

<sup>1</sup> 20 C.F.R. § 8101 *et seq.*

## **FACTUAL HISTORY**

OWCP accepted that on April 18, 2005 appellant, then a 55-year-old transportation security screener, sustained lumbago, right knee contusion, right hip bursitis, lumbar radiculitis, permanent aggravation of right hip arthritis, permanent aggravation of degenerative disc disease of the low back and spinal stenosis at the L3-4, L4-5 and L5-S1 levels.<sup>2</sup> Appellant received compensation for wage loss for total disability commencing June 12, 2005. He was held off work by Dr. Kenneth Botwin, an attending Board-certified internist.

On May 10, 2010 Dr. Anthony Moreno, an attending Board-certified orthopedic surgeon, advised that a May 6, 2005 magnetic resonance imaging (MRI) scan of appellant's back showed multilevel lumbar degenerative disc disease, most prominent at L3-4, L4-5 and L5-S1 and anterolisthesis of L5 on S1. There were disc bulges noted at these levels with moderate bilateral neural foraminal stenosis at L4-5 and L5-S1. The findings also showed bone edema most prominent at L4 and L5.

The findings of a May 18, 2005 MRI scan testing of appellant's pelvis showed probable avascular necrosis with fragmentation involving the subchondral area of the medial aspect of the right femoral head and apparent attenuation of the overlying cartilage. The left hip and the rest of the bony pelvis were unremarkable. Electrodiagnosic testing from May 24, 2005 showed radiculopathies in both legs.

In an October 15, 2009 report, Dr. Botwin stated that appellant reported having severe back and leg pain with numbness and tingling in both legs. He diagnosed lumbar myofascial pain, sacroiliitis, spinal stenosis of the lumbar region, thoracic or lumbosacral neuritis or radiculitis, hip joint pain, bilateral hip avascular necrosis, degeneration of lumbar intervertebral disc, left S1 Tarlov cyst, multilevel L3-S1 degenerative joint disease and stenosis, severe hypertrophic L4-S1 facet arthropathy and L5-S1 spondylolisthesis (grade 1). Dr. Botwin advised that the conditions were related to appellant's employment and were not an aggravation of preexisting conditions. He concluded that appellant was unable to work and was permanently disabled.

In early November 2009, OWCP referred appellant, a statement of accepted facts and the case record to Dr. Narinder Aujla, a Board-certified orthopedic surgeon, for a second opinion examination. It asked Dr. Aujla to address whether appellant had residuals of his employment injuries.

In a November 20, 2009 report, Dr. Aujla reviewed appellant's medical records, provided a description of his medical history and performed a physical examination. He noted that palpation of the thoracic and lumbar spine revealed no spasm, but that appellant had tenderness near the sacroiliac joint. Appellant did not exhibit any motor weakness or sensory loss in his lower extremity muscle groups and was able to extend both knees without arching his back. Dr. Aujla diagnosed lumbar disc degeneration and right hip pain, noting that appellant had preexisting lumbar disc degeneration and sustained a temporary aggravation of the lumbar spine.

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<sup>2</sup> Appellant's employment injuries were attributed to lifting a stack of plastic bins on April 18, 2005 and an incident on the same date when he twisted his trunk while tripping on a floor mat.

He stated that appellant exhibited no signs of avascular necrosis or any arthritis of the hip at the time of his work injury, but indicated that he did have some right trochanteric bursitis, most likely in the form of a hip strain. Dr. Aujla noted that appellant had symptoms of lumbar disc degeneration and no residual symptoms of the original injury. He indicated that appellant's significant lumbar disc degeneration and overweight condition would prevent him from performing duties as a transportation security officer. Dr. Aujla stated that appellant had permanent light-duty restrictions.<sup>3</sup>

OWCP determined that a conflict in medical opinion arose between Dr. Botwin and Dr. Aujla regarding whether appellant had disability residuals of his employment injuries. It referred appellant, a statement of accepted facts and the case record to Dr. Emmanuel Scarlatos, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

In a March 31, 2010 report, Dr. Scarlatos discussed appellant's factual and medical history and reviewed the findings of the previous examinations and diagnostic tests. On physical examination, appellant ambulated with a cane and exhibited minimal guarding with respect to position changes. He got on and off the examining table without obvious difficulty and could stand erect. There were no lumbar spasms or radicular symptoms of dysesthesias and hip rotation was symmetrical with no groin pain. Dr. Scarlatos noted that appellant had tenderness over the right lateral aspect of his pelvis near the trochanter and mild tenderness in his right sciatic notch region. Mobility at the waist was guarded with extension diminished to about 10 to 15 degrees. There were no dysesthesias or radicular symptoms found on examination, even though appellant complained of such conditions. Deep tendon reflexes were symmetrically slightly diminished, straight leg raising was to 90 degrees bilaterally with no radicular symptoms and examination of the right knee yielded normal results. Dr. Scarlatos diagnosed degenerative disc disease with grade 1 spondylolisthesis of L4 on L5 and L5 on S1; degenerative arthrosis of the right and left hips -- rule out focal avascular necrosis of the femoral heads; acquired bilateral foraminal stenoses at L4-5 and L5-S1; and resolved capsuloligamentous sprain of the right knee.

