

FACTUAL HISTORY

On July 6, 1988 appellant, then a 46-year-old supervisory training instructor, sustained an employment-related low back strain and aggravation of a bulging disc at L4-5. He missed intermittent periods until he stopped work on January 3, 1989 and was thereafter placed on the periodic compensation rolls. Appellant was terminated by the employing establishment on May 5, 1989 due to a reduction-in-force. In November 1992 he moved to Pakistan and returned to live in the United States in 1996.¹

Appellant came under the care of Dr. Mohammed Ghassemi, a Board-certified family practitioner, who advised in a July 18, 2000 report that appellant was unable to work. On May 23, 2003 the Office referred him, together with a statement of accepted facts,² a set of questions and the medical record, to Dr. Weed for a second opinion evaluation. By report dated June 11, 2003, Dr. Weed noted his review of the record and that appellant reported he had been diagnosed with multiple sclerosis. He recorded subjective complaints and findings on examination which included poor range of motion of the low back, weakness in his left leg and radiculopathy in the right. Dr. Weed referred appellant for additional studies.

Dr. Ghassemi provided a June 12, 2003 report stating that appellant's condition had deteriorated since his June 28, 2000 examination due to cardiac problems, hypertension, Meniere's disease with constant dizziness, muscle weakness and chronic back pain. He opined that appellant was totally disabled.

A magnetic resonance imaging (MRI) scan of the lumbar spine dated June 18, 2003 was read by Dr. Thomas Summers, Board-certified in radiology, as demonstrating bulging discs at L4-5 and L5-S1 and what was most likely a hemangioma at L3. Dr. John J. Sand, Board-certified in neurology, advised that the June 30, 2003 electromyography (EMG) of the lower extremities was normal with no electrodiagnostic evidence of radiculopathy affecting the lower extremities.

In a July 7, 2003 report, Dr. Weed reviewed the EMG and MRI scan findings, which he discussed with appellant. He advised that appellant's examination had not changed and diagnosed mechanical low back pain with mild degenerative disc disease, coronary artery disease, multiple sclerosis and Meniere's disease. Dr. Weed opined that appellant had an essentially normal MRI scan for his age and that his employment-related lumbar strain was no longer active. Based on the MRI scan and normal EMG findings, appellant had no present orthopedic condition that was a result of the accepted 1988 injury. Dr. Weed noted that appellant had degenerative changes present in 1988 and these had progressed over the years. Any aggravation of that condition in 1988 would have been temporary and had resolved. He

¹ In a decision dated March 25, 1993, the Office terminated appellant's wage-loss compensation effective April 4, 1993. By decision dated July 26, 1993, an Office hearing representative reversed the March 25, 1993 decision, and appellant was returned to the periodic rolls.

² The statement of accepted facts, dated May 21, 2003, noted that appellant had preexisting multiple sclerosis, tinnitus and vertigo, hearing loss on the left and left loss of vision. He was also involved in a nonemployment-related motor vehicle accident on November 14, 1989 and had a heart attack in May 1998 with subsequent bypass surgery.

indicated that appellant's present condition would be the same irrespective of the 1988 work injury. Dr. Weed stated that he did not feel there was "anything about the injury of 1988 that would prevent [appellant] from returning to [work as] a supervisory training instructor" and could work eight hours a day, but that his other medical conditions would require restrictions that could prevent him from returning to gainful employment. In an attached work capacity evaluation, Dr. Weed advised that appellant could work eight hours a day with permanent restrictions to his physical activity that were due to his multiple sclerosis.

By letter dated August 21, 2003, the Office proposed to terminate appellant's compensation benefits, based on Dr. Weed's opinion that the accepted back conditions had resolved. Appellant disagreed with the proposed termination and submitted a September 10, 2003 report in which Dr. Steven M. Arkin, a Board-certified neurologist, examined appellant for evaluation of chronic low back pain with radiation into the right leg and presumptive multiple sclerosis. He advised that appellant's back pain and radiculopathy were "clearly related to the back injury that he sustained."³ In a September 12, 2003 report, Dr. Safder Mohsin, Board-certified in internal medicine, advised that appellant had severe degenerative back disease of the neck and lower back and was totally disabled.

