



## **FACTUAL HISTORY**

This is the second appeal before the Board in this case. By order issued August 22, 2005,<sup>1</sup> the Board remanded the case to the Office for reconstruction of the record. The Board found that the record submitted to the Board was incomplete as there was no evidence dated from the January 25, 1999 date of injury and January 2001.<sup>2</sup> The law and the facts of the case as set forth in the Board's order are hereby incorporated by reference.

On remand, the Office associated additional records with the case file.<sup>3</sup> From the date of injury onward, appellant was treated by several physicians for persistent headaches, neck pain, low back and right knee pain. In reports from September 1999 through October 2000, Dr. Todd D. Moldawer, an attending Board-certified orthopedic surgeon, diagnosed headaches, neck and back pain related to the January 25, 1999 injuries. He also observed a right arm tremor of uncertain etiology. Dr. Moldawer obtained studies demonstrating congenital L4-5 stenosis, right L5 and bilateral S1 nerve root dysfunction, C3-4 and C5-6 disc protrusions. He opined that appellant was totally disabled for work.

Dr. John Beck, an attending Board-certified psychiatrist and neurologist, submitted reports dated September 8, 2000 to January 18, 2001. He diagnosed a pain disorder with mood disturbance and anxiety. In a January 18, 2001 report, he opined that the January 25, 1999 injuries were the sole cause of appellant's psychiatric conditions and that her reaction was "proportionate to the known injury."

In October and November 2000 reports, Dr. Joseph F. Condon, an attending Board-certified physiatrist, diagnosed lumbar stenosis, cervical degenerative disc disease and a benign tremor of the right hand.

In a January 10, 2001 report, Dr. Sadik, an attending Board-certified anesthesiologist specializing in pain management, provided a history of injury and treatment, noting that appellant struck the right side of her face when she fell on January 25, 1999. He diagnosed lumbar stenosis from L4-S1, right-sided radiculitis, multilevel degenerative disc disease, cervical disc bulges, chronic lumbosacral strain, mixed type headaches and right-sided occipital neuralgia, right upper extremity tremor and very significant depression with psychosocial overlay.<sup>4</sup> From August 26, 2002 to April 22, 2004, Dr. Sadik performed a series of six facet rhizotomies bilaterally from L2 to S1. He administered trigger point injections for occipital

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<sup>1</sup> Docket No. 05-927 (issues August 22, 2005).

<sup>2</sup> The Office accepted a lumbar strain and right knee contusion sustained on January 25, 1999 when appellant, then a 37-year-old aircraft maintenance coordinator, fell down concrete steps. The Office later accepted a consequential adjustment reaction.

<sup>3</sup> The Office also included records regarding a March 29, 1993 right knee injury, accepted for a recurrent dislocation of the right patella. This claim is not before the Board on the present appeal.

<sup>4</sup> In an August 7, 2002 report, Dr. John D. Kaufman, a Board-certified orthopedic surgeon and second opinion physician, diagnosed cervical and lumbar musculoligamentous strains with probable multiple disc bulges. In a November 8, 2002 report, Dr. Mitchell Kaufman, an attending Board-certified psychiatrist and neurologist, diagnosed possible reactive depression or somatoform disorder.

headaches and lumbar spondylosis through July 2004. Dr. Sadik opined that appellant was permanently and totally disabled due to lumbar pain, neck pain, headaches and the side effects of medications prescribed to treat those conditions.

On January 13, 2004 the Office referred appellant, the medical record and a statement of accepted facts to Dr. Ha'Eri, a Board-certified orthopedic surgeon, and Dr. Dupee, a Board-certified psychiatrist and neurologist, for a second opinion regarding the presence of any work-related residuals.

In a March 18, 2004 report, Dr. Ha'Eri noted reviewing the medical record and statement of accepted facts. He noted no abnormal findings on examination of both lower extremities and the lumbar spine. Dr. Ha'Eri diagnosed a resolved right knee contusion and resolved lumbar strain. He opined that the accepted strain temporarily produced low back pain due to revelation of underlying lumbar degenerative disease. Dr. Ha'Eri stated that appellant no longer exhibited any injury-related disability or residuals. He found that appellant could perform light duty.