Dr. Scarlatos stated that appellant sustained a soft-tissue injury superimposed upon preexisting lumbar spondylosis and degenerative arthritis of the right hip, both of which preexisted the April 18, 2005 work injury. He noted that appellant had denied having any preexisting disease prior to April 18, 2005, but indicated that it was obvious that the lumbar and hip pathologies existed at the time of his work injury. Dr. Scarlatos noted the fact that appellant continued to experience symptoms with respect to the low back and right buttock areas was the result of his preexisting degenerative changes. He stated, "There is no evidence to suggest that there has been an aggravation of this pathology, though the claimant/examinee stated ... that [appellant's] had received treatment over the years from several orthopedists and several chiropractic physicians but felt that the work injury of April 18, 2005 resulted in an increase in intensity and frequency of his usual back and right lower extremity symptoms." Dr. Scarlatos indicated that there was significant magnification and exaggeration of appellant's subjective complaints unsupported by the clinical examination. He stated that appellant was capable of

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<sup>3</sup> Dr. Aujla completed a work restrictions form outlining recommended limits on such activities as walking, standing and lifting.

engaging in some form of light or modified duties noting that any work restrictions were “predicated upon the preexisting degenerative changes noted in the lumbar spine as well as the hips.” Appellant could not, however, return to his regular work for the employing establishment.

In an April 14, 2010 notice, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits because he no longer had residuals of his accepted employment injuries. It indicated that the weight of the medical evidence with regards to work-related residuals rested with the opinion of Dr. Scarlatos. Appellant was advised that he could submit additional evidence for consideration within 30 days if he disagreed with the proposed action.

Appellant submitted a May 3, 2010 written statement, prior to the April 18, 2005 work injury, he was able to work full duty with no restrictions. He disagreed with Dr. Scarlatos’ opinion that he had sustained a soft-tissue injury superimposed on preexisting degenerative disease. Appellant denied telling Dr. Scarlatos that he had back and leg symptoms in the past and had received treatment for such conditions from several orthopedists and chiropractors.

In a January 13, 2009 report, Dr. Eric Bonenberger, an attending Board-certified orthopedic surgeon, reported findings on physical examination and noted that appellant exhibited pain localized to his hip with passive range of motion. There was a positive hip impingement sign on the right and a negative sign on the left. Dr. Bonenberger noted that forward flexion of the hips was to 90 degrees, abduction was to 60 degrees, internal rotation was to 0 degrees and external rotation was to 45 degrees. He diagnosed bilateral hip pain secondary to avascular necrosis, right greater than left. In an April 19, 2010 report, Dr. Botwin diagnosed numerous conditions, including spinal stenosis of the lumbar region, thoracic or lumbosacral neuritis or radiculitis, hip joint pain, degeneration of lumbar intervertebral disc, left S1 Tarlov cyst, multilevel L3-S1 degenerative joint disease, spinal stenosis of lumbar region severe hypertrophic L4-S1 facet arthropathy, L5-S1 spondylolisthesis (grade 1), lumbar myofascial pain and sacroiliitis. He stated that appellant had permanent and total disability.<sup>4</sup>

In a May 19, 2010 decision, OWCP terminated appellant’s wage-loss compensation and medical benefits effective June 6, 2010 finding that the opinion of Dr. Scarlatos showed that appellant had no residuals of his accepted employment injuries after June 6, 2010.

Appellant disagreed with OWCP’s termination decision, and through counsel, requested a telephonic hearing with OWCP’s hearing representative. The hearing was held on October 6, 2010. Appellant testified that he had not worked since he was separated from the employing establishment in 2006 and that Dr. Botwin has not stated that he is able to return to work. Counsel argued that Dr. Scarlatos did not discuss all the accepted conditions in his report and improperly concluded that the preexisting conditions had only been temporarily worsened by the work injury. He indicated that appellant’s claim was accepted for spinal stenosis and argued that Dr. Scarlatos’ acknowledgement that this condition was still present showed that it had not been cured. Counsel noted that he interpreted Dr. Scarlatos’ report as stating that appellant’s

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<sup>4</sup> An April 26, 2010 MRI scan (without contrast) of appellant’s pelvis and hips showed unremarkable results with no evidence of bone contusion, fracture, dislocation, osteoarthritis, joint effusion or avascular necrosis or other abnormalities concerning the hips.

claim should only have been accepted for a soft-tissue injury superimposed on the preexisting degenerative lumbar spondylosis and degenerative arthritis of the right hip. He asserted that Dr. Scarlatos did not acknowledge that the aggravation of appellant's back and hip conditions were permanent and therefore did not follow the statement of accepted facts.<sup>5</sup>

In a December 17, 2010 decision, OWCP's hearing representative affirmed its May 19, 2010 decision.

