

**United States Department of Labor  
Employees' Compensation Appeals Board**

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A.G., Appellant )  
and ) Docket No. 14-1234  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: September 26, 2014  
Bellmawr, NJ, Employer )  
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)

*Appearances:*

*Jason S. Lomax, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 5, 2014 appellant, through her attorney, filed a timely appeal from a November 12, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP met its burden of proof to terminate appellant's compensation benefits on March 6, 2013.

**FACTUAL HISTORY**

On December 14, 2009 appellant, then a 51-year-old letter carrier, slipped and fell to the ground, injuring his low back. He filed a claim for benefits, which OWCP accepted for lumbar

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

strain. Appellant stopped work and received temporary total disability compensation from OWCP. He returned to full-time light duty with restrictions on March 16, 2010.

In an April 13, 2010 report, Dr. Marc J. Levine, a treating physician Board-certified in orthopedic surgery, stated that appellant continued to experience back pain with some radiation down his right leg. Appellant tried physical therapy but did not attain any lasting relief. He was not able to walk as much as he did in the past but was still working light duty. Dr. Levine advised that radiographic tests showed no evidence of significant instability at the L5-S1 level, though they did indicate that he had grade 1 to 2 L5-S1 spondylolisthesis. He recommended that appellant undergo a course of epidural steroid injections.

In order to determine appellant's residuals from his accepted condition, OWCP referred him for a second opinion examination to Dr. David Rubinfeld, Board-certified in orthopedic surgery. In an October 13, 2010 report, Dr. Rubinfeld reviewed the medical history and the statement of accepted facts and listed findings on examination. He opined that the objective findings on examination did not support any continuing disability from the accepted lumbar strain and that the accepted condition had resolved. Dr. Rubinfeld advised that appellant had degenerative disease and spondylolisthesis of the low back but these conditions were not causally related to the accepted condition. He found that appellant had no work restrictions stemming from the December 14, 2009 work injury and required no additional medical treatment or diagnostic tests for the accepted lumbosacral sprain condition.

In a report dated December 23, 2010, Dr. Levine advised that appellant continued to work light duty at the employing establishment with restrictions. He experienced an exacerbation of his lower back discomfort the previous day and was awaiting approval for back surgery. Dr. Levine reiterated that the diagnoses of L5 bilateral spondylolysis and grade 1 to 2 L5-S1 spondylolisthesis. He placed appellant off work until January 4, 2010 and prescribed medication for his back spasms.

On January 24, 2011 OWCP issued a notice of proposed termination of appellant's medical benefits and eligibility for receipt of disability compensation. It found that the weight of the medical evidence was represented by Dr. Rubinfeld's opinion and established that the accepted lumbar strain condition had resolved without any work-related residuals.

By decision dated March 2, 2011, OWCP terminated appellant's compensation.

On March 10, 2011 appellant, through his attorney, requested an oral hearing which was held on June 10, 2011.

In a May 20, 2011 report, Dr. Levine reviewed x-rays, a computerized axial tomography scan and a magnetic resonance imaging scan of the lumbar spine. He opined that appellant had an L5 bilateral spondylolysis with a grade 1 to 2 L5-S1 spondylolisthesis. Dr. Levine disagreed with Dr. Rubinfeld's opinion, stating that his December 23, 2010 report did not reveal a thorough understanding of appellant's medical condition. He asserted that Dr. Rubinfeld described an L5 bilateral spondylosis condition, which referred to a degenerative process and/or arthritic process of the spine. Dr. Levine stated that appellant actually had an L5 bilateral spondylolysis, a different pathology. He advised that a spondylolysis was a defect or abnormality in the pars

interarticularis and was responsible for appellant's grade 1 to 2 L5-S1 spondylolisthesis. Dr. Levine stated that this was the pathology that was causing appellant's current pain complex. He stated that this condition existed for many years prior to appellant's current injury but was asymptomatic until the December 14, 2009 work injury. Dr. Levine advised that Dr. Rubinfeld did not take into consideration the full extent of this condition in rendering his opinion, did not review all of appellant's diagnostic tests and incorrectly opined that this condition was not causally related to appellant's work injury. He stated:

