



Board reversed this determination.<sup>1</sup> The facts and the circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

The Office referred appellant for a second opinion evaluation with Dr. Jennifer J. James, a physician Board-certified in preventative medicine and rehabilitation. In an April 8, 2006 report, Dr. James reviewed appellant's history of injury, performed a physical examination and diagnosed lumbosacral strain, bilateral peripheral vascular disease and left L5 radiculitis. She stated that appellant did not require further medical treatment and that his employment-related conditions did not prevent him from returning to his date-of-injury position.

The Office issued a notice of proposed termination of compensation on April 27, 2006 and finalized this by decision dated June 6, 2006.

Appellant submitted a July 2, 2006 report from his attending physician, Dr. James P. Robinson, Board-certified in rehabilitation medicine with professorial rank. Dr. Robinson disagreed with Dr. James. He stated that he had reviewed all appellant's medical records and opined that appellant had sustained a lumbar disc herniation with radiculopathy as a result of his June 30, 1990 employment injury and that appellant had persistent L5/S1 radiculopathy. Dr. Robinson stated that appellant's current condition remained the result of his employment injury and that he remained totally disabled.

Appellant requested reconsideration on August 14, 2006. By decision dated August 22, 2006, the Office set aside the June 6, 2006 termination decision due to a conflict in medical opinion which required an impartial medical examination. It referred appellant to Dr. William Thieme, a Board-certified orthopedic surgeon, to resolve the conflict.

Dr. Thieme completed a report on October 24, 2006 and provided a review of the medical records. He performed a physical examination and diagnosed work-related displacement of lumbar intervertebral disc and lumbar neuritis or radiculitis by history. Dr. Thieme noted that appellant currently had no objective findings substantiating an ongoing lumbar disc prolapsed or radiculitis. He found mild evidence of symptom magnification. Dr. Thieme did not recommend any further medical treatment. Due to appellant's long history of back complaints, he should not engage in repetitive heavy lifting, carrying or bending. Dr. Thieme stated: "[Appellant] does not suffer residuals of the work incident. His current symptoms are quite atypical for mechanical low back pain or discogenic back pain with radiculitis." Dr. Thieme found that appellant's current conditions were nonemployment-related urinary incontinence, tremor, unsteady gait, easy fatigability and narcotic dependence.

The Office requested a supplemental report from Dr. Thieme on November 30, 2006 addressing whether appellant had any objective findings supporting that his work-related conditions persisted. On December 6, 2006 Dr. Thieme stated that there were no objective findings to substantiate that appellant had a continuing work-related condition. He noted that objective findings related that appellant's work-related injury had resolved. Dr. Thieme stated that appellant had no work restrictions based on objective findings on examination.

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<sup>1</sup> Docket No. 95-2712 (issued August 11, 1997); Docket No. 98-639 (issued December 27, 1999).

By letter dated March 21, 2007, the Office proposed to terminate appellant's medical and compensation benefits. It allowed 30 days for a response. On March 24, 2007 appellant disagreed with the proposed termination. On April 16, 2007 he submitted a detailed narrative disputing that his condition had resolved. Appellant also alleged that he experienced urinary incontinence due to his accepted back condition.

In a decision dated April 25, 2007, the Office terminated appellant's compensation and medical evidence effective April 27, 2007. Appellant requested a review of the written record on May 16, 2007.

By decision dated October 4, 2007, the hearing representative found that Dr. Thieme's report was sufficient to terminate appellant's wage-loss compensation benefits. The hearing representative further found that there was an unresolved conflict of medical opinion evidence on the issue of whether appellant had any medical residuals as a result of his accepted employment injury and set aside the Office's termination of appellant's medical benefits.

On October 19, 2007 Dr. Robinson reviewed Dr. Thieme's October 24, 2006 report and disagreed with the finding that appellant was capable of work. He stated that appellant was 69 years of age at the time of the evaluation that it would be an unfair burden to expect him to engage in competitive employment. Dr. Robinson reviewed a magnetic resonance imaging (MRI) scan dated May 3, 2007 and found moderate spinal central canal stenosis at L3-4 which had progressed since 1992. He opined that appellant could have neurological compromise related to the stenosis which could explain appellant's urinary incontinence. On November 9, 2007 Dr. Robinson stated that there was some uncertainty about the cause of appellant's L3-4 spinal stenosis. He also examined appellant on December 3, 2007.

