



## **FACTUAL HISTORY**

On December 20, 2011 appellant, then a 59-year-old nutritionist, filed a traumatic injury claim alleging that on November 30, 2011 she injured her lower back, both shoulders, right hand, and right knee when she collided with another employee while walking down the hall. OWCP accepted the claim for aggravation of lumbago, aggravation of left rotator cuff syndrome, aggravation of cervicgia, and other unspecified complications of medical care. Appellant worked full duty from December 1, 2011 to January 22, 2012 and used sick leave for intermittent periods of disability.

On February 16, 2012 appellant accepted a temporary modified job offer from the employing establishment working five hours per day retroactive to January 23, 2012. On March 28, 2012 she accepted another modified job offer from the employing establishment for her usual job duties working six hours per day retroactive to March 23, 2012.

In an August 29, 2012 report, Dr. Kennedy Yalamanchili, an examining Board-certified neurosurgeon, related that a medical history revealed lower back problems going back to 1990 following an automobile accident, surgical treatment in 2000, and spinal fusion and lumbar discectomy in October 2004. Appellant also related a history of lower back injuries due to motor vehicle accidents in 1998, 2001, 2002, and 2007, a 2010 fall, and the November 30, 2011 employment injury. A review of a magnetic resonance imaging (MRI) scan revealed L5-S1 postsurgical changes, L4-5 mild broad-based disc bulge with no nerve impingement or significant canal stenosis, and additional levels of mild degenerative changes.

On October 8, 2012 OWCP referred appellant for a second opinion evaluation with Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, to determine appellant's current status. On October 29, 2012 it rescheduled appellant's appointment with Dr. Smith. In a November 6, 2012 report, Dr. Smith noted that the claim had been accepted for aggravation of lumbago, cervicgia, and left rotator cuff syndrome. A physical examination revealed no atrophy, deformity, trigger points, or spasm in the spine and no atrophy or deformity in the shoulder. Dr. Smith reported that appellant's motion was limited due to prior fusions and she had satisfactory shoulder range of motion. He opined that appellant's accepted conditions had resolved as there were no objective findings supporting any ongoing aggravation. Dr. Smith also opined that appellant could return to her date-of-injury job as there were no work restrictions due to the November 30, 2011 employment injury.

In an October 31, 2012 report, Dr. Yalamanchili noted appellant's MRI scan revealed mild-to-moderate disc disease and recommended surgery. He stated that her "symptoms continue to remain severe."

On December 5, 2012 OWCP issued a notice proposing to terminate appellant's compensation benefits. It found that the weight of the evidence that her accepted conditions had resolved with no residuals resided with the opinion of Dr. Smith, a second opinion physician.

On December 14, 2012 appellant accepted and returned to her full-time date-of-injury job as a nutritionist.

In a January 3, 2013 report, Dr. James E. D'Amour, a treating Board-certified internist, stated that appellant continued to have low back pain problems and has had significant improvement in her shoulder pain and the exacerbation of her knee and ankle pain. He related that appellant has a medical history of lumbar disc disease and prior L5-S1 lumbar laminectomy "with subsequent lumbar arthrodesis at the same level in 2004." Dr. D'Amour stated that he had reviewed Dr. Smith's opinion and noted that Dr. Smith failed to include the fact that appellant "is unable to sit for more than [five] minutes without recurrence of severe low back pain." Dr. D'Amour reported significantly decreased lumbar range of motion, inability to flex forward without hand support, and 10 degrees of lateral bending. He related that Dr. Yalamanchili recommended further evaluation by Dr. Downing, a local pain management physician, who provided work restrictions. Dr. D'Amour noted that Dr. Downing attributed appellant's pain to a L4-5 annular disc tear. In concluding, he opined that it was "very highly probable" that appellant's pain and annular disc tear were due to the November 2011 incident.

On January 4, 2013 Dr. Yalamanchili noted that a computerized tomography scan demonstrated "vacuum changes involving the facet at L4-L5 level" and a discography revealed positive L4-5 findings. Surgery was recommended and the risks discussed. In concluding, Dr. Yalamanchili opined that the November 30, 2011 employment injury aggravated her symptoms as they worsened following the injury.

By decision dated January 7, 2013, OWCP finalized the termination of her compensation benefits effective that day.

By letter dated January 28, 2013, appellant's counsel requested a telephonic hearing before an OWCP hearing representative, which was held on May 13, 2013.

By decision dated July 24, 2013, OWCP hearing representative affirmed the termination of appellant's compensation benefits, relying upon the medical report and opinion of Dr. Smith.

