



## **FACTUAL HISTORY**

On March 8, 2004 appellant, then a 49-year-old nurse, filed a traumatic injury claim alleging that on February 24, 2004 she sustained a lower back and buttocks strain/sprain due to lifting a heavy patient out of a wheelchair. OWCP accepted the claim for a lumbar strain and placed her on the periodic rolls for temporary total disability by letter dated August 3, 2004.<sup>2</sup>

In progress notes dated April 20 to July 8, 2005, Dr. Steven Johnson, a treating physician, diagnosed lumbar degenerative disc disease with radiculopathy and reported mild improvement after a series of epidural injections, the last performed on February 3, 2005. He reported appellant was happy with her pain management treatment. In a September 1, 2005 note, Dr. Johnson diagnosed lumbar degenerative disc disease with radiculopathy and depression. He noted that appellant showed moderate improvement following a series of epidurals with the last one done on July 14, 2005. On October 20, 2005 Dr. Johnson reported appellant as being satisfied with her pain management treatment and diagnosed lumbar degenerative disc disease with radiculopathy and depression with anxiety.

In a November 28, 2005 report, Dr. Aubrey A. Swartz, a second opinion Board-certified orthopedic surgeon, performed a review of the statement of accepted facts and medical reports and conducted a physical examination. He diagnosed chronic nonspecific lower back pain which was associated with appellant's chronic depression and associated somatoform disorder, which were unrelated to her accepted employment injury. On physical examination, there was no actual low back tenderness and intact lower extremity sensation. Lumbar range of motion included 45 degrees flexion, 5 degrees extension, 20 degrees right lateral flexion, 5 degrees left lateral flexion and 45 degrees bilateral rotation. Dr. Swartz concluded that, based on his physical examination and review of the medical records, that appellant's accepted employment conditions had resolved without ongoing residuals based on the lack of valid supporting objective findings. He advised that appellant was capable of performing the duties of her date-of-injury job.

Subsequent to the receipt of Dr. Swartz's report, OWCP received progress notes from Dr. Johnson, who reiterated the diagnosis of lumbar degenerative disc disease with radiculopathy and bilateral lumbar facet arthropathy.

In a March 9, 2007 report, Dr. David R. Lanzkowsky, a treating Board-certified anesthesiologist and pain medicine specialist, diagnosed lumbar radiculopathy and lumbar facet arthropathy. He reported that appellant sustained an employment-related back injury on February 24, 2004 while lifting an obese patient out of a wheelchair. Dr. Lanzkowsky, in multiple reports, noted limited lumbar range of motion and treatment for appellant's significant lower back pain.

On June 13, 2008 OWCP referred appellant to Dr. Mark J. Rosen, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion between Dr. Swartz, the second opinion physician, and Drs. Johnson and Lanzkowsky, appellant's treating physicians, on the issue of whether her accepted lumbar strain had resolved without any residuals.

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<sup>2</sup> Appellant stopped work on February 24, 2004 and relocated to Las Vegas, Nevada in October 2004.

In an August 7, 2008 report, Dr. Rosen reviewed the medical evidence, statement of accepted facts and set forth findings on physical examination. He concluded that appellant's accepted low back strain had resolved. On physical examination, there was no palpable spasm, lumbosacral tenderness, negative straight leg raising, 20 degrees flexion and no more than 10 degrees extension. Dr. Rosen advised that appellant currently had nonemployment-related nonspecific lower back pain and depression. He found no objective evidence supporting any continued residuals from the accepted lumbar strain. Dr. Rosen reviewed a magnetic resonance imaging scan that showed minor findings of a bulging disc at L4-5, but that the physical finding was inconsistent with her symptoms and disability. He noted that, if the L4-5 area was involved, then there would be positive findings on a discography, but the discography performed was not positive. Dr. Rosen stated that it was unclear why appellant continued to be symptomatic, but her symptoms were unrelated to her February 2004 employment injury.

On August 27, 2008 OWCP issued a notice proposing to terminate appellant's compensation benefits based upon the report from the impartial medical examiner, Dr. Rosen.

In a September 22, 2008 letter, appellant's counsel noted disagreement with the proposal to terminate her compensation benefits. She contended that Dr. Rosen's report was insufficient to meet OWCP's burden as it was unrationalized. Counsel also contended that OWCP failed to properly develop the claim as to whether appellant sustained additional conditions due to the accepted employment injury.

