



wall. OWCP accepted the claim for a back contusion. Appellant stopped work on March 11, 2012. On July 12, 2012 he accepted a limited-duty position with the employing establishment.

In a report dated June 28, 2012, Dr. Arash Emami, a Board-certified orthopedic surgeon, discussed appellant's history of a lumbar laminectomy and discectomy.<sup>2</sup> He opined that the slip and fall aggravated appellant's preexisting degenerative disorder. Dr. Emami stated, "I do not feel [appellant] is a candidate for surgical interventions as he has mostly axial pain for a lumbar degenerative disorder with minimal to no radiculopathy and his symptoms are not focal or localized to a specific level."

On August 2, 2012 Dr. Mark J. Ruoff, an attending Board-certified orthopedic surgeon, related that appellant experienced back pain beginning March 11, 2012 when he slipped and fell on a cinder block wall at work. He diagnosed L5 radiculopathy on the right side, postlaminectomy syndrome at L4-5, spondylolisthesis at L4-5, mild spinal stenosis at L3-4 and multilevel degenerative disc disease. Dr. Ruoff referred appellant for electrodiagnostic testing.

On September 13, 2012 Dr. Frank L. Gazzillo, a Board-certified neurologist, related that electromyogram (EMG) and nerve conduction velocity (NCV) testing showed radiculopathy at L5 probably due to the prior L5 laminectomy.

In a report dated September 25, 2012, Dr. Ruoff diagnosed radiculopathy at L5, spondylolisthesis at L4-5, stenosis at L3-4, degenerative disc disease and postlaminectomy syndrome. He stated, "I do feel [appellant's] current condition is an aggravation of his prior degenerative pathology, which includes the spondylolisthesis, spinal stenosis and degenerative disc disease. I believe that he aggravated this condition on March 11, 2012, and that this is ongoing to remain a permanent situation." Dr. Ruoff recommended an L4-5 fusion and a decompression at L5 and L3-4.

On September 25, 2012 Dr. Ruoff requested authorization to perform a posterior decompression and fusion at L4-5 and decompression at L3-4.

In a report dated September 29, 2012, an OWCP medical adviser opined that the claim could be expanded to include a temporary aggravation of preexisting degenerative disease and prior laminectomies. He indicated that the aggravation was "possibly tempo[rary]." In a separate report dated September 29, 2012, the medical adviser noted that appellant had two prior nonemployment-related laminectomies. He questioned Dr. Ruoff's request for authorization for spinal surgery given the lack of evidence of significant changes on electrodiagnostic testing. The medical adviser noted that Dr. Emami advised that appellant was not a candidate for surgery. He questioned the need for surgery given the "chronic degenerative changes in his spine."

On October 4, 2012 OWCP referred appellant to Dr. Jeffrey F. Lakin, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated November 8, 2012, Dr. Lakin discussed the history of injury and reviewed the medical reports of record. On examination he found a loss of sensation in the right L5 dermatome. Dr. Lakin noted that

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<sup>2</sup> A magnetic resonance imaging (MRI) scan study dated March 19, 2012 revealed status post L4-5 and L5-S1 laminectomy, a right paramedian herniation resulting in mild canal narrowing, a tiny herniation at L5-S1 and L1-2 and L2-3 and disc bulging at L3-4.

appellant had preexisting degenerative joint disease with surgery at L4-5 and L5-S1. He opined that the degenerative changes on MRI scan study resulted from his prior back surgeries and that the work injury “caused a temporary aggravation of his condition and no permanent aggravation of his condition. There is no need for surgery due to the work-related accident of March 11, 2012, which resulted in a fall.” Dr. Lakin provided work restrictions.

By decision dated December 3, 2012, OWCP denied appellant’s request for surgical authorization for a lumbar spinal fusion. It found that Dr. Lakin’s opinion represented the weight of the evidence and established that he did not require further surgery.

On December 29, 2012 appellant requested an oral hearing before an OWCP hearing representative. On January 7, 2013 his attorney requested a telephone hearing.

In a report dated January 10, 2013, Dr. Ruoff advised that appellant had back pain radiating into both lower extremities. He stated, “He is having more difficulty functioning at this point. I do feel that although he has a degenerative condition and prior condition in his back, that this was aggravated by the fall on his buttocks on March 11, 2012. I believe a decompression and fusion at the L4-L5 level with decompression at L3-L4 is clinically indicated.”