In a decision dated October 3, 2003, the Office terminated wage-loss compensation effective November 1, 2003. Appellant continued to be entitled to medical benefits for aggravation of a bulging disc at L4-5. On October 14, 2003 he requested a hearing that was held on March 25, 2004. In a May 24, 2004 decision, an Office hearing representative found that a conflict in the medical evidence arose between appellant's physicians, Dr. Arkin and Dr. Ghassemi and Dr. Weed, who provided a second opinion evaluation for the Office. The case was remanded to the Office for an impartial evaluation. The referee physician was to resolve whether appellant continued to experience residuals of his accepted July 6, 1988 employment injury, whether this injury permanently aggravated his preexisting degenerative disc disease, whether the MRI scan results were of clinical significance and, if so, whether these were related to the 1988 work injury and whether he was capable of performing the duties of his date-of-injury position.

On June 14, 2004 the Office referred appellant, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Richard J. Brennan, a Board-certified orthopedic surgeon, for an impartial evaluation. In a July 28, 2004 report, he reviewed the medical record, including MRI scan findings of protruding or bulging discs but no disc herniation and normal EMG studies. Dr. Brennan noted the statement of accepted facts and appellant's complaints of constant radiating back pain. Examination findings included virtually complete hearing loss on the right. Sitting straight leg raising was negative. Examination of the spine caused pain, and pinprick examination did not elicit evidence of nerve root compression or sensory change. Dr. Brennan advised that there was no objective basis for appellant's pain and

³ Appellant also submitted reports from Dr. Yama Zafer and Dr. Bay N. Conley, chiropractors, dated September 4 and 15, 2003 respectively. Section 8101(2) of the Federal Employees' Compensation Act provides that chiropractors are considered physicians only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. Neither report provided a diagnosis of subluxation by x-ray. These reports, therefore, do not constitute competent medical evidence. 5 U.S.C. § 8101(2); see *Michelle Salazar*, 54 ECAB 523 (2003).

diagnosed lumbar strain, stating that the July 6, 1988 episode resulted in a lumbar strain or myofascial pain which could have temporarily aggravated the preexisting degenerative disease. He opined that appellant did not have a diagnosable condition resulting from the July 6, 1988 employment injury, that appellant had fully recovered and could return to his former employment of supervisory training instructor. Dr. Brennan also provided a work capacity evaluation in which he advised that he could perform his usual job but, that he had permanent restrictions to his physical activity due to the underlying degenerative condition.

By decision dated August 17, 2004, the Office terminated appellant's compensation benefits on the grounds that he no longer had residuals of his employment-related conditions. The Office accorded the weight of the medical evidence to Dr. Brennan, who provided the impartial medical evaluation.

In a report dated July 29, 2004 and received by the Office on August 26, 2004, Dr. Mary E. Brothers, Board-certified in occupational medicine, advised that she had examined appellant in mid-June. She reported the history of injury, his complaints, including radiating back pain and a review of medical records, including the 1992 MRI scan. Dr. Brothers opined that the diagnosis of multiple sclerosis had never been confirmed. Review of systems was significant for a recent stroke in February 2004. Physical examination demonstrated diffuse soreness at the lower lumbar level with tenderness over the sacroiliac joints and at the greater trochanter. There was limitation of back range of motion with no significant atrophy present. Both seated and supine sciatic stretch tests were abnormal. Sensory examination was diminished, primarily in the lateral left toes with some loss of sensation on the right in the L4-5 distribution. Dr. Brothers disagreed with Dr. Weed's findings, noting that he referred to the employment injury as a fall when it had been a lifting injury. She concluded that the July 6, 1988 employment injury caused a persistent pattern of symptoms and musculoskeletal and neurologic findings which were "clearly worrisome" for lower lumbar nerve root impingement and cervical cord impairment as evidenced by her physical findings. Dr. Brothers stated that she was "singularly unimpressed" with Dr. Weed's reports. Dr. Brothers concluded that the accepted conditions of lumbar strain and aggravation of bulging disc at L4-5 were still active. Although appellant's other diagnoses played some role in his condition, the mechanism of the July 6, 1988 injury acutely damaged his lower lumbar spine and nerve roots, which produced a chronic right sciatica with radicular elements. She concluded that appellant could not return to work as a language instructor and recommended computerized myelogram and repeat EMG studies.

