

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

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P.G., Appellant	)	
	)	
and	)	<b>Docket No. 13-902</b>
	)	<b>Issued: February 20, 2014</b>
<b>U.S. POSTAL SERVICE, PROCESSING &amp; DISTRIBUTION CENTER, Wilmington, DE, Employer</b>	)	
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*Appearances:*  
Thomas R. Uliase, Esq., for the appellant  
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 March 5, 2013 appellant, through counsel, timely appealed the December 4, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which affirmed the termination of 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 wage-loss compensation and medical benefits effective May 17, 2012.

**FACTUAL HISTORY**

This case was previously before the Board.<sup>2</sup> Appellant, a 49-year-old former clerk, injured his back on March 29, 1993 while reaching over a mail processing machine to clear a jam. OWCP accepted the claim for lumbar strain and lumbar subluxations at L2, L4 and L5. In

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> Docket Nos. 97-2721 (issued March 14, 2000) and 05-1326 (issued June 6, 2006).

a decision dated April 26, 1995, it terminated wage-loss compensation and medical benefits. On January 22, 1998 appellant underwent a lumbar fusion at L4-5 and L5-S1.<sup>3</sup> Afterwards he returned to work in a limited-duty capacity. On April 22, 1999 appellant stopped work entirely.

By decision dated March 14, 2000, the Board found that the record did not establish that appellant's accepted lumbar subluxation had resolved. Therefore, OWCP had not met its burden of proof to terminate benefits effective April 26, 1995. Following the Board's March 14, 2000 reversal, OWCP paid wage-loss compensation for intermittent periods of disability from April 26, 1995 through January 2, 1998.

In a February 4, 2004 decision, OWCP again terminated appellant's wage-loss compensation and medical benefits. It determined that appellant no longer had residuals of his March 29, 1993 work injury. The decision was based on the opinion of Dr. Richard P. DuShuttle, a Board-certified orthopedic surgeon and OWCP-referral physician, who found appellant severely impaired due to his lumbar fusion. Dr. DuShuttle indicated that appellant's lumbar strain did not require any further active medical treatment and his lumbar subluxation was treated with the fusion; but, he was only capable of performing part-time, sedentary work. Appellant was partially disabled as a result of the lumbar fusion. OWCP had not authorized the January 22, 1998 surgery. By decision dated January 14, 2005, the Branch of Hearings & Review affirmed OWCP's decision to terminate benefits.

By order dated June 6, 2006, the Board set aside the hearing representative's January 14, 2005 decision because the record was incomplete.<sup>4</sup> The Board also noted that there was an unresolved issue regarding whether appellant's January 22, 1998 lumbar fusion was related to the March 29, 1993 employment injury. OWCP did not address the compensability of appellant's surgery under the current claim (xxxxxx870).

The Board's June 6, 2006 order remanding case and its March 14, 2000 decision are incorporated herein by reference.

Since the last appeal OWCP and the Branch of Hearings & Review have issued 10 decisions with respect to the termination of appellant's benefits.<sup>5</sup> On four occasions the Branch of Hearings & Review set aside an OWCP decision terminating benefits. The current appeal arises from OWCP's May 17, 2012 decision terminating benefits, which the Branch of Hearings & Review affirmed by decision dated December 4, 2012.

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<sup>3</sup> Dr. Bikash Bose, a Board-certified neurosurgeon, performed the January 22, 1998 procedure. His postoperative diagnosis was lumbar radiculopathy secondary to Grade II spondylolisthesis at L5-S1 and degenerative disc disease at L4-5 and L5-S1.

<sup>4</sup> The hearing representative referenced another claim for a March 29, 1993 back injury that OWCP previously denied (xxxxxx095), but did not incorporate information regarding this claim in the current record.

<sup>5</sup> During this timeframe, OWCP referred appellant back to Dr. DuShuttle for another second opinion evaluation. Dr. DuShuttle reexamined appellant on June 5, 2008 and found, *inter alia*, that the "lumbar fusion was due to spondylolisthesis that was activated by [appellant's] work injury, therefore the lumbar fusion was in-directly (sic) related to his work injuries." He explained that appellant continued to suffer from the effects of his lumbar fusion, and thus, remained partially disabled. After concluding that Dr. DuShuttle's latest findings lacked adequate rationale, OWCP referred appellant to another orthopedic specialist for a second opinion.

Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon and OWCP referral physician, examined appellant on February 8, 2010 and noted a history of a lower back injury on March 29, 1993 while attempting to clear a mail jam in a machine. Appellant reportedly stretched forward and apparently developed some low back pain. Dr. Hanley noted at the time appellant was diagnosed with “a lumbar strain and a lumbar subluxation.” He noted that it appeared appellant returned to work in a light-duty capacity, but it was unclear whether he ever resumed his full duties. Appellant’s symptoms began to increase and an August 23, 1993 lumbar magnetic resonance imaging (MRI) scan revealed evidence of disc desiccation, but no evidence of disc herniation. Dr. Hanley noted that the MRI scan report made no mention of any spondylolisthesis. A second MRI scan in 1995 reportedly showed a small central herniation, but a subsequent MRI scan dated September 26, 1996 showed no signs of a disc herniation, but simply spondylolisthesis at L5-S1 and degenerative disc disease. Dr. Hanley noted that Dr. Bose performed a two-level fusion (L4-5 to L5-S1) in January 1998 which essentially failed because appellant underwent intense pain management afterwards.<sup>6</sup> Appellant was not currently working and had been off work for some time. Dr. Hanley noted that appellant was receiving social security disability. Additionally, he noted that appellant’s original claim for lumbar sprain/strain had been accepted, but a subsequent claim in 1998 for disc herniation had not.