“In summary, it is my belief with a reasonable degree of medical certainty and based upon the information that has been provided that [appellant] is having ongoing pain from an injury that he sustained at the workplace when he fell down steps while carrying mail. [Appellant's] diagnosis is that of an L5 bilateral spondylolysis and a grade 1 to 2 spondylolisthesis. While this pathology was present prior to his injury, it was asymptomatic and did not become symptomatic until he injured himself at the workplace. It is my belief that [appellant] has made every effort to utilize pain management and physical therapy techniques to alleviate his ongoing discomfort. If he chooses to proceed with surgical intervention, I do believe that this would be causally related to his workers' compensation injury.”

By decision dated September 7, 2011, an OWCP hearing representative set aside the March 2, 2011 termination decision. He found a conflict in medical opinion between Dr. Levine and Dr. Rubinfeld as to whether appellant had residuals of his accepted lumbar strain injury. The hearing representative remanded the case for referral to an impartial medical specialist to resolve the conflict.

OWCP referred appellant to Dr. Gregory S. Maslow, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated December 20, 2011, Dr. Maslow stated that appellant sustained a lumbar sprain in the presence of a preexistent lumbar spondylosis on December 14, 2009. While appellant continued to be symptomatic, his present symptom complex was causally related to the preexistent spondylosis. Dr. Maslow opined that, while appellant had no evidence of a neurologic deficit, but his back condition would not be cleared without surgical intervention. He concluded that appellant could perform full-time work, with lifting restrictions. On January 5, 2012 OWCP requested that Dr. Maslow clarify his report as to whether appellant's accepted lumbar sprain had resolved, his spondylosis was aggravated by the employment incident and whether appellant had any disability remaining due to the December 14, 2009 injury. On January 12, 2012 Dr. Maslow responded that appellant had a preexisting lumbar spondylolysis which was aggravated by the December 14, 2009 incident; however, the aggravation was temporary. He concluded that appellant's work restrictions were due the structural spinal abnormality that existed prior to December 14, 2009.

By decision dated March 7, 2012, OWCP terminated appellant's compensation benefits. It found that the report of Dr. Maslow, the impartial medical examiner, was well reasoned and established that appellant's accepted lumbar condition had ceased without disability causally related to the December 14, 2009 injury.

On March 12, 2012 appellant requested a hearing before an OWCP hearing representative.

By decision dated September 13, 2012, an OWCP hearing representative set aside the March 7, 2012 termination of appellant's compensation benefits, for referral to a new impartial medical specialist. He found that Dr. Maslow's report was not well rationalized or sufficient to establish that appellant's current condition was unrelated to the work injury and that there were no objective findings to support continuing disability.

OWCP referred appellant to Dr. Thomas J. O'Dowd, Board-certified in orthopedic surgery, for a referee medical examination. In a December 11, 2012 report, Dr. O'Dowd stated that appellant sustained a lumbar strain/sprain as noted by the statement of accepted facts which had long since resolved and also had a preexisting, chronic, underlying spinal defect which made him prone to recurrent episodes of back pain with little or no inciting causes. He stated that the condition of spondylolysis at L5 which resulted in a grade 1 to 2 spondylolisthesis was previously symptomatic and most likely the reason for appellant's continuing ongoing symptom complex. Dr. O'Dowd noted Dr. Levine's opinion that this was an exacerbation of his underlying problem, but stated that without studies showing a worsening of the problem or progression of the problem directly after the injury, it did not constitute an exacerbation of the accepted injury. He stated that it was difficult to blame appellant's ongoing symptoms to a single episode of trauma.

