



On appeal, counsel contends that OWCP's July 17, 2013 merit decision was contrary to fact and law.

### **FACTUAL HISTORY**

OWCP accepted that on January 25, 2008 appellant, then a 30-year-old boatswain mate, sustained a traumatic lumbar sprain due to carrying a large cabinet.<sup>2</sup> He briefly returned to work on April 1, 2008, stopped work and did not return. Appellant received compensation on the supplemental rolls beginning on April 27, 2008 and on the periodic rolls beginning on June 22, 2008. His position description noted that his job required "a great amount of physical effort."

Appellant was first followed by Dr. Kathy Y. Chang, an employing establishment physician specializing in occupational medicine. In reports from January 25 to February 4, 2008, Dr. Chang diagnosed a lumbar strain without radiculopathy. Appellant then sought treatment from Dr. Thaddeus J. Tuten, an attending Board-certified internist. In reports from February 15, 2008 to August 13, 2009, Dr. Tuten diagnosed lumbago due to the January 25, 2008 lifting incident. He released appellant to light duty as of February 15, 2008 then held him off work from March 21, 2008 onward as his symptoms did not improve.<sup>3</sup>

Dr. M. Kathleen Wiley, an attending Board-certified internist, noted a completely normal examination on March 31, 2010. She attributed appellant's back pain to depression.<sup>4</sup> In August 23 and October 5, 2010 reports, Dr. Cary E. Fechter, an attending Board-certified internist and pulmonologist, diagnosed secondary depression due to chronic lumbar pain.

On December 2, 2010 OWCP referred appellant, the medical record and a statement of accepted facts to Dr. Dowse D. Rustin, a Board-certified orthopedic surgeon, for a second opinion. Dr. Rustin submitted a December 21, 2010 report reviewing the medical record and a statement of accepted facts. On examination, he observed no sensory or motor abnormalities of the lumbar spine and both lower extremities. To determine if appellant's symptoms were psychogenic, Dr. Rustin ordered a functional capacity evaluation and a Minnesota Multiphasic Personality Inventory. A January 25, 2011 functional capacity evaluation and February 7, 2011 psychological testing were found invalid due to poor effort and symptom exaggeration. Dr. Rustin reviewed the test reports on February 14, 2011 and opined that appellant's limitations were "more psychological and emotional rather than physical" as he had no objective findings of an orthopedic lumbar condition.

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<sup>2</sup> On January 14, 2011 appellant filed an occupational disease claim (Form CA-2) for the previously accepted January 25, 2008 lumbar sprain. On January 14, 2011 he claimed a schedule award. In a February 7, 2011 letter, OWCP advised appellant that until he submitted his physician's statement documenting maximum medical improvement and offering an impairment rating, no further action would be taken on his schedule award claim.

<sup>3</sup> Dr. Tuten obtained a March 17, 2008 lumbar magnetic resonance imaging (MRI) scan that revealed a right-sided posterior disc bulge at L5-S1 and a July 31, 2008 lumbar computerized tomography study demonstrating L4-5 and L5-S1 posterior disc bulges.

<sup>4</sup> A July 6, 2010 lumbar MRI scan showed mild facet arthropathy from L1 to L5 and a possible annular tear centrally at L5-S1.

By notice dated March 8, 2011 and finalized April 5, 2011, OWCP suspended appellant's compensation effective April 10, 2011 finding that he failed to cooperate with directed testing. In June 22 and 25, 2011 letters, appellant agreed to cooperate.<sup>5</sup> OWCP reinstated his compensation benefits.

On October 5, 2011 OWCP referred appellant for repeat testing. An October 20, 2011 functional capacity evaluation demonstrated that he could perform full-time work at the medium physical demand level. The results were considered valid. October 25, 2011 psychological tests indicated moderate to severe depression. Dr. Rustin submitted a November 1, 2011 report reviewing the test results. On examination, he found appellant's condition unchanged, with no lumbar nerve root involvement. Dr. Rustin diagnosed a chronic lumbosacral strain without evidence of disc herniation. He opined that appellant could perform full-time medium-duty work.<sup>6</sup>

