appellant did not exhibit any clinical or objective findings of lumbar strain. However, he did exhibit findings of degenerative disc and joint disease, aggravated by marked obesity and deconditioning with loss of range of motion and weakness in appellant's back. Dr. Race explained that the two separate work incidents in 1996 and 1998 would not be expected to cause permanent lower back pain and in all likelihood would not result in objective radiographic findings of facet hypertrophy and lumbar disc degeneration. He also stated that it was more likely that appellant's findings were the result of the aging process, genetic factors and heavy stress on his back due to obesity. Dr. Race concluded that the effects of appellant's lumbar strains had resolved.

On March 24, 2004 the Office issued a notice of proposed termination of compensation and medical benefits based on Dr. Race's examination. Appellant challenged the Office's proposed termination on April 12, 2004. He submitted a July 17, 2002 report in which Dr. Gonzales found that because of appellant's work injury he was incapable of performing even sedentary work. The last page of the report included an April 2, 2004 handwritten notation from Dr. Gonzales indicating that appellant's medical condition and functional status remained unchanged and was a direct consequence of his work-related injuries.

By decision dated April 27, 2004, the Office terminated appellant's wage-loss compensation and medical benefits. Appellant requested an oral hearing. In a decision dated October 18, 2004, the Office hearing representative vacated the April 27, 2004 termination of

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<sup>2</sup> Appellant previously sustained a lumbosacral strain on April 18, 1996 and the Office combined the two case records under claim number 16-0277963.

<sup>3</sup> Due to a reduction-in-force appellant was separated from duty effective September 22, 2000.

benefits finding an unresolved conflict of medical opinion. He instructed the Office to refer appellant for an impartial medical evaluation.<sup>4</sup>

In a December 3, 2004 report, Dr. David R. Willhoite, a Board-certified orthopedic surgeon and impartial medical examiner, diagnosed degenerative disc disease at L5-S1 with chronic low back pain. He also diagnosed disc disease of the cervical spine. Dr. Willhoite explained that appellant most likely had degenerative disc disease at L5-S1 when he initially injured his low back in 1986. He further explained that the accepted lumbar strain was superimposed upon the degenerative disc disease and appellant continued to be symptomatic long beyond the time that a lumbar strain would have resolved. Dr. Willhoite concluded that appellant's current severe degenerative disc disease at L5-S1 was not secondary to his lumbar strain. In a supplemental report dated January 7, 2005, Dr. Willhoite further explained that, while the employment injury caused a temporary aggravation of appellant's preexisting degenerative disc disease at L5-S1, the lumbar strain and any effects of the injury resolved within six months time of the injury.

On January 24, 2005 the Office issued a notice of proposed termination of compensation and medical benefits. The Office found that the impartial medical examiner's December 3, 2004 and January 7, 2005 reports represented the weight of the medical evidence of record. Appellant was afforded 30 days to submit any additional evidence or argument.

By decision dated February 24, 2005, the Office terminated appellant's wage-loss compensation and medical benefits.

On April 5, 2005 appellant requested an oral hearing. The Branch of Hearings and Review denied appellant's request by decision dated April 25, 2005.

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

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>5</sup> Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>6</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.<sup>7</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>8</sup>

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<sup>4</sup> The hearing representative directed that appellant's compensation be reinstated retroactive to April 27, 2004.

<sup>5</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>6</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>7</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

<sup>8</sup> *Calvin S. Mays*, 39 ECAB 993 (1988).

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

The Office determined that a conflict of medical opinion existed based on the opinions of Drs. Gonzales and Dr. Race. Therefore, the Office properly referred appellant to an impartial medical examiner.<sup>9</sup> Dr. Willhoite, the impartial medical examiner, reported that appellant's degenerative disc disease at L5-S1 predated his 1986 lumbar strain and the lumbar strain most likely resolved within six months time of the injury. He explained that appellant continued to be symptomatic long beyond the time that a lumbar strain would have resolved. Dr. Willhoite concluded that appellant's current severe degenerative disc disease at L5-S1 was not secondary to his lumbar strain.

The Board finds that the Office properly relied on the impartial medical examiner's December 3, 2004 and January 7, 2005 reports in determining that appellant's accepted employment injury had resolved. Dr. Willhoite's opinion is sufficiently well rationalized and based upon a proper factual background. He not only examined appellant, but also reviewed appellant's medical records. Dr. Willhoite also reported accurate medical and employment histories. The Office properly accorded determinative weight to the impartial medical examiner's findings.<sup>10</sup> As the weight of the medical evidence establishes that appellant's accepted lumbar strain has resolved, the Office properly terminated appellant's wage-loss compensation and medical benefits.

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

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.<sup>11</sup> If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. However, the Office has discretion to grant or deny a request that was made after this 30-day period.<sup>12</sup> In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.<sup>13</sup>

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<sup>9</sup> The Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

<sup>10</sup> In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

<sup>11</sup> 20 C.F.R. § 10.616(a) (1999).

<sup>12</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>13</sup> *Rudolph Bermann*, 26 ECAB 354 (1975).

## ANALYSIS -- ISSUE 2

The Office issued its decision terminating compensation and medical benefits on February 24, 2005. Appellant did not request an oral hearing until April 5, 2005. Because he filed his request more than 30 days after the Office's February 24, 2005 decision, appellant is not entitled to an oral hearing as a matter of right.<sup>14</sup> Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue could equally well be addressed by requesting reconsideration.<sup>15</sup> Accordingly, the Office properly exercised its discretion in denying appellant's request for an oral hearing.

## CONCLUSION

The Board finds that the Office properly terminated wage-loss compensation and medical benefits on the basis that appellant's accepted lumbar strain had resolved. The Board also finds

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<sup>14</sup> 20 C.F.R. § 10.616(a) (1999).

<sup>15</sup> The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

that the Branch of Hearings and Review properly denied appellant's request for an oral hearing because he did not file his request in a timely manner.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 24 and April 25, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 21, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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