By decision dated September 29, 2008, OWCP terminated appellant's wage-loss and medical compensation benefits effective that day. It found the weight of the medical evidence rested with the opinion of the impartial medical examiner, Dr. Rosen, and that appellant's accepted lumbar strain had resolved with no continuing residuals.

On October 8, 2008 appellant's counsel requested a telephonic hearing before an Office hearing representative, which was held on February 11, 2009.

On March 3, 2009 Dr. Gary Grossman, a treating physician, indicated that he had reviewed the statement of accepted facts and appellant had been his patient for the prior few months. It was his opinion that her lumbar strain had not resolved and that she remained totally disabled due to severe pain. Dr. Grossman concluded that appellant's severe depression and anxiety were also due to her low back and leg pain.

By decision dated April 27, 2009, OWCP's hearing representative affirmed the September 29, 2008 decision terminating appellant's compensation benefits.

In an April 20, 2010 letter, appellant's counsel requested reconsideration.

Appellant submitted an April 1, 2010 report from Dr. John W. Ellis, an examining Board-certified family practitioner, who reviewed the medical records, statement of accepted facts and performed a physical examination. Dr. Ellis diagnosed muscle tendon unit back strain, right iliolumbar ligament strain, L4-5 and L5-S1 deranged discs, bilateral L5 and S1 nerve root impingement, depression due to chronic pain and sleep deprivation and cauda equine syndrome with bladder dysfunction. A physical examination revealed spasms in the lower cervical, thoracic and lumbar paraspinal muscles and tightness of the thoracic, posterior cervical and

lumbar paraspinous muscles, which were all greater on the right side. Dr. Ellis also reported decreased lumbar spinal range of movement with 4 degrees extension, 43 degrees flexion, 12 degrees right rotation, 7 degrees left rotation, 8 degrees left lateral bending and 16 degrees right lateral bending. He opined that appellant's pain was "consistent with classical muscle tendon unit strain of the back, deranged discs in the back and bilateral radiculopathy." Dr. Ellis opined that the lifting of the obese patient on February 24, 2004 caused extraordinary stress on her lower lumbar muscles, ligament and discs which resulted in L4-5 and L5-S1 disc protrusion and impingement. He related that the early objective tests showed findings of disc derangement as a result of the injury with objective findings shown on subsequent tests. Dr. Ellis stated that the pinching of the spinal nerves caused a pinching of the cauda equine nerves which innervate the bladder. He opined that this pinching aggravated appellant's preexisting weak bladder and led to more bladder leaks. According to Dr. Ellis, the lifting episode was so severe that it may have caused some straining of the vagina and bladder. He related that it was medically probable that the pressure placed on the spinal nerves also resulted in pressure on the bladder nerves. Thus, the bladder dysfunction was due to the employment-related nerve impingement.

By decision dated July 22, 2010, OWCP denied reconsideration.

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

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.<sup>3</sup> After it has determined that an employee has disability causally related to his 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>4</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>6</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.<sup>7</sup>

Section 8123(a) of the Act 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>8</sup> Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of

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<sup>3</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>4</sup> *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>5</sup> *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>6</sup> *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

<sup>7</sup> *Kathryn E. Demarsh*, *supra* note 6; *James F. Weikel*, 54 ECAB 660 (2003).

<sup>8</sup> 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits on September 29, 2008. OWCP accepted the condition of a lumbar strain due to February 4, 2004 employment injury when lifting a heavy patient out of a wheelchair. It determined that a conflict in medical evidence was created between the opinions of Dr. Swartz, a second opinion physician, and Drs. Johnson and Lanzkowsky, appellant's treating physicians, on whether her accepted lumbar strain had resolved without residuals. OWCP properly referred her to Dr. Rosen, Board-certified in orthopedic surgery, for an impartial evaluation.

