

Dr. Irwin Jacobson, appellant's treating physician and a specialist in family practice, periodically submitted disability slips and duty status reports, which indicated that appellant was still disabled and undergoing physical therapy to ameliorate her back condition.

In order to determine appellant's current condition, the Office referred appellant for a second opinion examination with Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon.¹ In a report dated October 15, 2004, Dr. Hanley stated that reflexes in the lower extremities were intact, strength testing of the lower extremity was normal and sensory examination was intact. He did not believe that any additional treatment was necessary. Dr. Hanley stated:

"I see no relationship between the injury of April 14, 2004 and her current cervical complaints. She does have preexisting degenerative disease in the cervical spine and her spinal symptomatology is most consistent with those findings. That symptomatology was not caused as a consequence of the April 14, 2004 accident.

"It is my belief that the patient is not in need of any additional or future treatment. She suffers no impairment or inability to perform work activities as a consequence of this injury, that she would be fit for full duties without restriction at this time and that she has reached maximum benefits of medical care in this particular situation."

The Office determined that a conflict in the medical evidence existed between Dr. Jacobson and Dr. Hanley. Appellant was referred to Dr. Edward J. Resnick, Board-certified in orthopedic surgery. In a report dated January 18, 2005, Dr. Resnick, after stating findings on examination, reviewed the statement of accepted facts and the medical history and found that appellant's accepted lumbar strain condition had resolved. He stated:

"[Appellant's] examination indicates a marked discrepancy between her complaints, her responses and a paucity of supportive objective findings. Practically, all of her responses appear to be exaggerated. There does not appear to be any connection on the basis of my review of the records with a low back injury, which may have been sustained in April 2004. I find no relationship of any neck or upper back complaints and I find no significant supporting evidence of persistent objective low back difficulty.

"From the standpoint of the stated low back injury, it is my opinion that this woman can return to full unrestricted work duty. It would appear that she had recovered by June 2004. Obviously, her present symptoms and complaints are such that she will probably not wish to return to any work. Nevertheless, in my opinion, the diagnosed condition has resolved. Her present complaints are, in my opinion not medically connected to the work injury or to the factors of employment. She complains that she has had no improvement what[so]ever despite treatment for at least [nine] months. It would, therefore, appear to me that

¹ The Office informed appellant, by letter dated September 16, 2004, that the forms Dr. Jacobson did not constitute a well-reasoned opinion sufficient to support continued total disability compensation.

continuation of the present treatment would be ineffective and inappropriate. I strongly suspect a psychologic or nonmedical component to her complaints and her apparent dysfunction. This would, however, be unrelated to work.”

On February 25, 2005 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 the January 18, 2005 report by Dr. Resnick, established that appellant was no longer disabled due to the accepted lumbar strain condition. The Office allowed him 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

In a letter to the Office dated March 14, 2005, appellant’s attorney argued that it was not appropriate to use Dr. Resnick as the referee examiner because appellant was previously examined by his partner Dr. Albert Weiss, a Board-certified orthopedic surgeon.²

By decision dated March 28, 2005, the Office terminated appellant’s compensation.

By letter dated April 1, 2005, appellant’s attorney requested an oral hearing. By letter dated December 9, 2005, appellant’s attorney requested a review of the written record. Counsel reiterated the argument he made below regarding the impropriety of having Dr. Resnick serve as an impartial medical examiner when his associate, Dr. Weiss, treated appellant for another injury. In addition, counsel contended that the Office failed to properly utilize the Physician’s Directory System (PDS) for choosing referee examiners.

By decision dated February 7, 2006, an Office hearing representative affirmed the March 28, 2005 termination decision, finding that the Office met its burden to terminate compensation. The hearing representative found, however, that the Office erred in designating Dr. Resnick as a referee medical examiner. The hearing representative stated that there was no conflict in medical evidence, as Dr. Jacobson failed to submit a rationalized medical opinion supporting appellant’s continued total disability. The hearing representative, therefore, found that any issues raised by appellant’s attorney pertaining the propriety of Dr. Resnick being designated as a referee examiner were not relevant. The hearing representative nevertheless found that Dr. Resnick’s opinion represented the weight of the medical evidence as a second opinion referral examination, as it was sufficiently thorough and his opinion was sufficiently well rationalized.