In a February 2, 2004 report, Dr. Dupee reviewed the medical record and statement of accepted facts. On examination, she noted that appellant appeared very histrionic and that her thought process was tangential. Dr. Dupee diagnosed chronic pain disorder associated with psychological factors and a mixed personality disorder. She opined that appellant would remain unemployable without psychotherapy as she was unable to "give or take supervision, cooperate with others, work under deadlines or be able to concentrate effectively on a daily basis."<sup>5</sup> Dr. Dupee explained that the January 25, 1999 fall triggered an underlying personality disorder.

In a June 1, 2004 letter, the Office requested that Dr. Dupee clarify any causal relationship between appellant's back pain and the accepted psychiatric condition. Dr. Dupee responded on June 21, 2004 that the January 25, 1999 lumbar strain could have triggered the chronic pain disorder and a previously undiagnosed personality disorder.

By notice dated July 26, 2004, the Office advised appellant that it proposed to terminate her wage-loss compensation and medical benefits as Dr. Ha'Eri and Dr. Dupee found that her accepted work-related conditions had ceased. Appellant responded in August 6 and September 10, 2004 letters, asserting that Dr. Ha'Eri did not examine her and that his report was fraudulent.<sup>6</sup> She also asserted that there was a conflict of medical opinion between Dr. Dupee and her attending physicians that required appointment of an impartial medical examiner. Appellant submitted additional evidence.

In a July 22, 2004 report, Dr. Grewal, an attending licensed clinical psychologist, diagnosed moderate depression caused by the January 25, 1999 fall.

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<sup>5</sup> In a May 3, 2004 letter, the Office advised Dr. Sadik to refer appellant to a psychiatrist or psychologist based on Dr. Dupee's recommendation. He referred appellant to Dr. Balijander S. Grewal, a licensed clinical psychologist.

<sup>6</sup> In an August 6, 2004 statement, Kim Pearson, appellant's sister, noted accompanying appellant to the March 16, 2004 appointment with Dr. Ha'Eri. Ms. Pearson alleged that Dr. Ha'Eri spoke with appellant for approximately 10 minutes but did not examine her. During the discussion, appellant vomited due to a headache, whereupon Dr. Ha'Eri left the room.

In an August 2, 2004 report, Dr. Sadik opined that the January 25, 1999 injuries caused a chronic lumbosacral strain with consequential severe anxiety and depression.

By decision dated September 10, 2004, the Office terminated appellant's wage-loss and medical compensation benefits effective that day as the evidence did not establish that she had any residuals or continuing disability related to the accepted January 25, 1999 injuries. The Office found that Dr. Sadik's reports were insufficiently rationalized. The Office noted that, as Dr. Sadik was an anesthesiologist, he lacked "the knowledge and training to determine whether [appellant] continue[d] to suffer residuals of [her] injury" or continued to be totally disabled. The Office accorded the weight of the medical evidence to Drs. Dupee and Ha'Eri.

In a September 13, 2004 letter, appellant requested a review of the written record. In a January 10, 2005 letter, appellant contended that there was a conflict of medical opinion between Drs. Ha'Eri and Dupee, for the government, and Dr. Sadik regarding the presence of residuals of the accepted conditions and any disability for work. She submitted additional evidence.

In a September 9, 2004 note, Dr. Sadik opined that appellant was increasingly anxious and angry. He administered epidural and trigger point injections for headaches, right occipital nerve tenderness and lumbar pain through February 2005. Dr. Sadik opined that appellant's headaches, neck pain and lumbar pain remained related to the January 25, 1999 injuries.

In an October 19, 2004 report, Dr. Grewal diagnosed a depressed and anxious mood secondary to chronic mixed severe headaches and musculoskeletal right-sided occipital neuralgia secondary to myofascial pain syndrome.

By decision dated and finalized March 4, 2005, an Office hearing representative affirmed the September 10, 2004 decision. The hearing representative found that the weight of the medical evidence continued to rest with Drs. Dupee and Ha'Eri. He explained that Dr. Sadik was not an expert in an appropriate specialty and did not provide sufficient rationale to support that appellant continued to suffer from residuals of the accepted conditions.

On March 14, 2005 appellant filed her prior appeal with the Board. After the Board's August 22, 2005 order remanding the case to the Office, appellant submitted additional evidence from Dr. Sadik. In reports from February 28 to October 25, 2005, Dr. Sadik noted treating appellant's headaches, neck pain, back pain and myofascial pain syndrome with trigger point injections. He opined that these conditions were caused by the January 25, 1999 injury.

