

disease or illness was caused by his employment on October 13, 2005. Appellant stopped work on October 23, 2005.

On November 2, 2006 the Office accepted appellant's claim for a lumbar strain.

In a December 4, 2006 report, Dr. Pillado opined that appellant was unable to perform his regular job duties because he could not carry his mailbag which weighed over 35 pounds and which caused increasing pain. He also noted that appellant was unable to stand for more than a few hours. Dr. Pillado diagnosed lower back pain and herniated disc.

On January 11, 2007 the Office referred appellant to Dr. Ghol Bahman Ha'eri, a Board-certified orthopedic surgeon, for a second opinion. In a February 10, 2007 report, Dr. Ha'eri described appellant's history and reviewed his job description. On physical examination, he observed that appellant stood with normal posture, walked with a normal gait, did not use any assistive device for ambulation and had no lumbar brace. Visual inspection of the lumbar spine showed normal lumbar lordosis, palpation of the lumbosacral region demonstrated no tenderness and no paravertebral muscle spasm. On range of motion, Dr. Ha'eri found that, for flexion, the fingertip missed the floor by four inches. Appellant had extension of 20 degrees, lateral bend to the right and left of 30 degrees, lateral rotation to the right and left equal to 40 degrees. Straight leg raises bilaterally were equal to 90 degrees. Neurological examination of the lower extremities was grossly intact and there was no atrophy. Dr. Ha'eri diagnosed a lumbar strain which was work related. He also diagnosed multilevel degenerative disc disease with a small L5-S1 disc protrusion, which was preexisting.

Regarding the lumbar strain, Dr. Ha'eri opined that it was a temporary aggravation of symptoms of the preexisting degenerative disc disease, which was caused by appellant's work duties. He explained that appellant began experiencing numbness in his right foot in July 2005, approximately six months after starting his employment. Dr. Ha'eri noted that the magnetic resonance imaging (MRI) scan of the lumbar spine showed that appellant had a preexisting multilevel degenerative disc condition in his lower back (L3 through S1) with a small broad-based disc protrusion at L5-S1, but more toward the left. He explained that appellant's short course of employment, six months, was not sufficient to produce the multilevel degenerative changes. Dr. Ha'eri noted that appellant has not worked since October 23, 2005. He opined that the work-related injury of lumbar spine strain resolved by January 1, 2006. Dr. Ha'eri explained that there were no objective residuals. He completed a work capacity evaluation form and noted that the limitations were due to a preexisting, nonindustrial condition of multilevel degenerative disc disease of lumbar spine and not the work-related injury of lumbar strain, which had resolved.

On March 19, 2007 the Office issued a notice of proposed termination of compensation. It found that the weight of the medical evidence, as represented by the report of Dr. Ha'eri, established that appellant no longer had any disability or residuals due to his accepted work-related condition as of January 1, 2006.

In a statement received by the Office on April 13, 2007, appellant questioned how Dr. Ha'eri could determine that his condition had resolved from a 10-minute examination with minimal testing. He alleged that he was still receiving epidural injections and questioned how

the second opinion physician could conclude that his condition had resolved without further testing. Appellant requested a third opinion from an unbiased physician.

On April 23, 2007 the Office received an April 10, 2007 report from Dr. Pillado who noted responding to Dr. Ha'eri's report. Dr. Pillado disagreed with Dr. Ha'eri and asserted that appellant's back injury was work related. He noted that appellant had difficulty with his satchel and carrying the weight caused his back pain. Dr. Pillado noted that the past MRI scans revealed a small herniated disc in the lumbar region and a three millimeters herniated disc at L5-S1.

By decision dated April 23, 2007, the Office terminated appellant's compensation benefits effective that date. It found that no further medical evidence was submitted and found that Dr. Ha'eri, was the weight of the evidence.

On May 13, 2007 appellant requested reconsideration. He alleged that it was unclear how Dr. Ha'eri was given the weight of the evidence without conducting additional testing on him. In a July 10, 2007 work restriction form, Dr. Pillado advised that appellant's restrictions were permanent. He filled in a 40-pound weight limitation with respect to lifting, sitting, standing, walking, climbing, kneeling, stooping, bending, twisting, pushing, pulling and simple grasping.

By decision dated August 24, 2007, the Office denied modification of the April 23, 2007 decision. It also noted that Dr. Pillado's April 10, 2007 report was received on April 10, 2007; however, it was not accessed or in the file prior to the April 23, 2007 decision. The Office noted that his report was not sufficient to carry the weight of medical evidence.

On September 22, 2007 appellant requested reconsideration. He alleged that he worked many hours and that the Office should request documentation from the employing establishment pertaining to his schedule. On November 28, 2007 the Office denied appellant's request for reconsideration without a review of the merits.

