

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

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D.H., Appellant	)	
	)	
and	)	<b>Docket No. 12-1975</b>
	)	<b>Issued: June 5, 2013</b>
U.S. POSTAL SERVICE, HARRISBURG	)	
PROCESSING & DISTRIBUTION CENTER,	)	
Harrisburg, PA, Employer	)	

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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On September 20, 2012 appellant filed a timely appeal from a March 28, 2012 decision of the Office of Workers' Compensation Programs (OWCP) terminating her compensation benefits and denying a traumatic injury. 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.

**ISSUES**

The issues are: (1) whether OWCP properly terminated appellant's wage-loss and medical compensation benefits effective July 6, 2011 on the grounds that her work-related disability had ceased; and (2) whether appellant sustained a herniated lumbar disc causally related to an accepted lumbar strain.

On appeal, appellant asserts that the employing establishment violated OWCP's procedures by removing her from a permanent rehabilitation position on which it based a

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

February 19, 2002 loss of wage-earning capacity determination. She contended that a January 6, 1997 lifting incident caused a ruptured L5-S1 disc in addition to an accepted lumbar sprain.

### **FACTUAL HISTORY**

OWCP accepted that on January 6, 1997 appellant, then a 41-year-old rural carrier, sustained a lumbar sprain while lifting and casing flats of mail. She was first treated by Dr. Richard H. Daly, Jr., an attending Board-certified family practitioner, who diagnosed a lumbar strain on January 6, 1997. Dr. Daly submitted progress notes through January 1997 diagnosing a lumbosacral or iliosacral strain. On January 30, 1997 he newly diagnosed a ruptured disc. Dr. Daly ordered a February 14, 1997 lumbar magnetic resonance imaging (MRI) scan, demonstrating degenerative disc disease and a mild central posterior disc protrusion at L5-S1 with no compression.

In a March 14, 1997 report, Dr. Steven J. Triantafyllou, an attending Board-certified orthopedic surgeon, diagnosed a herniated L5-S1 disc causally related to the January 6, 1997 injury. He diagnosed a ruptured disc on July 21, 1997, causally related to the accepted injury.<sup>2</sup>

On October 5, 2000 the employing establishment offered appellant a job as a full-time modified clerk. Appellant accepted the position and performed work for six hours a day from April 2001 to January 2002. She received compensation for the remaining two hours a day.

In reports from February 6 to May 25, 2001, Dr. Daly opined that the accepted injury caused a decreased left Achilles reflex and left-sided lumbar radiculopathy. Appellant had attained maximum medical improvement with the following permanent work restrictions: lifting limited to 10 pounds frequently and 30 pounds intermittently, 6 hours standing, 1 to 2 hours walking, 30 minutes of bending, reaching above the shoulder, no climbing, kneeling, pushing or pulling.

On January 29, 2002 OWCP offered appellant a permanent, full-time rehabilitation position as a modified clerk, based on a Dr. Perry A. Eagle's restrictions, requiring the same sedentary clerical duties she had performed since April 2001. Appellant accepted the job on February 7, 2002 and began work on February 9, 2002 for six hours a day.

By decision dated February 19, 2002, OWCP found that appellant's actual earnings as a modified full-time clerk as of February 9, 2002 fairly and reasonably represented her wage-earning capacity. It found that she had performed the position successfully for several years. Appellant continued working the permanent rehabilitation position through February 2010.<sup>3</sup>

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<sup>2</sup> In an August 24, 1999 report, Dr. Gregory J. Lignelli, a Board-certified orthopedic surgeon consulting to the employing establishment, found diminished pinprick sensation in the right L5 dermatome. He noted that appellant had attained maximum medical improvement but would benefit from lumbar surgery.

