



accepted the claim for low back strain. Subsequently, the Office placed appellant on the periodic rolls for temporary total disability.

In a report dated January 13, 2000, Dr. Joseph S. Gimbel, a second opinion Board-certified orthopedic surgeon, diagnosed a lumbosacral and sacroiliac strain due to the March 17, 1988 employment injury. He noted that this should have been a temporary injury. Dr. Gimbel stated that there were “no positive neurological findings since 1988.” He reported that x-ray interpretations and computerized axial tomography (CAT) scans showed some degenerative changes. Dr. Gimbel opined that “[t]he residuals that she suffers from are subjective.” He indicated that the work restrictions were based upon appellant’s subjective complaints as no objective findings were present. In an attached Form OWCP-5c, Dr. Gimbel concluded that appellant was capable of working four hours per day with restrictions.

In a report dated April 22, 2001, Dr. Gary T. Purcell, a treating Board-certified orthopedic surgeon, diagnosed chronic low back pain. He concluded that appellant was totally disabled as a result of this condition.

On September 13, 2001 the Office issued a notice of a proposed termination of benefits. The Office found that the weight of the evidence rested with Dr. Gimbel’s opinion that appellant had no residuals or disability due to her accepted employment injury.

In a letter dated October 3, 2001, appellant disagreed with the proposed termination of benefits.

By decision dated October 17, 2001, the Office finalized the termination of appellant’s wage-loss and medical benefits effective that date.

In a letter dated November 19, 2001, appellant’s counsel requested an oral hearing, which was held on April 2, 2002.

In a report dated March 18, 2002, Dr. John B. Dorsey, an examining Board-certified orthopedic surgeon, diagnosed lumbosacral strain/sprain with permanent aggravation of degenerative disc disease including development of an L3-4 disc herniation. He disagreed with Dr. Gimbel that appellant’s injury was temporary. Dr. Dorsey opined that the accepted lifting incident permanently aggravated appellant’s preexisting degenerative disc disease and caused a L4-5 disc herniation.

In a decision dated July 16, 2002, the Office hearing representative affirmed the termination of appellant’s benefits effective October 17, 2001. However, he found that a conflict in the medical opinion subsequently arose between Dr. Dorsey and Dr. Gimbel. The case was remanded to the Office for referral to an impartial medical specialist to address whether appellant has any continuing disability or residuals from her March 17, 1988 employment injury.

On August 13, 2002 the Office referred appellant, together with a statement of accepted facts, list of questions and medical record, to Dr. Michael S. Weng, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion.

In a September 6, 2002 report, Dr. Weng concluded that appellant no longer had any residuals from her March 17, 1988 employment injury and that any aggravation would have been temporary. A physical examination revealed “some minimal tenderness along the right SI joint and buttocks area,” tenderness over the paraspinal muscles at L1 to L4, 80 degrees forward flexion, 30 degrees lateral bending and 30 degrees rotation. Dr. Weng reported “moans and groans” when moving her back. A review of x-ray interpretations revealed lumbosacral spine degenerative changes. A July 26, 1998 magnetic resonance imaging (MRI) scan showed some areas of mild stenosis involving the lumbosacral spine and degenerative dysethesias, especially at the L3-4 level. Dr. Weng disagreed with Dr. Dorsey that appellant sustained a permanent aggravation of her preexisting degenerative lumbosacral spine disease. He noted that the 1988 MRI scan showed herniation into the endplate which he stated was more indicative “of a degenerative process rather than anything acute.” Dr. Weng opined that appellant’s complaints of pain were more subjective than based on any objective evidence. He also reported finding no evidence of any radicular symptoms or neurologic damage. With respect to her ability to work, Dr. Weng found appellant capable of performing her regular work duties, but “this may not be possible secondary to her elderly age, as well as the fact that she has not worked since her date of injury.”

By decision dated December 13, 2002, the Office denied her claim for continuing disability.

Appellant, through counsel, requested an oral hearing, which was held on October 22, 2003.

In a supplemental report dated January 13, 2003, Dr. Dorsey stated his disagreement with Dr. Weng. He opined that Dr. Weng’s conclusion that appellant did not sustain a permanent injury from the accepted employment injury was speculative “particularly after reviewing the medical file and the MRI [scan] studies as well as the examinations [he] performed in March of last year.”