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.³

² Accompanying the March 14, 2005 letter from appellant’s attorney was a copy of a February 2, 2004 report by Dr. Weiss, a Board-certified orthopedic surgeon, which documented that he had appellant undergo diagnostic testing for carpal tunnel syndrome and ulnar nerve irritation.

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

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.⁴

ANALYSIS

The Office based its decision to terminate appellant's compensation on the January 18, 2005 report of Dr. Resnick, who was initially designated by the Office as a referee medical examiner. He stated that there was a "marked discrepancy" between appellant's complaints and the objective findings during examination. Dr. Resnick believed that most of her responses were exaggerated. There was no significant, objective evidence to support her persistent low back complaints. Dr. Resnick found no connection between these complaints and the April 2004 lower back injury, which had completely resolved and opined that she could return to full duty without restrictions.

The Board finds that the weight of the medical evidence establishes that the residuals of appellant's accepted injury of lumbar strain and sprain had resolved and the Office met its burden of proof to terminate appellant's compensation benefits. Prior to the Office's termination decision, appellant's treating physician, Dr. Jacobson, had not submitted a rationalized medical report supporting appellant's continuing disability due to the accepted injury. Dr. Jacobson's reports were, therefore, not sufficient to create a conflict in the medical opinion evidence. Dr. Hanley, the Office's second opinion physician, conducted a physical examination of appellant and found no objective findings regarding the lumbar spine. He noted that appellant had current cervical complaints, but that these complaints were most consistent with her preexisting degenerative disc disease, not the accepted injury. Dr. Resnick's opinion negating a causal relationship between appellant's claimed current condition and disability and her accepted April 2004 lumbar strain injury and that she no longer has any residuals from her employment injuries was sufficiently probative, rationalized and based upon a proper factual background. While Dr. Resnick's opinion is not entitled to the weight of the medical evidence, as a conflict did not exist in the medical opinion evidence at the time of the referral, his opinion is entitled to its own intrinsic weight and will remain in the record.⁵

Appellant's attorney has argued that the Office's choice of Dr. Resnick to serve as a referee medical examiner was improper because Dr. Resnick's associate, Dr. Weiss, had treated appellant for another injury. He further asserted that the Office did not abide by the mandatory PDS rotation system in choosing Dr. Resnick.⁶ The Office hearing representative found, however, that Dr. Resnick was not a referee examiner by virtue of the fact that the Office had

⁴ *Id.*

⁵ *Cleopatra McDougal-Sadler*, 50 ECAB 367 (1999).

⁶ Appellant's attorney provided insufficient evidence to support this assertion.

improperly found a conflict in the medical evidence.⁷ As Dr. Resnick was not an impartial medical specialist, his opinion does not have to be excluded from the record.⁸ The Board affirms the hearing representative's finding, as the intrinsic weight of Dr. Resnick's January 18, 2005 report constituted a sufficient basis for the Office to rely on his opinion, as well as that of Dr. Hanley. The Office hearing representative, therefore, properly affirmed the March 28, 2005 termination.

CONCLUSION

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

⁷ The Board notes that Federal (FECA) Procedure Manual, Part 3 -- Medical Examinations, *Referee Examinations*, Chapter 3.500.4a(3) (March 1994) and its previous decisions place great importance on the appearance as well as the fact of impartiality in choosing referee examiners. Only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an "impartial specialist." In *Leonard W. Waggoner*, 37 ECAB 676, the Board remanded the case because the physician who examined the claimant was an associate of the physician to whom the claimant had been referred. The Board further found that to give special weight to a physician not selected in accordance with procedures would "undermine the appearance of impartiality or would appear to compromise the integrity of the system for selecting impartial specialists." The Board found that the physician was not entitled to the special weight accorded to a referee specialist because the procedures designed to provide adequate safeguards against any possible appearance of bias were not followed. In the instant case, however, in light of the hearing representative's decision to strip Dr. Resnick of his status as a referee examiner, these issues are moot.

⁸ See *Pierre W. Peterson*, 39 ECAB 955 (1988).

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 6, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board