

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**L.B., Appellant**

**and**

**U.S. POSTAL SERVICE, CORONADO  
STATION, Santa Fe, NM, Employer**

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**Docket No. 13-47**

**Issued: February 14, 2013**

*Appearances:*

*Daniel M. Goodkin, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 5, 2012 appellant, through his attorney, filed a timely appeal of the August 31, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating his compensation benefits. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective February 21, 2012 on the grounds that he no longer had any residuals or disability causally related to his accepted employment-related injuries.

On appeal, counsel contends that the medical opinion of Dr. Melburn K. Huebner, a Board-certified orthopedic surgeon and OWCP referral physician, which OWCP relied on in terminating appellant's compensation lacks sufficient medical rationale to create a conflict in the medical opinion evidence.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

OWCP accepted that on December 4, 1996 appellant, then a 49-year-old custodial laborer, sustained cervical and lumbar sprains, myalgias and myositis as a result of being struck in the face by a box that slipped from the hands of a coworker. He stopped work on December 6, 1996 and resigned from the employing establishment in August 1997. OWCP paid appropriate total disability compensation benefits.

A November 10, 2009 investigative report from the employing establishment's Office of the Inspector General stated that appellant was engaged in raising livestock and textile bearing animals on his property which was not in accordance with his physical restrictions.<sup>2</sup> Nyle Norwood, appellant's business accountant, discussed appellant's income and expenses.

By letter dated April 5, 2011, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Barry R. Maron, a Board-certified orthopedic surgeon. After reviewing the statement of accepted facts and medical file, and conducting a thorough physical evaluation, Dr. Maron, in a May 23, 2011 medical report, diagnosed chronic neck pain in association with alleged degenerative disc disease and degenerative facet disease in the cervical spine and chronic headache pattern since 1996 with etiology unknown and depression. Appellant had reached maximum medical improvement within three years of the employment injury and he could perform his date-of-injury position. Dr. Maron advised that his accepted neck and lumbar sprain conditions had resolved and his chronic neck pain was associated with degenerative disc disease and degenerative facet disease. He further advised that no further physical therapy was warranted but recommended a psychiatric evaluation.

A June 12, 2011 newspaper article indicated that the New Mexico Medical Board was investigating Dr. Maron's practice of prescribing medications. In a September 8, 2011 letter, appellant's attorney advised OWCP that Dr. Maron's report could not be accorded the weight of the medical evidence as his medical license was revoked on August 11, 2011 by the New Mexico Medical Board.

By letter dated September 27, 2011, OWCP referred appellant to Dr. Huebner for a second opinion. In an October 14, 2011 report, Dr. Huebner obtained a history of the December 4, 1996 employment injuries, reviewed appellant's medical records and obtained a history of his social and employment background. On physical examination, he reported normal findings related to appellant's head. Dr. Huebner noted his complaints of discomfort with superficial palpation over the entire occipital area, back and neck and parathoracic paralumbar muscles. Appellant also had pain with very superficial palpation over the right and left trapezial muscles. He had limited cervical range of motion. On examination of the thoracic spine, Dr. Huebner reported pain with superficial palpation. Appellant had normal range of motion of the upper extremities which included the shoulders, arms, elbows, wrists, hands and fingers. He had excellent grip strength and firm handshakes. Appellant could feel touch on his entire right and left upper extremity. He had no abnormal reflexes or arm and forearm circumference. There

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<sup>2</sup> On May 8, 2011 appellant stated that he owned a sole proprietorship business. He had four Navajo Churro sheep on his property. Appellant's activities included daily feedings for 15 to 30 minutes, light cleaning of animals three times a week for 30 to 45 minutes and consolidating financial records two to three hours annually for his accountant. His supplies were delivered, unloaded and stacked by the supplier.