Dr. O'Dowd explained that appellant's lumbar strain/sprain and underlying spondylolisthesis were different conditions. The ongoing symptom complex was related to appellant's underlying spinal deformity, while the lumbar strain had long since resolved. This was especially true given that the patient had previous symptoms and previous trauma. With regards to his work-related lumbar strain/sprain, appellant was capable of returning to his previous employment, but his present right knee condition, together with his underlying spondylolisthesis, caused him to be out of work for the past year; the right knee problem was severe enough that he was being considered for a knee replacement and was the main reason appellant was currently not able to perform light-duty work. Dr. O'Dowd reiterated that, while the spondylolisthesis was persistently symptomatic, it was not caused by a single episode of trauma. He also had a residual symptom complex which was primarily due his underlying spondylolysis and spondylolisthesis at L5-S1, resulting in mechanical back pain which was not work related and not due to his December 2009 work injury. Dr. O'Dowd recommended surgery to ameliorate appellant's persistent discomfort and underlying, preexisting spinal deformity.

On February 4, 2013 OWCP issued a notice of proposed termination of compensation. It found that the weight of the medical evidence, as represented by Dr. O'Dowd's impartial opinion, established that his accepted lumbar strain condition had ceased and he had no work-related residuals from this condition.

By decision dated March 6, 2013, OWCP terminated appellant's medical benefits and eligibility for wage loss, finding that Dr. O'Dowd's impartial opinion represented the weight of the medical evidence.

On April 3, 2013 appellant, through his attorney, requested an oral hearing, which was held on August 13, 2013.

By decision dated November 12, 2013, an OWCP hearing representative affirmed the March 6, 2013 termination decision.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>2</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.<sup>3</sup>

Section 8123(a) provides that, if there is a 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>4</sup> It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>5</sup>

### **ANALYSIS**

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits.

In a December 11, 2012 report, Dr. O'Dowd found that appellant's December 14, 2009 lumbar strain had resolved. Appellant had a preexisting, chronic, underlying spinal defect which made him prone to recurrent episodes of back pain with little or no inciting causes; a spondylolysis at L5-S1 which resulted in a grade 1 to 2 spondylolisthesis. Dr. O'Dowd opined that, without studies showing a worsening or progression of the problem immediately following the injury, there was no exacerbation of appellant's preexisting lumbar condition by the accepted lumbar strain injury. He did not believe that the spondylolisthesis was related to a single episode of trauma; as the lumbar strain and the underlying spondylolisthesis were different conditions. Dr. O'Dowd's ongoing symptom complex was related to his underlying spinal deformity, while the lumbar strain had long since resolved. With regard to his work-related lumbar strain, appellant was capable of returning to his previous employment, but he was disabled due to a right knee condition and the underlying spondylolisthesis. OWCP relied on Dr. O'Dowd's

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<sup>2</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>3</sup> *I.J.*, 59 ECAB 408 (2008).

<sup>4</sup> *Regina T. Pellecchia*, 53 ECAB 155 (2001).

<sup>5</sup> *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

opinion in its March 6, 2013 decision, finding that appellant had no continuing disability or residuals causally related to his lumbar strain condition.

On appeal, counsel argues that Dr. O'Dowd's impartial medical report was insufficiently rationalized and does not merit the special weight of a referee medical examiner. He contends that Dr. O'Dowd was not provided with the proper legal framework to determine causation under FECA and failed to thoroughly analyze the factual and medical evidence within the proper legal context. Counsel asserts that appellant's December 2009 work injury aggravated his underlying spondylolysis and spondylolisthesis conditions and that Dr. O'Dowd should have found that these conditions were work related. He attributes appellant's continuing disability and residuals to the December 2009 employment injury. Counsel asserted that OWCP should have requested clarification from Dr. O'Dowd on this issue.

The Board finds that Dr. O'Dowd's impartial opinion negates the causal relationship between appellant's spondylolisthesis defeat and disability related to his employment. The medical evidence establishes that appellant no longer has any residuals from his accepted lumbar strain condition. The issue of causation must be based on the medical evidence of record. Dr. O'Dowd's opinion is sufficiently probative, rationalized and based upon a proper factual background. OWCP properly accorded his opinion the special weight of an impartial medical examiner.<sup>6</sup> The Board finds that Dr. O'Dowd's opinion constituted the weight of medical opinion and supports OWCP's March 6, 2013 decision to terminate appellant's compensation benefits.

The Board will affirm OWCP's hearing representative's November 12, 2013 decision.

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits.

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<sup>6</sup> *Gary R. Seiber*, 46 ECAB 215 (1994).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 2014  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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