



## **FACTUAL HISTORY**

In November 2007, OWCP accepted that appellant, then a 42-year-old letter carrier, sustained a lumbar sprain and sciatica due to a February 12, 2007 work accident when he fell down stairs covered in snow and ice while delivering mail. In February 2008, it accepted aggravation of lumbosacral spondylosis without myelopathy and aggravation of degeneration of lumbar or lumbosacral intervertebral disc.<sup>2</sup>

The findings of January 17, 2007 x-ray testing of appellant's lumbar spine showed spondylosis at L4-5. January 22, 2007 magnetic resonance imaging (MRI) scan of his lumbar spine revealed degenerative disc changes at L4-5 with diffuse disc bulge and some minimal disc bulges at L1-2, L2-3, L3-4 and L5-S1.

Appellant received periodic treatment for his back condition from Dr. Harold Pye, an osteopath and Board-certified preventive medicine physician, who found that appellant, was totally disabled from work. In June 2007 Dr. Pye diagnosed myalgia, sciatica, sacroiliac dysfunction, facet joint syndrome and annular tear at L4-5. He obtained electromyogram (EMG) and nerve conduction velocity testing on October 19, 2007 which showed a left-sided L5-S1 radiculopathy.

On January 7, 2008 Dr. Theodore Suchy, an osteopath and Board-certified orthopedic surgeon serving as an OWCP referral physician, diagnosed bulging disc with lumbar myositis and mild radiculopathy with no neurological deficits. He opined that these were preexisting conditions that were aggravated by the February 12, 2007 work injury. Dr. Suchy indicated that appellant could perform limited-duty work.

In reports dated October 29, 2008, February 3 and August 21, 2009, Dr. Pye continued to find that appellant was totally disabled due to his work-related back condition. In a September 30, 2009 report, Dr. Theodore Fisher, an attending Board-certified orthopedic surgeon, diagnosed degenerative disc disease at L4-5 and L5-S1 and broad-based disc bulge at L4-5 with subarticular stenosis. He recommended decompression and fusion surgery at L4-5 and L5-S1.

In a December 17, 2009 report, Dr. Hythem P. Shadid, an attending Board-certified orthopedic surgeon serving as an OWCP referral physician, stated that when appellant was asked about whether he had any back symptoms or back problems prior to February 12, 2007, appellant denied having had any injury or any previous problems with low back pain. He reported findings on physical examination and indicated that appellant had 5/5 strength and symmetrical sensation in his legs. Appellant did not exhibit any back spasms but he complained of tenderness throughout his lumbar spine. Dr. Shadid opined that appellant had spondylosis of his lumbar spine secondary to degenerative disc disease as well as a generalized degenerative spine. He stated that these diagnoses were based upon x-rays and MRI scan findings before and after the February 12, 2007 injury and asserted that there was no evidence of any objective changes after

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<sup>2</sup> Appellant stopped work for a period and returned to work in a light-duty position on July 23, 2007. He stopped work again on December 21, 2007 and did not return to work. OWCP paid compensation for periods of partial and total disability.

the February 12, 2007 injury. Dr. Shadid advised that appellant's current diagnosed condition was not medically connected to the work injury by direct cause, aggravation, precipitation or acceleration. The current diagnosed condition, based on all objected findings, was identical to that which was seen on x-rays and MRI scan findings prior to the February 12, 2007 injury. Dr. Shadid stated that while appellant might have sustained an aggravation of a preexisting condition when he fell down the stairs on February 12, 2007, such an aggravation would have resolved within six weeks of the injury given that this was a "commonly accepted physiologic healing time" for the type of condition appellant sustained. He indicated that the "diagnosed condition of a degenerative spine" was not currently medically connected to the accepted work factors either by direct cause, aggravation, precipitation or acceleration. Dr. Shadid stated that the diagnosed condition of degenerative spondylosis was far more likely connected to genetic factors as well as lifestyle factors. There was no material change noted in any of appellant's workups to signify any permanent aggravation or any evidence of an altered course of the underlying disease. Dr. Shadid found that appellant had no physical limitations resulting from work-related disability and indicated that he no longer suffered any residual of the February 12, 2007 injury. Appellant's current residuals and work restrictions were only due to his preexisting condition.

