



which the Office accepted for lumbar strain.<sup>1</sup> Appellant did not return to work. The Office paid wage-loss compensation for total disability.

A magnetic resonance imaging (MRI) scan report dated May 10, 2007 diagnosed a diffuse disc bulge at L5-S1 with a small posterocentral disc protrusion and early herniation at L5-S1. The report also noted a small focal high T2 signal abnormality in the posterior aspect of the disc suggestive of annular tear, with no significant foraminal stenosis. The record reflects that the Office accepted a herniated disc at L4-5.<sup>2</sup>

In a July 9, 2007 treatment note and work capacity evaluation, Dr. Jacob M. Morgenstern, Board-certified in family practice, stated that appellant had severe low back pain with radicular symptoms and was not able to work. He recommended that she receive epidural injections to relieve her pain.

Appellant underwent another MRI scan on July 29, 2008. The results of this test revealed a small central disc herniation at L5-S1 causing no significant central canal or foraminal stenosis, with no ligamentous flavum hypertrophy and no abnormal paravertebral mass lesions or fluid collections. It also found that appellant had degenerative disc disease at the L5-S1 level.

In order to determine the nature and extent of residuals from her accepted conditions, the Office referred appellant for a second opinion examination with Dr. Julie Wehner, Board-certified in orthopedic surgery. It referred a March 18, 2008 statement of accepted facts. In an October 22, 2008 report, Dr. Wehner noted mild back pain on examination with axial compression and rotation, no paraspinal spasm or scoliosis, no radicular pain complaints and negative straight leg raising. She reviewed the May 10, 2007 MRI scan which suggested an annular tear and a mild diffuse disc bulge. Dr. Wehner stated, however, that these were minor, clinically insignificant findings. In her opinion, the May 2007 MRI scan did not indicate a herniated disc at L4-5; therefore, the diagnosis based on the injury was erroneous and should have been lumbar strain. Dr. Wehner asserted that appellant's lumbar strain should have resolved with a short course of therapy followed by a transitioned return to work. She opined that there was no reason for appellant to be off work for a year and a half due to a lumbar strain. Dr. Wehner advised that the MRI scan findings did not warrant any further diagnostic or therapeutic intervention and did not require surgery.

Dr. Wehner also reviewed the July 29, 2008 MRI scan report, which indicated mild degenerative disc disease at L5-S1 with mild central posterior disc herniations, causing no significant central canal foraminal stenosis. She stated that this report did not present a clinically significant finding, did not correlate with appellant's present pain complaints and did not warrant any restrictions.

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<sup>1</sup> The letter of acceptance states that the accepted condition is lumbar "pain." The Board notes that "pain" cannot be accepted as a diagnosed condition. However, subsequent references in the record indicated that the accepted condition was actually a lumbar strain.

<sup>2</sup> This apparently is an error on the part of the Office. The May 10, 2007 MRI scan states that appellant had a herniated disc at L5-S1, not at L4-5.

In a December 30, 2008 report, Dr. Morgenstern advised that appellant continued to experience symptoms of low back pain on the right side with symptoms of radiculopathy that radiated into both buttocks and lower extremities. He noted complaints of pain with range of motion of the trunk, extended standing, walking and sitting. Dr. Morgenstern rated these symptoms as a seven on a scale of one to ten. He opined that appellant's symptoms were the direct result of her April 26, 2007 work injury. Dr. Morgenstern recommended that appellant receive epidural injections to ameliorate her lumbosacral disc syndrome. However, the Office did not approve his requests for these injections. Dr. Morgenstern reiterated that the May 10, 2007 MRI scan demonstrated diffuse disc bulge with central disc herniation at L5-S1.