Appellant requested reconsideration on January 18, 2008. By decision dated February 8, 2008, the Office declined to reopen appellant's claim for further consideration of the merits.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.<sup>3</sup>

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.<sup>4</sup>

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<sup>2</sup> *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

<sup>3</sup> *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

<sup>4</sup> *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

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

The Office referred appellant for a second opinion evaluation with Dr. James, a physician Board-certified in preventative medicine and rehabilitation, who found that appellant had no medical residuals or disability due to his accepted employment injuries. Appellant's attending physician, Dr. Robinson, Board-certified in rehabilitation medicine with professorial rank, disagreed and advised that appellant had sustained a lumbar disc herniation with radiculopathy as a result of his June 30, 1990 employment injury with persistent L5/S1 radiculopathy. He stated that appellant's current condition was the result of his employment injury and that he was totally disabled. The Office properly found a conflict of medical opinion evidence between Drs. James and Robinson and referred appellant for an impartial medical evaluation with Dr. Thieme, a Board-certified orthopedic surgeon, to resolve this conflict.

In an October 24, 2006 report, Dr. Thieme reviewed the statement of accepted facts, the medical records and performed a physical examination. He diagnosed work-related displacement of lumbar intervertebral disc and lumbar neuritis or radiculitis by history. Dr. Thieme noted that appellant currently had no objective findings substantiating an ongoing lumbar disc prolapsed or radiculitis. He found mild evidence of symptom magnification. Dr. Thieme did not recommend any further medical treatment. He stated that due to appellant's long history of back complaints he should not engage in repetitive heavy lifting, carrying or bending. Dr. Thieme stated: "[Appellant] does not suffer residuals of the work incident. His current symptoms are quite atypical for mechanical low back pain or discogenic back pain with radiculitis." He found that appellant's current conditions were nonemployment-related urinary incontinence, tremor, unsteady gait, easy fatigability and narcotic dependence. In response to a request from the Office, on December 6, 2006, Dr. Thieme stated that there were no objective findings to substantiate that appellant had a continuing work-related condition. He stated that based on the objective findings appellant's work-related injury had resolved.

As the impartial medical examiner, Dr. Thieme's report is entitled to the special weight of the medical evidence. He based his conclusions on a proper factual background and provided medical reasoning for concluding that appellant was capable of returning to his date-of-injury position. Dr. Thieme noted that appellant had no objective findings of disability due to his accepted employment-related condition and that his condition had resolved. The Office met its burden of proof to terminate appellant's compensation benefits.

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

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>5</sup> the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>6</sup> When a claimant fails to meet one of the above standards, the Office

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<sup>5</sup> 5 U.S.C. §§ 8101-8193, § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.606(b)(2).

will deny the application for reconsideration without reopening the case for review on the merits.<sup>7</sup>

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

Appellant requested reconsideration of the hearing representative's October 4, 2007 decision on January 18, 2008. In support of his request, he submitted a series of reports from Dr. Robinson, who stated that appellant should be found incapable of work because of his age. This opinion is not relevant to the issue of whether appellant has any continuing disability causally related to his accepted employment injury and is not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

Dr. Robinson diagnosed spinal stenosis and, on November 9, 2007, stated that he was uncertain about the cause of appellant's spinal stenosis. This note is not relevant to appellant's claim as Dr. Robinson did not opine that appellant remained disabled due to his accepted employment injury. Dr. Robinson also examined appellant on December 3, 2007 and failed to address appellant's disability for work due to the accepted employment injuries.

As appellant has failed to submit relevant new evidence in support of his request for reconsideration, the Office properly declined to reopen appellant's claim for consideration of the merits.

### **CONCLUSION**

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that he had no disability causally related to his accepted employment injury. The Board further finds that the Office properly declined to reopen appellant's claim for consideration of the merits on the grounds that he failed to submit relevant and pertinent new evidence in support of his reconsideration request.

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<sup>7</sup> 20 C.F.R. § 10.608(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 8, 2008 and October 4, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 2, 2009  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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