



strain which was employment related. The Office accepted the claim for a lumbar strain/sprain. Appellant received appropriate compensation.<sup>1</sup>

In a September 21, 2005 report, Dr. Jason Huffman, a Board-certified orthopedic surgeon and treating physician, reviewed appellant's history of injury and treatment. A June 7, 2005 magnetic resonance imaging (MRI) scan and a March 29, 2005 x-ray revealed significant multilevel degenerative disc disease at L3-4 level with bony spurring anteriorly and posteriorly. Dr. Huffman advised that appellant's current symptoms included low back pain with radiating bilateral lower extremity pain, which was worse on the left side. The pain was exacerbated by standing for any length of time and walking. Dr. Huffman found that appellant was unable to lift any significant amount of weight. He diagnosed lumbosacral degenerative disc disease and lumbar spinal stenosis. Dr. Huffman opined that appellant's condition was directly related to his occupation and provided work restrictions which included no heavy lifting and no prolonged standing. He stated that it was "unlikely" that appellant would return to his prior level of work.

On January 17, 2006 the Office referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Aubrey Swartz, a Board-certified orthopedic surgeon.

In a report dated February 10, 2006, Dr. Swartz reviewed appellant's history of injury and treatment and diagnosed chronic lumbar spinal stenosis, both central and peripheral, from L3 to L5, degenerative facet arthritis in the lumbar spine and multilevel degenerative disc disease. He opined that the diagnosed conditions were "medically connected to the work injury by aggravation." Dr. Swartz noted that the requirements of appellant's position contributed to the degenerative processes in the lumbar spine and that "the precipitating event of March 15, 2005, appeared to be a temporary strain which caused an aggravation of his preexisting arthritic disease." In a February 24, 2006 report, he clarified that there was no evidence to support a permanent material change to appellant's preexisting arthritic condition. Dr. Swartz opined that the March 15, 2005 employment injury was a temporary aggravation that would have ended by September 15, 2005.

In a March 3, 2006 report, Dr. Lambert noted appellant's work injury, diagnosed acute lumbar strain and recommended continued treatment and modified duty with restrictions that included lifting and carrying of up to 20 pounds.

In a letter dated March 7, 2006, the Office requested that Dr. Lambert review Dr. Swartz's report and provide an opinion regarding whether appellant's accepted injury had ceased. Dr. Lambert did not respond to this request but submitted additional reports noting appellant's status and duty limitations.

The Office found a conflict in opinion between appellant's treating physician, Dr. Lambert, who supported continued residuals of an acute lumbar strain, and Dr. Swartz, the

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<sup>1</sup> Appellant was released to light duty on April 8, 2005. However, the employing establishment did not have light duty and he was placed on the periodic compensation rolls. The record also reflects that appellant has preexisting degenerative disc disease and stenosis.

second opinion physician, who opined that the lumbar strain resolved by September 2005. On September 6, 2006 the Office referred appellant, together with a statement of accepted facts, and the medical record to Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In an October 18, 2006 report, Dr. Auerbach noted appellant's history of injury and treatment and conducted a physical examination. He reported that appellant had subjective complaints comprised of constant low back pain, increasing to occasional moderate back pain, with intermittent numbness and tingling in the lower extremities. Dr. Auerbach reviewed a June 7, 2005 MRI scan of the lumbar spine and noted that objective findings included multi-disc narrowing and end plate sclerosis with osteophytosis and significant degenerative disc disease at L3-4 and L4-5 and L5-S1; chronic motor changes consistent with re-innervation through L5-S1; limited back motion and distress upon straight leg raising. He indicated that there were no subjective or objective findings related to the lumbar strain. Dr. Auerbach opined that the accepted lumbar strain resolved within six months. He noted that appellant was overweight and had lumbar degenerative disc disease, lumbar spinal stenosis, with neurogenic claudication in both lower extremities, which were not industrial. Dr. Auerbach opined that the natural progression of appellant's degenerative lumbar disease and lumbar spinal stenosis resulted in appellant's current condition and symptoms. He opined that appellant did not have any ongoing disability or restrictions as a result of his employment injury.

In a January 19, 2007 report, Dr. Lambert opined that appellant had a significant injury on March 15, 2005 and that he continued to have residuals of that injury.

On June 14, 2007 the Office proposed to terminate appellant's compensation. On August 2, 2007 it terminated his compensation benefits effective August 5, 2007. In a December 12, 2007 decision, an Office hearing representative set aside the August 2, 2007 decision and directed the Office to obtain a supplemental report from Dr. Auerbach. The hearing representative noted that Dr. Auerbach did not address whether the work injury and accepted condition resulted in any aggravation of the underlying degenerative disease and, if so, whether any effects had ceased. On January 17, 2008 the Office requested that Dr. Auerbach clarify his opinion.

