



## **FACTUAL HISTORY**

On October 19, 2000 appellant, then a 38-year-old census office manager, filed a traumatic injury claim (Form CA-1) alleging that on September 20, 2000 he sustained a back injury in the performance of duty, when he was moving a soda machine in the staff break room. The reverse of the claim form indicated that appellant stopped work on September 22, 2000.

Appellant received treatment from Dr. Guy Vise, a Board-certified orthopedic surgeon. In a report dated October 24, 2000, Dr. Vise provided a history and results on examination. He noted that x-rays had been taken in September 2000 and films revealed normal disc spaces. Dr. Vise diagnosed acute lumbar strain. On January 10, 2001 OWCP accepted the claim for a lumbar strain. Appellant remained off work and received compensation benefits.

OWCP referred appellant for a second opinion examination by Dr. Wallace Weatherly, a Board-certified orthopedic surgeon to determine his ability to return to work. In a report dated June 3, 2002, Dr. Weatherly provided a history and results on examination. He diagnosed subjective complaints of lumbar pain with minimal objective findings. Dr. Weatherly stated that appellant's condition had probably resolved.

Following proper notices, by decision dated July 26, 2002, OWCP terminated appellant's compensation. After a request for hearing, in a decision dated December 5, 2002, an OWCP hearing representative affirmed the termination of compensation. Appellant requested reconsideration by letter dated May 31, 2003 and submitted a January 9, 2003 report from Dr. Harold J. Wheeler, Board-certified in internal medicine.

OWCP again referred appellant for a second opinion examination. In a report dated October 7, 2003, Dr. Neal Capel, a Board-certified orthopedic surgeon, provided a history and results on examination. He stated that the lumbosacral strain was now chronic, and a July 29, 2002 magnetic resonance imaging (MRI) scan showed a L5-S1 herniated disc. Dr. Capel opined that the herniated disc was causally related to the employment injury.

By decision dated April 6, 2004, OWCP vacated the December 5, 2002 OWCP decision. It accepted an L5-S1 herniated disc and appellant's wage-loss compensation was retroactively restored to the prior date of termination.

Appellant continued treatment with Dr. Wheeler. Multiple form reports were submitted to the record during 2006 and 2007 from Dr. Wheeler in which he indicated that appellant was unable to return to work due to his back condition.

On December 14, 2007 OWCP referred appellant for another second opinion examination to determine the extent of appellant's employment-related disability. In a report dated January 23, 2008, Dr. Fred Sandifer, a Board-certified orthopedic surgeon, provided a history and results on examination. He opined that appellant's employment-related condition had not resolved. Dr. Sandifer stated that the work-related condition had "eventuated in a degenerative disc disease of L5-S1 with collapse of the disc."

Appellant underwent a functional capacity evaluation on April 9, 2009. OWCP referred him for a second opinion examination by Dr. Daneca DiPaolo, a Board-certified orthopedic surgeon. In a report dated April 29, 2009, Dr. DiPaolo provided a history and results on

examination. He stated that appellant needed more recent diagnostic tests of the lumbar spine, including an MRI scan and electromyogram (EMG). The record indicates that appellant underwent an MRI scan on May 28, 2009, and an EMG/nerve conduction study was performed on June 17, 2009.

In addition, appellant underwent a lumbar MRI scan on August 12, 2010. In a report of that date, Dr. Dean Tanner, a radiologist, diagnosed spondylolisthesis and associated central canal stenosis. He stated no significant focal disc herniation was seen. In an MRI scan report dated May 23, 2012, Dr. Tanner diagnosed a L5-S1 grade 2 spondylolisthesis with moderate central canal and bilateral foraminal stenosis. He stated the overall appearance of the degenerative changes were unchanged from the previous study.

OWCP referred appellant to Dr. James Galyon, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated March 28, 2013, Dr. Galyon provided a history and results on examination. He diagnosed moderate spondylolisthesis aggravated by an injury in September 2000. Dr. Galyon further stated:

“I do not believe that [appellant] has a herniated nucleus pulposus. There is one MRI [scan] report that says that there may be a small herniated nucleus pulposus but I do not believe so with my physical examination. I do believe that [appellant] has a spondylolisthesis which is not caused by work. I do believe that he had an aggravation of his spondylolisthesis in 2000. It is unlikely that is the persistent cause of [appellant’s] back pain. I believe that his back pain was due to a congenital spondylolisthesis which is demonstrated on multiple studies and morbid obesity which is obvious to any examiner and the patient admits to current weight of between 368 [to] 390 pounds. I do believe that the lumbar sprain has resolved.”

By letter dated May 31, 2013, OWCP advised appellant that it proposed to terminate his compensation for wage-loss and medical benefits based on the medical evidence. Appellant was advised to submit evidence or argument within 30 days if he disagreed with the proposed action.

In a decision dated July 15, 2013, OWCP terminated compensation for wage-loss and medical benefits. It found Dr. Galyon represented the weight of the medical evidence.

Appellant requested a hearing before an OWCP hearing representative.

On December 27, 2013 OWCP received a June 13, 2013 MRI scan report from Dr. Mary Moss, a radiologist, diagnosing spondylolisthesis L5-S1 with degenerative disease and right paracentral disc protrusion.