By decision dated February 7, 2006, the Office affirmed its termination of appellant's compensation benefits. The Office found that the medical evidence and legal arguments submitted were insufficient to warrant modification of the prior decision. The Office noted that Dr. Sadik's reports were insufficient to outweigh the opinions of Dr. Ha'Eri and Dr. Dupee.

### **LEGAL PRECEDENT**

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>7</sup> Thus, after the Office determines that an

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<sup>7</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

employment-related injury or condition caused a period of disability for work, the Office may not terminate compensation without establishing either that its original determination was erroneous or that the disability ceased or is no longer related to the employment injury.<sup>8</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>9</sup>

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability during the period subsequent to the date when compensation is terminated or modified.<sup>10</sup> The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>11</sup>

### ANALYSIS

The Office accepted that appellant sustained a lumbar strain, right knee contusion and a consequential adjustment reaction related to a January 25, 1999 fall down steps. Appellant submitted medical evidence regarding her treatment for the accepted conditions through August 2004 and continuing. Dr. Moldawer, an attending Board-certified orthopedic surgeon, found appellant totally disabled for work through October 2000, in part due to lumbar pain caused by nerve root dysfunction related to the January 25, 1999 injury. Dr. Sadik, an attending Board-certified anesthesiologist specializing in pain management, submitted reports from January 2001 through August 2004 finding appellant totally disabled for work due to the accepted lumbar strain and its sequelae.

Dr. Beck, an attending Board-certified psychiatrist and neurologist, opined on January 18, 2001 that the January 25, 1999 injuries were the sole cause of appellant's disabling pain disorder with mood disturbance and anxiety. Dr. Grewal, an attending licensed clinical psychologist, opined in a July 22, 2004 report that the January 25, 1999 fall precipitated a moderate depression. Dr. Sadik observed appellant's continued pain disorder in periodic reports through August 2004.

In January 2004, the Office referred appellant to Dr. Ha'Eri, a Board-certified orthopedic surgeon, and Dr. Dupee, a Board-certified psychiatrist and neurologist, to obtain a second opinion regarding the nature and duration of any injury-related residuals. Dr. Ha'Eri submitted a March 18, 2004 report finding that the accepted lumbar strain and right knee contusion resolved without residuals. In contrast, Dr. Sadik submitted numerous reports through August 2004 finding that the lumbar strain had not resolved and continued to disable appellant for work. The Board, therefore, finds a conflict of opinion between Dr. Sadik, for appellant, and Dr. Ha'Eri, for the government, regarding the continued presence of the accepted lumbar strain.

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<sup>8</sup> *Carl D. Johnson*, 46 ECAB 804 (1995).

<sup>9</sup> *Pamela K. Guesford*, 53 ECAB 726 (2002).

<sup>10</sup> *Raymond W. Behrens*, 50 ECAB 221 (1999).

<sup>11</sup> *Id.*

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123, states 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. But the Office did not do this. At the time of the termination, there was an outstanding conflict of medical opinion. The termination was thus improper as the Office did not meet its burden of proof in terminating compensation.<sup>12</sup>

The Board notes that the Office also accepted an adjustment reaction related to the accepted lumbar and knee injuries. Dr. Dupee submitted February 2 and June 21, 2004 reports finding that the January 25, 1999 injuries precipitated a chronic pain disorder and mixed personality disorder that disabled appellant for work. This opinion actually supports Dr. Sadik's assertion that appellant remained disabled through August 2004 and continuing due to a pain disorder precipitated by the January 25, 1999 injuries. Yet, the Office terminated appellant's compensation benefits effective September 10, 2004 despite evidence from both appellant's physician and a second opinion physician that appellant continued to be disabled by psychiatric conditions caused by the accepted injuries. This demonstrates that the Office's termination of appellant's compensation was additionally improper.

### **CONCLUSION**

The Board finds that the Office improperly terminated appellant's wage-loss and medical benefits as there was a conflict of medical opinion regarding the presence of continuing injury-related residuals.

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<sup>12</sup> *Raymond W. Behrens, supra* note 10.

**ORDER**

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

Issued: April 5, 2007  
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