

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

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G.B., Appellant )  
and ) Docket No. 10-1784  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: September 30, 2011  
Denver, CO, Employer )  
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)

*Appearances:*

*John S. Evangelisti, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 23, 2010 appellant, through his attorney, filed a timely appeal of January 14, 2010 merit decisions by a hearing representative of the Office of Workers' Compensation Programs (OWCP) that rescinded his claim for total disability and denied a recurrence of disability claim. Pursuant to the Federal Employees' Compensation Act (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.<sup>1</sup>

**ISSUE**

The issue is whether OWCP met its burden of proof to rescind acceptance of appellant's claim for a recurrence of total disability commencing March 11, 2003 and reinstating compensation under a December 16, 2004 wage-earning capacity determination.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.* Pursuant to 20 C.F.R. § 501.5(b) appellant, through his attorney, requested oral argument that was scheduled for November 9, 2010. Subsequently, counsel withdrew the request and submitted the case on the record.

On appeal, appellant's attorney argued that OWCP failed to meet its burden of proof to rescind acceptance of appellant's claim for total disability. He also argued error by OWCP in the retroactive wage-earning capacity determination as it was based on a temporary part-time job and was issued more than 60 days after appellant returned to work.

### **FACTUAL HISTORY**

OWCP accepted that appellant, then a 49-year-old full-time letter carrier, sustained a low back strain and herniated disc at L4-5 on August 9, 1995 when he picked up a tub of mail. On July 2, 1996 appellant underwent authorized surgery for a bilateral laminectomy at L4-5 and discectomy and laminectomy at L5-S1. He returned to light modified-duty work at full time on September 23, 1996 and received compensation for intermittent periods of disability in 2000 and 2001. Appellant received schedule awards for 21 percent impairment of the right leg and 13 percent impairment of the left leg. The period of the awards ran from April 25, 2001 to March 11, 2003.

Dr. Justin D. Green, Board-certified in physical medicine and rehabilitation, advised that appellant could lift up to 15 pounds, stand less than 2 hours a day, walk 1 hour a day and sit for 40 minutes at a time for 3 hours a day. He stated that appellant should lift no more than 8 pounds with one arm and push and pull less than 75 pounds. The employer provided appellant with a light-duty position answering telephones in a seated position beginning March 28, 2002 for four hours a day. Appellant was to stand and walk intermittently for one hour each as well as sit intermittently in a chair for four hours. He was notified that as he received compensation under the schedule award, compensation of four hours wage loss could not issue until the expiration of the schedule award.

On June 25, 2002 Dr. Teresa Jarmal, a family practitioner, noted appellant's history of injury and diagnosed chronic low back pain with degenerative disc disease. She opined that appellant was permanently disabled and noted that he had been out on disability since his injury. Appellant applied for disability retirement at that time.

Dr. Christopher B. Ryan, a physician Board-certified in physical medicine and rehabilitation, completed a July 3, 2002 report. He advised that appellant underwent a total hip arthroplasty on the right on July 10, 2002. Dr. Ryan stated that appellant developed avascular necrosis due to steroid usage to treat his accepted back condition or as a result of changing his body mechanics and employment duties resulting in an increased load for his hips contributing to the development of avascular necrosis. He also suggested that appellant's pain could have been solely due to a hip injury as a result of lifting and twisting on August 9, 1995 in the performance of duty.

On August 23, 2002 appellant filed a claim for compensation for total disability commencing June 25, 2002. The record reflects that he continued to hold his light-duty position until he received disability retirement on August 27, 2002. Appellant used eight hours of leave beginning June 26, 2002. By letter dated January 23, 2003, counsel inquired as to appellant's eligibility for wage-loss compensation at the expiration of the schedule award on March 11, 2003. In other correspondence, he also claimed that appellant's avascular necrosis of the right hip was a consequence of the employment injury.