In a January 22, 2010 report, Dr. Fisher diagnosed degenerative disc disease at L4-5 and L5-S1 and herniated nucleus pulposus at L4-5 and recommended disc fusion surgery. In a March 12, 2010 form report, he checked "yes" to the question of whether appellant's diagnosed conditions were causally related to the February 12, 2007 work injury. Dr. Fisher checked "no" to the question of whether appellant had a prior back condition and indicated that appellant was totally disabled.

OWCP determined that a conflict in the medical opinion arose between appellant's attending physicians and Dr. Shadid on the issue of whether appellant had residuals of his February 12, 2007 employment injury. In order to resolve the conflict, it referred appellant, pursuant to section 8123(a) of FECA, to Dr. Kevin F. Walsh, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

In a June 14, 2010 report, Dr. Walsh detailed his review of the records and his interview and physical examination of appellant. The lumbar spine did not exhibit any paraspinal muscle spasm and there were no palpable trigger points. Appellant exhibited limited back motion due to reported pain and he had 5/5 strength in both the extensor and flexor hallucis longus muscle groups. Dr. Walsh diagnosed lumbosacral spondylosis with degenerative disc disease, sciatica, lumbar sprain and indicated that, more likely than not, the lumbar sprain was directly caused by the February 12, 2007 work injury. He noted that the degenerative disc disease was a preexisting condition that was not caused, aggravated or accelerated by the February 12, 2007 work injury. Dr. Walsh agreed with Dr. Shadid that appellant's MRI scan testing from before February 12, 2007 showed disc desiccation with chronic endplate changes at L4-5 and a diffuse disc bulge. He stated, "The accident in question did not cause those MRI [scan] findings. There is no evidence that those MRI [scan] findings were aggravated or accelerated as a result of the fall." Dr. Walsh agreed with Dr. Shadid that six weeks of disability following the injury appeared to be appropriate for a lumbar sprain. He noted, "Any ongoing disability at this time, more likely than not, is unrelated to the injury in 2007 and [is] more likely causally related to the degenerative dis[c] disease which was not caused, aggravated or accelerated by the work injury." Dr. Walsh

stated that appellant required no physical limitations or restrictions as a result of work-related disability and noted:

“[Appellant] suffers no residuals as a result of his injury in 2007. The lumbar sprain described by [him] did not cause a permanent change in his spine. All of [appellant’s] MRI [scan] findings are related to his preexisting condition. The EMG study, more likely than not, is a result of his preexisting condition which was not caused, aggravated or accelerated by the work injury. [Appellant’s] continued symptoms at this time are not related to the accepted work-related injury.”

In a July 9, 2010 letter, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits on the grounds that he ceased to have residuals of his February 12, 2007 work injury. It determined that the weight of the medical evidence regarding his work-related residuals rested with the opinion of Dr. Walsh, the impartial medical specialist.

In an August 16, 2010 decision, OWCP terminated appellant’s wage-loss compensation and medical benefits effective August 16, 2010 on the grounds that he had no residuals of his February 12, 2007 work injury after that date.

Appellant submitted an August 4, 2010 report in which Dr. Fisher diagnosed degenerative disc disease at L4-5 and L5-S1 and herniated nucleus pulposus at L4-5. Dr. Fisher indicated that appellant’s symptoms significantly changed at the time of the February 12, 2007 accident. Appellant had relatively asymptomatic degenerative changes in the lumbar spine which became significantly symptomatic and constituted an aggravation of a preexistent condition. Dr. Fisher stated that the pain could not be explained by a simple lumbar spine strain as lumbar spine strain symptoms would have resolved by now. He stated, “Therefore, [appellant’s] current state of ill-being is an exacerbation of a [preexisting] condition and therefore causally related to his accident.”

Appellant requested a telephonic hearing with an OWCP hearing representative. During the December 7, 2010 hearing, he testified that he continued to have the same back symptom that he developed after his February 12, 2007 work injury. Counsel asserted that Dr. Walsh’s opinion was of limited probative value because he improperly failed to accept that appellant sustained an aggravation of his degenerative disc disease on February 12, 2007.

In a February 3, 2011 decision, OWCP’s hearing representative affirmed the August 16, 2010 decision terminating appellant’s compensation effective August 16, 2010. He found that the weight of the medical evidence regarding work-related residuals continued to rest with the opinion of Dr. Walsh.

