# United States Department of Labor
# Employees' Compensation Appeals Board

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| **J.H., Appellant** | ) | |
| **and** | ) | **Docket No. 08-708** |
| | ) | **Issued: September 5, 2008** |
| **INTERNAL REVENUE SERVICE,** | ) | |
| **Cherry Hill, NJ, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On December 31, 2007 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated March 19, October 30 and November 16, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective March 18, 2007; and (2) whether appellant met his burden of proof to establish that he sustained recurrences of disability on April 5 and 20, 2007.

## ***FACTUAL HISTORY***

On February 3, 2006 appellant, then a 53-year-old investigative analyst, injured his lower back and left arm when packing and lifting boxes while preparing for an office move.[1] He stopped work on February 8, 2006. In a March 8, 2006 report, Dr. Stuart G. Dubowitch, a Board-certified osteopath specializing in orthopedic surgery, noted the history of injury and that appellant recently had a nonwork-related rupture of his left triceps tendon with repair. He advised that appellant had significant pain and spasm on examination of the lumbar spine. Dr. Dubowitch diagnosed lumbar strain/sprain with myofasciitis and a history of prior back injury/rule out lumbar disc pathology and recommended a magnetic resonance imaging (MRI) scan. On April 5, 2006 the Office accepted that appellant sustained an employment-related lumbar strain, and he was placed on the periodic rolls. A May 1, 2006 MRI scan of the lumbar spine demonstrated degenerative changes and spondylosis.

On May 26, 2006 the Office referred appellant to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a June 8, 2006 report, Dr. Stark noted the history of injury, his review of the medical record including the May 1, 2006 MRI scan and appellant's complaint of radiating low back pain. Examination of the spine demonstrated local tenderness to palpation over the spinous processes of the lumbar vertebrae with some tenderness over the paralumbar musculature with no spasm. Lumbar spine range of motion was resisted at 50 percent of normal. Sitting root test was negative and straight leg raising 80 degrees bilaterally. Dr. Stark diagnosed status post lumbar strain and lower back pain secondary to degenerative disease of the lumbar spine and noted that, as appellant had no objective findings of the accepted condition, his employment-related condition had resolved and he had returned to his preinjury condition. He concluded that appellant could return to his usual work as an investigative analyst. In an attached work capacity evaluation, Dr. Stark advised that appellant could work eight hours a day with no limitations.

By report dated June 13, 2006, Dr. Dubowitch reported that appellant continued to have pain and spasm with radiculopathy. He advised that appellant had aggravated a preexisting back condition and provided a work capacity evaluation with restrictions that appellant could sit for 10 to 15 minutes, stand for 30 minutes, drive to and from work for 30 to 35 minutes and had a lifting restriction of 15 to 20 pounds.

The Office determined that a conflict in medical evidence arose between Dr. Dubowitch and Dr. Stark regarding appellant's continuing disability and work restrictions. On October 16, 2006 it referred him to Dr. George P. Glenn, Jr., Board-certified in orthopedic surgery, for an impartial medical evaluation. Dr. Dubowitch submitted reports reiterating the diagnoses and restrictions.

[1] Appellant had received a promotion and was transferring from the Cherry Hill location to a new work location in Springfield, NJ. The record also contains evidence regarding a separate umbilical hernia injury, adjudicated by the Office under file number 022519597. The instant claim was adjudicated under file number 022512610.

In a November 21, 2006 report,[2] Dr. Glenn reviewed the statement of accepted facts, history of injury, history of chronic back pain, and the medical record including the May 1, 2006 MRI scan. He reported appellant's current complaints including that he could not drive the two-hour commute to work and that his work was mainly sedentary. Dr. Glenn stated that, during a prolonged interview, appellant sat easily on the examination table, showed no outward signs of difficulty or distress, and, although he had a tendency to move slowly, was able to heel and toe walk with a normal gait. There was no evidence of lumbar muscle spasm or tenderness to palpation on physical examination in the upright position. Although appellant would not complete a squat because of low back pain, squatting was not a low back pain generator, and axial compression did not produce complaints of low back pain. Forward flexion was limited to 75 degrees. Hyperextension, tilting and rotating were normal but produced pain with no spasm or tenderness. Hip flexion, sitting and supine straight leg raising was normal. Calf and thigh circumference were equal bilaterally, and motor tone and strength were excellent. Dr. Glenn noted that the MRI scan findings of mild degenerative disease showed no evidence of acute change and were present prior to the February 3, 2006 employment injury. He advised that appellant had subjective complaints of constant low back pain but no evidence of muscle spasm and no objective findings in terms of spasm, specific lumbar muscle tenderness, positive provocative tests with a normal neurologic evaluation, and that appellant had returned to his preinjury condition, had long since reached maximum medical improvement, and could return to his usual work activity. Dr. Glenn stated that he would have difficulty justifying driving restrictions based on appellant's physical findings and diagnostic studies. In an attached work capacity evaluation, he advised that appellant could work full time without restrictions.