Dr. Lynn Fernandez, an osteopath, performed a second opinion evaluation on August 19, 2003. She reviewed the history of injury and medical treatment. Dr. Fernandez provided findings on examination and found that, while the accepted back strain had resolved, appellant had radiculopathy as a residual of the herniated disc. She noted that he was overweight and had multiple other medical problems with degenerative disease due to the 1995 work injury. Dr. Fernandez concluded that appellant could work four hours a day within specified physical restrictions on sitting, standing and walking, with lifting of 15 to 20 pounds on occasion. She stated that appellant should alternate sitting, standing and walking every half hour. In an October 23, 2003 supplemental report, Dr. Fernandez advised that appellant's right hip necrosis condition was not a result of the August 9, 1995 employment injury.

In an October 30, 2003 letter, OWCP noted that appellant had worked four hours a day under physical restrictions until his disability retirement on August 27, 2002. It advised that he was not entitled to wage-loss benefits during the period of his schedule award as dual benefits were not permitted; however, he would be entitled to wage loss for four hours a day commencing March 12, 2003. Appellant was requested to submit an election form if he claimed benefits under FECA. In a November 12, 2003 decision, OWCP denied appellant's claim for his right hip necrosis condition.

Dr. Jarmal completed a report on January 14, 2004. She noted having treated appellant since 1996 for depression and hypertension. Dr. Jarmal stated that in appellant's current state he was not able to perform part-time sedentary duties and was totally disabled.

Counsel requested an oral hearing and submitted the September 6, 2004 report of Dr. Ryan, who supported a causal relationship between appellant's employment and his avascular necrosis. He also contended that appellant could not have continued in sedentary employment after the schedule award expired in March 2003.

By decision dated September 28, 2004, the hearing representative found a conflict of medical opinion evidence between Dr. Ryan and Dr. Fernandez as to the relationship of appellant's avascular necrosis to his employment and ongoing disability for work due to his accepted back condition.

Appellant submitted a letter dated November 30, 2004 from Elise Wingert, a licensed clinical social worker, opining that appellant was unable to complete activities of daily living including household management, cooking, cleaning, shopping transportation and assessing community resources. He provided a physical capacity evaluation dated November 8, 2004 finding that he could lift up to 20 pounds and sit for up to 1 hour or 30 minutes as an optimum with standing for 10 minutes and walking 5 to 10 minutes.

By decision dated December 16, 2004, OWCP found that appellant was employed as a modified letter carrier four hours a day with weekly wages of \$417.33 a week and that his actual earnings as of March 28, 2002 fairly and reasonably represented his wage-earning capacity. Appellant was advised that his wage-loss benefits would continue at this level.

On January 10, 2005 appellant requested reconsideration of the wage-earning capacity determination. In a March 9, 2005 report, Dr. Jarmal listed appellant's conditions as chronic low

back pain, bilateral knee arthroscopies and a total hip replacement. She also diagnosed hypertension, depression, Bells' palsy and syncopal episodes of an unexplained cause. On May 19, 2005 Dr. Jarmal opined that appellant needed home assistance for cooking, cleaning, laundry, grocery shopping and medical appointments.

OWCP referred appellant to Dr. John Tobey, Board-certified in physical medicine and rehabilitation, for an impartial medical examination. In a report dated June 21, 2006, Dr. Tobey reviewed appellant's history of injury and medical treatment, noting that he had not worked since 2002. He provided the results from physical examination. Dr. Tobey found that appellant had a small stepping shuffling gait pattern and ambulated with the use of a walker. He diagnosed L4-5 disc herniation and right L5-S1 radiculopathy as a result of the August 9, 1995 employment injury. Dr. Tobey stated that there was not enough documented evidence to establish that appellant's avascular necrosis of the right hip was due to steroid use following the 1995 injury. He noted that avascular necrosis was usually traumatic in nature or caused by prolonged chronic use of oral steroids or intravenous steroids. Dr. Tobey suggested that appellant's avascular necrosis was due instead to his multiple syncopal falls. He found that appellant had reached maximum medical improvement and required three epidural injections a year. Dr. Tobey found that appellant could not work due to his multiple medical problems.

By decision dated November 8, 2006, OWCP denied appellant's claim for avascular necrosis. In a separate decision of the same date, it found that the December 16, 2004 wage-earning capacity was in error due to an unresolved conflict. OWCP noted that Dr. Tobey resolved the conflict in finding that appellant had no wage-earning capacity and was eligible for total disability compensation.

