

to limited duty for approximately one month in May 2004 and stopped work again in June 2004. Appellant retired from the employing establishment effective March 19, 2005. The Office paid appropriate compensation.

In a May 6, 2003 report, Dr. Steven J. Valentino, a Board-certified osteopath and Office referral physician, reviewed the history of injury, appellant's treatment and the objective testing of record and set forth his examination findings. He provided an impression of resolved lumbar and left knee strain. Dr. Valentino found appellant's diagnostic studies remarkable for age-related degenerative changes and no evidence on examination or on magnetic resonance imaging (MRI) scan of the lumbar spine for lumbosacral radiculopathy. He noted that an MRI scan of the left knee did not indicate internal derangement. Dr. Valentino opined that appellant reached maximum medical improvement and recovered from the work-related injury without residuals. He opined that appellant could return to his preinjury position without restriction.

In a May 22, 2003 report, Dr. Mitchell K. Freedman, a Board-certified physiatrist and treating physician, advised that appellant's MRI scan showed a small herniation at L3-4 as well as bulging at L5-S1 and L4-5. He stated that, while some of this may be degenerative, he disagreed with Dr. Valentino and opined that appellant's back pain had not resolved.

The Office found a conflict on the medical evidence between Dr. Valentino and Dr. Freedman regarding whether appellant had any residuals of the work-related conditions. In a July 31, 2003 report, Dr. William Simon, a Board-certified orthopedic surgeon, who served as an Office referral physician, reviewed appellant's medical record and evaluated him.¹ He concluded that appellant had a soft tissue injury superimposed upon preexisting degenerative changes and lumbar stenosis in his lumbar spine. Dr. Simon opined that appellant's soft tissue injury should have healed by July at the latest.

In a July 5, 2004 report, Dr. David Mattingly, a Board-certified osteopath specializing in family practice, noted that he initially examined appellant on January 27, 2003. He stated that appellant had post-traumatic lumbar strain, lumbar radiculitis, and left knee contusion and sprain as a result of his work injury. Dr. Mattingly opined that appellant was unable to work. In a September 21, 2004 report, he advised that the diagnoses were confirmed by abnormal studies. In an August 10, 2004 report, Dr. Gene Salkind, a Board-certified neurosurgeon, examined appellant and related appellant's complaints of pain in the back, buttocks and legs to lumbar stenosis, exacerbated by the work injury.

The record indicates that, after appellant returned to work on May 5, 2004, the Office in an August 24, 2004 decision reduced his wage-loss compensation based on his actual earnings as a security screener/exit lane monitor. Appellant elected to receive benefits from the Office of Personnel Management, effective March 19, 2005, in lieu of compensation benefits under the Federal Employees' Compensation Act.

¹ Dr. Simon noted that a December 17, 2002 left knee MRI scan showed degeneration with no cruciate ligament tear. A January 17, 2003 MRI scan showed small disc herniations from L2-3 to L4-5 and stenosis, ligamentous hypertrophy and bulging at L5-S1. A March 5, 2003 EMG showed early symmetric polyneuropathy and right L5-S1 radiculopathy.

In a March 7, 2006 report, Dr. Freedman noted that he last saw appellant about two years earlier.² He noted that appellant went back to part-time work in November 2005 but that his back pain intensified. Dr. Freedman also noted that appellant was working security until January. He opined that appellant had an exacerbation of his lumbar disc degeneration. Physical therapy was recommended.

The Office referred appellant to Dr. Kevin Hanley, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a July 11, 2006 report, Dr. Hanley reviewed medical reports and noted examination findings. He advised that review of the medical record indicated that left knee symptoms had resolved. Examination revealed appellant to be overweight and deconditioned. While appellant had mild limitation of motion in the lumbar spine, Dr. Hanley opined that this was due to “body habitus and degenerative change.” Straight leg raising was negative and strength testing revealed no weakness. Knee examination was normal. Dr. Hanley diagnosed history of musculoligamentous straining injury superimposed on degenerative disc disease and spinal stenosis, lumbar spine and resolved sprain/strain of the knee. He opined that appellant no longer had any affects of the work injury. Dr. Hanley advised that the work injury temporarily aggravated appellant’s underlying problem of spinal stenosis and degenerative disease. He stated that the aggravation was temporary as there was no evidence of a significant change to any of the lumbar spine anatomy occurring such as disc herniation or subluxation or dislocation. Dr. Hanley had noted in his review of the medical record that appellant did not sustain an acute disc herniation as a consequence of the work incident. He concluded that the lumbar sprain/strain ran its natural course, which was to heal over time. Dr. Hanley advised that appellant’s continuing and residual symptoms were due to appellant’s obesity, deconditioning and underlying degenerative process and no longer represented acute symptoms coming from an acute injury. He opined that appellant was capable of returning to work activities without restriction, as his symptoms have resolved from the work-related injury. Dr. Hanley further opined no additional medical treatment was necessary.