The Office found a conflict in medical opinion between appellant's treating physician, Dr. Morgenstern, who found that she was unable to work and had residuals of her accepted lumbar strain and herniated disc at L5-S1 and Dr. Wehner, the second opinion physician, who opined that appellant's only accepted condition had been a lumbar strain which had resolved, and that appellant was able to perform her date-of-injury job without restrictions. It referred the case to a referee medical specialist, Dr. Jaroslaw Dzwinyk, a Board-certified orthopedic surgeon, on January 9, 2009. The Office provided a December 16, 2008 statement of accepted facts. In a February 9, 2009 report, Dr. Dzwinyk reviewed the medical history and statement of accepted facts and provided findings on examination. He noted that the May 10, 2007 MRI scan showed disc protrusion at L5-S1, accompanied by disc desiccation, with no other abnormalities, and that a July 29, 2008 MRI scan of the lumbar spine revealed similar changes at L5-S1 with no evidence of significant stenosis or disc herniation.

In response to questions, Dr. Dzwinyk stated that the only diagnosed condition he found was a resolved lumbosacral strain. He opined that appellant could return to her usual job as a housekeeping aide and probably could have done so three months after her April 2007 work injury. Dr. Dzwinyk stated that appellant did not require any further treatment due to her April 2007 employment injury.

On April 17, 2009 the Office issued a notice of proposed termination of compensation. It found that the weight of the medical evidence was represented by Dr. Dzwinyk's referee opinion and established that her accepted low back condition had resolved with no residuals. Dr. Dzwinyk's report established that her accepted medical conditions of herniated disc had ceased. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination. Appellant did not submit any additional evidence.

By decision dated May 28, 2009, the Office terminated appellant's compensation, finding that Dr. Dzwinyk's opinion represented the weight of the medical evidence.

On June 4, 2009 appellant requested reconsideration. She submitted progress reports dated January 16 to June 26, 2009 from Dr. Morgenstern who advised that appellant continued to experience low back pain causally related to the April 26, 2007 work injury and was awaiting approval to provide her with epidural injections. On May 14, 2009 Dr. Morgenstern reiterated his findings on examination and his opinion that appellant was unable to return to her regular work duties due to her chronic low back symptoms of radiculopathy. He noted that the MRI scan results were compatible with L5-S1 disc herniation.

By decision dated August 28, 2009, the Office denied appellant's request for modification of the May 28, 2009 termination decision.

**LEGAL PRECEDENT -- ISSUE 1**

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>

After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>4</sup>

Section 8123(a) 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.<sup>5</sup>

**ANALYSIS -- ISSUE 1**

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation.

The Office erred in relying on the opinion of Dr. Dzwinyk, who disregarded a critical element of the statement of accepted facts by stating that appellant did not have an accepted herniated lumbar disc condition causally related to her employment. The Board notes that the Office's December 16, 2008 statement of accepted facts listed that the May 10, 2007 MRI scan diagnosed herniated disc at L5-S1 and provided the basis for the Office's acceptance of a herniated disc condition as causally related to the April 26, 2007 work injury. Appellant underwent a second MRI scan in July 29, 2008, which also found a herniated disc at L5-S1. While the Office erred in its December 16, 2008 statement of accepted facts by stating that it had accepted a condition for a herniated disc at L4-5, instead of at L5-S1, as indicated by the May 10, 2007 MRI scan, it was incumbent upon Dr. Dzwinyk -- as the referee medical examiner -- to request clarification of the record and for the Office to specify the condition it had accepted. Dr. Dzwinyk's opinion is of diminished probative value and does not merit the special weight accorded an impartial medical examiner. Therefore, given the Office's failure to indicate the proper accepted condition and the failure of Dr. Dzwinyk to ascertain whether appellant had an accepted work-related herniated disc condition at the level indicated by the MRI scan, the Office's reliance on his opinion constitutes reversible error. As the Office based its May 28, 2009 termination decision on Dr. Dzwinyk's opinion, it did not meet its burden of proof.

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

<sup>4</sup> *Id.*

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

**CONCLUSION**

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 28 and May 28, 2009 decisions of the Office of Workers' Compensation Programs be reversed.

Issued: July 15, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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