Dr. Hanley stated that, based on the available information, it appeared that appellant sustained a soft tissue injury on March 29, 1993. He diagnosed industrial sprain/strain, lumbar spine, resolved and degenerative disc disease and spondylolisthesis, L5-S1, surgically treated. Dr. Hanley advised that the 1998 surgery was necessary to address appellant’s spondylolisthesis and associated instability, but not for disc herniation. He further indicated that appellant’s spondylolisthesis was not caused by his industrial exposure. Dr. Hanley attributed the need for surgery to the natural progression of appellant’s condition rather than any substantial material change due to industrial exposure.

OWCP subsequently acquired a copy of the 1998 surgical report and forwarded it to Dr. Hanley for review. In a supplemental report dated May 1, 2012, Dr. Hanley stated that he believed that “the lumbar strain of August 23, 1993 had resolved by the time [appellant] underwent surgery in 1998,” and therefore, appellant did not suffer with the residuals of a permanent injury, but rather residuals of a degenerative process that has gone on to progress not as a consequence of industrial exposure, but rather with natural history. As noted, OWCP relied on Dr. Hanley’s findings as a basis for terminating compensation and medical benefits effective May 17, 2012.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>7</sup> Having determined that an employee has a disability causally related to his or her federal employment, it may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>8</sup>

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<sup>6</sup> While Dr. Hanley was aware that appellant had undergone back surgery on January 22, 1998, he noted there was “absolutely no record of the surgical procedure, what was found and things of that nature.”

<sup>7</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>8</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.<sup>9</sup> To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.<sup>10</sup>

### ANALYSIS

On appeal, counsel argued that Dr. Hanley's opinion is insufficient to terminate benefits. Counsel noted that Dr. Hanley did not address appellant's accepted condition of lumbar subluxation. The Board finds that Dr. Hanley's opinion is insufficient to satisfy OWCP's burden to justify termination of benefits.

When the case was last on appeal it had yet to be determined whether appellant's January 22, 1998 lumbar fusion was causally related to the March 29, 1993 employment injury. OWCP subsequently developed the record to ascertain what, if any, relationship existed between appellant's accepted employment injury and his January 1998 surgery. It specifically asked Dr. Hanley whether appellant aggravated a preexisting degenerative condition necessitating the fusion surgery performed in 1998. In response, Dr. Hanley indicated that degenerative disease in an obese, deconditioned individual like appellant can progress on its own accord. He attributed the need for surgery to the underlying progression and natural history as opposed to any substantial material change due to industrial exposure.

Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>11</sup> Dr. Hanley's opinion is deficient because it is premised on the mistaken belief that appellant sustained only a soft tissue injury -- lumbar sprain/strain -- as a result of the March 29, 1993 employment incident. Early on in his February 8, 2010 report Dr. Hanley noted that appellant had been diagnosed with a lumbar strain and a lumbar subluxation, however, the remainder of the report made no further mention of appellant's lumbar subluxation. As previously noted, OWCP accepted the instant claim for lumbar strain and lumbar subluxations at L2, L4 and L5. Dr. Hanley's diagnoses included industrial sprain/strain, lumbar spine, resolved and degenerative disc disease and spondylolisthesis, L5-S1, surgically treated. Absent from the diagnosis section of the report was any reference to lumbar subluxation. This accepted condition was similarly absent from the discussion section of Dr. Hanley's February 8, 2010 report. In a May 1, 2012 supplemental report, he stated that "the lumbar strain ... had resolved by the time [appellant] underwent surgery in 1998," and therefore, appellant did not suffer with the residuals of a permanent injury. Dr. Hanley's supplemental report made no mention of appellant's accepted lumbar subluxations.

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<sup>9</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

<sup>10</sup> *Calvin S. Mays*, 39 ECAB 993 (1988).

<sup>11</sup> *Richard F. Williams*, 55 ECAB 343, 346 (2004).

A physician's opinion on causal relationship must be based on a complete factual and medical background.<sup>12</sup> Counsel noted that neither the February 8, 2010 report nor Dr. Hanley's May 1, 2012 supplemental report specifically acknowledged lumbar subluxation as an accepted condition arising from appellant's March 29, 1993 employment injury. Accordingly, the medical evidence that OWCP relied on to terminate benefits is insufficient to establish that his accepted lumbar subluxations resolved.

Dr. Hanley's opinion is also deficient because it was based on a standard of causal relationship that appears at odds with OWCP's own standard. The procedure manual recognizes the following types of causal relationship: (1) direct causation; (2) aggravation (temporary or permanent); (3) acceleration; and (4) precipitation.<sup>13</sup> It is not entirely clear where Dr. Hanley's "substantial material change" standard falls along this spectrum. Thus, the question of whether appellant's January 1998 surgery was employment-related still remains unresolved.

### CONCLUSION

OWCP has not met its burden to justify termination of benefits. Consequently, it improperly terminated wage-loss compensation and medical benefits effective May 17, 2012.

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<sup>12</sup> *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (January 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 4, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 20, 2014  
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