In a thorough August 7, 2008 report, Dr. Rosen described the history of injury and appellant's complaints, reported physical findings and noted that she exhibited no objective evidence of a continuing lumbar strain. He noted that a physical examination of the back demonstrated lumbosacral tenderness and no palpable spasm. Dr. Rosen advised that lumbar strain had resolved as there was no evidence at the time of his examination of an objective cause for the duration and degree of appellant's many complaints. He found no basis on which to attribute any continuing residuals or disability to the accepted February work injury

The Board finds Dr. Rosen had full and accurate knowledge of the relevant facts and evaluated the course of appellant's condition. Dr. Rosen provided a review of the records, diagnostic tests and performed a thorough physical examination. He found no basis to support that appellant had injury residuals or work-related disability from the accepted lumbar strain. Dr. Rosen's opinion as set forth in his report of October 7, 2008 is found to be probative and reliable. The Board finds that Dr. Rosen's opinion constitutes the special weight of the medical evidence and is sufficient to support OWCP's termination of benefits for the accepted condition of lumbar strain.<sup>10</sup> There is no other medical evidence sufficient to overcome his opinion or to create a new medical conflict. OWCP therefore properly terminated appellant's compensation benefits on September 29, 2008.

The medical evidence appellant submitted subsequent to the September 29, 2008 decision terminating her benefits was insufficient to overcome the weight accorded Dr. Rosen as an impartial medical specialist regarding whether she had residuals of her accepted conditions. In his March 3, 2009 report, Dr. Grossman stated that appellant continued to have residuals of her lumbar strain and was totally disabled due to her pain. He provided no physical findings, referenced no objective data or history of the employment injury and provided no supporting rationale for his opinion that appellant continues to suffer from residuals of her

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<sup>9</sup> *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

<sup>10</sup> In cases where OWCP has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *R.C.*, 58 ECAB 238 (2006); *Gary R. Sieber*, *supra* note 9.

accepted lumbar strain. Dr. Grossman's report is insufficient to overcome that of Dr. Rosen or to create a new medical conflict.<sup>11</sup>

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

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had any disability causally related to her accepted injury.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

Following the April 27, 2009 OWCP hearing representative's decision affirming the termination of her benefits, appellant requested reconsideration and submitted medical evidence to support her allegation of continuing employment-related disability.

In an April 1, 2010 report, Dr. Ellis, a treating Board-certified family practitioner, reviewed the medical evidence and set forth findings on physical examination. He diagnosed lumbar strain. Dr. Ellis also diagnosed muscle tendon unit back strain, L4-5 and L5-S1 deranged discs, bilateral L5 and S1 nerve root impingement, depression due to chronic pain and sleep deprivation and cauda equine syndrome with bladder dysfunction, noting that appellant's bladder dysfunction condition was aggravated by her accepted injury. He concluded that appellant continued to have residuals of the February 24, 2004 employment injury based upon the findings on physical examination including decreased lumbar range of motion and lumbar paraspinal muscle spasms, a review of the objective evidence and statement of accepted facts.

The Board finds that the 2010 report from Dr. Ellis creates a conflict in the medical opinion with Dr. Rosen, the impartial medical examiner. Dr. Ellis attributed appellant's lumbar strain, disc derangement, bladder dysfunction to her accepted employment injury. He advised that appellant continued to have residuals of her accepted lumbar strain. This is contrary to the opinion of Dr. Rosen, who found that the accepted condition had resolved and she had no disability or residuals as a result of the accepted February 24, 2004 employment injury. Given the disagreement between these two physicians, the Board finds that further development of the evidence is warranted as to continuing disability. Accordingly, the Board will set aside OWCP's July 22, 2010 decision with respect to the issue of continuing disability and residuals. The case will be remanded to OWCP for referral of appellant, the case record and a statement of accepted facts to an appropriate impartial medical specialist to resolve the outstanding conflict in medical evidence. After such further development as it deems necessary, OWCP shall issue a *de novo* decision.

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<sup>11</sup> See *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990). The Board finds that Dr. Grossman's report did not contain rationale on causal relationship upon which a new conflict might be based.

<sup>12</sup> See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

**CONCLUSION**

The Board finds that OWCP properly terminated appellant's compensation effective September 29, 2008 on the grounds that she no longer had any residuals or disability causally related to her accepted lumbar strain. However, the medical evidence reveals a conflict on whether the accepted employment injury continues to disable appellant from work. Further, development of the medical evidence is warranted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 22, 2010 is affirmed in part, set aside in part and remanded for further proceedings consistent with the above opinion.

Issued: August 8, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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