On March 17, 2014 OWCP received a November 17, 2013 report by Dr. Yalamanchili who provided a medical history and noted that it was currently being debated whether her current condition was related to her employment injury. Dr. Yalamanchili noted that appellant has a history of lower back problems, surgeries, and that she had been symptom free until her employment injury. Physical examination findings were provided and diagnostic tests reviewed. Under assessment, Dr. Yalamanchili stated that appellant was seen for her persistent back pain and that her symptoms appear to be improving following her surgery. Appellant was released to return to work with restrictions.

By letter dated July 16, 2014, appellant's counsel requested reconsideration and submitted a July 9, 2014 report by Dr. Yalamanchili in support of the request.

Dr. Yalamanchili, in a July 9, 2014 report, noted medical and employment injury histories, noted diagnostic tests performed, and stated that the claim had been accepted for aggravation of lumbago, aggravation of left rotator cuff syndrome, and aggravation of cervicalgia. He disagreed with Dr. Smith's opinion as the report "lacks attention to the studies performed" as well as appellant's need for lower back treatment and additional testing. Dr. Yalamanchili noted that the objective data reveals disc disease and radiculopathy. A review

of a June 2012 MRI scan showed disc degeneration and L4-5 stenosis while a bone scan confirmed L4-5 changes, which were consistent with appellant's injury and symptoms. Dr. Yalamanchili diagnosed additional conditions including herniated lumbar disc, lumbar disc degeneration, lumbar instability, lumbar radiculopathy, lumbar spondylosis without myelopathy, and pseudoarthrosis based on recent objective testing.

By decision dated October 15, 2014, OWCP denied modification.<sup>2</sup>

### **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.<sup>3</sup> After it has determined that an employee has disability causally related to her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>4</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>6</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.<sup>7</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>8</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.<sup>9</sup>

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<sup>2</sup> The Board notes that, following the October 15, 2014 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

<sup>3</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>4</sup> *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>5</sup> *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>6</sup> *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

<sup>7</sup> *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

<sup>8</sup> 5 U.S.C. § 8123(a). *See S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

<sup>9</sup> *A.R.*, Docket No. 09-1566 (issued June 2, 2010); *M.S.*, 58 ECAB 328 (2007); *Bryan O. Crane*, 56 ECAB 713 (2005).

### ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to terminate appellant's medical benefits for the accepted employment injury as a conflict of medical opinion exists between the opinions of Dr. Smith, the second opinion physician, and Dr. D'Amour, appellant's treating physician, regarding whether further medical treatment was necessary for accepted employment injury. In a November 6, 2012 report, Dr. Smith reported that her examination revealed no shoulder atrophy or deformity and no spinal atrophy, deformity, trigger points or spasm. He concluded that appellant's accepted conditions had resolved and she would not require any additional treatment for her left shoulder or spine causally related to her employment injury. Additionally, Dr. Smith concluded that appellant was capable of performing her date-of-injury duties as there were no restrictions. In contrast, in a January 3, 2013 report, Dr. D'Amour noted that appellant continued to have low back pain problems as she was "unable to sit for more than [five] minutes without recurrence of severe low back pain." Upon examination, he observed that appellant had decreased lumbar range of motion, 10 degrees lateral bending and inability to flex forward with using her hands. Dr. D'Amour diagnosed an L4-5 annular tear which was "very highly probable" due to the employment incident occurring on November 30, 2011. Further, he opined that appellant needed further treatment for her injuries.

On appeal, counsel contends that OWCP erred in relying upon Dr. Smith's opinion as he failed to provide a rationalized opinion as it was not based on an accurate review of the record, history, and physical examination. Counsel also argues that there is an unresolved conflict in the medical opinion evidence between Dr. Smith and Dr. Yalamanchili's July 9, 2014 report.<sup>10</sup> The Board, however, finds a conflict of medical opinion exists between Dr. Smith and Dr. D'Amour as to whether appellant still suffered from her accepted conditions as a result of the November 30, 2011 employment injury and required further medical treatment. Thus, Dr. Smith's opinion alone is insufficient to establish that appellant's accepted aggravation of lumbago, aggravation of cervicgia, and aggravation of left rotator cuff syndrome had resolved and is insufficient to constitute the weight of the medical evidence. As the record contains an unresolved conflict in medical opinion, the Board consequently finds that OWCP has not met its burden of proof to terminate appellant's medical benefits for the accepted employment injury.<sup>11</sup>

### CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits. In light of the Board's disposition on the first issue, the second issue is moot.

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<sup>10</sup> The Board notes that Dr. Yalamanchili's report does not address an employment relationship and thus his report is not of equal weight to that of Dr. Smith's sufficient to create a conflict in medical opinion.

<sup>11</sup> See *G.S.*, Docket No. 09-1670 (issued May 19, 2010); *Lori E. Rayner-Brown*, Docket No. 02-375 (issued July 12, 2002).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 15, 2014 is reversed.

Issued: May 1, 2015  
Washington, DC

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

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

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