On February 15, 2007 OWCP reopened the claim stating that further development was necessary before wage-loss compensation was paid. It requested a supplemental report from Dr. Tobey on February 16, 2007 explaining appellant's work restrictions based on his accepted conditions.

On March 3, 2007 Dr. Tobey reported that appellant had lumbar spine surgery in July 1996 and was placed on maximum medical improvement when an impairment rating was conducted on May 23, 2001. Thereafter, on September 10, 2001, he accepted a light-duty, eight-hour-a-day position. Dr. Tobey noted that appellant delivered mail but underwent treatment for his right hip condition, resulting in surgery in July 2002. As appellant was five years postoperative from his low back, it was more reasonable than not that he was at maximum medical improvement in September 2001 and the restrictions placed at that time were based solely on his permanent back condition. Given that he was diagnosed with avascular necrosis of the right hip in March 2002, the work restrictions on or about January 23, 2002 were more likely related to the hip condition than the back condition. Dr. Tobey opined that any subsequent change in restrictions was most likely due to the hip condition than the work-related back injury. When he examined appellant in 2006, Dr. Tobey found appellant to be housebound due to his significant difficulty with mobility and syncopal episodes that rendered driving dangerous. He stated: "In retrospect, it is very difficult to differentiate his current mobility issues into that which is spine related and that which is hip related. This is a multifactorial event ... it is my medical opinion one cannot make the assumption that his total disability is solely related to his back condition only."

On March 16, 2007 Dr. Virginia Hrywnak, an osteopath, stated that appellant had reached maximum medical improvement in September 2001 and that his restrictions were due to his accepted back injury. She stated that the change in work restrictions in January 2002 were due to his back injury and based on objective radiologic findings as well as loss of mobility and function. Appellant's hip surgery corrected his necrosis problem, but his back condition did not improve as his radiographs demonstrated increased pathology and his functional abilities had decreased. Dr. Hrywnak concluded that appellant was totally disability due to his back condition and his ability to sit, stand, walk or provide self-care was severely limited.

OWCP found a new conflict in medical opinion between Dr. Hrywnak and Dr. Tobey as to whether appellant's disability was related to the accepted back injury. On April 25, 2007 it referred to Dr. Barry Ogin, Board-certified in physical medicine.<sup>2</sup>

On May 14, 2007 Dr. Ogin reviewed appellant's history of injury and medical treatment. Although appellant generally used a walker, he could ambulate with a very slow and symmetric gait pattern. Dr. Ogin stated that the distribution of appellant's numbness, weakness and balance deficits could not be explained by his accepted spine injuries but was instead related to peripheral vascular disease, muscular deconditioning, osteoarthritis and polyneuropathy. He opined that the worsening of appellant's condition and functional decline was not directly caused by his 1995 work injury. Dr. Ogin found that appellant was totally disabled. OWCP requested a supplemental report on August 10, 2007. On August 24, 2007 Dr. Ogin responded that appellant's September 10, 2001 job description and work limitations were directly related to his August 9, 1995 employment injury. He concluded that appellant's worsening condition after December 2001 was not a direct result of his 1995 employment injury.

On November 16, 2007 OWCP proposed rescinding the November 8, 2006 decision that found appellant was totally disabled. It relied on Dr. Ogin's opinion and stated that the December 16, 2004 wage-earning capacity determination would be reinstated. On December 17, 2007 counsel objected to OWCP's reliance on Dr. Ogin's reports.

In a February 7, 2008 decision, OWCP rescinded acceptance of appellant's claim for total disability and reinstated the 2004 wage-earning capacity determination.

