



permanent aggravation of right hip arthritis, permanent aggravation of degenerative disc disease of the low back and spinal stenosis at the L3-4, L4-5 and L5-S1 levels.<sup>2</sup>

In an October 15, 2009 report, Dr. Kenneth Botwin, an attending Board-certified internist, stated that appellant was totally and permanently disabled due to several work-related conditions, including spinal stenosis of the lumbar region, lumbosacral radiculitis and degenerative joint disease of the lumbar region.

In a report dated November 20, 2009, Dr. Narinder Aujla, a Board-certified orthopedic surgeon serving as an OWCP referral physician, found that appellant's work-related conditions had resolved. He advised that appellant could only perform limited-duty work, but that his work restrictions were due to nonwork-related conditions.

In February 2010 OWCP determined that there was a conflict in medical opinion between Dr. Botwin and Dr. Aujla on the issue of whether appellant had residuals of his April 18, 2005 work injury. In order to resolve the conflict, it referred appellant, pursuant to section 8123(a) of FECA, to Dr. Emmanuel Scarlatos, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

In a March 31, 2010 report, Dr. Scarlatos discussed appellant's work and medical histories and reported findings on physical examination of appellant. He diagnosed degenerative disc disease with grade 1 spondylolisthesis of L4 on L5 and L5 on S1; degenerative arthrosis of the hips -- rule out focal avascular necrosis of the femoral heads; acquired bilateral foraminal stenosis at L4-5 and L5-S1; and resolved capsuloligamentous sprain of the right knee. Dr. Scarlatos opined that appellant's low back and right buttock symptoms were due to his preexisting degenerative changes and stated, "There is no evidence to suggest that there has been an aggravation of this pathology...." Dr. Scarlatos noted that appellant was capable of engaging in some form of light or modified duties and stated that any work restrictions were "predicated upon the preexisting degenerative changes noted in the lumbar spine as well as the hips." Appellant could not, however, return to his regular work for the employing establishment.

In a May 19, 2010 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective June 6, 2010. It found the March 31, 2010 report of Dr. Scarlatos established that appellant had no residuals of his April 18, 2005 work injury. In a December 17, 2010 decision, an OWCP hearing representative affirmed the May 19, 2010 decision.

In a decision dated October 19, 2011,<sup>3</sup> the Board reversed the December 17, 2010 decision. The Board found that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 6, 2010. The Board found that the March 31, 2010 report of Dr. Scarlatos was not sufficiently rationalized to constitute the weight of the medical evidence with respect to appellant's continuing work-related residuals. Dr. Scarlatos failed to address the fact that appellant's claim was accepted for permanent aggravation of right hip arthritis and permanent aggravation of degenerative disc disease of the

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<sup>2</sup> Appellant's employment injuries were attributed to lifting a stack of plastic bins on April 18, 2005 and an incident on the same date when he twisted his trunk while tripping on a floor mat.

<sup>3</sup> Docket No. 11-735 (issued October 19, 2011).

low back. The Board noted that Dr. Scarlatos' opinion was of limited probative value regarding appellant's work-related residuals because it was not based on a complete and accurate factual and medical history. Dr. Scarlatos also failed to address whether all of appellant's accepted work-related conditions had resolved; or whether appellant had disability or the need for medical care due to the work-related spinal stenosis. He stated that appellant continued to have symptoms in his right hip, but he did not provide any specific discussion of whether the accepted right hip bursitis had resolved.

In a February 27, 2012 report, Dr. Botwin addressed the results of appellant's diagnostic testing and reported findings on physical examination. He diagnosed spinal stenosis of the lumbar region, degeneration of lumbar and cervical discs, thoracic/lumbosacral neuritis or radiculitis, lumbar myofascial pain, joint hip pain, gait disturbance and sacroiliitis. Dr. Botwin stated that appellant was totally disabled on a permanent basis. On June 6, 2012 he diagnosed the same conditions and noted each of these conditions, except for sacroiliitis, were related to appellant's April 18, 2005 work injury. Dr. Botwin reiterated that appellant was totally disabled.

On July 30, 2012 OWCP referred appellant to Dr. Jonathan Black, a Board-certified orthopedic surgeon, for a second opinion examination in order to evaluate whether appellant continued to have wage loss and the need for medical treatment due to his April 18, 2005 work injury.