In reports dated December 5, 2006 and January 16 and February 27, 2007, Dr. Dubowitch reiterated his findings and conclusions.

By letter dated February 15, 2007, the Office proposed to terminate appellant's compensation benefits on the grounds that he no longer had residuals or disability due to the accepted conditions. Appellant's attorney disagreed with the proposed termination.

In a decision dated March 19, 2007, the Office terminated appellant's compensation effective March 18, 2007.

On April 5, 2007 appellant requested a hearing and submitted reports dated April 11 to July 18, 2007 from Dr. Dubowitch who repeated his diagnoses and restrictions. Dr. Dubowitch noted that appellant's commute should be limited to 30 to 35 minutes and advised that he did not anticipate further improvement.[3] In a May 1, 2007 report, Dr. Moshen Kalliny, Board-certified in anesthesiology and pain medicine, noted appellant's complaints of worsening radiating back pain and that he had recently been in a motor vehicle accident. Physical examination demonstrated tenderness in the lumbar spine with a positive straight leg raising and diminished

[2] On January 25, 2007 Dr. Glenn advised that page 19 of his November 21, 2006 report contained a typographical error, and he submitted an amended report.

[3] Appellant also submitted a March 8, 2007 report with an illegible signature that included diagnoses of lumbar myofascial pain and lumbar discogenic disease, and in a July 29, 2007 report, Dr. Richard B. Wise, a Board-certified ophthalmologist, noted a history of recurrent uveitis with a recent flare-up on the left.

sensation to pinprick. Dr. Kalliny reviewed the May 1, 2006 MRI scan, diagnosed lumbar disc herniation, lumbar radiculopathy and lumbar facet arthropathy from L3 to S1, and recommended epidural steroid injections.

On May 27, 2007 appellant submitted a Form CA-2, occupational disease claim, alleging that he sustained employment-related anxiety and depression due to the physical damage to his body. In a June 12, 2007 report, Robert Chorney, Psy.D., noted that appellant had been a patient for two years and reported that he complained that his two-hour commute to work exacerbated his back pain. He diagnosed adjustment disorder with depressed mood which was work related. Dr. Chorney stated that appellant's employers failed to provide a reasonable accommodation and shorten his commute. He recommended medical leave. On July 18, 2007 Dr. Chorney advised that appellant could not work for an undetermined period due to a work-related psychological condition. On August 8, 2007 he advised that, although appellant had improved, he should continue off work.

At the August 9, 2007 hearing, appellant testified that he returned to work in March 2007 but the two-hour commute caused his symptoms to return and he could not concentrate and was tired at work due to pain. On August 29, 2007 Dr. Chorney advised that staying off work improved appellant's psychologic functioning but that he should remain off work, at least until September 12, 2007.

On August 11, 2007 appellant filed two recurrence claims, alleging that he sustained recurrences of disability on April 5 and 20, 2007, stating that residual pain from his back strain and an inguinal hernia prevented him from commuting to work and caused stress and anxiety.[4] In letters dated September 4 and 5, 2007, the Office informed appellant of the evidence needed to support his recurrence claims. In a September 5, 2007 report, Dr. Dubowitch advised that appellant's condition was essentially unchanged and that the two-hour commute to work was excessive. He indicated that appellant could drive for approximately one hour.

By decision dated October 30, 2007, an Office hearing representative affirmed the March 19, 2007 termination decision with regard to appellant's accepted back condition. He remanded the case to the Office for further development regarding whether appellant had developed a consequential emotional condition causally related to the February 3, 2006 employment injury. In a November 16, 2007 decision, the Office denied that appellant sustained recurrences of disability on April 5 and 20, 2007 due to his accepted lumbar strain.

## ***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

[4] Appellant reported that he had surgical repair of the hernia on January 29, 2007.