On September 9, 2004 appellant requested a hearing and submitted additional medical evidence, including an October 5, 2004 report from Dr. Robert J. Takacs, a Board-certified orthopedic surgeon. He addressed appellant's complaints of low back pain and numbness in his left foot. Straight leg raising was negative and motor and sensory examinations were within normal limits. Midline lumbosacral and right sciatic notch tenderness were present. He reviewed a 1992 and June 18, 2003 MRI scan and diagnosed lumbar degenerative disc disease and leg numbness. Dr. Takacs opined that appellant "seems quite disabled by this problem" and recommended EMG evaluation. An October 7, 2004 bilateral lower extremity EMG, interpreted by Dr. Terrence Pratt, Board-certified in physiatry, demonstrated a mild degree of nerve root irritation limited to S1 on the right. By report dated December 15, 2004, Dr. Carroll L.

Zahorsky,⁴ noted that appellant injured his back at work in 1988 and had complaints of radiating back pain. He reviewed the June 18, 2003 MRI scan and Dr. Brothers' July 29, 2004 report and noted that appellant had intervertebral differential dynamics (IDD) therapy in August and September 2003. Dr. Zahorsky diagnosed degenerative disc disease of the lumbar spine with bulging discs at L1-2, L2-3 and L3-4 with protruding discs at L4-5 and L5-S1 and left and occasional right radiculopathy. He recommended a new MRI scan. A December 17, 2004 MRI scan of the lumbar spine was interpreted by Dr. Kelly Hart, a Board-certified radiologist, as showing a large extruded disc herniation at L5-S1 compressing the thecal sac and involving the left S1 nerve root and slight annular bulging with a small annular tear at L4-5. In a January 11, 2005 report, Dr. Zahorsky noted the MRI scan findings, diagnosed degenerative disease at L4-5 and L5-S1 with protruding and/or bulging discs and recommended IDD therapy.

At the April 21, 2005 hearing, appellant, through his attorney, argued that Dr. Brennan was not impartial as he had been selected by the Office, noting that appellant had not participated in his selection. Appellant testified that his bulging disc condition had not resolved and that he was told by a secretary in Dr. Brennan's office that he was a Department of Labor doctor, thus, showing that he was not independent. The hearing representative explained that only a temporary aggravation of bulging disc at L4-5 had been accepted as employment related. He requested that appellant have Dr. Brothers review Dr. Brennan's report.

In a report dated June 16, 2005, Dr. Brothers noted her review of Dr. Brennan's report, Dr. Takacs' report, the October 5, 2004 EMG and Dr. Zahorsky's report. Regarding Dr. Brennan's report, she opined that it was "much in the style" of Dr. Weed's report with "quite minimal assessment of the past medical history." Dr. Brothers stated, "in short, I was not impressed by the Brennan report of examination and find his conclusions to be open to questions and clarification." She noted that his examination was done prior to the December 17, 2004 MRI scan which demonstrated a large extruded disc herniation at L5-S1. Dr. Brothers agreed with the opinions of Dr. Zahorsky and concluded that appellant could not return to any work.

By decision dated August 9, 2005, the Office hearing representative affirmed the August 17, 2004 decision.

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.⁵ 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.⁶

⁴ Dr. Zahorsky's credentials could not be ascertained. He practices back pain care.