In a September 19, 2012 report, Dr. Black discussed appellant's April 18, 2005 work injury and reported the findings of his physical examination of appellant. He noted that appellant's right knee contusion had resolved and stated that the physical examination did not confirm evidence of an active lumbar radiculopathy. Dr. Black stated that there was no evidence on physical examination of ongoing bursitis in appellant's right hip and that diagnostic testing did not show the existence of significant hip arthritis. He noted that appellant primarily complained of low back pain and right hip pain, but opined that these complaints were related to age-related degenerative findings and deconditioning rather than the April 18, 2005 work injury. Dr. Black stated that appellant's work-related injuries had resolved. He did not believe that appellant was capable of performing his date-of-injury position as a transportation security screener, but noted that the work restrictions he was imposing were based on age-related findings and not on the work-related injury. In an attached September 19, 2012 work restrictions form, Dr. Black stated that appellant could work eight hours per day with restrictions of lifting 30 pounds for three hours per day.

OWCP determined that a conflict in medical opinion arose between Dr. Botwin and Dr. Black regarding whether appellant continued to have residuals of his April 18, 2005 employment injury. In order to resolve the conflict, it referred appellant, pursuant to section 8123(a) of FECA, to Dr. Robert B. McShane, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an April 29, 2013 report, Dr. McShane discussed the mechanism of appellant's April 18, 2005 work injury and detailed the diagnostic testing of his hips and back. He noted that appellant presently complained of right hip pain and low back pain with occasional radiation into both legs. A magnetic resonance imaging (MRI) scan testing of appellant's back from February 2012 showed mild central and right neuroforaminal stenosis at L3-4, moderate central and bilateral neuroforaminal stenosis at L4-5, grade 1 spondylolisthesis at L4-5, moderate central

and bilateral foraminal stenosis at L5-S1 and grade 1 spondylolisthesis at L5-S1. On examination of his back, appellant voluntarily flexed to 30 degrees, extended to 30 degrees and bent to his sides to 20 degrees. He displayed no spasms in his lumbar musculature and there was normal sensation in both legs. Appellant's right hip internal rotation was normal, but external rotation was limited at 50 degrees. Dr. McShane noted that appellant complained of some mild right groin pain and that he was minimally tender to deep palpation over the greater trochanteric bursa. Appellant had some mild tenderness in the right sciatic notch, but not the left sciatic notch. Dr. McShane felt that appellant's complaints of low back and hip pain were age related and were unrelated to the episodes that occurred on April 18, 2005. He found that appellant was not capable of performing his date-of-injury position as a transportation security screener. This disability was not due to the April 18, 2005 work injury, but rather was due to appellant being eight years older, somewhat overweight and deconditioned, and not having worked in the last eight years. Dr. McShane stated that appellant was capable of working a light-duty position as described in an attached work restrictions form.<sup>4</sup> He further stated:

“It is my opinion that [appellant] has sustained a temporary aggravation of preexisting lumbar spondylolysis and degenerative arthritis of his right hip. His temporary right knee contusion has resolved completely. [Appellant] degenerative lumbar spondylolysis and mild degenerative arthritis of the right hip both preexisted the April 18, 2005 work injury. I do not find any evidence that the patient currently has any severe hip arthritis or any [avascular necrosis (AVN)] based on his February 2012 MRI [scan] of the pelvis. I feel that the patient's temporary aggravation of these preexisting conditions has resolved at this point. The patient's description of his injuries would suggest a minor twisting injury to his back, and a minor twisting injury to his right leg. Diagnostic studies in the form of x-rays and MRI [scan] very shortly after his injuries suggested significant degenerative changes in his low back, which would certainly be preexisting. Mild arthritis of the hip in a 55-year-old would not be unusual, and the patient's follow[-]up MRI scan of the pelvis failed to show any evidence of any AVN or significant degenerative changes.”

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“The patient's aggravation to his preexisting degenerative changes is temporary. I would opine that the aggravation ceased one year status post his injuries. He does not have any permanent residuals from his April 18, 2005 injuries.”

In a June 7, 2013 letter, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits on the grounds that he ceased to have residuals of his April 18, 2005 work injury. It noted that the proposed termination action was supported by the April 29, 2013 report of Dr. McShane, the impartial medical specialist. Appellant was provided with 30 days from the date of the letter to submit evidence and argument challenging OWCP's proposed action.

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<sup>4</sup> In an April 29, 2013 work restrictions form, Dr. McShane indicated that appellant could work eight days with restrictions of lifting, pushing and pulling 40 pounds and squatting or climbing for two hours per day. Appellant could perform each of the following activities for four hour per day: sitting, walking, standing, twisting, bending, stopping, operating a motor vehicle, lifting, pushing and pulling.

Appellant submitted an April 3, 2013 pharmacy form, but he did not submit any additional medical evidence in response to OWCP's June 7, 2013 letter.

