



appellant's compensation benefits, finding that he had no residuals from his October 11, 1985 employment injury. By decision dated January 14, 2004, an Office hearing representative affirmed the Office's January 3, 2003 termination decision; he found, however, that there was a conflict in the medical evidence regarding whether L2-5 disc and facet joint changes seen on a May 30, 2002 magnetic resonance imaging (MRI) scan were causally related to appellant's 1985 employment injury. The Office referred appellant to Dr. Donald D. Hubbard, Board-certified in orthopedic surgery, for a referee medical examination to resolve the conflict in the medical evidence. Dr. Hubbard indicated that appellant's condition was not connected to his 1985 employment injury and stated that his degenerative disease of the lumbosacral spine was both behavior induced and related to age. By decision dated August 30, 2004, the Office affirmed the Office's January 3, 2003 termination decision, finding that Dr. Hubbard's impartial opinion represented the weight of the medical evidence and established that appellant had no residuals from his October 15, 1985 employment injury. In an August 22, 2005 decision,<sup>1</sup> the Board affirmed the Office's termination finding but found that Dr. Hubbard did not provide sufficient rationale for his opinion that appellant's degenerative disc and facet disease was both behavior induced and related to age. The Board set aside the August 30, 2004 decision and remanded for the Office to obtain a supplemental report from Dr. Hubbard to review the degenerative changes seen on the May 30, 2002 MRI scan and sufficiently explain whether or not appellant's degenerative disc and facet disease was causally related to the October 1985 employment injury. The complete facts of this case are set forth in the Board's August 22, 2005 decision and are herein incorporated by reference.

In a supplemental report dated November 27, 2006, Dr. Hubbard stated:

“Separating the process of normal aging of the human spine with its known, overwhelming, probability of progression of spinal degeneration from ‘symptomatic degenerative lesions’ of the spine is one of the great challenges in the diagnosis and treatment of spinal pain.”

Dr. Hubbard opined that this specific issue was a causative factor in the development of the specialty of pain management. Regarding this case, he stated that, because no provocative diagnostic spinal injection had been performed to determine pain source generator(s) following appellant's first MRI scan in 1989 or the second on May 23, 2002, it could not be determined whether appellant's symptoms and findings were the result of a lumbar strain/sprain injury only; or were also the result of injury or aggravation of preexisting age-related degenerative disc disease and/or degenerative joint disease. Dr. Hubbard concluded: “[I]n the absence of such

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<sup>1</sup> Docket No. 05-397 (issued August 22, 2005).

information related to the source of pain and other symptoms it can only be stated with reasonable medical probability [that] radiographic imaging findings are related to and secondary to age.”<sup>2</sup>

By decision dated January 16, 2007, the Office found that appellant had no continuing disability or impairment causally related to the October 1985 employment injury. It found that Dr. Hubbard in his November 27, 2006 report had provided sufficient medical rationale for his opinion that appellant’s degenerative disc disease and degenerative changes shown by 1989 and 2002 MRI scan were not causally related to the October 1985 employment injury. The Office therefore found that his supplemental referee opinion represented the weight of the medical evidence.

By letter dated February 2, 2007, appellant requested an oral hearing, which was held on July 18, 2007.

In a report dated June 5, 2007, Dr. David S. Whitney, Board-certified in orthopedic surgery, expressed his disagreement with Dr. Hubbard’s opinion that appellant’s degenerative changes were caused by age and were unrelated to his October 1985 lumbar strain injury. He indicated that he only saw appellant on one occasion, November 8, 1999, at which time he performed a medical examination of him. Dr. Whitney opined that appellant’s degenerative changes were causally related to the accepted lumbar strain condition because of the following factors: prior to October 11, 1985 appellant had no history of back injury, condition or symptoms; his lifting injury on that date was extreme; he described symptoms consistent with discogenic pain during his November 8, 1999 examination; on examination he exhibited no pain behavior without exaggeration; his lumbar MRI scan showed significant degenerative disc changes; and he showed full effort during his functional capacity evaluation by a physical therapist, with evidence of mechanical back impairment on lifting. He stated:

“All of us will develop [radiographic] changes with time but without specific impairment of function. In [appellant’s] case he sustained a lumbar strain with onset of symptoms. His symptoms continue to be brought on by specific back activities. This occurrence, when associated with a work-related injury, is known as permanent aggravation of a preexisting asymptomatic condition.”

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<sup>2</sup> Dr. Hubbard submitted a report dated October 3, 2005, in which he opined that appellant’s degenerative disc disease and radiographic findings were not related to the October 1985 work injury. In support of his opinion and diagnosis, he referenced an enclosure containing an article from a medical journal. By decision dated May 31, 2006, the Office denied compensation, finding that Dr. Hubbard’s October 3, 2005 report represented the weight of the medical evidence. By decision dated August 8, 2006, an Office hearing representative set aside the May 31, 2006 decision, finding that Dr. Hubbard’s October 3, 2005 report failed to address the outstanding question presented by the Board in its August 22, 2005 decision; *i.e.*, why he believed appellant’s degenerative disc and facet disease was related to age rather than the October 1985 work injury. The hearing representative returned the case to the district Office, for the Office to refer the case file to Dr. Hubbard to submit another report addressing the outstanding question issue in the case.

In a July 16, 2007 report, Dr. Richard R. Lynn, Board-certified in internal medicine, stated:

“I have reviewed Dr. Hubbard’s and Dr. Whitney’s reports. I agree with Dr. Whitney’s assessment that the October 11, 1985 strain injury contributed to and permanently aggravated, [appellant’s] disc condition, which continues to manifest with static standing and heavy lifting. Ever since that time, he has had to modify his life significantly.