By notice dated August 14, 2012, OWCP advised appellant that it proposed to terminate his compensation benefits because the accepted lumbar sprain had ceased without residuals, based on Dr. Rustin's opinion. Appellant responded by September 7, 2012 letter, asserting that he continued to be totally disabled for work. He submitted a September 7, 2012 report from Dr. Fechter, diagnosing an annular tear, depression and chronic asthma attributable to the January 25, 2008 lumbar sprain. Dr. Fechter opined that appellant's depression was caused by chronic back pain due to the lumbar sprain.<sup>7</sup>

By decision dated September 17, 2012, OWCP terminated appellant's wage-loss and medical benefits, effective September 23, 2012, based on Dr. Rustin's opinion as the weight of the medical evidence.<sup>8</sup>

In a December 18, 2012 letter, counsel requested reconsideration. He submitted an October 19, 2012 report from Dr. Byron N. Bailey, an attending Board-certified neurosurgeon, who noted that a September 26, 2012 lumbar MRI scan showed significant changes at L5-S1 possibly requiring surgical decompression and fusion.<sup>9</sup> Dr. Bailey diagnosed lumbar pain.

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<sup>5</sup> Appellant filed an appeal with the Board on May 2, 2011, docketed as No. 11-1281. At his request, the Board issued an Order Dismissing Appeal on September 14, 2011.

<sup>6</sup> Based on Dr. Rustin's opinion that appellant could perform full-time medium-duty work, OWCP referred appellant for vocational rehabilitation on January 19, 2012. April 16, 2012 vocational testing performed by Dr. L. Randolph Waid, a licensed clinical psychologist, noted that appellant's job search would be hampered by depression and inappropriate focus on physical symptoms. OWCP closed the vocational effort in September 2012.

<sup>7</sup> Appellant also provided an August 23, 2012 report from Dr. Rustin, who noted that appellant paid for the visit using his insurance. Dr. Rustin stated that he spoke with appellant and encouraged him to cooperate with OWCP, but did not examine or evaluate him.

<sup>8</sup> In a September 21, 2012 letter, counsel requested a telephonic hearing. He withdrew the request on December 19, 2012.

<sup>9</sup> A September 26, 2012 lumbar MRI scan showed a transitional lumbar vertebra considered as S1, with a rudimentary disc at S1-S2, minimal disc bulge at L2-3, mild facet arthrosis at L4-5 and a mild disc bulge with facet arthrosis at L5-S1 with moderate bilateral foraminal stenosis. Lumbar x-rays showed slight upper lumbar scoliosis.

By decision dated February 1, 2013, OWCP denied modification on the grounds that the additional medical evidence was insufficient to establish that appellant continued to have residuals of the accepted lumbar sprain on and after September 17, 2012.

In a June 18, 2013 letter, counsel requested reconsideration, asserting that the medical evidence was sufficient to establish continuing disability for work due to the accepted lumbar sprain. He provided a September 25, 2012 report from Dr. Bailey, who diagnosed lumbar pain and ordering the September 26, 2012 MRI scan. Dr. Bailey noted no “palpable abnormality, no paraspinal tenderness” on examination, with bilaterally positive Patrick’s and Lasegue’s signs. In December 6, 2012 and January 18, 2013 reports, he noted continued lumbar symptoms, which he attributed to the January 25, 2008 lumbar sprain, noting that appellant remained totally disabled. In a February 10, 2013 report, Dr. Bailey diagnosed lumbar pain with unchanged symptoms. In a May 31, 2013 letter, he stated that “the changes in [appellant’s] lumbar spine [were] directly a result of his on[-]the[-]job injury in 2008.”

By decision dated July 17, 2013, OWCP denied modification, finding that the additional evidence did not change the weight of the medical opinion. It found that Dr. Bailey’s additional reports were insufficient to outweigh Dr. Rustin’s opinion that the accepted lumbar sprain had ceased without residuals.

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

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>10</sup> Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>11</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>12</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>13</sup>

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

OWCP accepted that appellant sustained a lumbar sprain on January 25, 2008. In support of his continuing disability, appellant submitted reports from several attending physicians. Dr. Chang, specializing in occupational medicine, diagnosed a lumbar strain without radiculopathy on January 25, 2008. Dr. Tuten, a Board-certified internist, found appellant totally disabled for work from March 21, 2008 onward due to lumbago. Appellant received

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<sup>10</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

<sup>11</sup> *Id.*

<sup>12</sup> *Roger G. Payne*, 55 ECAB 535 (2004).

