



## **FACTUAL HISTORY**

This case has previously been before the Board. In a decision dated March 7, 2011, the Board affirmed in part and reversed in part a February 17, 2010 decision.<sup>2</sup> OWCP determined that a conflict existed between Dr. William Simpson, an attending orthopedic surgeon, and Dr. Ghol Bahman Ha'Eri, a Board-certified orthopedic surgeon and OWCP referral physician, regarding whether appellant had further disability due to his accepted cervical and lumbar sprains. It referred appellant to Dr. Benjamin Broukhim, a Board-certified orthopedic surgeon, for an impartial medical examination. The Board found that Dr. Broukhim's opinion was insufficient to resolve the conflict in medical opinion as he was professionally associated with Dr. Ha'Eri, who provided the second opinion examination. The Board reversed OWCP's termination of appellant's compensation and medical benefits. The Board, however, affirmed OWCP's finding that he had not established that he sustained a consequential emotional condition due to his June 5, 2001 employment injury. The facts and the circumstances as set forth in the prior decision are hereby incorporated by reference.

On April 20, 2011 OWCP referred appellant to Dr. Glenn Takei, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated May 18, 2011 and signed November 3, 2011, Dr. Takei discussed appellant's complaints of continued neck and upper and lower back pain and reviewed the medical reports of record. On examination, he found tenderness of the cervical paraspinous muscle, intact sensation of the upper extremities and diffuse weakness that seemed due to reduced effort instead of weakness. Dr. Takei further found tenderness of the bilateral paraspinous muscles and right and left sciatic notches, intact sensation of the lower extremities and discomfort with straight-leg raising over 40 degrees in the supine position. He opined that x-rays showed slight diffuse degenerative arthritis of the cervical spine and slight diffuse degenerative arthritis of the lumbar spine with disc narrowing at L5-S1. Dr. Takei diagnosed cervical and lumbar strains with minimal chronic discomfort. He stated:

“On my examination today, during [appellant's] physical examination, [his] movements were quite guarded and limited. During the taking of his history, [he] appeared to move more easily with better range of motion. Although there was limited motion of the neck and lower back, this appeared to be due to voluntary guarding rather than true muscle spasm. Sensation was intact in both lower extremities. Straight-leg raising in the seated position was to 70 [degrees] bilaterally with no discomfort. Straight-leg raising in the supine position was to 40 [degrees]. Further elevation caused significant discomfort about the lower back. The straight-leg raised test in both the seated and supine positions should be very similar. A significant discrepancy in the findings in the two positions indicate that there is magnification of the subjective complaints.”

Dr. Takei opined that appellant's subjective complaints were not supported by objective findings. He stated, “Voluntary guarding to decrease range of motion does not correlate with an objective finding, especially if there is an inconsistency during the examination. The straight-leg

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<sup>2</sup> Docket No. 10-1267 (issued March 7, 2011). OWCP accepted that on June 5, 2011 appellant, then a 35-year-old payroll technician, sustained cervical and lumbosacral sprains in the performance of duty.

raise test that is inconsistent on multiple occasions over multiple years in the past and again today would suggest that [his] subjective complaints are in excess of any objective findings.” Dr. Takei opined that appellant’s lumbosacral and cervical strains sustained due to the June 5, 2001 employment injury had resolved without further objective residuals. He explained that the physical examination showed symptom magnification and that magnetic resonance imaging (MRI) studies showed no disc herniation or impingement but diffuse degenerative changes. Dr. Takei stated:

“Although the fall may have aggravated the preexisting arthritic changes in the neck and lower back, I feel that these changes were temporary and have resolved. Again, there is no objective evidence that a significant change occurred as a result of the fall that occurred on June 5, 2001. The persistent subjective complaints of discomfort over the past 10 years are not supported by the physical examination of multiple physicians other than Dr. Simpson. The straight-leg raise test has always been inconsistent and would indicate that [his] symptoms are being magnified.”

Dr. Takei found that appellant had no limitations due to his June 5, 2001 employment injury but had some restrictions due to preexisting arthritis of his neck and back.

In a report dated December 15, 2011, Dr. Simpson noted that Dr. Takei reviewed the medical reports from Dr. Broukhim and Dr. Ha’Eri even though they belonged to the same medical group. He maintained that Dr. Takei should not have considered their opinions. Dr. Simpson related that a witness verified that Dr. Takei examined appellant for 40 minutes instead of 3 hours. He questioned Dr. Takei’s finding that appellant could return to work given “multiple objective findings.” Dr. Simpson opined that appellant was totally disabled.