At the telephone hearing, held on April 18, 2013, appellant’s attorney contended that he sustained more than a back contusion at the time of his March 11, 2012 work injury.

By decision dated July 8, 2013, an OWCP hearing representative affirmed the December 3, 2012 decision denying authorization for lumbar surgery. She determined, however, that the case required further development regarding whether appellant sustained an aggravation of degenerative disc disease due to his work injury.

In a letter dated July 22, 2013, OWCP requested that Dr. Lakin address whether appellant sustained an employment-related aggravation of his preexisting lumbar degenerative condition and, if so, whether it was temporary or permanent and the date of any resolution of the condition.

On July 23, 2013 Dr. Lakin found that appellant sustained an aggravation of his preexisting lumbar disc disease when he fell on his back. He stated:

“Falling backwards caused an aggravation of the degenerative changes in the preexisting back condition. The clinical findings for this are that on physical examination he was able to forward flex fingertips to knees and straight leg raising test was negative. He just had some restriction in range of motion of the lumbar spine which was a temporary aggravation of a preexisting lumbar disc disease, and this aggravation was temporary, and had reverted back to baseline at the time of my independent medical evaluation on November 8, 2012.”

On September 4, 2013 OWCP accepted appellant’s claim for a temporary aggravation of degenerative disc disease that resolved as of November 8, 2012.

In a report dated September 10, 2013, Dr. Ruoff related that he had reviewed the November 8, 2012 report by Dr. Lakin and medical evidence of record. He described appellant’s work injury and history of prior back surgeries. Dr. Ruoff noted that, while appellant had a preexisting back injury, at the time of his March 11, 2012 injury, he experienced radiculopathy

into his legs. He stated, "It is my opinion within a reasonable degree of medical certainty that [appellant] had a preexisting lumbar condition. This condition was aggravated by the fall-down that occurred on March 11, 2012 causing persistent back pain and bilateral leg pain. It is my opinion that it was this fall-down that precipitated the need for a surgical intervention." Dr. Ruoff noted that appellant worked without restrictions before his fall on March 11, 2012 but only worked limited duty following the injury.

By letter dated September 23, 2013, appellant, through his attorney, requested reconsideration of the July 8 and September 4, 2013 decisions. He advised that Dr. Ruoff performed a fusion at L3-4 and L4-5 with decompression on July 1, 2013.

In a report dated October 25, 2013, Dr. Ruoff diagnosed foot drop on the right with L5 radiculopathy versus peroneal nerve and status post interbody fusion at L3-4 and L4-5. He found that appellant was permanently disabled.

By decision dated November 26, 2013, OWCP denied modification of its July 8 and September 4, 2013 decisions.

On appeal appellant's attorney argues that Dr. Ruoff's opinion supported that he required a fusion at L3-4 and L4-5 causally related to his accepted work injury. He maintains that Dr. Lakin failed to explain why the work injury did not permanently aggravate his condition and did not understand the mechanics of the injury, that appellant fell onto a wall on his back.

### **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. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>3</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>4</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>5</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>6</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>7</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

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<sup>3</sup> *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>4</sup> *Gewin C. Hawkins*, 52 ECAB 242 (2001).

<sup>5</sup> *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

<sup>6</sup> *Id.*

<sup>7</sup> 5 U.S.C. § 8123(a).

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>8</sup>

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

OWCP accepted that appellant sustained a back contusion and a temporary aggravation of degenerative disc disease. Based on the report of Dr. Lakin, the second opinion examiner, it found that the temporary aggravation of degenerative disc disease resolved no later than November 8, 2012. The Board finds, however, that a conflict in medical opinion exists between Dr. Lakin and Dr. Ruoff, appellant's attending physician, regarding whether the temporary aggravation of degenerative disc disease resolved.

On September 25, 2012 Dr. Ruoff diagnosed postlaminectomy syndrome, L3-4 stenosis, L4-5 spondylolisthesis, L5 radiculopathy and degenerative disc disease. He asserted that appellant had permanently aggravated his preexisting spondylolisthesis, spinal stenosis and degenerative disc disease as a result of the March 11, 2012 work injury. In a report dated January 10, 2013, Dr. Ruoff found that appellant was experiencing increased problems due to his back pain radiating into the lower extremities. He opined that his degenerative back condition was aggravated by his March 11, 2012 fall.