On August 10, 2006 the Office advised appellant that it proposed to terminate his medical benefits as Dr. Hanley’s opinion established that he had no residuals of his accepted conditions. It provided appellant 30 days to submit additional evidence.

In a June 29, 2006 report, Dr. Nicholas Diamond, an osteopath, noted the history of injury and reviewed appellant’s course of treatment. He additionally noted that appellant sustained a neck injury in 2004 due to a motor vehicle accident. Dr. Diamond diagnosed central herniated nucleus pulposus L2-3, L3-4, L4-5 with disc bulging at L5-S1, MRI scan positive; right lumbar L4, L5 and S1 radiculopathy, EMG positive; chronic post-traumatic lumbosacral strain and sprain; post-traumatic internal derangement left knee with medial meniscus tear; and aggravation of preexisting quiescent osteoarthritis of the lumbosacral spine. He opined that appellant’s subjective and objective findings were due to the December 2, 2002 work injury. Dr. Diamond opined that appellant had 30 percent impairment of his left leg under the New Jersey Workers’ Compensation Act. This was based on strength deficits in the knee and ankle as

² Dr. Freedman advised appellant has bilateral lumbar radiculopathy and a history of polyneuropathy secondary to diabetes.

well as pain. In an August 22, 2006 letter, appellant's counsel indicated that appellant sought a schedule award.

On November 20, 2006 an Office medical adviser opined that there was no ratable impairment of the left leg. He stated that the accepted condition of sprain/strain of the left knee had resolved with no residual defects. The Office medical adviser noted that, while Dr. Diamond assigned impairment for loss of strength of the left knee extension and left ankle plantar flexion, these findings were inconsistent with many physical examinations documented in the record. He also advised that an impairment rating for pain was inappropriate as the left knee condition had resolved. Therefore, the Office medical adviser concluded that there was no basis for a schedule award.

By decision dated November 22, 2006, the Office denied appellant's claim for a schedule award as the requirements have not been met for entitlement to a schedule award.

By decision dated November 30, 2006, the Office terminated appellant's medical benefits effective November 27, 2006 on the basis that the weight of the medical evidence demonstrated that the work injury had resolved without residuals.

Appellant's counsel disagreed with both Office decisions and requested a telephone hearing. During the teleconference, the hearing representative noted that, since the November 30, 2006 decision terminated all benefits, the November 22, 2006 schedule award decision would not be specifically addressed but any actions or directions concerning the schedule award would be incorporated. Both during and after the hearing, appellant's counsel argued that the record established that appellant sustained a herniated disc as a result of the work injury and that he had ongoing and permanent effects of the work injury.

By decision dated May 23, 2007, an Office hearing representative affirmed the November 22 and 30, 2006 decisions.³ On appeal appellant's counsel argued that the Office hearing representative erred in combining the issues of termination and entitlement to a schedule award. He further contended that appellant is entitled to a schedule award based on Dr. Diamond's report.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.⁵ The right to medical benefits is not limited to the period of entitlement to disability. To terminate authorization for

³ The hearing representative affirmed the denial of the schedule award on the fact that, since the effects of the injury resolved without residual, there was no permanent impairment that would entitle appellant to a schedule award.

⁴ *Jorge E. Sotomayor*, 52 ECAB 105, 106 (2000).

⁵ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that requires further medical treatment.⁶

ANALYSIS -- ISSUE 1

In early 2003, the Office accepted that appellant sustained a lumbar strain and left knee sprain as a result of a December 2, 2002 slip and fall. It terminated his compensation benefits effective November 27, 2006, as the opinion of Dr. Hanley, a Board-certified orthopedic surgeon and Office referral physician, showed that he did not have residuals of his accepted conditions after that date. On May 23, 2007 an Office hearing representative affirmed the termination of appellant's compensation benefits.

In his July 12, 2006 report, Dr. Hanley provided a history of injury, reviewed medical records, and conducted a physical examination. He provided an unequivocal opinion that the effects of appellant's back and knee strains sustained on December 2, 2002 had resolved when he examined appellant on July 11, 2006. Dr. Hanley noted that appellant did not sustain an acute disc herniation as a consequence of the work incident but rather had only sustained a strain superimposed on underlying conditions of degenerative disc disease and spinal stenosis. He advised that the work injury temporarily aggravated appellant's underlying conditions and explained that, in the absence of a significant change to any of the lumbar spine anatomy, the lumbar sprain/strain ran its natural course, which was to heal over time. Dr. Hanley advised that appellant's continuing and residual symptoms did not represent acute symptoms coming from an acute injury, but were a consequence of appellant's obesity, deconditioning and the underlying degenerative process. He opined that appellant could return to work with no restrictions and his current symptoms did not necessitate ongoing treatment.