<sup>3</sup> On July 9, 2002 the employing establishment notified appellant that her permanent rehabilitation position would be relocated. In a September 11, 2002 letter, OWCP advised the employing establishment that, under the February 19, 2002 wage-earning capacity determination, appellant was entitled to compensation if the permanent rehabilitation position was no longer available. In a September 17, 2002 letter, the employing establishment noted that rehabilitation assignments, including appellant's, were not "posted for bid to other clerks. In keeping with FECA, rehabilitation assignments are created to accommodate employees injured on duty."

In reports from February 4, 2009 to April 19, 2010, Dr. Daly diagnosed degenerative lumbar disc disease with ruptured L4-5 and L5-S1 discs, related to the accepted injury. He opined on February 12, 2009 and April 19, 2010 that the accepted lumbar strain had not resolved, causing continued chronic lumbar pain.

On February 22, 2010 the employing establishment advised appellant that her permanent rehabilitation position would be excessed under the National Reassessment Process (NRP).

In a June 30, 2010 letter, the employing establishment stated that on June 23, 2010 appellant voluntarily accepted a part-time position at the York Post Office for five hours a day rather than a full-time rehabilitation position in Harrisburg. Appellant worked five hours a day or less from June 23 to July 2, 2010. She claimed wage-loss compensation for the remaining three hours a day. OWCP paid compensation for wage loss from June 19 to July 2, 2010.

On June 30, 2010 appellant claimed a recurrence of disability commencing June 23, 2010. She submitted a July 14, 2010 report from Dr. Daly, stating that she needed two consecutive days off.

Appellant worked five hours a day from July 31 to September 10, 2010 and filed claims for wage loss (Form CA-7) for the remaining three hours a day. In a September 20, 2010 letter, OWCP advised her to stop submitting claims for compensation as she chose to reduce her work hours by accepting the five-hour-a-day position at York Post Office. Appellant continued working five hours a day through January 14, 2011.

In a January 19, 2011 letter, the employing establishment contended that, since appellant refused the mandatory transfer on June 23, 2010, she was assigned to sit in a swing room on standby. Appellant was sent home on January 19, 2011 under NRP. She filed claims for total disability compensation from January 19 to May 17, 2011.

In a February 11, 2011 work capacity evaluation (Form OWCP-5), Dr. Daly found appellant able to work eight hours a day, five days a week, with pushing and pulling limited to 10 pounds, lifting limited to 5 pounds and frequent changes of position.

On May 5, 2011 OWCP obtained a second opinion from Dr. Stuart J. Gordon, a Board-certified orthopedic surgeon, who reviewed the medical record and a statement of accepted facts. On examination, Dr. Gordon noted a full range of lumbar motion, negative straight leg raising tests bilaterally and no motor or sensory deficits of the lower extremities. He obtained x-rays showing a low grade right lumbar curvature and multilevel degenerative disc disease. Dr. Gordon stated that he did “not hold the opinion that [appellant’s] current complaints are related to a chronic lumbar strain.... It is my opinion that they are related to obesity and degenerative disease.” He did not “attribute her current complaints to this work injury.” Dr. Gordon found that she could work full duty without restrictions.

By notice dated May 18, 2011, OWCP advised appellant that it proposed to terminate her medical and wage-loss compensation benefits, based on Dr. Gordon’s report indicating that the accepted lumbar strain had ceased without residuals. In response, appellant filed claims for wage-loss compensation through June 28, 2011.

By decision dated July 14, 2011, OWCP terminated appellant's wage-loss compensation and medical benefits effective July 6, 2011 on the grounds that the accepted injury had ceased without residuals, based on Dr. Gordon as the weight of the medical evidence.

Appellant's counsel requested a telephonic hearing, held on December 19, 2011. At the hearing, she asserted that Dr. Gordon performed only a cursory examination and that the accepted injury also caused a herniated lumbar disc. Following the hearing, counsel submitted a January 18, 2012 letter contending that there was a conflict of medical opinion between Dr. Gordon and Dr. Daly regarding appellant's work capacity and the presence of ongoing injury-related residuals. She submitted additional evidence.