On February 19, 2008 appellant requested an oral hearing. In an April 16, 2008 report, Dr. Ryan noted that appellant used a walker and cane with high level of ambulatory dysfunction and received periodic injections to his low back. On May 14, 2008 Dr. Ryan noted that appellant was using forearm crutches. On July 18, 2008 he attributed appellant's depression to his employment injury. Dr. Ryan reviewed appellant's history of injury and opined that his back pain and radicular symptoms were the major problem. He stated that appellant's conditions had progressed. Dr. Ryan reviewed Dr. Ogin's report and advised that appellant's lower extremity issues were the result of cellulitis as diagnosed in 2003 rather than peripheral vascular disease. The most recent magnetic resonance imaging (MRI) scan of December 7, 2007 demonstrated a posterocentral disc herniation at L3-4 and bulge L4-5 with impingement of the L4 nerve root, as well as complete collapse of the L5-S1 disc and impingement of the L5 nerve roots bilaterally.

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<sup>2</sup> Counsel for appellant objected to the selection of Dr. Ogin under the PDS rotational system.

Dr. Ryan concluded that the neurologic condition manifested in appellant's lower extremities began in the lumbar spine.

In a December 16, 2008 decision, an OWCP hearing representative found that Dr. Ogin's report of reduced probative value was not based on an accurate factual background. The hearing representative directed OWCP to revise the statement of accepted facts and make a new referral for impartial medical examination.

OWCP revised the statement of accepted facts and referred appellant to Dr. Jeffrey Wunder, a Board-certified physiatrist.

The employing establishment provided a surveillance report during which appellant washed and refueled his car on March 5, 2009 without using a cane or walker. Dr. Ryan submitted a report dated March 18, 2009 advising that appellant was increasingly home bound and could not drive due to numbness in his lower extremities.

On March 30, 2009 Dr. Wunder reviewed the history of injury and medical treatment. He examined appellant and found no pain behavior during the 25-minute interview that he was able to walk without crutches and demonstrated a "wide-based, very short step, shuffling, waddling kind of gait pattern." Dr. Wunder found no muscle spasm in the back and limited range of motion with breakaway manual muscle testing. He reviewed the video recording from the employer, that appellant could walk without aids with no evidence of limping or guarding. Dr. Wunder noted that appellant was carrying weight of approximately 20 pounds under his left arm. He diagnosed chronic low back pain, underlying lumbar degenerative disc disease and symptom embellishment. Dr. Wunder opined that appellant could have continued to perform his light-duty work until his retirement in August 2002. He stated that avascular necrosis of the right hip was not related to the accepted employment injury. Dr. Wunder found that appellant could work eight hours a day, sitting four hours, walking and standing two hours each and operating a motor vehicle four hours a day. He limited appellant's lifting to 20 pounds with occasional pushing and squatting.

In a letter dated May 7, 2009, OWCP proposed to rescind acceptance of appellant's claim for total disability. In a May 15, 2009 report, Dr. Ryan disagreed with Dr. Wunder's opinion. He took issue with the description of appellant's gait and the extent of appellant's light-duty position description. Dr. Ryan stated that he had not viewed the video discussed by Dr. Wunder. Counsel disagreed with the proposed rescission and contended that the wage-earning capacity determination was based on stale medical evidence, that Dr. Tobey had determined appellant's work capacity, that Dr. Wunder was not appropriately selected and that his report was speculative.

In a June 10, 2009 decision, OWCP rescinded the November 8, 2006 determination that appellant was totally disabled.

Appellant requested an oral hearing on June 24, 2009. Appellant's attorney contended that the wage-earning capacity decision was in error as appellant could not sit for four hours a day or drive to work due to narcotic medications.

By decision dated July 29, 2009, OWCP denied appellant's claim of total disability commencing March 11, 2003 or modification of the December 16, 2004 wage-earning capacity determination.

Counsel requested a review of this decision. Appellant testified at the October 22, 2009 hearing that he could drive limited distances. Counsel stated that appellant no longer challenged OWCP's determination that his hip necrosis was not employment related.

In two decisions dated January 14, 2010, the hearing representative found that OWCP met its burden of proof to rescind acceptance of total disability and reinstate appellant's 2004 wage-earning capacity determination. The hearing representative also found appellant had not established a recurrence of total disability.