In a decision dated January 4, 2004, the Office hearing representative found that the report of Dr. Weng required clarification with respect to appellant’s claim that she occasionally had pain radiating from her knee. The hearing representative noted that reinstatement of compensation benefits was not warranted as the Office had previously met its burden of proof in terminating appellant’s compensation benefits.

In a supplemental April 19, 2004 report, Dr. Weng again opined that appellant had no disability or residuals due to her employment injury. He noted appellant’s complaints of numbness and pain radiating into her leg were new. Dr. Weng found that appellant lacked radicular symptoms based upon the medical records dated from 1988 to 1992 the history he took and his notes. He also reported a 1988 MRI scan showed L4-5 disc “herniations in to the endplate which would indicate a degenerative condition,” which “would not correspond to any radicular pattern.” Dr. Weng concluded that the “MRI [scan] reflects a degenerated condition, rather than a finding related to her injury.” He determined that there was no correlation between the history, physical findings and the MRI scan findings to support the conclusion that appellant sustained a permanent back injury. Appellant exhibited a positive Waddell’s sign, which Dr. Weng noted was a reaction which indicated nonphysiologic responses to pain. He then

reported three reactions to pain which were inconsistent with the objective evidence. These included complaint of leg pain on straight leg raising that decrease with foot dorsiflexion, arm pain which radiated down to her toes and complaints of pain with respect to her degenerative lumbar spine disease.

By decision dated June 7, 2004, the Office found that the opinion of the impartial medical examiner, Dr. Weng, constituted the weight of the evidence that appellant had no residuals from her employment injury.

In a letter dated June 15, 2004, appellant requested an oral hearing, which was held on June 24, 2005. By decision dated September 19, 2005, the Office hearing representative affirmed the June 7, 2004 decision.

On March 15, 2006 appellant requested reconsideration and submitted a March 23, 2006 report by Dr. Scott Kreiner, a treating Board-certified physiatrist, in support of her request. Dr. Kreiner diagnosed lumbar disc displacement, lumbar stenosis, lumbar radiculitis, scoliosis and lumbar degenerative disc disease. He concluded that appellant's symptoms were due to her 1988 employment injury. Physical findings included tenderness upon palpitation over mid-lumbar spine, limited lumbar spine range of motion, negative straight leg raising and slow and shuffling gait. Dr. Kreiner noted that "[appellant] had no pain prior to the incident." He also stated that "[i]t would be inappropriate to deny benefits at this point as her symptoms have not changed in the 18 years following the injury." Dr. Kreiner concluded that there was no new injury but some of the progressive spine deterioration may be age related.

By decision dated June 16, 2006, the Office denied modification of the September 22, 2005 decision.

### **LEGAL PRECEDENT**

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant.<sup>1</sup> In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability, which continued after termination of compensation benefits.

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between appellant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of appellant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature

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<sup>1</sup> See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

of the relationship between the diagnosed condition and the specific employment factors identified by appellant.<sup>2</sup>

Section 8123(a), in pertinent part, provides: If there is a 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.<sup>3</sup> 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.<sup>4</sup>

### ANALYSIS

The Office accepted the claim for low back strain. Subsequent to the termination of appellant's benefits, a conflict arose between the opinions of appellant's treating physician, Dr. Dorsey, who concluded that appellant had a permanent disability due to her March 17, 1988 employment injury and Dr. Gimbel, an Office referral physician, who concluded that her disability and residuals had ceased. The Office properly referred appellant to Dr. Weng, a Board-certified orthopedic surgeon, for an impartial medical evaluation.<sup>5</sup>