By decision dated July 18, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits effective July 28, 2013 on the grounds that he had no residuals of his April 18, 2005 work injury after that date. It founds that the weight of the medical evidence rested with the well-rationalized opinion of Dr. McShane.

Appellant requested a telephone hearing with an OWCP hearing representative. During the hearing held on December 23, 2013, counsel asserted that the April 29, 2013 opinion of Dr. McShane was defective since he failed to recognize that OWCP had accepted that appellant sustained permanent aggravation of his right hip arthritis, permanent aggravation of his degenerative disc disease and spinal stenosis at L3-4, L4-5 and L5-S1. Counsel stated that Dr. Botwin provided new medical reports which showed that appellant continued to have residuals of his April 18, 2005 work injury.

In a March 14, 2014 decision, OWCP's hearing representative affirmed OWCP's July 18, 2013 termination decision noting that the weight of the medical evidence continued to rest with the opinion of Dr. McShane. The hearing representative indicated that Dr. McShane provided medical rationale for his opinion that appellant's work-related conditions had resolved. OWCP's hearing representative stated:

“Although the claimant's representative has indicated the impartial medical evaluator did not accept or recognize the accepted employment injuries, it is the opinion of this reviewer that although he only accepted such as [sic] temporary aggravation of degenerative disc disease and spinal stenosis at L3-L4 and L5-S1 (rather than permanent), he has clearly and with rationale indicated the employment injuries to have resolved.”

### **LEGAL PRECEDENT**

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>5</sup> OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>6</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</sup>

Section 8123(a) of FECA provides in pertinent part: “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>8</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is

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<sup>5</sup> *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>6</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

<sup>7</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>8</sup> 5 U.S.C. § 8123(a).

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>9</sup>

### ANALYSIS

OWCP accepted that on April 18, 2005 appellant sustained lumbago, right knee contusion, right hip bursitis, lumbar radiculitis, permanent aggravation of right hip arthritis, permanent aggravation of degenerative disc disease of the low back and spinal stenosis at the L3-4, L4-5 and L5-S1 levels.

OWCP determined that there was a conflict in the medical opinion between Dr. Botwin, an attending Board-certified internist, and Dr. Black, a Board-certified orthopedic surgeon acting as an OWCP referral physician, on the issue of whether appellant continued to have residuals of his April 18, 2005 work injury. To resolve the conflict, OWCP properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. McShane, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.<sup>10</sup>

The Board finds that the April 29, 2013 report of Dr. McShane is not sufficiently rationalized to constitute the weight of the medical evidence regarding appellant's work-related residuals.<sup>11</sup>

In his April 29, 2013 report, Dr. McShane failed to acknowledge that appellant's claim was accepted for permanent aggravation of right hip arthritis and permanent aggravation of degenerative disc disease of the low back. He stated, "It is my opinion that [appellant] has sustained a temporary aggravation of preexisting lumbar spondylolysis and degenerative arthritis of his right hip." This omission calls into question the probative weight to be accorded Dr. McShane's opinion. Because his opinion is not based on a complete and accurate factual and medical history, it is of limited probative value on the relevant issue of this case.<sup>12</sup> Dr. McShane's opinion is of limited probative value for the further reason that he failed to indicate whether all of appellant's accepted work-related conditions had resolved. For example, he did not clearly indicate whether appellant no longer had disability or the need for medical care due to the accepted work-related spinal stenosis at L3-4, L4-5 and L5-S1. Appellant complained of pain radiating from his low back down into his legs and diagnostic testing showed foraminal encroachment at multiple lumbar disc levels, but Dr. McShane did not discuss whether the work-related condition of lumbar radiculitis had resolved. For these reasons, Dr. McShane did not provide a rationalized medical opinion showing that appellant ceased to have work-related residuals causing wage loss or the need for medical care due to his April 18, 2005 work injury. Given that there is an unresolved conflict in the medical opinion evidence regarding whether appellant continues to have wage loss and the need for medical treatment due to his April 18,

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<sup>9</sup> *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>10</sup> *See supra* note 8.

<sup>11</sup> *See supra* note 9.

<sup>12</sup> *See William Nimitz, Jr.*, 30 ECAB 567 (1979) (finding that a medical opinion must be based on a complete and accurate factual and medical history).

2005 work injury, OWCP did not meet its burden of proof to terminate his wage-loss compensation and medical benefits effective July 28, 2013.<sup>13</sup>

**CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective July 28, 2013 on the grounds that he had no residuals of his April 18, 2005 work injury after that date.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 14, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 22, 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

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<sup>13</sup> See *Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989) (finding that termination action was not supported when there was continuing conflict in medical opinion evidence regarding work-related residuals).