⁵ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁶ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

Section 8123(a) of the Act⁷ provides that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁸ When 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.⁹

ANALYSIS -- ISSUE 1

In this case, the Office determined that a conflict in the medical evidence was created between the opinions of appellant's treating physicians Dr. Arkin, Dr. Ghassemi and Dr. Mohsin, and Dr. Weed, who provided a second opinion evaluation for the Office. The conflict arose as to whether he continued to have residuals of his accepted July 6, 1988 employment injury, whether this injury permanently aggravated appellant's preexisting degenerative disc disease, whether the MRI scan results were of clinical significance and, if so, whether these were related to the 1988 work injury and whether he was capable of performing the duties of his date-of-injury position, considering only the 1988 employment injury and not his other nonemployment-related medical conditions. The Office properly referred appellant to Dr. Brennan, Board-certified in orthopedic surgery, for an impartial evaluation.¹⁰

Regarding appellant's allegations that both Dr. Weed and Dr. Brennan were biased, section 8123(a) of the Act provides that an employee shall submit to examination by a medical officer of the United States or by a physician designated or approved by the Secretary of Labor after the injury and as frequently and at the times and places as may be reasonably required.¹¹ The only limitation on the Office's authority, with regard to instructing a claimant to undergo a medical examination, is that of reasonableness.¹² The Office has developed specific procedures for selecting impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced.¹³ These procedures provide that selection of referee physicians is made by a strict rotational system using appropriate medical directories and that the services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area and repeating the

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

⁹ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁰ *Supra* note 8.

¹¹ 5 U.S.C. § 8123(a); *see Lynn C. Huber*, 54 ECAB 281 (2002).

¹² *Id.*

¹³ *Miguel A. Muniz*, 54 ECAB 217 (2002).

process when the list is exhausted.¹⁴ An impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise; mere allegations are insufficient to establish bias.¹⁵ A claimant who objects to the selection of a physician as a medical referee has the burden to document bias or unprofessional conduct on the part of the selected physician.¹⁶ In this case, other than generally alleging that Dr. Weed and Dr. Brennan were biased, appellant did not submit sufficient evidence to show bias by either physician. Dr. Brothers stated disagreement with the findings of Dr. Weed and Dr. Brennan does not establish bias by either physician. There is nothing in the record to show that appellant requested to participate in the selection of the referee physician. There is no support for his allegation that Dr. Brennan's secretary told appellant that Dr. Brennan was a Department of Labor physician. The record supports that appellant was properly referred to Dr. Weed and that Dr. Brennan was properly selected utilizing proper Office procedures.

Regarding Dr. Brothers' concern that Dr. Weed described the July 6, 1988 injury as a fall when it was a lifting injury, the Board finds this error harmless as Dr. Weed noted his review of the statement of accepted facts and referred to the accepted conditions in his report.¹⁷ Furthermore, appellant's attending physician Dr. Arkin provided no description of the injury in his September 10, 2003 report, merely referring to a "back injury," Dr. Mohsin did not refer to any injury in his September 12, 2003 report and Dr. Brothers did not provide any explanation as to how appellant's July 1988 work injury caused his current findings in her July 29, 2004 report.

The Board finds Dr. Brennan's report is sufficiently well rationalized to establish that appellant's July 6, 1988 lumbar strain and aggravation of a bulging disc at L4-5 had resolved.¹⁸ The Office met its burden of proof to terminate his compensation benefits effective August 17, 2004.¹⁹ In a comprehensive July 28, 2004 report, Dr. Brennan noted his review of the statement of accepted facts and medical record including MRI scan and EMG findings and appellant's complaint of constant radiating back pain. He advised that there was no objective basis for appellant's symptoms of pain, stating that the July 6, 1988 episode resulted in a lumbar strain or myofascial pain which would have temporarily aggravated the preexisting degenerative disease. Dr. Brennan opined that appellant did not have a diagnosable condition resulting from the July 6, 1988 employment injury from which he had fully recovered and could return to his former employment of supervisory training instructor. He also provided a work capacity evaluation in which he advised that appellant could perform his usual job.

¹⁴ *Id.* Federal (FECA) Procedure Manual, Part 3 -- Medical Examinations, *Second Opinion Examinations & Referee Examinations*, Chapter 3.500.3-4 (March 1994, October 1995).

¹⁵ *William Fidurski*, 54 ECAB 146 (2002).

¹⁶ *Maura D. Fuller (Judson H. Fuller)*, 54 ECAB 386 (2003).

¹⁷ *See Lan Thi Do*, 46 ECAB 366 (1994).