<sup>13</sup> *Pamela K. Guesford*, 53 ECAB 726 (2002).

compensation for total disability beginning on April 27, 2008. In reports from March 31 to October 5, 2010, Board-certified internists, Dr. Wiley and Dr. Fechter attributed appellant's back pain to depression.<sup>14</sup> Dr. Fechter opined on September 7, 2012 that appellant's back pain was due to an annular tear, but did not explain how and why the tear was related to the accepted injury.

As appellant's physicians no longer attributed his continuing disability to the accepted injury, OWCP obtained a second opinion from Dr. Rustin, a Board-certified orthopedic surgeon, who provided December 21, 2010 and November 1, 2011 reports, based on the complete medical record, a statement of accepted facts, a functional capacity evaluation and psychological test results. Dr. Rustin explained that appellant had no objective abnormality of the lumbar spine on examination. He attributed appellant's subjective symptoms to a functional overlay as the accepted lumbar sprain had resolved completely. OWCP terminated appellant's compensation and medical benefits effective September 17, 2012 based on Dr. Rustin's opinion.

The Board finds that OWCP properly accorded Dr. Rustin's opinion the weight of the medical evidence. Dr. Rustin's reports were based on a complete and accurate medical history as well as thorough clinical examinations and relevant test results. He provided a reasoned opinion explaining that appellant no longer had any residuals of the accepted lumbar sprain and attributing his subjective symptoms to psychological causes. The Board has held that medical reports based on a complete, accurate history and fortified by medical rationale are entitled to significant probative value.<sup>15</sup> Therefore, OWCP's September 17, 2012 decision terminating appellant's medical and wage-loss compensation benefits effective September 23, 2012 was proper under the law and facts of this case.

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

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits.<sup>16</sup> For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.<sup>17</sup> The fact that a condition's etiology is unknown or obscure neither relieves appellant of the burden of establishing a causal relationship by the weight of the medical evidence nor shifts the burden of proof of OWCP to disprove an employment relationship.<sup>18</sup>

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<sup>14</sup> The Board notes that appellant did not claim that he sustained depression due to the accepted injury and that OWCP did not accept an emotional condition.

<sup>15</sup> *Deborah L. Beatty*, 54 ECAB 340 (2003).

<sup>16</sup> *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *see also Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

<sup>17</sup> *Alice J. Tysinger*, 51 ECAB 638 (2000).

<sup>18</sup> *Judith J. Montage*, 48 ECAB 292, 294-95 (1997).

## ANALYSIS -- ISSUE 2

OWCP accepted that appellant sustained a lumbar sprain. On September 17, 2012 it terminated his wage-loss and medical compensation benefits effective September 23, 2012 on the grounds that the accepted lumbar sprain ceased without residuals or work limitations. The burden now shifts to appellant to demonstrate that he continued to be disabled for work on and after September 23, 2012 due to the accepted injury.<sup>19</sup>

Pursuant to his June 18, 2013 request for reconsideration, appellant submitted reports from Dr. Bailey, an attending Board-certified neurosurgeon. In reports from September 15, 2012 to February 10, 2013, Dr. Bailey diagnosed unchanged lumbar pain, which he related to the January 25, 2008 lumbar sprain. In a May 31, 2013 letter, he opined that unspecified changes in appellant's lumbar spine were caused directly by the January 25, 2008 lumbar sprain. Dr. Bailey did not set forth his reasoning supporting that particular lumbar pathologies were caused by the accepted injury. In the absence of such medical rationale, his opinion is insufficient to create a conflict with Dr. Rustin's well-reasoned reports.<sup>20</sup> The Board therefore finds that OWCP's July 17, 2013 decision denying modification of the termination decision was proper under the law and facts of the case.

On appeal, counsel asserts that OWCP's July 17, 2013 decision is "contrary to fact and law." As stated, OWCP properly denied modification as Dr. Bailey's opinion was insufficient to create a conflict of opinion with Dr. Rustin's reports.

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(a) and 20 C.F.R. §§ 10.605 through 10.607.

## CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss and medical compensation benefits effective September 23, 2012. The Board further finds that he did not establish continuing work-related disability on and after September 23, 2012.

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<sup>19</sup> *Virginia Davis-Banks, supra* note 16.

<sup>20</sup> *Deborah L. Beatty, supra* note 15.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 17, 2013 is affirmed.

Issued: May 16, 2014  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

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

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