On May 3, 2012 OWCP advised appellant of its proposed termination of his compensation and medical benefits as the medical evidence showed that he had no further residuals of his June 5, 2001 employment injury.<sup>3</sup>

By letter dated May 14, 2012, appellant disagreed with the proposed termination. He noted that Dr. Takei agreed with Dr. Broukhim that he had symptom magnification. Appellant asserted that Dr. Broukhim’s report should have been stricken because of his affiliation with the second opinion examiner.

In a decision dated June 7, 2012, OWCP terminated appellant’s compensation effective that date. It determined that Dr. Takei’s report constituted the weight of the evidence and established that appellant had no further disability or need for medical treatment due to his June 5, 2001 work injury.

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<sup>3</sup> OWCP initially issued a November 18, 2011 termination decision without providing pretermination notice.

On July 3, 2012 appellant requested reconsideration.<sup>4</sup> He argued that Dr. Takei's report was inaccurate and that he should not have reviewed Dr. Broukhim's report.

By decision dated December 11, 2012, OWCP denied appellant's request for reconsideration after finding that he did not submit evidence or raise argument sufficient to warrant reopening the case for further review of the merits under section 8128.

The record contains electrodiagnostic testing of the upper extremities obtained on March 17, 2011 suggestive of a C6-7 radiculopathy and right cubital tunnel syndrome.

Appellant appealed to the Board. In an order dated August 12, 2013, the Board set aside the December 11, 2012 decision.<sup>5</sup> The Board found that OWCP's delay in issuing its December 11, 2012 decision beyond 90 days of appellant's reconsideration request jeopardized his right for Board review of the merits of his case. The Board remanded the case for OWCP to issue a merit decision to preserve his appeal rights.

By decision dated November 20, 2013, OWCP denied modification of its June 7, 2012 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.<sup>6</sup> It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>7</sup> OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>8</sup>

Section 8123(a) 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.<sup>9</sup> The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, it shall appoint a third physician to make an examination. 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>10</sup> In situations where there exist opposing medical reports of virtually equal weight and

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<sup>4</sup> In a statement dated June 12, 2012, appellant noted that Dr. Simpson found that he was totally disabled. He requested a new impartial medical examination.

<sup>5</sup> *Order Remanding Case*, Docket No. 13-966 (issued August 12, 2013).

<sup>6</sup> *Elaine Sneed*, 56 ECAB 373 (2005).

<sup>7</sup> *Fred Reese*, 56 ECAB 568 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>8</sup> *Gewin C. Hawkins*, 52 ECAB 242 (2001).

<sup>9</sup> 5 U.S.C. § 8123(a).

<sup>10</sup> 20 C.F.R. § 10.321.

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>11</sup>

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

OWCP accepted that appellant sustained cervical and lumbar strain due to a June 5, 2001 employment injury. It determined that a conflict arose between Dr. Simpson, an attending physician, and Dr. Ha'Eri, an OWCP referral physician, regarding whether he had any further residuals of his work injury. OWCP originally terminated appellant's compensation based on the report of Dr. Broukhim, who provided an impartial medical examination. On appeal, however, the Board reversed the termination, finding that Dr. Broukhim could not serve as an impartial medical examiner due to his association with Dr. Ha'Eri.

On April 20, 2011 OWCP referred appellant to Dr. Takei for an impartial medical examination. It terminated appellant's compensation benefits finding that Dr. Takei's report constituted the weight of the evidence that he had no further employment-related disability.

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>12</sup> The Board finds that the opinion of Dr. Takei, a Board-certified orthopedic surgeon selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. Dr. Takei accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions about appellant's condition which comported with his findings.<sup>13</sup> In a 16-page report dated May 18, 2011, signed November 3, 2011, he reviewed the medical evidence of record, including the results of diagnostic studies. On examination, Dr. Takei found limited low back and neck motion which appeared to be the result of voluntary guarding. He noted a discrepancy in the results of straight-leg raise tests in the seated and supine position, which showed a magnification of complaints. Dr. Takei opined that appellant's lumbosacral and cervical strains had resolved without any residuals. He provided rationale for his opinion by explaining that his subjective complaints were unsupported by objective findings and that the results on physical examination showed symptom magnification. As his report is detailed, well rationalized and based on a proper factual background, Dr. Takei's opinion is entitled to the special weight accorded an impartial medical examiner.<sup>14</sup> OWCP thus met its proof to terminate appellant's compensation benefits for the accepted conditions of lumbosacral and cervical strains.