[5] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

Section 8123(a) of the Federal Employees' Compensation Act[7] 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]

## ***ANALYSIS -- ISSUE 1***

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective March 18, 2007. The Office determined that a conflict in the medical evidence arose between the opinions of appellant's attending physician Dr. Dubowitch and Dr. Stark, who provided a second opinion evaluation for the Office, regarding appellant's continuing disability and work restrictions. It properly referred appellant to Dr. Glenn, Board-certified in orthopedic surgeon, for an impartial evaluation.[9]

In a comprehensive report dated November 21, 2006, Dr. Glenn described the February 8, 2006 employment injury and his review of the medical record including MRI scan findings of mild degenerative disease which, he opined, were present prior to the employment injury. He reported appellant's complaints of radiating back pain and provided findings on physical examination. Dr. Glenn advised that, while appellant had subjective complaints of constant low back pain, he had no objective findings in terms of spasm, specific lumbar muscle tenderness, or positive provocative tests, and had a normal neurologic evaluation, and that he had long since reached maximum medical improvement and had returned to his preinjury condition. He specifically stated that he would have difficulty justifying driving restrictions based on appellant's physical findings and diagnostic studies, and concluded that appellant could return to his usual full-time work without restrictions.

In additional reports dated December 5, 2006 to February 27, 2007, Dr. Dubowitch reiterated his previous conclusions and recommendations, including that appellant could only drive for 30 to 35 minutes daily. A subsequently submitted report of a physician on one side of a resolved conflict of medical opinion is generally insufficient to overcome the weight of the impartial medical specialist or to create a new conflict of medical opinion.[10] The Board finds that Dr. Dubowitch's medical opinion is insufficient to overcome the special weight accorded Dr. Glenn as an impartial medical specialist. In a June 12, 2007 report, Dr. Chorney, a psychologist, diagnosed adjustment disorder and advised that appellant could not work due to the failure of his employer to provide a reasonable accommodation that would shorten his commute

[6] *Id.*

[7] 5 U.S.C. §§ 8101-8193.

[8] 5 U.S.C. § 8123(a).

[9] *Id*.

[10] *Richard O'Brien*, 53 ECAB 234 (2001).

which exacerbated his back pain. This report is relevant to appellant's claim for a consequential emotional condition that is under development by the Office. The record before the Board does not contain a final decision regarding this claim, and the Board's jurisdiction is limited to reviewing final decisions of the Office.[11]

Dr. Glenn provided a comprehensive, well-rationalized evaluation in which he clearly advised that any residuals of appellant's employment-related back condition had resolved. His opinion is entitled to the special weight accorded an impartial examiner and therefore constitutes the weight of the medical evidence that appellant had no residuals of his accepted lumbar strain.[12] The Office therefore properly terminated appellant's compensation benefits effective March 18, 2007.

## ***LEGAL PRECEDENT -- ISSUE 2***

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[13] A recurrence of medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a "need for further medical treatment after release from treatment," nor is an examination without treatment.[14]

The employee has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury and should submit a detailed medical report.[15]

## ***ANALYSIS -- ISSUE 2***

The Board finds that appellant did not meet his burden of proof to establish that he sustained recurrences of disability on April 5 and 20, 2007. Appellant failed to submit contemporaneous medical evidence establishing that he became disabled due to residuals of his accepted lumbar strain. By letters dated September 4 and 5, 2007, the Office informed appellant of the evidence needed to establish his recurrence claims. The May 1, 2007 report from Dr. Kalliny did not advise that appellant was disabled for work or provide an opinion on the cause for the diagnosed condition. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal

[11] 20 C.F.R. § 501.2(c); *Karen L. Yaeger*, 54 ECAB 323 (2003).

[12] *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

[13] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[14] 20 C.F.R. § 10.5(y); *see Mary A. Ceglia*, 55 ECAB 626 (2004).

[15] 20 C.F.R. § 10.404(b).

relationship.[16] Appellant also submitted the reports of Dr. Dubowitch who repeated his prior findings and recommendations. Dr. Dubowitch stated that appellant should only drive 30 to 35 minutes. In his November 21, 2006 report, the referee physician, Dr. Glenn, specifically addressed this issue, stating that, based on appellant's physical findings and diagnostic studies, he would have difficulty justifying driving restrictions. Thus Dr. Dubowitch's reports are insufficient to establish appellant's recurrence claim. Appellant also submitted a number of reports from Dr. Chorney, psychologist, who advised that beginning in July 2007 he should not work due to a work-related emotional condition. As noted appellant's emotional condition claim is under development by the Office. The Board therefore finds that appellant did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on April 5 or 20, 2007 causally related to his accepted lumbar strain.

## ***CONCLUSION***

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective March 18, 2007, and that appellant did not establish that he sustained recurrences of disability on April 5 or 20, 2007.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated November 16 and October 30, 2007 be affirmed.

Issued: September 5, 2008
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

[16] *Willie M. Miller*, 53 ECAB 697 (2002).