On November 8, 2012 Dr. Lakin found that appellant's March 11, 2012 work injury temporarily aggravated a preexisting condition. In a report dated July 23, 2013, he determined that the temporary aggravation had ceased by the time of his examination on November 8, 2012.

The Board finds a conflict in medical opinion between Dr. Lakin and Dr. Ruoff regarding whether appellant continued to have residuals of his temporary aggravation of degenerative disc disease.<sup>9</sup> Consequently, OWCP did not meet its burden to establish that the aggravated condition ceased by November 8, 2012.

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

Section 8103 of FECA<sup>10</sup> provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree of the period of disability or aid in lessening the amount of monthly compensation.<sup>11</sup> In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under section 8103, with the only limitation on its authority being that of reasonableness.<sup>12</sup> Abuse of discretion is generally shown through proof of manifest error,

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<sup>8</sup> 20 C.F.R. § 10.321.

<sup>9</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. 5 U.S.C. § 8123.

<sup>10</sup> 5 U.S.C. § 8101 *et seq.*

<sup>11</sup> 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

<sup>12</sup> *Joseph P. Hofmann*, 57 ECAB 456 (2006); *James R. Bell*, 52 ECAB 414 (2001).

clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>13</sup> In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.<sup>14</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>15</sup>

### ANALYSIS -- ISSUE 2

On September 25, 2012 Dr. Ruoff diagnosed postlaminectomy syndrome, L3-4 stenosis, L4-5 spondylolisthesis, L5 radiculopathy and degenerative disc disease. He opined that appellant aggravated his preexisting back condition on March 11, 2012 and requested authorization to perform a posterior decompression at L3-4 and L4-5 and fusion at L4-5. On January 10, 2013 Dr. Ruoff advised that he was having increasing problems functioning. He found that appellant had aggravated a degenerative condition on March 11, 2012 that a decompression at L3-4 and L4-5 and L4-5 fusion was “clinically indicated.”

On September 29, 2012 an OWCP medical adviser discussed appellant’s history of two nonwork-related laminectomies and noted that Dr. Emami, a prior attending physician, recommended against further back surgery. OWCP referred him to Dr. Lakin for a second opinion examination. On November 8, 2012 Dr. Lakin found that appellant’s March 11, 2012 temporarily aggravated a preexisting condition. He concluded that surgery was not warranted as a result of the accepted work injury. In a supplemental report dated July 23, 2013, Dr. Lakin asserted that appellant’s fall aggravated his back condition but that the aggravation had resolved by the time of his November 8, 2012 evaluation.

On September 10, 2013 Dr. Ruoff reviewed Dr. Lakin’s report and related that following his March 11, 2012 injury appellant experienced back pain and new symptoms of radiculopathy into his lower extremities. He found that even after conservative care appellant had symptoms and that it was “these symptoms that led to the need for him to undergo surgery on July 1, 2013 consisting of a fusion at the L3-4 and the L4-5 levels with decompression of his nerve root.” Dr. Ruoff advised that appellant’s March 11, 2012 injury “precipitated the need for a surgical intervention.”

The Board finds a conflict in medical opinion between Dr. Ruoff, appellant’s attending physician, who found that appellant required surgery due to his March 11, 2012 work injury, and Dr. Lakin, an OWCP referral physician, who found that he did not require surgery. On remand, OWCP should refer appellant to an appropriate specialist for an impartial medical evaluation. After such further development as it deems necessary, it should issue a *de novo* decision regarding appellant’s request for authorization for surgery.

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<sup>13</sup> *Claudia L. Yantis*, 48 ECAB 495 (1997).

<sup>14</sup> *Cathy B. Mullin*, 51 ECAB 331 (2000).

<sup>15</sup> 5 U.S.C. § 8123(a).

**CONCLUSION**

The Board finds that OWCP improperly found that appellant had no further residuals of his accepted condition of a temporary aggravation of lumbar degenerative disc disease after November 8, 2012. The Board further finds that the case is not in posture for decision regarding whether OWCP properly denied his request for authorization for surgery on his lumbar spine.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 26, 2013 decision of the Office of Workers' Compensation Programs is reversed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 23, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

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

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