



cervical disc disease and lumbar disc disease due to the accepted incident and to carrying mail on July 28, 2005. Appellant stopped work on July 25, 2006 and did not return. He received compensation on the periodic rolls beginning September 27, 2006.

Several physicians treated appellant for the accepted injuries, Dr. Viren Desai, a Board-certified anesthesiologist, Dr. Robert L. Ferguson, a Board-certified internist, Dr. Deborah Figueroa, a family practitioner, and Dr. R. Ramachandran, a Board-certified neurologist. They submitted reports dated November 2005 to November 2007 diagnosing multilevel cervical, thoracic and lumbar disc protrusions with thoracic and lumbar radiculitis, complicated by morbid obesity.<sup>1</sup>

Beginning in November 2006, appellant was followed by Dr. Rene M. Kotzen, a Board-certified neurosurgeon. In reports dated through April 23, 2007, Dr. Kotzen diagnosed ankylosis of the cervical spine, post-traumatic disc bulges at T11-12, L1-2 and L5-S1 impinging on the thecal sac and worsening L5-S1 radiculopathy with impairment of urinary control. He opined that these conditions were caused by the accepted work incidents. Dr. Kotzen found appellant able to perform full-time sedentary duty, lifting no more than two pounds, with 30- to 60-minute breaks every 2 to 4 hours.<sup>2</sup> In a June 18, 2007 report, he found appellant totally disabled for work.

On July 18, 2007 the Office obtained a second opinion from Dr. David H. Cook, a Board-certified neurologist, who diagnosed mechanical neck and back pain related to multilevel degenerative disc disease, disc bulges at C4-5, C6-7, T11-12 and L5-S1, paresthesias in the hands and radicular leg pain. Dr. Cook held appellant off work through mid-November 2007 then released him to full-time sedentary duty.<sup>3</sup>

On November 5, 2007 the Office found a conflict of opinion between Dr. Kotzen, for appellant, and Dr. Cook, for the government, regarding appellant's diagnosis and the extent of his work-related disability. In a November 11, 2007 letter, it referred appellant to Dr. Inad Atassi, a Board-certified neurosurgeon, for an impartial medical examination. Dr. Atassi submitted a December 18, 2007 report reviewing the medical record and statement of accepted facts provided by the Office. He noted that appellant had reduced his weight to 270 pounds

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<sup>1</sup> October 10 and 11, 2005 magnetic resonance imaging (MRI) scans showed a broad-based disc bulge at T11-12 with mild bilateral neural foraminal narrowing, minimal degenerative disc disease with small central disc protrusions at C4-5 and C6-7, minimal degenerative disc disease at C3-4, disc bulges at L1-2, L5-S1 and disc desiccation at L5-S1. September 24, 2006 MRI scans showed mild disc desiccation at T9-10 and a stable posterior broad-based disc bulge at T11-12 effacing the thecal sac and slightly contacting the anterior cord, disc desiccation and mild narrowing of the neural foramen at L5-S1.

<sup>2</sup> A January 9, 2007 functional capacity evaluation showed appellant could work full-time sedentary duty. Appellant passed only 49 percent of the validity criteria, suggesting submaximal effort.

<sup>3</sup> October 15, 2007 electromyography (EMG) and nerve conduction velocity (NCV) studies of the upper extremities showed some abnormalities at C5-6 on the left, paraspinal spasticity and moderate bilateral median nerve compression at the wrists. October 16, 2007 EMG and NCV studies of the lower extremities showed a bilateral sensory motor neuropathy, worse than on November 2, 2005 studies. An October 29, 2007 cervical MRI scan showed minimal C4-5 and C6-7 disc protrusions "of doubtful clinical significance."

following gastric bypass surgery in July 2007. On examination, Dr. Atassi found self-limited restriction of neck motion and positive Waddell's signs for thoracic and lumbar pain. He diagnosed mild cervical spondylosis at C4-5 and C6-7 with no disc herniation, degenerative disc disease and spondylosis at T11-12, degenerative disc disease at L1-2, lumbar spondylosis and possible bilateral carpal tunnel syndrome. Dr. Atassi opined that appellant had only subjective complaints and was not disabled for work. He restricted appellant to lifting up to 40 pounds due to degenerative disc disease.

In a January 18, 2008 letter, the Office requested that Dr. Atassi clarify whether the accepted injuries had resolved. In a February 19, 2008 letter, Dr. Atassi responded that appellant had reached maximum medical improvement. "Since [he] continued to have subjective complaints that [were] not corroborated with the objective finding ... it [was Dr. Atassi's] opinion that the effect of his accepted injuries ... should have resolved."

By notice dated March 5, 2008, the Office proposed to terminate appellant's wage-loss compensation as Dr. Atassi opined that appellant was no longer totally disabled for work due to the accepted conditions.

