



## **FACTUAL HISTORY**

This case has previously been before the Board. In a March 19, 2007 decision, the Board found that OWCP properly denied appellant's request for reconsideration of the merits of its denial of his recurrence claim.<sup>2</sup> In an August 15, 2008 decision, the Board remanded the case, as the evidence established that the incident occurred as alleged. OWCP was directed to determine whether the medical evidence established that appellant sustained an injury causally related to the established factor of employment. The facts as set forth in the Board's prior decisions are hereby incorporated by reference.<sup>3</sup>

Appellant was evaluated by Dr. Lowell Schuknecht, Board-certified in aerospace medicine and occupational medicine, who examined appellant for the Department of Veterans Affairs with regard to an increase in his Veterans benefits due to a service-related condition in his spine. Dr. Schuknecht was asked to separate and describe the manifestations of the service-connected lumbar degenerative disc disease from the manifestations of the nonservice-connected herniated disc.

In an October 15, 2007 report,<sup>4</sup> Dr. Schuknecht diagnosed degenerative disc disease, thoracolumbar spine, moderate severity; and radiculitis, right leg, S1 nerve root distribution, transient. Since he last saw appellant, the low back condition remained the same. Dr. Schucknecht stated that appellant's injury of December 2001 resulted in radicular symptoms with clinical and magnetic resonance imaging (MRI) scan evidence of a mild disc bulge at the L5-S1 level. He also noted that appellant's employment condition had resolved with the passage of time, physical therapy, exercises and conservative management. In addition to symptoms of thoracolumbar degenerative disc disease and a prior injury, appellant had transient symptoms attributable to the 2011 disc injury with radiculitis. The symptoms included pain down the posterior thigh to the lateral malleolus in the S1 nerve distribution that occurred during the straight leg raising and repetitive motion tests of the examination. Dr. Schuknecht noted that the symptoms had resolved. In an October 16, 2007 report, he noted significant thoracolumbar spine pathology that was service connected. Dr. Schuknecht also noted minor, clinically insignificant thoracolumbar pathology that was work connected. He found no clinical evidence of nerve root entrapment compatible with appellant's past history of a employment-related disc injury. Appellant's major symptoms attributed to the disc injury in 2001 had spontaneously resolved. Dr. Schuknecht noted that the only exception was the minor and transient S1 nerve root irritation which was momentarily evidenced during the straight leg raise and repetitive motion tests. He advised that the disc injury in 2001 led to an exacerbation of his preexisting thoracolumbar degenerative disc disease but did not lead to an aggravation of the condition.

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<sup>2</sup> Docket No. 06-1389 (issued March 19, 2007).

<sup>3</sup> Docket No. 07-1647 (issued August 15, 2008). Appellant, a 42-year-old aircraft mechanic, filed a traumatic injury claim alleging that on December 19, 2001 he pulled muscles in his lower back in the performance of duty, when he stepped on a flashlight when he was descending stairs. The evidence further indicated that appellant suffered two significant prior injuries to his back: a May 17, 1990 injury when he was ejected from an aircraft and an August 1, 2001 injury that occurred while he was moving heavy equipment.

<sup>4</sup> The Board notes that the reports by Dr. Schuknecht in the record before the Board are electronically signed, as indicated by "/s/ Lowell Schuknecht."

By decision dated September 29, 2008, OWCP accepted appellant's claim for resolved disc bulge at L5-S1. It provided instructions for filing claims for wage-loss compensation. OWCP also sent appellant an Appeal Request Form.

On September 22, 2009 appellant, through his attorney, submitted a request for reconsideration and submitted a September 21, 2009 report by Dr. Richard Radnovich, an attending osteopath, who noted that appellant's recent MRI scan demonstrated significant lumbar pathology, specifically an L5-S1 broad-based disc bulge.<sup>5</sup> He stated that the MRI scan noted annular tearing at multiple levels. Given the length of time since appellant's injury and the fact that this disc has not healed, it was likely that appellant would need ongoing medical care for his low back. Appellant's symptoms had been consistent since the time of injury. Dr. Schuknecht noted that in the past he had reviewed appellant's medical records and found that the injuries represented on the MRI scan were consistent with that which would occur by stepping on a flashlight on December 19, 2001.

By decision dated November 18, 2009, OWCP denied modification of the September 29, 2008 decision.

On September 3, 2010 appellant, through counsel, requested reconsideration. In a July 7, 2010 report, Dr. Radnovich examined appellant that day and reviewed the MRI scans and injury of December 19, 2001. He opined that the December 19, 2001 incident aggravated and caused appellant's disc disease. Dr. Radnovich stated that his medical opinion was based on his experience treating patients with similar types of problems. Appellant had been treated continuously since August 2004, and his symptoms at L5-S1 and other chronic conditions relative to his industrial injuries had not resolved.

In a decision dated May 9, 2011, OWCP denied modification of the prior decision.

