



## **FACTUAL HISTORY**

Appellant, a 58-year-old retired materials handler, has an accepted occupational disease claim for low back spasms, which arose on or about July 1, 2005.<sup>2</sup> He stopped work on March 13, 2008. OWCP paid appropriate wage-loss compensation and placed appellant on the periodic compensation rolls effective April 13, 2008.

In a decision dated September 28, 2009, OWCP terminated wage-loss compensation and medical benefits on the basis that appellant's accepted condition had resolved. It relied on the December 3, 2008 and February 2, 2009 reports of Dr. Herbert Stein, a Board-certified orthopedic surgeon. OWCP accorded determinative weight to Dr. Stein's findings because of his purported status as an impartial medical examiner (IME). It had referred appellant to Dr. E. Michael Okin, a Board-certified orthopedic surgeon, for an impartial medical examination.<sup>3</sup> However, Dr. Okin was unavailable on December 3, 2008, and his colleague, Dr. Stein, examined appellant instead.

Although appellant's claim had been accepted for low back spasm, Dr. Stein explained that this was more a description of physical findings than a diagnosis. He diagnosed chronic lumbosacral spine sprain by history and herniated disc at L5-S1 with multilevel degenerative disc disease, which he found to be unrelated to appellant's employment injury. In fact, Dr. Stein indicated that there was no definite history of a back injury while working, just a progressive increase in symptoms according to appellant's history. Furthermore, he did not believe appellant's back spasms were related to an acute work injury. Dr. Stein attributed the spasms to appellant's preexisting lumbosacral spine degenerative disease. Despite the fact that he had not originally been selected as an IME, OWCP treated Dr. Stein as such, and terminated appellant's compensation and medical benefits based on his opinion.

By decision dated December 17, 2009, the Branch of Hearings and Review set aside OWCP's September 28, 2009 decision and directed that appellant's benefits be reinstated. OWCP's hearing representative found that Dr. Stein was not properly designated as an IME and, therefore, OWCP could not rely upon his opinion to resolve the conflict in medical opinion. Because there was an unresolved conflict in medical opinion, the hearing representative found that OWCP had not met its burden to terminate benefits.

After reinstating benefits, OWCP referred appellant to Dr. Menachem M. Meller, a Board-certified orthopedic surgeon, to resolve the conflict between appellant's physician, Dr. Schnall, and OWCP referral physicians, Dr. Valentino and Dr. Stein.

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<sup>2</sup> Appellant voluntarily retired effective December 29, 2009.

<sup>3</sup> OWCP declared a conflict in medical opinion between appellant's treating physician, Dr. Barry Schnall, a Board-certified psychiatrist, and Dr. Steven J. Valentino, a Board-certified orthopedic surgeon and OWCP referral physician. In a report dated September 15, 2008, Dr. Valentino found that appellant's accepted condition of back spasms had resolved. He also indicated that appellant no longer suffered from chronic lumbar sprain and strain, which may have resulted from the July 1, 2005 employment injury. In a report dated October 12, 2008, Dr. Schnall noted his disagreement with Dr. Valentino's opinion. He diagnosed lumbosacral sprain and strain, lumbosacral radiculopathy and lumbosacral degenerative disease, which were caused or aggravated by appellant's work activities. Dr. Schnall further noted that appellant was unable to return to his prior full work activities.

In a report dated February 19, 2010, Dr. Meller noted that presently there was no evidence of spasms on physical examination. He also stated that appellant exhibited self-limiting behavior on physical examination, but there were no objective findings of injury or illness. Dr. Meller noted that a December 18, 2007 lumbar magnetic resonance imaging (MRI) scan revealed a degenerative disc protrusion at L4-5; however, this was not caused, worsened or aggravated by the July 1, 2005 employment injury. He found that appellant had no work-related restrictions and could return to his preinjury occupation. With respect to the lumbar spine discogenic findings, which were not employment related, Dr. Meller found that appellant had medium duty restrictions, but even with those type limitations, appellant could still carry out his normal work duties sorting, recycling and driving a fork lift. He concluded that appellant's employment injury had fully and completely resolved without residuals.