was no visible atrophy of the thenar or ulnar intrinsic muscles. Appellant had good palpable distal radial pulses. His capillary refill was intact. On examination of the lumbar spine, Dr. Huebner reported complaints of discomfort with very superficial palpation over the lower lumbar spine. Appellant complained about pain with very light axial pressure applied to the top of the shoulders and with pelvic rotation. He could stand on his toes and stand on his heels. Appellant had limited lumbar range of motion. He had no radicular pain with a straight leg raise to 80 degrees on the right and left side. Appellant had intact strength in dorsiflexion, plantar flexion inversion and eversion of the bilateral knees, ankles, feet and toes. He complained about discomfort in the back with a straight leg raise at 50 degrees on the right and left side. Reflexes were 1+ at the knees and a trace at the ankles. Appellant had no demonstrable clonus. He walked well without a limp and he did not use any type of ambulatory assistance. Appellant had a normal base gait. Dr. Huebner diagnosed resolved work-related nasal contusion and cervical strain. Appellant also had degenerative changes of the cervical and lumbar spine. Dr. Huebner advised that the effects of the December 1996 work injury no longer existed and they did not limit appellant's activities. His current limitations were due to diseases of life. Sufficient medical treatment had been afforded. Dr. Huebner concluded that appellant could perform sedentary work.

On November 4, 2011 OWCP requested that Dr. Huebner submit a supplemental report providing his rationale explaining why he did not identify a lumbar condition resulting from the December 4, 1996 employment injury. It also requested that he complete an accompanying work capacity evaluation (Form OWCP-5c).

In a November 7, 2011 report, Dr. Huebner explained that he did not diagnose a lumbar spine condition because the first physician who evaluated appellant on January 17, 1997 did not report any lumbar spine findings and determined that appellant could perform full-duty work with no restrictions. It was not until March 26, 1998 when he was first diagnosed with back pain. Based on these findings, Dr. Huebner concluded that the lumbar sprain was not a result of the December 4, 1996 work injury. In a November 7, 2011 Form OWCP-5c capacity evaluation, he stated that appellant could work eight hours a day with no restrictions related to the December 4, 1996 employment injury.

On January 17, 2012 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on Dr. Huebner's medical opinion. Appellant was advised that he had 30 days to submit additional evidence in response to the proposed termination.

In a January 16, 2012 letter to the claims examiner, Dr. Phillip A. Wong, an attending osteopath, indicated that he reviewed Dr. Huebner's report of November 4, 2011. He challenged a number of issues ultimately finding that his work injury prevent him from returning to work, full time or otherwise on a consistent basis.

In a January 19, 2012 report, Dr. Wong stated that he last examined appellant on January 4, 2012. He reviewed cervical and lumbar x-rays and magnetic resonance imaging (MRI) scan results. The cervical x-rays showed abnormal straightening of the cervical spine, slight decreased extension ability, slight disc loss at C4-5, loss of disc space at the C5-6 level with degenerative changes and narrowing of the C3 neuroforamina opening bilaterally. Straightening of the cervical spine was consistent with paracervical muscle spasm. A June 5,

1998 cervical MRI scan showed a C3-4 minimal central disc bulge with very minimal compression along the anterior aspect of the thecal sac with bilateral foraminal narrowing secondary to small osteophytes with very mild canal stenosis. It also showed C4-5 mild canal stenosis with spondylitic ridging, C5-6 mild spondylitic ridging posteriorly with mild foraminal narrowing on the left due to small osteophytes with hypertrophy of the facet joints on the left and C6-7 mild spondylitic ridging. A June 5, 1998 lumbar MRI scan revealed a very mild central disc bulge at L4-5 which caused minimal deformation along the anterior aspect of the thecal sac with bilateral ligamentous and facet hypertrophy causing some mild canal stenosis. It also revealed a minimal disc bulge at L5-S1 on the right and slightly lateral with some foraminal narrowing along the inferior aspect of the neural foramen due to the disc bulge with mild bilateral facet and ligamentous hypertrophy. Dr. Wong advised that the effects of appellant's work injury had not ceased. The current findings were due to the effects of the work injury. The accepted neck and lumbar strains, and lumbar spine myalgias and myositis were still medically present and disabling. The effects of the work injury still persisted and prevented appellant from returning to his date-of-injury custodian position on a full-time basis or part-time or modified work. His work-related disability was permanent. Dr. Wong advised that appellant had been suffering from dry mouth (xerostomia) since October 2004. He stated that an injury that caused nerve damage to the head and neck area could result in this condition.

In a February 21, 2012 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the medical evidence he submitted was insufficient to outweigh the weight accorded to Dr. Huebner's opinion.