Appellant also submitted a February 18, 2014 report from Dr. Wheeler, who stated that appellant continued to be totally disabled, and in view of his excessive weight it was unlikely he could be gainfully employed. According to Dr. Wheeler, appellant’s employment injury had contributed to a fall on October 30, 2008, and this resulted in a torn right rotator cuff, right hip edema, and aggravated degenerative joint disease. He stated that appellant did have a herniated disc, referring to diagnostic studies from 2002 and 2009, and a June 13, 2013 MRI scan. Dr. Wheeler stated that Dr. Galyon seemed to say that appellant was disabled due to his weight, without considering whether weight gain was a consequential injury. As to appellant’s weight,

Dr. Wheeler stated that appellant was obese prior to the employment incident, but it did not keep appellant from working. According to Dr. Wheeler, Dr. Galyon failed to take into account appellant's right shoulder and right hip conditions and failed to consider whether these conditions were consequential injuries.

By decision dated March 25, 2014, the hearing representative affirmed the July 15, 2013 decision. She found Dr. Galyon represented the weight of the medical evidence and Dr. Wheeler's report was not sufficiently rationalized to establish continuing disability.

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

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>3</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 require further medical treatment.<sup>4</sup>

The Board has noted that in assessing medical evidence the weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The factors which enter in such an evaluation include the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested, and the medical rationale expressed in support of the physician's opinion.<sup>5</sup>

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

In the present case, OWCP terminated compensation for wage-loss and medical benefits as of July 15, 2013. It found that the weight of the medical evidence was represented by Dr. Galyon, the second opinion physician, in his March 28, 2013 report.

Dr. Galyon opined that appellant did not have a continuing employment-related condition. He found that there was no continuing herniated disc or lumbar strain, and any aggravation of spondylolisthesis had resolved. Dr. Galyon opined that appellant's current back condition was casually related to his underlying, congenital spondylolisthesis.

In this regard the Board notes that OWCP had accepted a lumbar strain and a herniated L5-S1 disc. Appellant argues that Dr. Galyon did not properly adhere to the SOAF and did not find a herniated disc as employment related, but he stated that appellant "has" no herniated disc at the time of examination, and the issue in a termination case is whether appellant has residuals of an employment-related condition. In this regard Dr. Galyon had noted the diagnostic studies, which included the most recent MRI scan studies at that time dated August 12, 2010 and

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<sup>3</sup> *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

<sup>4</sup> *Furman G. Peake*, 41 ECAB 361 (1990).

<sup>5</sup> *Gary R. Sieber*, 46 ECAB 215 (1994).

May 23, 2012. Neither of these reports diagnosed a disc herniation. The opinion that appellant did not have a continuing herniated disc was consistent with the medical evidence.

To the extent that Dr. Galyon deviated from the SOAF, it was to find that appellant had an additional employment-related condition. Dr. Galyon indicated that appellant had sustained an aggravation of underlying spondylolisthesis from the September 2000 injury. But again, the issue is whether appellant continued to have an employment-related condition or disability, at the time his compensation was terminated. Dr. Galyon explains that appellant's current condition was not an employment-related aggravation, but rather preexisting spondylolisthesis and obesity.

The Board finds that Dr. Galyon provided a medical opinion, supported by sound medical rationale, that appellant's accepted conditions of lumbar strain and L5-S1 herniated disc had resolved as of July 15, 2013.

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

After termination of compensation benefits clearly warranted on the basis of the evidence, the burden of reinstating compensation shifts to the claimant. To prevail, the claimant must establish by the weight of the reliable, probative, and substantial evidence that he had employment-related residuals or disability which continued after termination of compensation benefits.<sup>6</sup>

FECA 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 the 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, OWCP shall appoint a third physician to make an examination. This is called a referee or impartial examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.

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

The Board finds that there was an unresolved conflict in the medical evidence as to whether appellant continued to have an employment-related disabling condition after July 15, 2013. Dr. Galyon opined that appellant did not have a continuing employment-related condition. He found that there was no continuing herniated disc or lumbar strain, and any aggravation of spondylolisthesis had resolved. Dr. Galyon opined that appellant had an aggravation of his congenital spondylolisthesis due the accepted back injury, but that this aggravation had resolved and his current back condition was causally related to his underlying, congenital spondylolisthesis.

On the other hand, Dr. Wheeler, appellant's long time treating physician, opined in his February 18, 2014 report that appellant continued to have employment-related residuals and

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<sup>6</sup> See *R.J.*, 59 ECAB 695 (2005).

<sup>7</sup> 5 U.S.C. § 8123.

disability. He opined that appellant had sustained a consequential fall on October 30, 2008 resulting in a torn right rotator cuff, right hip edema, and aggravated degenerative joint disease. According to Dr. Wheeler, appellant's weight gain was also a consequential injury, and appellant's herniated disc had not resolved. The Board thus finds an unresolved conflict in the medical evidence as to whether appellant continued to have residuals or continuing disability causally related to the accepted employment injury, after the termination of benefits. This case must therefore be remanded to OWCP for preparation of a new statement of accepted facts and selection of an impartial medical examiner to resolve the conflict of medical evidence. After such further development as necessary, OWCP shall issue an appropriate decision.

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's compensation for wage-loss and medical benefits effective July 15, 2013. The Board also finds that a conflict exists in the medical evidence as to whether he had residuals or continuing disability after July 15, 2013, causally related to the accepted injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 25, 2014 is affirmed in part, and set aside and remanded in part.

Issued: August 20, 2015  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board