



could not breathe deeply. OWCP accepted appellant's claim for muscle spasm and thoracic sprain/strain. Appellant returned to limited duty and received compensation for partial disability.

Appellant claimed a recurrence of total disability on January 16, 2009. Dr. Gregory M. Lieberman, the attending Board-certified orthopedic surgeon, found that a recent exacerbation, while helping a family member lift up something of not much significance, had totally disabled appellant. He also found that preexisting multiple thoracic disc herniations with lumbago totally and permanently disabled appellant from gainful employment as a letter carrier.

Dr. David A. Benatar, a Board-certified orthopedic surgeon and second-opinion physician, noted that imaging studies before and after the employment injury showed no significant interval change. Appellant had multiple thoracic disc herniations with evidence of degenerative changes at many levels, including osteophyte, desiccation and disc bulging. Dr. Benatar found, however, that the employment injury had permanently exacerbated appellant's preexisting condition. He concluded that appellant was capable of limited duty.

OWCP found a conflict in medical opinion and referred appellant, together with the medical record and statement of accepted facts, to Dr. Javier Cerra, a Board-certified physiatrist, for resolution, who examined appellant on July 15, 2010 and found no muscle spasm or muscle strain. Dr. Cerra concluded that appellant's employment injury was a temporary exacerbation of previous thoracic disc herniations. He reasoned that an imaging study obtained after the work injury showed no change in the herniations. Dr. Cerra also found that appellant currently had returned to the state that he had prior to the employment injury.

On the issue of disability beginning January 16, 2009, Dr. Cerra explained that he could not say how appellant was on that date, but based on his current examination he agreed with Dr. Benatar that appellant could work with some limitations. He stated that appellant should have recovered from the temporary aggravation in six months, but he could not say with certainty.

In a decision dated August 24, 2010, OWCP denied appellant's recurrence claim. It found that Dr. Cerra, the impartial medical specialist, did not provide any findings or medical rationale to support that appellant's condition worsened to the point that he became totally disabled for work in January 2009.

On April 5, 2011 an OWCP hearing representative affirmed, finding that the weight of the medical evidence, held by Dr. Cerra, failed to establish a material change in the nature and extent of the accepted medical condition.

On appeal, appellant disagrees with OWCP's decision because he has been diagnosed with degenerative disc disease resulting from his injury at work. Stating that we cannot go back in time for an examination, he notes that Dr. Lieberman took him off work when his pain level rose to a point that he was no longer able to perform his duties.

## LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup> “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.<sup>3</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 establishes that he can perform the light-duty position, the employee has the burden of establishing 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 his 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 job requirements.<sup>4</sup>

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>5</sup> When 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>6</sup>

When OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist’s statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist’s supplemental report is also vague, speculative or lacks rationale, OWCP must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.<sup>7</sup> Unless this procedure is carried out by OWCP, the intent of section 8123(a) of FECA will be circumvented when the impartial specialist’s medical report is insufficient to resolve the conflict of medical evidence.<sup>8</sup>

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> 20 C.F.R. § 10.5(f).

<sup>4</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>5</sup> 5 U.S.C. § 8123(a).

<sup>6</sup> *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>7</sup> *See Nathan L. Harrell*, 41 ECAB 402 (1990).

<sup>8</sup> *Harold Travis*, 30 ECAB 1071 (1979).

## ANALYSIS

OWCP accepts that appellant sustained a muscle spasm and thoracic sprain/strain while delivering his route over a period to time. After returning to limited duty, he claimed compensation for total disability beginning January 16, 2009. The question raised by appellant's recurrence claim is whether his total disability beginning January 16, 2009 was a result of a material change in the nature and extent of the injury-related condition.<sup>9</sup>

OWCP found a conflict between the attending orthopedic surgeon, Dr. Lieberman, and the second-opinion orthopedic surgeon, Dr. Benatar, on the nature and extent of appellant's claimed disability. Dr. Cerra, the impartial medical specialist, examined appellant and answered questions posed by OWCP, but he did not resolve whether a material change in the injury-related condition totally disabled appellant for work beginning January 16, 2009. He explained that he could not say how appellant was on that date. Based on his July 15, 2010 examination, however, Dr. Cerra found that appellant was currently able to work full time with limitations.

This does not resolve the issue raised by appellant's recurrence claim. While it is true that Dr. Cerra cannot go back in time to examine appellant on January 16, 2009, OWCP provided him with appellant's medical record so he could review the history and complaints and findings made at that time. It is not necessary that Dr. Cerra's opinion be so conclusive as to eliminate all possible doubt. The evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical.<sup>10</sup> Dr. Cerra may base his opinion on appellant's history and on his review of the medical record and he must support his opinion with sound medical reasoning.

The Board will set aside OWCP's April 5, 2011 decision and remand the case for a supplemental report from the impartial medical specialist that resolves appellant's recurrence claim. After such further development of the evidence as may be necessary, OWCP shall issue an appropriate final decision on appellant's recurrence claim.

Appellant correctly notes on appeal that Dr. Lieberman took him off work on January 16, 2009 when his pain level rose to a point that he was no longer able to perform his duties. The question that remains is whether this work stoppage, for which he claims workers' compensation benefits, had anything to do with that three-day period in July 2008, when he sustained an employment-related muscle spasm and thoracic sprain/strain. The impartial medical specialist did not resolve this issue.

## CONCLUSION

The Board finds that this case is not in posture for decision as the conflict in medical opinion evidence remains unresolved. A supplemental report from the impartial medical specialist is warranted.

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<sup>9</sup> Appellant does not implicate a change in the nature and extent of the light-duty job requirements.

<sup>10</sup> *Kenneth J. Deerman*, 34 ECAB 641, 645 (1983) and cases cited therein.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 5, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: April 23, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board