By letter dated June 30, 2011, appellant requested reconsideration. On June 13, 2011 Dr. Radnovich noted that there was no basis in appellant's symptoms, physical examination findings, or radiographic findings to suggest that his disc disease had "spontaneously resolved." He noted that on December 19, 2001 appellant had an accident which resulted in an injury to his lumbar spine. The injury persisted as documented objectively by physical examination findings and lumbar MRI scans. Since the date of injury, appellant was disabled from his essential job functions. Continuing in employment would have a high likelihood of aggravating his disease and causing further anatomic injury. Appellant also submitted treatment records not previously in the record from Dr. Radnovich dated January 10, 2006 to November 2, 2010. They reflect that appellant was treated for chronic low back pain. Dr. Radnovich noted myofascitis, traumatic arthropathy involving the pelvic region and thigh, pain in the pelvic region and thigh joint, depression, lumbalgia and enthesopathy of the elbow.

In an October 21, 2011 decision, OWCP found that the evidence submitted in support of the reconsideration request was insufficient to modify the November 18, 2009 decision.

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<sup>5</sup> The Board discussed Dr. Radnovich's October 18, 2004 opinion in detail in its prior decision. *See supra* note 3.

## LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>6</sup> Once OWCP accepts a claim it has the burden of justifying modification or termination of compensation. After it has determined that an employee has disability causally related to his employment, it may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.<sup>7</sup> The fact that OWCP accepted an employee's claim for a specified period of disability does not shift the burden of proof to the employee. The burden is on OWCP to demonstrate an absence of employment-related disability or residual in the period subsequent to the date of termination or modification.<sup>8</sup>

## ANALYSIS

In a decision dated September 29, 2008, OWCP accepted appellant's claim for resolved disc bulge at L5-S1 and provided him with instructions on filing a claim for wage-loss compensation. It provided him a copy of his appeal rights. The Board notes that, under OWCP procedures, if a case is accepted as resolved but continued as an open case, OWCP must address the medical evidence upon which it determines the condition has "resolved" and provide appellant appeal rights.<sup>9</sup> OWCP provided appellant with appeal rights and kept the case open. Therefore, it has the burden of proof to establish that the accepted L5-S1 condition resolved.

OWCP gave weight to the opinion of Dr. Schucknecht. The Board finds, however, that Dr. Schucknecht's opinion is vague and contradictory and does not establish that the accepted L5-S1 condition had resolved. On October 15, 2007 Dr. Schuknecht stated that appellant's injury of December 2001 resulted in radicular symptoms with clinical and MRI scan evidence of a mild disc bulge at the L5-S1 level. He stated that the condition had resolved with the passage of time, physical therapy, exercises and conservative management. Dr. Schuknecht also noted that, in addition to symptoms from thoracolumbar degenerative disc disease and a prior injury, appellant had transient symptoms and findings attributable to the disc injury with radiculitis. The symptoms included pain down the posterior thigh to the lateral malleolus in the S1 nerve distribution that occurred during straight leg raising and repetitive motion testing. Dr. Schuknecht then stated that the symptoms were transient and resolved. On October 16, 2007 he indicated that appellant's condition had spontaneously resolved as to the disc injury in 2001, with the exception of the minor and transient S1 nerve root irritation which was evidenced during the straight leg raise and repetitive motion tests of the examination. Dr. Schuknecht opined that the disc injury in 2001 led to an exacerbation of appellant's preexisting thoracolumbar degenerative disc disease but did not lead to an aggravation of the accepted

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<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *D.M.*, Docket No. 10-857 (issued January 3, 2011); *Edwin Lester*, 34 ECAB 1807 (1983).

<sup>8</sup> See *Elsie L. Price*, 54 ECAB 734 739 (2003); *Raymond M. Shulden*, 31 ECAB 297 (1979); *Anna M. Blaine (Gilbert H. Blaine)*, 26 ECAB 351 (1975).

<sup>9</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Acceptance, Resolved Conditions*, Chapter 2.806(5) (June 2011).

condition. His opinion on the issue of aggravation is not well rationalized. The Board has held that medical opinions that are speculative or equivocal are of diminished probative value.<sup>10</sup> Dr. Schucknecht's reports do not establish that appellant's residuals from the accepted L5-S1 condition resolved.

Moreover Dr. Radnovich advised that appellant's employment-related injury had not resolved. On his reports of record, he reviewed appellant's medical records, and noted that appellant's back pain was never addressed as part of the ejection injury, nor were radicular pain ever mentioned. Dr. Radnovich noted a history of back pain prior to the December 19, 2001 injury, but treated appellant for low back pain after that date. He concluded that appellant's lumbar and radicular complaints were attributable to the injury of December 19, 2001. Dr. Radnovich opined that the incident of December 19, 2001 led to an injury to appellant's lumbar spine which had not resolved based on physical examination findings and MRI scans. He noted that, since the date of the injury, appellant was unable to perform his essential job functions.

Accordingly, the Board finds that OWCP did not meet its burden of proof to establish that appellant's L5-S1 disc bulge had resolved.

### **CONCLUSION**

The Board finds that OWCP did not properly determine that appellant's employment-related injury had resolved.

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<sup>10</sup> *D.D.*, 57 ECAB 735, 739 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 21, 2011 is reversed. The case is remanded to OWCP for further action consistent with this decision.

Issued: April 9, 2013  
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