¹⁸ *Manuel Gill*, *supra* note 9.

¹⁹ *Gloria J. Godfrey*, *supra* note 5.

While Dr. Brothers disagreed with Dr. Brennan's conclusions, she merely stated that the aggravation of the bulging disc at L4-5 was still active and provided no explanation regarding the mechanism of injury or why this aggravation was permanent. A permanent aggravation was not accepted as employment related and appellant stopped work in 1988. When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased, even if the employee is medically disqualified to continue employment because of the effect work factors may have on the underlying condition.²⁰ The Board finds Dr. Brothers' report is insufficient to overcome the weight accorded Dr. Brennan as the impartial medical specialist and the Office met its burden of proof to terminate appellant's compensation benefits effective August 17, 2004.²¹

LEGAL PRECEDENT -- ISSUE 2

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to him to establish that he had any continuing disability causally related to his July 6, 1988 injury.²² To establish a causal relationship between the condition, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.²³ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.²⁴ 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.²⁵

ANALYSIS -- ISSUE 2

The medical evidence submitted by appellant after the August 17, 2004 termination includes Dr. Takacs October 5, 2004 report. He noted examination findings and reported that appellant was disabled. An October 7, 2004 EMG demonstrated a mild degree of nerve root irritation at S1. A December 17, 2004 MRI scan showed a herniated disc at L5-S1 compressing the thecal sac and involving the left S1 nerve root and a slight annular bulging with a small annular tear at L4-5. None of these reports, however, addressed the causal relationship of these findings to the accepted injury. Medical evidence that does not offer any opinion regarding the

²⁰ *Raymond W. Behrens*, 50 ECAB 221 (1999).

²¹ *Manuel Gill*, *supra* note 9.

²² *Gloria J. Godfrey*, *supra* note 5.

²³ *Id.*

²⁴ *Donna L. Mims*, 53 ECAB 730 (2002).

²⁵ *Leslie C. Moore*, 52 ECAB 132 (2000); *Victor J. Woodhams*, 41 ECAB 345 (1989).

cause of an employee's condition is of limited probative value on the issue of causal relationship.²⁶ Furthermore, the October 7, 2004 EMG and December 17, 2004 MRI scan implicate the herniated disc found at L5-S1. This finding, which occurred 16 years after the 1988 employment injury, was not shown on previous MRI scans and has not been accepted as employment related. These reports are, therefore, insufficient to meet appellant's burden of proof.

In his December 11, 2004 and January 11, 2005 reports, Dr. Zahorsky noted that appellant had injured his back at work in 1988 and had continued complaints of radiating back pain. After review of the December 17, 2004 MRI scan, he diagnosed degenerative disc disease at L4-5 and L5-S1. Dr. Zahorsky, however, also provided no opinion regarding the cause of this condition or whether it was related to the 1988 employment injury. Thus, his reports are also insufficient to establish any continuing employment-related disability.²⁷

Dr. Brothers stated her disagreement with Dr. Brennan's assessment and noted that his examination took place prior to the December 17, 2004 MRI scan, which demonstrated the herniated disc at L5-S1. However, this disc condition has not been accepted as employment related although she opined that appellant was totally disabled, the test of "disability" under the Act is whether an employment-related impairment prevents the employee from engaging in the kind of work he or she was doing when injured.²⁸ Dr. Brothers provided no explanation regarding how this finding or appellant's disability were caused by the 1988 employment injury. The Board, therefore, finds that he submitted insufficient medical evidence to establish that he had any continuing disability causally related to the July 6, 1988 employment injury.²⁹

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective August 17, 2004. The Board further finds that appellant failed to meet his burden of proof to establish that he had any disability after August 17, 2004 causally related to his federal employment.

²⁶ *Willie M. Miller*, 53 ECAB 697 (2002).

²⁷ *Id.*

²⁸ *John M. Richmond*, 53 ECAB 702 (2002).

²⁹ *Leslie C. Moore*, *supra* note 25.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 9, 2005 be affirmed.

Issued: June 14, 2006
Washington, DC

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

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