### **LEGAL PRECEDENT**

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.<sup>3</sup> The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128 of FECA and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.<sup>4</sup> The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.<sup>5</sup>

Workers' compensation authorities generally recognize that compensation awards may be corrected, at the discretion of the compensation agency and in conformity with statutory provisions, where there is good cause for so doing, such as mistake or fraud. It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, OWCP later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.<sup>6</sup>

Section 8115(a) of FECA provides that the wage-earning capacity of an employee is determined by his actual earnings if actual earnings fairly and reasonably represent his wage-earning capacity.<sup>7</sup> The Board has held that, generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured worker's wage-earning capacity, must be accepted as

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<sup>3</sup> 5 U.S.C. § 8128.

<sup>4</sup> *D.G.*, 59 ECAB 734 (2008); *John W. Graves*, 52 ECAB 160, 161 (2000).

<sup>5</sup> 20 C.F.R. § 10.610.

<sup>6</sup> See *supra* note 4.

<sup>7</sup> 5 U.S.C. § 8115(a). See *J.K.*, Docket No. 11-159 (issued August 19, 2011).

such measure.<sup>8</sup> Wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs or a position that is seasonal in an area where year-round employment is available.<sup>9</sup> Wage-earning capacity may be based on a temporary or part-time position only if the position held by the employee at the time of injury was temporary or part time.<sup>10</sup>

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.<sup>11</sup>

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, 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 and resolve the conflict of medical evidence.<sup>12</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>13</sup>

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

OWCP issued a retroactive wage-earning capacity determination on December 16, 2004 finding that appellant's actual earnings in a modified part-time position of four hours a day fairly and reasonably represented his wage-earning capacity as of March 28, 2002. Appellant disagreed with this decision and alleged total disability commencing March 12, 2003, following the expiration of his schedule award, due to his 1995 back injury and residuals.

Following the acceptance of appellant's claim for a lumbar strain and herniated disc, for which he underwent surgery, he initially returned to full-time modified duty in 2001 and 2002 with intermittent periods of disability. He received schedule awards that ran from April 25, 2001 to March 11, 2003 for impairment to both lower extremities. The record reflects that appellant

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<sup>8</sup> *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989). Once it is determined that actual wages of a given position represent an employee's wage-earning capacity, OWCP applies the principles set forth in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the employee's compensation.

<sup>9</sup> See *James D. Champlain*, 44 ECAB 438 (1993).

<sup>10</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a)(1) (July 1997).

<sup>11</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>12</sup> 5 U.S.C. § 8123(a). See *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

<sup>13</sup> *R.C.*, 58 ECAB 238 (2006).

was limited by Dr. Green to work at light duty for four hours a day on or about March 28, 2002. Appellant was advised that he could not receive wage loss for four hours a day concurrently with compensation under the schedule award. He subsequently stopped work and was found by Dr. Jarmal to be totally disabled as of June 25, 2002. Appellant underwent surgery for a right hip arthroplasty on July 10, 2002. He retired on August 27, 2002 and subsequently maintained that he was entitled to compensation for total disability and that his hip condition was related to his accepted back injury.

The record reflects that appellant received wage-loss compensation for four hours a day following the expiration of his schedule award in 2003.<sup>14</sup> On December 16, 2004 OWCP formalized the finding that appellant had actual earnings with wages of \$417.33 a week as of March 28, 2002 in part-time employment that fairly and reasonably represented his wage-earning capacity. The Board finds, however, that this wage-earning capacity decision was erroneous.

OWCP's procedure manual provides that, when an employee cannot return to the date-of-injury job because of disability due to the work-related injury, the claims examiner is to determine whether actual wages in alternative employment represents the injured worker's wage-earning capacity.<sup>15</sup> It is well established that such reemployment may not be considered as suitable if the job is part time and the claimant was a full-time employee at the time of injury.<sup>16</sup> OWCP found that appellant's actual earnings in part-time employment as a modified letter carrier fairly and reasonably represented his wage-earning capacity. Appellant was a full-time employee at the time of injury. Through the procedure manual, the Director has determined that when the tour of duty is not at least equivalent to that of the job held when injured, OWCP will not consider the reemployment suitable for a wage-earning capacity determination. For this reason, OWCP abused its discretion in determining appellant's wage-earning capacity based on a part-time position as of March 28, 2002, when he worked four hours a day.