In a March 20, 2008 letter, appellant contended that MRI scans demonstrated the continued presence of the accepted conditions through 2007. He submitted copies of medical reports previously of record and a February 13, 2008 disability determination from the Office of Personnel Management (OPM).

By decision dated April 16, 2008, the Office terminated appellant's wage-loss compensation benefits effective that day. It found that the weight of the medical evidence rested with Dr. Atassi, who found appellant was no longer totally disabled for work due to the accepted conditions.

In a May 29, 2008 letter, appellant requested reconsideration. He asserted that Dr. Atassi overlooked a pars defect at L5-S1. Appellant submitted additional diagnostic studies.<sup>4</sup>

In an April 8, 2008 report, Dr. Bruce P. Jaufmann, an attending Board-certified neurosurgeon, opined that forearm paresthesias following bilateral median nerve releases could indicate cervical radiculopathy. In a May 8, 2008 report, he noted that appellant stated that he was "medically retired."

By decision dated July 14, 2008, the Office affirmed the termination of appellant's wage-loss benefits. It found that appellant did not submit medical evidence linking the pars defect to the accepted work injury. Also, Dr. Jaufmann did not find appellant totally disabled for work.

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<sup>4</sup> An April 24, 2008 cervical MRI scan showed a mild midline to left paramedian disc protrusion at C6-7, with slight improvement of the C4-5 disc protrusion. A May 6, 2008 thoracic MRI scan showed disc bulges at T7-8 and T9-10, degenerative disc disease with impingement at T11-12, an annular tear and central bulging at L1-2, bilateral pars defects at L5 also visible on October 10, 2005 and September 24, 2006 studies but not listed in the reports, minimal anterolisthesis of L5 on S1, a right-sided L5-S1 disc protrusion and endplate osteophytes at T11-12 and L1-2.

## LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>5</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>6</sup>

Section 8123 of the Federal Employees' Compensation Act 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>7</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>8</sup>

Where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.<sup>9</sup> If the specialist is unwilling or unable to clarify or elaborate on his or her opinion as requested, the case should be referred to another appropriate impartial medical specialist.<sup>10</sup> Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act<sup>11</sup> will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.<sup>12</sup>

## ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbar sprain, disc protrusions at C4-5 and C6-7, a disc bulge at T11-12 and aggravation of cervical and lumbar disc disease. Appellant received total disability compensation beginning in September 2006. Dr. Kotzen, a Board-certified neurosurgeon, found appellant totally disabled for work as of June 18, 2007. Dr. Cook, a Board-certified neurologist and second opinion physician, found appellant able to perform sedentary duty as of November 2007.

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<sup>5</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

<sup>6</sup> *Id.*

<sup>7</sup> 5 U.S.C. § 8123; see *Charles S. Hamilton*, 52 ECAB 110 (2000).

<sup>8</sup> *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

<sup>9</sup> *Harry T. Mosier*, 49 ECAB 688 (1998).

<sup>10</sup> *Guiseppe Aversa*, 55 ECAB 164 (2003).

<sup>11</sup> 5 U.S.C. § 8123(a).

<sup>12</sup> *Harold Travis*, 30 ECAB 1071 (1979).

The Office found a conflict of medical opinion and referred appellant to Dr. Atassi, a Board-certified neurosurgeon, who opined that appellant had only subjective complaints and was not disabled for work. When asked to clarify whether the accepted injuries had resolved, Dr. Atassi stated that the “effect of his accepted injuries ... should have resolved.” The Office then terminated appellant’s wage-loss compensation, based on Dr. Atassi’s opinion.

The Board finds that Dr. Atassi’s opinion is not sufficient to represent the weight of the medical evidence. The Office requested that Dr. Atassi address whether the accepted injuries had resolved. Instead, Dr. Atassi replied that the injuries “should have” resolved. The indefinite, speculative nature of Dr. Atassi’s opinion greatly diminishes its probative value.<sup>13</sup> As noted, if an impartial medical specialist is unable to clarify his opinion as requested, the case should be referred to another appropriate impartial medical specialist.<sup>14</sup> Instead, the Office terminated appellant’s wage-loss compensation based on Dr. Atassi’s opinion. Thus, the Board finds that the Office did not meet its burden of proof in terminating appellant’s wage-loss compensation.

The case will be returned to the Office for payment of all compensation due and owing from April 16, 2008 onward. As the Office improperly terminated appellant’s compensation, the second issue regarding whether appellant established continuing disability following the termination is moot.

### **CONCLUSION**

The Board finds that the Office improperly terminated appellant’s compensation benefits.

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<sup>13</sup> *Kathy A. Kelley*, 55 ECAB 206 (2004).

<sup>14</sup> *Guisepppe Aversa*, *supra* note 10.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 14 and April 16, 2008 are reversed.

Issued: June 19, 2009  
Washington, DC

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

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

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