### **LEGAL PRECEDENT**

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>6</sup> OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>7</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>8</sup>

Section 8123(a) of FECA provides in pertinent part: "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>9</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>10</sup>

### **ANALYSIS**

OWCP accepted that on April 18, 2005 appellant sustained lumbago, right knee contusion, right hip bursitis, lumbar radiculitis, permanent aggravation of right hip arthritis, permanent aggravation of degenerative disc disease of the low back and spinal stenosis at the L3-4, L4-5 and L5-S1 levels. It terminated his wage-loss compensation and medical benefits effective June 6, 2010 based on a March 31, 2010 report of Dr. Scarlatos, a Board-certified orthopedic surgeon who served as an impartial medical specialist.

OWCP properly determined that there was a conflict in the medical opinion between Dr. Botwin, an attending Board-certified internist and Dr. Aujla, a Board-certified orthopedic surgeon acting as an OWCP referral physician, on the issue of whether appellant continued to

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<sup>5</sup> Appellant submitted a May 26, 2010 report in which Dr. Botwin continued to find him totally disabled.

<sup>6</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>7</sup> *Id.*

<sup>8</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>9</sup> 5 U.S.C. § 8123(a).

<sup>10</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

have residuals of his accepted employment injuries.<sup>11</sup> In order to resolve the conflict, it properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Scarlatos for an impartial medical examination and an opinion on the matter.<sup>12</sup>

The Board finds that OWCP did not present sufficient evidence to justify its termination of appellant's wage-loss compensation and medical benefits effective June 6, 2010. The March 31, 2010 report of Dr. Scarlatos is not sufficiently rationalized to constitute the weight of the medical evidence with respect to appellant's continuing work-related residuals.<sup>13</sup>

Dr. Scarlatos discussed appellant's medical history and provided a review of the findings of his previous examinations and diagnostic tests. He noted that during the physical examination appellant had tenderness over the right lateral aspect of his pelvis near the trochanter and mild tenderness in his right sciatic notch region. Mobility at the waist was guarded with extension diminished to about 10 to 15 degrees. Dr. Scarlatos diagnosed degenerative disc disease with grade 1 spondylolisthesis of L4 on L5 and L5 on S1; degenerative arthrosis of the right and left hips -- rule out focal avascular necrosis of the femoral heads; acquired bilateral foraminal stenoses at L4-5 and L5-S1; and resolved capsuloligamentous sprain of the right knee.

In discussing why appellant no longer had residuals of his accepted employment injuries, Dr. Scarlatos stated that on April 18, 2005 appellant sustained a soft-tissue injury superimposed upon preexisting lumbar spondylosis and degenerative arthritis of the right hip. He did not address, however, that the claim was accepted for permanent aggravation of right hip arthritis and permanent aggravation of degenerative disc disease of the low back.<sup>14</sup> This omission calls into question the probative weight to be accorded his opinion. Given that Dr. Scarlatos' opinion is not based on a complete and accurate factual and medical history, it is of limited probative value.<sup>15</sup>

Dr. Scarlatos' report also fails to show that all of appellant's accepted work-related conditions had resolved. For example, it has been accepted that appellant sustained work-related spinal stenosis at the L3-4, L4-5 and L5-S1 levels and Dr. Scarlatos diagnosed acquired bilateral foraminal stenoses at L4-5 and L5-S1. Dr. Scarlatos did not provide a clear opinion that

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<sup>11</sup> In an October 15, 2009 report, Dr. Botwin stated that appellant was totally and permanently disabled due to several work-related conditions, including spinal stenosis of the lumbar region, lumbosacral radiculitis and degenerative joint disease of the lumbar region. In contrast, Dr. Aujla determined on November 20, 2009 that appellant's work-related conditions had resolved. He indicated that appellant could only perform limited-duty work, but posited that his work restrictions were due to nonwork-related conditions.

<sup>12</sup> See *supra* note 9 and accompanying text.

<sup>13</sup> See *supra* note 10 and accompanying text.

<sup>14</sup> Dr. Scarlatos made reference to appellant's preexisting low back and right hip conditions and stated, "There is no evidence to suggest that there has been an aggravation of this pathology, though the claimant/examinee stated ... that [appellant] had received treatment over the years from several orthopedists and several chiropractic physicians but felt that the work injury of April 18, 2005 resulted in an increase in intensity and frequency of his usual back and right lower extremity symptoms."

<sup>15</sup> See *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979) (finding that a medical opinion must be based on a complete and accurate factual and medical history).

appellant's work-related stenosis had resolved. He did not clearly address whether appellant no longer had disability or the need for medical care due to the work-related spinal stenosis. Dr. Scarlatos stated that appellant continued to have symptoms in his right hip, but he did not provide any specific discussion of whether the accepted condition of right hip bursitis had resolved. Given these circumstances, he did not provide a rationalized medical report showing that appellant ceased to have work-related residuals causing wage loss or the need for medical care.

For these reasons, OWCP improperly terminated appellant's wage-loss compensation and medical benefits effective June 6, 2010.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation effective June 6, 2010 on the grounds that he no longer had residuals of his accepted employment injuries after that date.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 17, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 19, 2011  
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