The attending physician, Dr. Freedman, advised in his March 7, 2006 report that appellant sustained an exacerbation of his lumbar disc degeneration. However, he provided no specific opinion regarding whether this condition was employment related. Furthermore, the Board notes that the Office did not accept a degenerative condition as employment related.⁷

In his June 29, 2006 report, Dr. Diamond opined that appellant's current conditions of herniated disc, right lumbar radiculopathy, chronic post-traumatic lumbosacral strain and sprain, post-traumatic internal derangement left knee with medial meniscus tear; and aggravation of preexisting quiescent osteoarthritis of the lumbosacral spine were due to the December 2, 2002 work injury. He did not, however, provide a rationalized medical opinion addressing why the accepted lumbar strain and left knee sprain persisted nor did he provide rationale to explain why diagnosed conditions that were never accepted by the Office would be considered to be employment related. Medical reports not containing rationale on causal relation are entitled to

⁶ *Frederick Justiniano*, 45 ECAB 491 (1994).

⁷ Where a claimant claims that a condition not accepted or approved by the Office was due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence. *T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009).

little probative value.⁸ As noted, appellant bears the burden of proof to establish that conditions not accepted by the Office are causally related to the accepted back strain and left knee strain.⁹

The Board finds that Dr. Hanley provided a rationalized medical opinion that accepted conditions resulting from the December 2, 2002 work incident had resolved.¹⁰ Dr. Hanley's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹¹ He also provided medical rationale for his opinion. There is no medical evidence showing any continuing residuals or disability due to appellant's accepted back and knee strains. Thus, the Office met its burden of proof to terminate appellant's benefits as the weight of the medical evidence indicates that residuals of the employment-related conditions had ceased effective November 27, 2006.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.¹² Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.¹³ The permanent impairment must be causally related to an accepted employment injury.¹⁴

⁸ *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

⁹ *See supra* note 7.

¹⁰ As noted, the Office issued a wage-earning capacity decision August 24, 2004. A wage-earning capacity determination remains in effect until it is properly modified. *See Katherine T. Kreger*, 55 ECAB 633 (2004). The medical evidence in this case shows a material change in the nature and extent of the employment-related condition, warranting a modification of the wage-earning capacity determination.

¹¹ *Michael S. Mina*, 57 ECAB 379 (2006) (in assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality; the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

¹² 5 U.S.C § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid additional members of the body are found at 20 C.F.R. § 10.404(a).

¹³ 20 C.F.R. § 10.404.

¹⁴ *Rosa Whitfield Swain*, 38 ECAB 368 (1987).

ANALYSIS -- ISSUE 2

In the present case, appellant submitted a June 29, 2006 report from Dr. Diamond regarding permanent impairment to the left lower extremity. He requested that the Office review the report and develop the issue of whether appellant was entitled to a schedule award pursuant to 5 U.S.C. § 8107. Based on the report of its Office medical adviser, the Office denied appellant's claim for a schedule award on November 20, 2006. In a May 23, 2007 decision, an Office hearing representative affirmed the denial of the schedule award on the basis that since compensation was terminated there can be no permanent impairment as the effects of the injury have resolved without residual.

On appeal, appellant argues that the Office hearing representative erred in combining the issues of termination and entitlement to schedule award. While the Office had properly terminated compensation for the accepted conditions, this does not in itself preclude a claimant from establishing an employment-related permanent impairment.¹⁵

Dr. Diamond opined that appellant has 30 percent impairment of his left lower extremity comprised of strength deficits in the knee and ankle as well as pain-related impairment. On November 20, 2006 an Office medical adviser opined that there was no ratable impairment of the left lower extremity, noting that appellant's left knee condition had resolved and pointing to inconsistencies between Dr. Diamond's findings and those of other examining physicians. The Office hearing representative subsequently denied any further consideration of the schedule award claim finding that, as the accepted conditions had resolved without residuals, there could be no permanent impairment. The Office cited no authority for the proposition that a termination of compensation based on medical evidence was a bar to seeking a subsequent schedule award.¹⁶ The Board finds that the Office should have considered the schedule award matter separately from the termination of benefits.

It is well established that proceedings under the Act are not adversarial in nature,¹⁷ and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.¹⁸ The Office has an obligation to see that justice is done.¹⁹ The case will therefore be remanded for further development on the issue of whether appellant has a ratable permanent impairment of the left lower extremity causally related to his work injury which would entitle him to a schedule award. After this and such further development as deemed necessary, the Office shall issue a *de novo* decision on the schedule award issue.

¹⁵ See *A.A.*, 59 ECAB ____ (Docket No. 08-951, issued September 22, 2008).

¹⁶ *B.K.*, 59 ECAB ____ (Docket No. 07-1545, issued December 3, 2007).

¹⁷ *John J. Carlone*, 41 ECAB 354 (1989).

¹⁸ *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

¹⁹ *William J. Cantrell*, 34 ECAB 1233 (1983).

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective November 27, 2006. The Board further finds the case is not in posture for decision regarding whether appellant is entitled to a schedule award for a permanent impairment of his left lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated May 23, 2007 is affirmed in part and set aside in part and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: September 11, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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