The remaining evidence submitted subsequent to OWCP's termination is insufficient to overcome the weight afforded Dr. Takei as impartial medical examiner. On December 15, 2011

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<sup>11</sup> *R.C.*, 58 ECAB 238 (2006); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

<sup>12</sup> *See J.M.*, 58 ECAB 478 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

<sup>13</sup> *See Manuel Gill*, 52 ECAB 282 (2001).

<sup>14</sup> *See J.M.*, *supra* note 12; *Katheryn E. Demarsh*, 56 ECAB 677 (2005).

Dr. Simpson generally asserted that Dr. Takei should not have considered the reports of Dr. Broukhim or Dr. Ha'Eri as they were part of the same medical group. He further questioned how Dr. Takei released appellant to return to work given his own objective examination findings. The Board notes that a medical report from a physician on one side of a conflict resolved by an impartial medical examiner is generally insufficient to overcome the weight accorded the report of an impartial medical examiner or create a new conflict.<sup>15</sup> Moreover, the reports of Dr. Broukhim and Dr. Ha'Eri do not fall within the categories of reports which require exclusion from the record.<sup>16</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>17</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>18</sup>

### **ANALYSIS -- ISSUE 2**

OWCP met its burden of proof to terminate authorization for medical benefits through the opinion of Dr. Takei, the impartial medical examiner, who found that appellant had no residuals of his accepted conditions. Dr. Takei explained that, based on the results of a physical examination and diagnostic studies, his cervical and lumbar strains had resolved. His opinion is detailed and well rationalized. It is entitled to the special weight accorded an impartial medical examiner and establishes that appellant has no further residuals of his accepted employment injury.<sup>19</sup>

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<sup>15</sup> *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael Hughes*, 52 ECAB 387 (2001).

<sup>16</sup> OWCP's procedure manual provides the instances in which medical evidence will be excluded. These include when the physician selected for referee examination is regularly involved in performing fitness-for-duty examinations for the claimant's employing establishment; when a second referee specialist's report is requested before OWCP has attempted to clarify the original referee specialist's report; when a referee report is obtained through telephone contact; when surveillance video is provided directly to a referee physician from the employing establishment and when leading questions have been posed to the physician in a referee context. The procedure manual notes that the excluded report need not be physically removed from the file. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Exclusion of Medical Evidence*, Chapter 2.810.12(a)(2) (September 2010). The Board's case law draws a distinction between those situations in which OWCP may have influenced the opinion of the impartial medical specialist from circumstances in which the evidence establishes that the medical report obtained is defective for other procedural reasons. *See Beverly Grimes*, 54 ECAB 543 (2003); *Terrance R. Stath*, 45 ECAB 412 (1994).

<sup>17</sup> *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

<sup>18</sup> *Id.*

<sup>19</sup> *See B.H.*, Docket No. 14-423 (issued June 26, 2014).

### **LEGAL PRECEDENT -- ISSUE 3**

Once OWCP properly terminates appellant's compensation benefits, the burden shifts to appellant to establish that he has continuing disability after that date related to his accepted injury.<sup>20</sup> To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.<sup>21</sup> Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>22</sup>

### **ANALYSIS -- ISSUE 3**

Given the Board's finding that OWCP properly relied upon the opinion of Dr. Takei in terminating compensation, the burden of proof shifts to appellant to establish that he remains entitled to compensation after that date.<sup>23</sup> Dr. Takei submitted the results of electrodiagnostic testing dated March 17, 2011. However, this evidence is not relevant to the issue of whether appellant has any continuing employment-related disability or need for medical treatment as there is no opinion from a physician regarding causation.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP properly terminated appellant's compensation and medical benefits effective June 7, 2012 on the grounds that he had no further employment-related disability or need for medical treatment. The Board further finds that appellant has not established that he had continuing disability after June 7, 2012 due to his June 5, 2001 employment injury.

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<sup>20</sup> *Supra* note 13.

<sup>21</sup> *Id.*

<sup>22</sup> *Paul Foster*, 56 ECAB 208 (2004); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>23</sup> *See supra* note 13.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 20, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 26, 2014  
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