In a report dated March 15, 2008, Dr. Auerbach explained that appellant's injury of March 15, 2005 resulted in a low back strain and an aggravation of his preexisting degenerative disc disease. He explained that appellant's degenerative condition was medically connected to the factors of employment by aggravation, which was temporary and should have lasted for no more than six months. Dr. Auerbach added that no material change had occurred which would alter the course of appellant's underlying degenerative disease. He opined that appellant's underlying condition would continue regardless of the March 15, 2005 employment injury. Dr. Auerbach opined that the present impairment of the low back into the lower extremities was 100 percent due to the preexisting degenerative diseases.

On April 15, 2008 the Office issued a proposed notice of termination of compensation. It advised appellant that his compensation for wage-loss and medical benefits was being terminated because he no longer had any continuing injury-related disability or residuals. The Office indicated that the weight of the medical evidence, as demonstrated by the opinion of

Dr. Auerbach, demonstrated that appellant's work injury had resolved. Appellant was given 30 days to submit additional evidence or argument. No response was received by the Office.

By decision dated May 21, 2008, the Office finalized its proposed termination of benefits effective May 19, 2008.

### **LEGAL PRECEDENT**

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>2</sup> Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>3</sup>

The Federal Employees' Compensation Act<sup>4</sup> provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.<sup>5</sup> In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>6</sup>

### **ANALYSIS**

The Office determined that a conflict of medical opinion arose regarding the nature and extent of any ongoing residuals of the work injury of March 15, 2005. Appellant's treating physician, Dr. Lambert, supported continued residuals of an acute lumbar strain that had not resolved and Dr. Swartz, the second opinion physician, opined that the lumbar strain resolved by September 2005. Therefore, the Office properly referred appellant to Dr. Auerbach, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In an October 18, 2006 report, Dr. Auerbach reviewed appellant's history of injury and treatment and conducted an examination. He noted that appellant had subjective complaints, which included constant low back pain and intermittent tingling in the lower extremities. Dr. Auerbach found that diagnostic testing revealed objective findings of significant degenerative disc disease at L3-4 and L4-5 and L5-S1 and chronic motor changes consistent with reinnervation through L5-S1 but no subjective or objective findings related to the resolved lumbar strain. He opined that appellant had exclusive lumbar degenerative disc disease, lumbar spinal stenosis, with neurogenic claudication in both lower extremities, which were not related to

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<sup>2</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>3</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>4</sup> 5 U.S.C. §§ 8101-8193, 8123(a).

<sup>5</sup> 5 U.S.C. § 8123(a); *Shirley Steib*, 46 ECAB 309, 317 (1994).

<sup>6</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

the accepted work injury. Dr. Auerbach explained that appellant had a natural progression of degenerative lumbar disease and lumbar spinal stenosis. His symptoms were due to the underlying degenerative condition. Dr. Auerbach opined that appellant did not have a disability or restrictions as a result of his accepted lumbar sprain.

On January 17, 2008 the Office requested that Dr. Auerbach clarify his report with regard to the extent of appellant's work-related injury and whether it caused any ongoing aggravation of appellant's degenerative conditions.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.<sup>7</sup> As the hearing representative determined that the Office needed further clarification from Dr. Auerbach, the Office properly requested that he supplement his opinion.

On March 15, 2008 Dr. Auerbach explained that appellant's injury of March 15, 2005 resulted in a low back strain and aggravated his preexisting degenerative disc disease. He advised that appellant's degenerative condition was medically connected to the factors of employment by aggravation, which was temporary and lasted for no more than six months. Dr. Auerbach explained that there was no material change which would alter the course of appellant's underlying disease as a result of the work-related injury. He explained that appellant's underlying condition would continue regardless of the March 15, 2005 employment injury. Dr. Auerbach opined that the present impairment of the low back into the lower extremities was 100 percent related to the preexisting nonindustrial condition.

The Board finds that Dr. Auerbach's opinion is entitled to special weight as his reports are sufficiently well rationalized and based upon a proper factual background. The Office properly relied upon his reports in finding that appellant's employment-related condition had resolved. Dr. Auerbach examined appellant, reviewed his medical records, and reported accurate medical and employment histories. In his supplemental report, he emphasized that the employment injury had resolved within six months as well as any aggravation of appellant's preexisting degenerative conditions. Dr. Auerbach opined that the only factors that were causing continuing symptoms were related to appellant's preexisting conditions. Accordingly, the Office met its burden of proof to justify termination of benefits.

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<sup>7</sup> *Roger W. Griffith*, 51 ECAB 491 (2000).

Subsequent to Dr. Auerbach's reports, no further current medical evidence was received indicating that appellant had any continuing employment-related condition.<sup>8</sup>

**CONCLUSION**

The Board finds that the Office met its burden of proof in terminating appellant's benefits effective May 19, 2008.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 21, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 6, 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

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<sup>8</sup> Following the issuance of the Office's May 21, 2008 decision, appellant submitted additional evidence. However, the Board may not consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from seeking to have the Office consider such evidence pursuant to a reconsideration request filed with the Office.