A January 10, 1997 lumbar x-rays showed L5-S1 disc space narrowing and mild lumbar scoliosis. A July 23, 1997 lumbar MRI scan showed a stable small central disc protrusion at L5-S1, mild annular bulging at L4-5 and multilevel degenerative disc disease.

In a June 26, 1997 report, Dr. K. Nicholas Pandelidis, an attending Board-certified orthopedic surgeon, noted the January 6, 1997 injury and diagnosed degenerative disc disease. He opined that appellant did not have a true radicular problem as straight leg raising tests were negative bilaterally, MRI scans showed only a small herniation and she had no symptom relief with epidural injections.<sup>4</sup>

In a January 26 and April 19, 2011 reports, Dr. Daly stated that the January 6, 1997 injury caused a ruptured lumbar disc. He found that appellant could work full-time restricted duty. In August 10, 2011 reports, Dr. Daly opined that appellant's chronic lumbar pain originated in "1997 she hurt her back at work while lifting a mail tray.... Obesity exacerbated the back disorder but did not cause it. Appellant's back pain began with her injury in 1997." Dr. Daly limited her to working six hours a day limited duty with two consecutive days off.

By decision dated and finalized March 28, 2012, an OWCP hearing representative affirmed the July 14, 2011 decision terminating appellant's wage-loss and medical compensation benefits effective July 6, 2011. The hearing representative found that the additional evidence submitted was insufficient to outweigh Dr. Gordon's report. The hearing representative further found that appellant had not established that she sustained a herniated L5-S1 disc causally related to the accepted January 6, 1997 work incident, as Dr. Gordon negated causal relationship.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP 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, OWCP may not terminate compensation

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<sup>4</sup> In reports from August 5, 2004 to March 8, 2006, Dr. Michael J. Moritz, an attending Board-certified orthopedic surgeon, noted that appellant had arthroscopic right medial and lateral meniscectomies in 2004. He opined that, regarding the knee surgery, she was able to return to work without restrictions as of July 21, 2004.

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

without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>6</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>7</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.<sup>8</sup>

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>9</sup> When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>10</sup> In situations where there are 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 on a proper factual background, must be given special weight.<sup>11</sup>

### ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a lumbar sprain on January 6, 1997. Appellant submitted periodic reports through July 14, 2010 from Dr. Daly, an attending Board-certified family practitioner, limiting her to part-time restricted duty due to continuing lumbar symptoms. Dr. Daly opined that on February 12, 2009 and April 19, 2010 the accepted lumbar strain remained active, causing ongoing chronic lumbar pain.

On May 5, 2011 OWCP obtained a second opinion from Dr. Gordon, a Board-certified orthopedic surgeon, who opined that she no longer had injury-related residuals and could perform regular full-time duty. Dr. Gordon stated that he did “not hold the opinion that [appellant’s] current complaints are related to a chronic lumbar strain.”

By notice dated May 18, 2011 and finalized July 14, 2011, OWCP terminated appellant’s medical and wage-loss compensation benefits on the grounds that the accepted injury had ceased without residuals. It accorded Dr. Gordon the weight of the medical evidence. However, the Board finds that this termination was improper as there was an outstanding conflict of medical opinion between Dr. Daly, for appellant and Dr. Gordon for OWCP.

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

<sup>7</sup> *Roger G. Payne*, 55 ECAB 535 (2004).

<sup>8</sup> *Pamela K. Guesford*, 53 ECAB 726 (2002).

<sup>9</sup> 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

<sup>10</sup> *Delphia Y. Jackson*, 55 ECAB 373 (2004).

<sup>11</sup> *Anna M. Delaney*, 53 ECAB 384 (2002).