Moreover, the medical evidence does not support the wage-earning capacity determination. A conflict in medical opinion was found between Dr. Ryan, for appellant, and Dr. Fernandez, a second opinion referral physician as to appellant's residual back condition and disability for work.<sup>17</sup>

Dr. Tobey, selected as the impartial medical examiner to resolve the conflict of medical evidence, reviewed the history of injury and appellant's medical treatment. He provided findings on examination and diagnosed L4-5 disc herniation and right L5-S1 radiculopathy as residuals of the accepted injury. Dr. Tobey advised that appellant's right hip necrosis was not employment related but found that appellant was unable to work due to his multiple medical problems. OWCP requested that he further address appellant's disability and on March 3, 2007, he

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<sup>14</sup> The record reflects payment of compensation from March 12, 2003 to January 20, 2007 in the net amount of \$74,270.81.

<sup>15</sup> See *supra* note 10.

<sup>16</sup> See K.V., Docket No. 11-145 (issued July 22, 2011); K.S., Docket No. 08-2105 (issued February 11, 2009).

<sup>17</sup> A conflict was also found on the causal relationship of appellant's right hip necrosis to his employment but, as noted, counsel for appellant advised that he no longer contested this denial and it will not be addressed on appeal.

addressed appellant's lumbar surgery in 1996. Based on his examination, Dr. Tobey stated that in retrospect, it was very difficult to differentiate appellant's mobility problems between his back injury and the right hip condition. He described appellant's disability for work as multifactorial and that he could not make the assumption that total disability was solely due to his back condition. The Board finds that Dr. Tobey, the impartial medical specialist, did not attribute appellant's disability after March, 2002 solely to his right hip necrosis; rather, he explained that appellant's accepted lumbar disc herniation and radiculopathy contributed to his disability. It is well established that any contribution by accepted employment factors is sufficient to establish the element of causal relation.<sup>18</sup>

On November 8, 2006 OWCP found that appellant was entitled to compensation for total disability based on the finding of Dr. Tobey whose supplemental opinion was cited by OWCP, however, as a basis for finding a new conflict with Dr. Hrywnak on the issue of appellant's disability due to his accepted back condition. This was error. Dr. Tobey did not eliminate appellant's lumbar disc condition or radiculopathy as contributing causes of his total disability. There was no conflict in medical opinion with Dr. Hrywnak as she, too, found appellant totally disabled due to increased pathology involving the low back which caused a decrease in appellant's functional abilities. For this reason, neither Dr. Ogin nor Dr. Wunder have the status of impartial medical specialists.<sup>19</sup>

The Board finds that OWCP failed to meet its burden of proof to rescind the acceptance of appellant's claim of total disability commencing on March 11, 2003, following the expiration of his schedule award. It was error to rely on the 2006 wage-earning capacity determination made in this case as it relied upon actual earnings from part-time employment in 2002 while appellant was a full-time employee when injured. As the wage-earning capacity was in error, the only remaining question concerned whether he sustained a recurrence of total disability due to residuals of his accepted lumbar conditions; a medical question which was answered in the affirmative by Dr. Tobey.

Following receipt of the reports of Dr. Ogin and Dr. Wunder, OWCP rescinded acceptance of appellant's claim for total disability and reinstated the erroneous wage-earning capacity determination. The Board finds that the weight of medical opinion in this case is represented by Dr. Tobey, the initial impartial medical specialist. His report does not support OWCP's rescission of acceptance of appellant's claim of total disability due to residuals of his 1995 lumbar disc herniation with radiculopathy.

### **CONCLUSION**

The Board finds that OWCP failed to meet its burden of proof to rescind acceptance of appellant's claim for total disability as of March 11, 2003.

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<sup>18</sup> See *L.R. (claiming as widow of E.R.)*, 58 ECAB 369 (2007); *Roger W. Griffith*, 51 ECAB 491 (2000).

<sup>19</sup> The opinion of Dr. Ogin was found of reduced probative value based on an inaccurate factual history prior to referral to Dr. Wunder.

**ORDER**

**IT IS HEREBY ORDERED THAT** January 14, 2010 Office of Workers' Compensation Programs' decisions are reversed.

Issued: September 30, 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