### **LEGAL PRECEDENT**

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> OWCP may not terminate compensation

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<sup>3</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

without establishing that the disability ceased or that it was no longer related to the employment.<sup>4</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</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>6</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>7</sup>

### ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain, sciatica, aggravation of lumbosacral spondylosis without myelopathy and aggravation of degeneration of lumbar or lumbosacral intervertebral disc due to a February 12, 2007 work accident when he fell down snow and ice covered stairs while delivering mail. It terminated his wage-loss compensation and medical benefits effective August 16, 2010 on the grounds that he had no residuals of his February 12, 2007 work injury after that date. In support of this termination, OWCP relied on the opinion of Dr. Walsh, a Board-certified orthopedic surgeon, who served as an impartial medical specialist.

OWCP properly determined that there was a conflict in the medical opinion evidence between appellant’s attending physicians and Dr. Shadid, a Board-certified orthopedic surgeon acting as an OWCP referral physician, on the issue of whether appellant continued to have residuals of his February 12, 2007 employment injury.<sup>8</sup> In order to resolve the conflict, it properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Walsh for an impartial medical examination and an opinion on the matter.<sup>9</sup>

In his June 14, 2010 report, Dr. Walsh concluded that appellant did not have any residuals of his February 12, 2007 work injury. The Board finds that his opinion is not sufficiently well rationalized to represent the weight of the medical evidence regarding appellant’s work-related residuals and therefore does not resolve the conflict in the medical

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<sup>4</sup> *Id.*

<sup>5</sup> See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>6</sup> 5 U.S.C. § 8123(a).

<sup>7</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

<sup>8</sup> In several reports dated in late 2009 and early 2010, Dr. Fisher, an attending and Board-certified orthopedic surgeon, and Dr. Pye, an osteopath and Board-certified preventive medicine physician, determined that appellant was disabled due to residuals of his February 12, 2007 work injury. In contrast, Dr. Shadid indicated in a December 17, 2009 report that appellant ceased to have residuals of his February 12, 2007 work injury.

<sup>9</sup> See *supra* note 6 and accompanying text.

opinion evidence regarding this matter.<sup>10</sup> The opinion of Dr. Walsh does not establish that appellant had no residuals due to his February 12, 2007 employment injury after August 16, 2010.

The Board notes that Dr. Walsh did not base his opinion on a complete and accurate factual or medical history.<sup>11</sup> OWCP accepted that appellant sustained an aggravation of lumbosacral spondylosis without myelopathy and an aggravation of degeneration of lumbar or lumbosacral intervertebral disc due to the February 12, 2007 work accident. In his June 14, 2010 report, Dr. Walsh categorically stated that appellant did not sustain any degree of aggravation of his underlying degenerative disc disease of the lumbar spine.<sup>12</sup> The Board has held that a medical expert should only determine the medical question certified to him.<sup>13</sup> Dr. Walsh did not adequately explain the basis for his opinion in this regard and simply stated, without elaboration, that the findings on diagnostic testing did not show an aggravation of the underlying degenerative condition by the February 12, 2007 work injury. He did not discuss whether other findings, such as the physical examination findings after February 12, 2007, supported the existence of any degree of work-related aggravation of appellant's underlying condition. OWCP accepted that appellant sustained an aggravation of lumbosacral spondylosis without myelopathy, but Dr. Walsh did not provide any notable discussion of this particular condition. Dr. Walsh posited that appellant's lumbar sprain resolved in six weeks but he did not fully explain the basis for this opinion.

Because the opinion of Dr. Walsh is of limited probative value regarding appellant's work-related residuals, there is an unresolved conflict in the medical opinion evidence regarding whether appellant continues to have residuals of his February 12, 2007 work injury. Therefore, OWCP did not meet its burden of proof to terminate appellant's compensation effective August 16, 2010.

### CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation effective August 16, 2010 on the grounds that he no longer had residuals of his February 12, 2007 employment injury after that date.

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<sup>10</sup> See *supra* note 6 and accompanying text.

<sup>11</sup> See *supra* note 5 and accompanying text.

<sup>12</sup> For example, Dr. Walsh noted, "Any ongoing disability at this time, more likely than not, is unrelated to the injury in 2007 and [is] more likely causally related to the degenerative dis[c] disease which was not caused, aggravated or accelerated by the work injury."

<sup>13</sup> *Jeannine E. Swanson*, 45 ECAB 325 (1994); see *D.V.*, Docket No. 09-1011 (issued April 9, 2010) (a medical expert should only determine the medical question certified to him; determination of the legal standards in regards to such medical questions is outside the scope of his or her expertise).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 3, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 10, 2012  
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