By letter dated February 28, 2012, appellant, through his attorney, requested a telephone hearing with an OWCP hearing representative.

In a May 16, 2012 report, Dr. Wong advised that his current findings of cervical and lumbar strains, myalgia and myositis and somatic dysfunction of the head (headaches) were related to appellant's work injury. The cervical and lumbar MRI scan findings were related to the employment injury and natural degeneration of the spine as the work injury accelerated the natural aging process of the spine compared to individuals that never had a traumatic spine injury. Dr. Wong stated that any form of traumatic injury could cause the spine to degenerate and age faster. Injuries were a chief cause of degenerative disc disease. Dr. Wong related that the key difference between acquiring degenerative disc disease by aging and by injury was that the former usually affected all discs while the latter only affected the injured disc.

In an August 31, 2012 decision, an OWCP hearing representative found that OWCP met its burden of proof to terminate appellant's compensation on February 21, 2012 based on Dr. Huebner's opinion. The hearing representative also found that based on Dr. Wong's May 16, 2012 report, a conflict existed in the medical opinion evidence between Dr. Wong and Dr. Huebner as to whether appellant's accepted cervical and lumbar strains had resolved and whether his somatic headaches and acceleration of his cervical and lumbar degenerative disc disease were caused by the accepted December 6, 1994 employment injuries.

## **LEGAL PRECEDENT**

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>3</sup> Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>4</sup> After it has determined that an employee has disability causally related to federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>5</sup>

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>6</sup>

## **ANALYSIS**

OWCP accepted that appellant sustained cervical and lumbar sprains, myalgias and myositis while in the performance of duty. It therefore has the burden of proof to justify the termination of compensation for temporary total disability.

OWCP found that the opinion of Dr. Huebner, an OWCP referral physician, represented the weight of the medical evidence. Dr. Huebner reported an essentially normal examination with the exception of degenerative changes of the cervical and lumbar spine. He found that the effects of the December 1996 work-related nasal contusion and cervical strain had resolved and appellant had no disability.<sup>7</sup> Dr. Huebner further found that he did not sustain a work-related lumbar strain on December 4, 1996, which was accepted by OWCP. He concluded that appellant could perform full-time work with nonemployment-related restrictions.

The Board, however, finds that Dr. Wong's opinions are of equal weight to the opinion of Dr. Huebner. Dr. Wong was the attending physician. In a January 16, 2012 letter, he took issue with Dr. Huebner's findings. On January 19, 2012 Dr. Wong found that the effects of the December 4, 1996 employment injuries had not ceased and permanently prevented appellant from returning to his date-of-injury custodian position on a full-time basis or part-time or modified work. He indicated that his current findings were due to the effects of the accepted injuries. Dr. Wong advised that an injury which caused nerve damage to the head and neck area could cause appellant's diagnosed xerostomia. On May 16, 2012 he reported that his current findings of cervical and lumbar strains, myalgia and myositis, and somatic headaches were related to the accepted employment injury. Dr. Wong advised that the cervical and lumbar MRI scan findings were related to the employment injury and natural degeneration of the spine as the

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>5</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>6</sup> 5 U.S.C. § 8123(a).

<sup>7</sup> The Board notes that nasal contusion was not an accepted employment-related condition. In addition, Dr. Huebner found that appellant did not sustain a work-related lumbar strain on December 4, 1996.

work injury accelerated the natural aging process of the spine compared to individuals that never had a traumatic spine injury. He explained how a traumatic injury caused degenerative disc disease.

Pursuant to 5 U.S.C. § 8123(a), there is a disagreement between the physician making the examination for the United States and the physician of the employee on the issue of whether appellant had any continuing residuals and disability causally related to the December 4, 1996 employment injuries and whether the December 4, 1996 employment injuries caused appellant's somatic headaches and cervical and lumbar degenerative disc condition. OWCP should have referred appellant to an impartial medical specialist.<sup>8</sup> Without a resolution of the conflict, the Board finds that OWCP improperly terminated appellant's wage-loss compensation and medical benefits. The Board will reverse OWCP's August 31, 2012 decision and remand the case for payment of appropriate compensation.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 31, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 14, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

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

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

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<sup>8</sup> *M.D.*, Docket No. 11-928 (issued December 1, 2011).