“I have been the primary care physician for [appellant] for years.”

In a report dated August 22, 2007, Dr. Whitney essentially reiterated his previously stated findings and conclusions. He stated:

“To reiterate my opinion: had he for some reason undergone a lumbosacral MRI [scan] study before October 1985, [appellant] would have, on a more probable than not basis, shown degenerative disc disease. A large percentage of active adults do, absent a history of injury or symptoms. This is why we examining physicians cannot, in general, ascribe an MRI [scan] disc abnormality to an injury. However, and this is the key, if we have a claimant/patient with no history of previous back symptoms, a solid work history, a work-related back injury, development of symptoms compatible with such an injury and residual symptoms of a chronic nature along with a physical exam[ination] and MRI [scan] compatible with traumatic residuals and no pain exaggeration or ‘phony injury behavior’ on exam[ination], we have a more probable than not basis for ‘permanent aggravation of a previously asymptomatic condition. This is the situation with [appellant].

By decision dated October 4, 2007, an Office hearing representative affirmed the January 16, 2007 decision.

### **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.<sup>3</sup> Following a proper termination of compensation benefits, the burden of proof shifts back to the claimant to establish continuing employment-related disability.<sup>4</sup>

Section 8123(a) provides that, 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>5</sup> It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the

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<sup>3</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>4</sup> *John F. Glynn*, 53 ECAB 562 (2002).

<sup>5</sup> *Regina T. Pellecchia*, 53 ECAB 155 (2001).

opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>6</sup>

### ANALYSIS

The Board in its August 22, 2005 decision remanded to the Office for a supplemental report from Dr. Hubbard, the impartial medical examiner, to review the degenerative changes seen on the 1989 and 2002 MRI scans and sufficiently explain whether or not these changes and appellant's degenerative disc and facet disease were causally related to the October 1985 employment injury. Dr. Hubbard submitted a November 26, 2007 report stating that his review of the case file indicated that neither the 1989 nor the 2002 MRI scans, nor any of the contemporaneous records, documented degenerative changes which developed as a direct result of appellant's October 1985 employment injury. He stated that in the absence of such documentation conclusively showing the source of appellant's lower back pain and symptoms it could only be stated with reasonable medical probability that his MRI scan findings were related to age. The Office relied on Dr. Hubbard's opinion in its January 16, 2007 decision, finding that appellant had no continuing disability or impairment causally related to the October 11, 1985 work injury and was therefore not entitled to compensation or medical benefits.

The Board finds that Dr. Hubbard's impartial opinion negates a causal relationship between appellant's continuing condition and disability related to his employment. The medical evidence establishes that appellant no longer has any residuals from his accepted October 1985 low back strain injury. Dr. Hubbard found no indication in the record that his degenerative disc condition was caused by anything other than the normal aging process. His opinion is sufficiently probative, rationalized and based upon a proper factual background. Therefore, the Office properly accorded Dr. Hubbard's opinion the special weight of an impartial medical examiner.<sup>7</sup> The Board therefore finds that Dr. Hubbard's opinion constituted the weight of medical opinion and supports the Office's January 16, 2007 decision to deny any entitlement to continuing compensation based on the October 11, 1985 work injury.

Appellant subsequently requested an oral hearing and submitted the June 5 and August 22, 2007 reports from Dr. Whitney, who stated that appellant's degenerative changes are causally related to the accepted lumbar strain condition. Dr. Whitney asserted that appellant sustained a permanent aggravation of his underlying, preexisting lower back condition on October 11, 1985, noting that he sustained an "extreme injury" on that date and had no history of back injury, condition or symptoms prior to this injury. He also related that appellant described symptoms consistent with discogenic pain during his November 8, 1999 examination, during which he did not exaggerate his low back pain. Dr. Whitney also noted that appellant's lumbar MRI scan showed significant degenerative disc changes, which would also have been shown by MRI scan had he undergone such testing prior to his 1985 injury.

Dr. Whitney's reports do not constitute probative medical opinion showing that appellant had any continuing disability or residuals from his accepted condition. He merely states that

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<sup>6</sup> *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

<sup>7</sup> *Gary R. Seiber*, 46 ECAB 215 (1994).

appellant's degenerative disc condition and changes as shown by MRI scan were causally related to the October 1985 employment injury; his reports do not contain a well-reasoned and sufficiently supported opinion that would vitiate the Office's finding that appellant did not have any employment-related disability following the termination of his benefits. Dr. Whitney's reports do not outweigh Dr. Hubbard's opinion nor do they negate the Office's finding that Dr. Hubbard's November 26, 2007 report represented the weight of the medical evidence. His report is of diminished probative value for the further reason that he has not examined appellant since November 8, 1999. Dr. Lynn's report is summary in nature and merely expresses his preference for Dr. Whitney's opinion over that of Dr. Hubbard, without providing a probative, well-rationalized opinion that appellant's degenerative disc condition is causally related to his 1985 work injury. Appellant failed to submit medical evidence sufficient to negate the Office's finding that he does not have disability caused by residuals of the accepted employment injury. Thus, the Office hearing representative properly found in his October 4, 2007 decision that appellant had submitted no evidence sufficient to undermine the Office's finding, in its January 16, 2007 decision, that the opinion of Dr. Hubbard represented the weight of the medical evidence.

**CONCLUSION**

The Board finds that appellant has not met his burden to establish continuing disability.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 4 and January 16, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 19, 2008  
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