By decision dated May 24, 2010, OWCP terminated appellant's compensation and medical benefits effective that day.<sup>4</sup>

Counsel requested an oral hearing, which was held on September 8, 2010. He challenged OWCP's reliance on Dr. Meller's opinion as a basis for terminating appellant's benefits. Counsel submitted follow-up reports from Dr. Schnall, including a May 18, 2010 report in which Dr. Schnall noted his disagreement with Dr. Meller's finding. Dr. Schnall indicated that appellant's back condition was not purely degenerative in nature. According to him, appellant's work activities aggravated his back condition, including his current L5-S1 disc herniation and right-sided L5 nerve root involvement. Dr. Schnall's June 15, September 2 and December 2, 2010 follow-up reports documented ongoing complaints and treatment for chronic pain related to lumbosacral disc herniation, lumbosacral sprain and strain, degenerative arthritis of the lumbar spine and right-sided radiculopathy.

In a December 27, 2010 decision, the Branch of Hearings and Review affirmed OWCP's May 24, 2010 termination of appellant's wage-loss compensation and medical benefits. OWCP's hearing representative found Dr. Meller's opinion sufficiently reasoned to carry the special weight of the medical evidence.

On appeal, counsel reiterated his challenge to OWCP's reliance on Dr. Meller's opinion as a basis for terminating benefits.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>5</sup> Having determined that an employee has a disability causally related to his 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>6</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement

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<sup>4</sup> OWCP had previously issued a notice of proposed termination of benefits on April 22, 2010.

<sup>5</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>6</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

to compensation for disability.<sup>7</sup> To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition which require further medical treatment.<sup>8</sup>

Where an employee claims that a condition not accepted or approved by OWCP was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>9</sup>

FECA provides that if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>10</sup> For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."<sup>11</sup> Where OWCP has referred the employee to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>12</sup>

Subsequent reports from a physician who was on one side of a medical conflict that has since been resolved would generally be insufficient to overcome the weight accorded the impartial medical examiner's report and/or insufficient to create a new medical conflict.<sup>13</sup>

### ANALYSIS

OWCP properly found a conflict in medical opinion based on the opposing views of appellant's physiatrist, Dr. Schnall, and those of Dr. Valentino and Dr. Stein, both of whom were referred to by OWCP. Because of this conflict in medical opinion, it appropriately referred appellant to Dr. Meller to resolve the question of whether appellant had any ongoing injury-related residuals.

In a February 19, 2010 report, Dr. Meller found no evidence of spasms on physical examination and no objective findings of injury or illness. He reported that appellant exhibited self-limiting behavior on physical examination. With respect to appellant's lumbar degenerative disc disease, Dr. Meller indicated this condition was not caused, worsened or aggravated by the July 1, 2005 employment injury. Based on the accepted condition of low back spasms, which had since resolved, appellant had no work-related restrictions and could return to his preinjury

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<sup>7</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

<sup>8</sup> *Calvin S. Mays*, 39 ECAB 993 (1988).

<sup>9</sup> *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>10</sup> 5 U.S.C. § 8123(a); see 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

<sup>11</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

<sup>12</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

<sup>13</sup> *I.J.*, 59 ECAB 408, 414 (2008).

occupation. In conclusion, Dr. Meller found that appellant's employment injury had fully and completely resolved without any residuals.

OWCP's hearing representative found that Dr. Meller provided a well-reasoned report based on a proper factual and medical history. Dr. Meller accurately summarized the relevant medical evidence, and relied on the latest statement of accepted facts, which included a description of appellant's duties as a materials handler. He also provided detailed examination findings and medical rationale supporting his opinion. As such, Dr. Meller's impartial medical examination was entitled to determinative weight.<sup>14</sup>

The Board finds that OWCP appropriately terminated compensation and medical benefits on the basis of the weight of the evidence, as represented by Dr. Meller's February 19, 2010 report.

As a party to the original conflict, Dr. Schnall's follow-up reports dated May 18, June 15, September 2 and December 2, 2010 are insufficient to overcome the weight properly accorded Dr. Meller's opinion. These additional reports are also insufficient to create a new conflict in medical opinion. In his May 18, 2010 report, Dr. Schnall reiterated that appellant's lumbar degenerative disc disease progressively worsened due to his employment activities. However, he offered no additional support or rationale for his opinion that appellant sustained more serious injuries as a consequence of his accepted employment exposure on or after July 1, 2005. The remaining reports also provided no additional insight.

The Board finds that OWCP satisfied its burden to justify termination of appellant's benefits.

### **CONCLUSION**

OWCP properly terminated appellant's wage-loss compensation and medical benefits effective May 24, 2010.

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<sup>14</sup> Gary R. Sieber, *supra* note 12.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 27, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 18, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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