On June 18, 2008 appellant requested reconsideration. He reiterated his disagreement with the report of Dr. Ha'eri, asserted that there was medical conflict and submitted additional medical evidence.

The new evidence included an April 28, 2008 report from Dr. Alan M. Gross, a Board-certified orthopedic surgeon, who examined appellant and diagnosed lumbosacral strain with clinical evidence of radiculopathy. Dr. Gross noted that no medical records were available for review. He explained that appellant related that on July 17 or 18, 2005, while working as a mail carrier, he reported having symptoms and pain in his back while walking in a parking lot and wearing new shoes. Appellant reported that, by October, 2005, the pain worsened and he noticed pain while in bed. Dr. Gross noted also that appellant was referred to U.S. Healthworks, where x-rays were taken and appellant was told he had scoliosis, which caused his pain. He also noted that appellant saw his family physician, Dr. Pillado, who diagnosed a herniated disc. After examining the upper and lower extremity, which included palpation, gait, range of motion, sensory, motor and reflex examinations, Dr. Gross opined that appellant's low back disability was caused as a direct result of the industrial injury arising and occurring in the course of employment with the employing establishment. He opined that there was no doubt, given his

job description as a mail carrier that this was a plausible etiology for his pain and his condition was work related. Dr. Gross recommended a repeat lumbar spine MRI scan and an electromyography (EMG) scan and nerve conduction study. He recommended further treatment.

In a February 7, 2008 report, Dr. Rocco Calderone, a Board-certified orthopedic surgeon, noted that appellant had complaints of recurrent low back pain after carrying a bag for nine months, 7 to 10 hours per day, which weighed up to 35 pounds. He also advised that appellant had tingling in the right toes in August 2007. Dr. Calderone also noted that he had reviewed Dr. Ha'eri's February 10, 2007 report. He diagnosed lumbosacral strain, degenerative disc disease, right lower extremity radiculopathy. Dr. Calderone explained that an MRI scan revealed moderate degenerative disc disease of the lumbar spine. He opined that appellant's condition was a "work-related (aggravation) from carrying mailbags." Dr. Calderone recommended physical therapy and home exercise. He also noted that the prospect of surgery was an option.

By decision dated October 29, 2008, the Office denied modification of its prior decision. It found that neither of the reports from appellant's treating physicians was sufficient to carry the weight of the evidence.

On January 6, 2009 appellant's representative requested reconsideration. She made numerous allegations regarding why the Office did not meet its burden of proof and asserted that the report of the second opinion physician was not sufficient to carry the weight of the evidence. Appellant's representative alleged that Dr. Hantman's reports were biased and that the employing establishment was biased in its submissions on the claim. Additionally, she alleged that the Office did not give sufficient notice to appellant of defects in the claim.

By decision dated April 3, 2009, the Office denied modification of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹ 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.²

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbar strain in the performance of duty. It terminated appellant's April 23, 2007 on the basis that appellant had no residuals from his accepted employment injury. The Office accorded determinative weight to the opinion of Dr. Ha'eri.

¹ *Curtis Hall*, 45 ECAB 316 (1994).

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

The Board finds that there is a disagreement between Drs. Pillado and Gross, appellant's treating physicians, and Dr. Ha'eri, the second opinion examiner, regarding whether residuals of appellant's accepted lumbar strain have resolved. Drs. Pillado and Gross both supported that the accepted strain had not resolved while Dr. Ha'eri found that it had resolved. Furthermore, Dr. Pillado asserted that appellant's employment caused or aggravated lumbar disc herniation while Dr. Ha'eri disagreed that employment would have affected the herniation and, instead, attributed ongoing symptoms to preexisting degenerative disc disease.

Accordingly, there was an unresolved conflict between appellant's treating physicians and the second opinion physician with regard to whether appellant still has residuals of his accepted lumbar strain and also whether appellant's employment caused or aggravated a herniated disc in the low back. The Federal Employees' Compensation Act³ 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 to resolve the conflict.⁴ The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation and medical benefits due to an unresolved conflict in medical opinion.

The Board has reviewed appellant's lengthy argument for appeal. In light of our decision further discussion of those arguments would be cumulative.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation and medical benefits effective April 23, 2007.⁵

³ 5 U.S.C. §§ 8101-8193, 8123(a).

⁴ *Id.* at § 8123(a); *Shirley Steib*, 46 ECAB 309, 317 (1994).

⁵ In light of the Board's finding on the first issue the second issue is moot. It also is not necessary to address the arguments on appeal.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 24, 2010
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