

decision. The Board found that there was a conflict in the medical evidence regarding whether appellant continued to experience residuals from his December 17, 1987 employment injury. The complete facts of this case are set forth in the Board's December 17, 2001 decision and are herein incorporated by reference.²

The Office referred appellant to Dr. Anthony F. Merlino, a Board-certified orthopedic surgeon. In a report dated March 27, 2003, he stated that there was no objective evidence that he had any residuals of disc herniation, nerve root compression or nerve root damage in his back stemming from the 1987 employment injury.

By decision dated July 28, 2003, the Office terminated appellant's compensation benefits, finding that Dr. Merlino's opinion represented the weight of the medical evidence.

On July 29, 2003 appellant's attorney requested an oral hearing which was held on June 23, 2004. Counsel contended that the Office's July 28, 2003 termination decision was improper because it was based on the opinion of Dr. Merlino, a second opinion examiner. He noted that this was not in keeping with the Board's finding that there was a conflict in the medical evidence. Counsel argued that, in light of this conflict, the Office was required to resolve this conflict by referral to an impartial medical specialist.³

By decision dated September 10, 2004, an Office hearing representative set aside the July 28, 2003 termination decision and remanded the case for referral to an impartial medical specialist.

On remand the Office referred the case to a referee medical specialist, Dr. Gilbert L. Shapiro, a Board-certified orthopedic surgeon. In a report dated December 7, 2004, he stated findings on examination and reviewed the statement of accepted facts and appellant's medical history. Dr. Shapiro concluded that appellant had preexisting degenerative changes in his lumbar spine which were aggravated by the December 1987 work injury. He advised that the acute problem had long resolved and that any residual complaints were due to degenerative lumbar disc disease unrelated to that episode. Dr. Shapiro felt that appellant had work capabilities limited only by the degenerative changes noted by magnetic resonance imaging (MRI) scan.

By decision dated January 18, 2005, the Office terminated appellant's compensation based on Dr. Shapiro's referee opinion, which represented the weight of the medical evidence.

On January 21, 2005 appellant's attorney requested an oral hearing, which was held on October 26, 2005. At the hearing, counsel argued that the Office erred in not accepting a condition for herniated lumbar disc and that Dr. Shapiro's opinion was flawed because he stated erroneously in his report that appellant was able to drive a car. Appellant testified at the hearing that Dr. Shapiro was biased and that his examination was limited and inadequate.

By decision dated February 6, 2006, an Office hearing representative affirmed the January 18, 2005 decision.

² The Board also denied a claim for a consequential psychiatric condition.

³ 5 U.S.C. § 8123(a).

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴ 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.⁵

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.⁶

ANALYSIS

Following the Board's December 17, 2001 decision, the Office referred appellant to Dr. Shapiro, the impartial medical examiner. He stated that appellant's December 1987 work injury was an acute problem which had long since resolved. Dr. Shapiro noted that appellant had preexisting degenerative changes in his lumbar spine which were aggravated by the December 1987 work injury. However, he opined that any residual symptoms he experienced were due to degenerative lumbar disc disease unrelated to the December 1987 employment injury. Dr. Shapiro concluded that appellant's ability to work was limited only by the degenerative changes noted by MRI scan. The Office relied on his opinion in its January 18, 2005 decision, finding that appellant had no continuing disability or impairment causally related to the December 1987 employment injury.

The Board finds that Dr. Shapiro's referee opinion negated a causal relationship between appellant's condition and disability and constituted medical evidence sufficient to establish that he no longer had any residuals from his accepted December 1987 lower back injury. Dr. Shapiro's opinion is sufficiently probative, rationalized and based upon a proper factual background. The Office properly accorded Dr. Shapiro's opinion the special weight of an impartial medical examiner.⁷ Accordingly, the Board finds that his opinion constituted the weight of medical opinion and supports the Office's January 18, 2005 decision to terminate appellant's compensation.

Once the Office properly terminated appellant's compensation in its January 18, 2005 decision, the burden of proof shifted to him to establish a continuing employment-related disability.⁸ Although he contends that the Office erred in not accepting a herniated lumbar disc,

⁴ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁵ *Id.*

⁶ *Barbara J. Warren*, 51 ECAB 413 (2000).

⁷ *Gary R. Seiber*, 46 ECAB 215 (1994).

⁸ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

the Office can only accept a medical condition based on the medical evidence of record. Appellant's attorney is not a physician under section 8101(2), so his opinion on this matter contains no probative value.⁹ He also contended that Dr. Shapiro's opinion is flawed because he incorrectly stated that appellant was able to drive a car. Notwithstanding the accuracy of this assertion, Dr. Shapiro did not base his opinion on appellant's ability to operate an automobile. Neither did appellant substantiate his assertion that Dr. Shapiro was biased against him or that his examination was limited and inadequate. The Board has found that Dr. Shapiro's referee opinion merited the special weight of an independent medical examiner. Appellant did not submit any additional factual medical evidence to vitiate this finding. The Office hearing representative, therefore, properly affirmed the January 18, 2005 termination decision in his February 6, 2006 decision.

CONCLUSION

The Board finds that the Office met its burden to terminate appellant's compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2006 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 20, 2006
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

⁹ 5 U.S.C. § 8101(2).