Dr. Daly found appellant partially disabled for work due to sequelae of the accepted January 6, 1997 injury. Dr. Gordon found that she had no injury-related residuals and could perform full duty. He did not find that appellant's continuing lumbar condition was work related. Dr. Daly, who followed appellant since 1997, found that the accepted 1997 injury remained active and partially disabled. The Board finds that the opinions of Dr. Daly and Dr. Gordon are therefore of equal weight. The physicians reached an opposite conclusion regarding whether the accepted lumbar sprain had ceased without residuals, thereby creating a conflict of medical opinion. When there is a conflict of opinion between the claimants attending physician and the physician performing an examination for the government, OWCP shall appoint a third physician to resolve the disagreement.<sup>12</sup> As there exists an unresolved conflict in the medical evidence, OWCP did not meet its burden of proof to terminate her compensation benefits. The termination decision will be reversed.<sup>13</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>14</sup> A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.<sup>15</sup> Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>16</sup> Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.<sup>17</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>18</sup> must be one of reasonable medical certainty<sup>19</sup> explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>20</sup>

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<sup>12</sup> 5 U.S.C. § 8123(a).

<sup>13</sup> The Board also notes that, after OWCP's February 9, 2002 wage-earning capacity determination, appellant further claimed compensation for recurrent disability beginning June 23, 2010 when she alleged that her modified position was removed pursuant to NRP. The Board has no jurisdiction over this matter as OWCP has not issued a final decision regarding this period of claimed compensation. *See* 20 C.F.R. § 501.2(c).

<sup>14</sup> *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>15</sup> *See Katherine J. Friday*, 47 ECAB 591 (1996).

<sup>16</sup> *John W. Montoya*, 54 ECAB 306 (2003).

<sup>17</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>18</sup> *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>19</sup> *Montoya*, *supra* note 16.

<sup>20</sup> *Judy C. Rogers*, 54 ECAB 693 (2003).

## **ANALYSIS -- ISSUE 2**

OWCP accepted that appellant sustained a lumbar strain on January 6, 1997 while lifting and casing flats of mail. At a December 19, 2011 hearing, appellant asserted that the January 6, 1997 lifting incident also caused a herniated lumbar disc.

Dr. Daly first diagnosed a lumbar strain on January 6, 1997 and in progress reports over the next three weeks. The January 10, 1997 lumbar x-rays did not show a disc rupture or herniation. On January 30, 1997 Dr. Daly newly diagnosed a ruptured disc. He submitted reports through August 10, 2011 reiterating that the January 6, 1997 lifting incident caused a ruptured lumbar disc with radiculopathy, exacerbated but not caused by obesity. However, Dr. Daly did not explain why he changed his initial diagnosis from lumbar strain to ruptured disc or provide adequate medical rationale explaining how the accepted injury caused or contributed to a ruptured disc. Therefore, his opinion is insufficient to meet appellant's burden of proof.

Appellant consulted two Board-certified orthopedic surgeons shortly after her injury. In a March 14, 1997 report, Dr. Triantafyllou diagnosed a herniated L5-S1 disc causally related to the January 6, 1997 injury. On June 26, 1997 Dr. Pandelidis noted that February 14 and July 23, 1997 MRI scans showed only a small disc herniation at L5-S1 without compression. Neither physician explained the processes by which the accepted injury would cause a lumbar disc herniation. Therefore, their opinions are insufficient to meet appellant's burden of proof.

There are no other medical reports of record which address the reasons why the January 6, 1997 work injury caused or aggravated a herniated lumbar disc. On appeal, appellant asserts that OWCP should expand the claim to include a herniated lumbar disc. However, as stated above, she submitted insufficient medical evidence to establish the causal relationship asserted.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

## **CONCLUSION**

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and medical benefits, effective July 6, 2011, as there was an outstanding conflict of medical opinion. The Board further finds that she has not established that the claim should be expanded to include acceptance of a herniated lumbar disc.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 28, 2012 is affirmed in part regarding the denial of the herniated lumbar disc and reversed in part regarding the termination of compensation benefits.

Issued: June 5, 2013  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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