The Board finds that Dr. Weng's reports are sufficiently rationalized to support that appellant no longer had any residuals from her March 17, 1988 employment injury or any permanent aggravation of her degenerative disc disease due to her injury. Appellant did not meet her burden of proof to establish that she had disability or residuals on and after October 17, 2001, the date the Office terminated her compensation benefits. In a report dated September 6, 2002, Dr. Weng noted the history of injury, reviewed the medical records and performed a physical examination. Physical findings included some minimal tenderness along the right SI joint and buttocks area, tenderness over the paraspinal muscles at L1 to L4, 80 degrees forward flexion, 30 degrees lateral bending and 30 degrees rotation. Dr. Weng reviewed x-ray interpretations which showed lumbosacral spine degenerative changes. A July 26, 1998 MRI scan showed some areas of mild stenosis involving the lumbosacral spine and degenerative dysethesias, especially at the L3-4 level. Dr. Weng noted the 1988 MRI scan showed "herniation into the endplate" which he stated was more indicative of a degenerative process rather than an acute trauma. He opined that appellant's complaints of pain were more subjective than based on any objective evidence. Dr. Weng also reported finding no evidence of any radicular symptoms or neurologic damage. With respect to appellant's ability to work, Dr. Weng indicated that she was capable of performing her regular work duties, but noted that she had not worked since the date of injury.

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<sup>2</sup> *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>3</sup> 5 U.S.C. § 8123(a).

<sup>4</sup> *Darlene R. Kennedy*, 57 ECAB \_\_\_\_ (Docket No. 05-1284, issued February 10, 2006).

<sup>5</sup> 5 U.S.C. § 8123(a), *see Bryan O. Crane*, 56 ECAB \_\_\_\_ (Docket No. 05-232, issued September 2, 2005); *Geraldine Foster*, 54 ECAB 435 (2003).

On January 4, 2002 an Office hearing representative concluded that Dr. Weng's report required clarification of the issue of appellant's claim of occasional pain radiating from her knees. In an April 19, 2004 supplemental report, Dr. Weng concluded that appellant had no disability or injury from her accepted employment injury. He stated that appellant's complaints of numbness and pain radiating into her legs were new. A review of medical evidence from 1988 to 1992, the history he took and his notes showed no radicular symptoms. In addition, the objective evidence did not support a radicular problem. Dr. Weng noted that the 1988 MRI scan showed evidence of a degenerative condition which "would not correspond to any radicular pattern." He opined that the MRI scan supported that appellant had a degenerative condition "rather than a finding related to her injury." Dr. Weng also reported a positive Waddell's sign which is a reaction indicating nonphysiologic reactions or responses to pain. Moreover, appellant's reactions to pain were inconsistent with the objective evidence.

Appellant submitted a February 23, 2006 progress note by Dr. Kreiner in support of her request for reconsideration. The Board finds Dr. Kreiner's report insufficient to create a conflict with Dr. Weng. Dr. Kreiner's report contains no history of the employment injury beyond noting that appellant sustained an injury in 1988. As his medical conclusions are based on an incomplete factual history they are of diminished probative value.<sup>6</sup> Dr. Kreiner also provides no rationale to support his conclusion that appellant's disability is employment related besides noting that she had no pain prior to the 1988 employment injury. The Board has held that the mere fact that a condition manifests itself after an injury and was not present before an injury is not sufficient, without supporting medical rationale, to support causal relationship.<sup>7</sup> For these reasons Dr. Kreiner's opinion is insufficient to create a conflict with Dr. Weng's opinion as to whether appellant has any disability or residuals due to her accepted March 17, 1988 employment injury.

Dr. Weng provided a well-rationalized evaluation and supplemental report in which he clearly advised that appellant did not have any residuals or disability due to her March 17, 1988 employment injury. The Board finds that he is entitled to special weight as an impartial medical specialist. Appellant, therefore, failed to meet her burden of proof to establish that she had any continuing disability or residuals after October 17, 2001.<sup>8</sup>

### **CONCLUSION**

The Board finds that appellant failed to meet her burden of proof to establish that she had any continuing employment-related disability or residuals after October 17, 2001 causally related to her employment.

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<sup>6</sup> *M.W.*, 57 ECAB \_\_\_\_ (Docket No. 06-749, issued August 15, 2006).

<sup>7</sup> *Michael S. Mina*, 57 ECAB \_\_\_\_ (Docket No. 05-1763, issued February 7, 2006).

<sup>8</sup> *Kathryn E. Demarsh*, 56 ECAB \_\_\_\_ (Docket No. 05-269, issued August 18, 2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 16, 2006 and September 19, 2005 are affirmed.

Issued: March 7, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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