



## **FACTUAL HISTORY**

This case has been previously before the Board.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.

OWCP accepted that on March 12, 1990 appellant, then a 32-year-old sheet metal mechanic, sustained a lumbar contusion when he stumbled on uneven ground and fell against the corner of a steel plate that was protruding from a truck bed. Following a period of light duty, appellant stopped work on July 29, 1990 and did not return. He received wage-loss compensation on the daily and periodic compensation rolls. Appellant remained under medical care.

On June 7, 1993 OWCP obtained a second opinion from Dr. Stanley Askin, a Board-certified orthopedic surgeon, who opined that appellant's symptoms and lumbar disc bulges were due to idiopathic degenerative disc disease and not the accepted contusion. Dr. Askin found appellant able to perform full-time light duty.

Appellant's physicians submitted reports from September 1993 through May 2012, finding appellant totally disabled for work due to lumbar pain.

On August 3, 2012 OWCP obtained an updated second opinion report from Dr. Askin, who diagnosed age-related degenerative lumbar disc disease, unrelated to the accepted lumbar contusion. Dr. Askin opined that the accepted contusion had resolved as of the June 7, 1993 examination and required no further treatment. He found appellant able to perform full-time work, with restrictions attributable only to age-related changes.

By notice dated November 30, 2012 and finalized December 31, 2012, OWCP terminated appellant's wage-loss compensation and medical benefits, based on Dr. Askin's opinion as the weight of the medical evidence.

In a January 9, 2013 letter, counsel requested a hearing before an OWCP hearing representative, held on April 10, 2013 by video link. At the hearing, he asserted that Dr. Askin did not fully consider the medical record. Following the hearing, counsel submitted an April 10, 2013 report from Dr. Laura E. Ross, an attending osteopathic physician Board-certified in orthopedic surgery. Dr. Ross opined that the L4-5 herniated disc was related to the accepted March 12, 1990 lumbar contusion because it was visible on a June 19, 1990 computerized tomography (CT) scan.

By decision dated June 12, 2013, an OWCP hearing representative affirmed OWCP's December 31, 2012 decision, finding that the additional evidence submitted was insufficient to outweigh Dr. Askin's report.

In September 9 and 16, 2013 letters, counsel requested reconsideration. He asserted that new medical evidence established a conflict of opinion with Dr. Askin. Counsel provided an August 5, 2013 report from Dr. Steven J. Valentino, an attending osteopathic physician Board-

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<sup>3</sup> Docket No. 14-0990 (issued July 20, 2015).

certified in orthopedic surgery, who opined that appellant's condition was related to the March 12, 1990 employment injury, based on appellant's history and clinical presentation. He also provided a September 11, 2013 report from Dr. William C. Murphy, an osteopath Board-certified in physiatry. Dr. Murphy noted that, on March 12, 1990, appellant "fell off a truck and his back hit a metal manhole cover," causing multiple herniated cervical and lumbar discs.

By decision dated December 6, 2013, OWCP denied modification, finding that the additional medical evidence submitted was insufficient to establish residuals of the accepted injury on and after December 31, 2012. It found that Dr. Murphy's report was based on an inaccurate history as he reported that appellant fell off a truck. Therefore, Dr. Askin's opinion continued to represent the weight of the medical evidence. Appellant then appealed to the Board.

By decision issued July 20, 2015, the Board affirmed OWCP's December 6, 2013 decision, finding that OWCP met its burden of proof to terminate benefits.<sup>4</sup> The Board found that OWCP properly accorded Dr. Askin's opinion the weight of the medical evidence, as it was based on the complete medical record, a statement of accepted facts, and detailed clinical examinations. The Board further found that appellant did not meet his burden of proof to establish that he was disabled for work on and after December 31, 2012.

On August 31, 2015 counsel again requested reconsideration and submitted reports from Dr. Murphy. He asserted that Dr. Askin's report contained "no reasoned opinion" and failed to discuss imaging studies confirming lumbar disc herniations. Alternatively, counsel argued that there was a conflict of medical opinion between appellant's physicians and Dr. Askin, requiring referral to an impartial medical examiner.

In an April 9, 2014 report, Dr. Murphy found tenderness to palpation of the cervical and lumbar paraspinal muscles, bilateral L5-S1 paraspinal spasm, greater on the right, tenderness over the right greater sciatic notch, bilaterally positive straight leg raising tests, bilaterally positive sitting root signs, a positive Bragard's test on the right, and limited lumbar motion. He diagnosed subacute to chronic bilateral L5 radiculopathy, worse on the right. Dr. Murphy opined that, based on appellant's history, findings on examination, and significant magnetic resonance imaging (MRI) scan and electromyography (EMG) and nerve conduction velocity (NCV) findings,<sup>5</sup> appellant's "lumbar contusion, strain, sprain, multilevel lumbar disc herniation L3-4 through L5-S1 and bilateral L5 radiculopathy, are all directly attributable to his work-related incident of March 12, 1990." He prescribed medication and activity restrictions. Dr. Murphy obtained EMG/NCV test results, demonstrating bilateral L5 radiculopathy, worse on the right.

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<sup>4</sup> *Id.*

<sup>5</sup> January 15, 2013 EMG and NCV testing of the lower extremities was normal, without "clear evidence of a radiculopathy or neuropathy at this time." January 17, 2013 lumbar and cervical MRI scans showed underlying developmental central canal stenosis with exacerbating multilevel cervical spondylosis," severe central canal stenosis at C4-5, C5-6, and C6-7 with spinal cord impingement and spinal cord deformity, disc bulges at L3-4 and L4-5, a small central disc protrusion at L5-S1, and T9-10, and degenerative disc disease at L4-5 with a prominent disc bulge and annular tear causing mild-to-moderate bilateral neural foraminal stenosis and central canal stenosis.

In a July 23, 2014 report, Dr. Murphy related appellant's symptoms of right-sided lumbar radiculopathy, and left-sided cervical radiculopathy. He opined that the March 12, 1990 employment injury remained symptomatic and appellant had "never fully recovered." Dr. Murphy explained that appellant's prognosis was poor. He remained permanently disabled from his date-of-injury position. Dr. Murphy found appellant's condition unchanged in periodic reports through August 12, 2015.<sup>6</sup> He reiterated that appellant remained "symptomatic from his work[-]related spinal injuries of March 12, 1990 and has never fully recovered."

In an August 25, 2015 report, Dr. Murphy related appellant's account of a March 12, 1990 work injury, when he "stepped off of a truck into a tire rut and fell backwards, striking his back against a steel plate/manhole cover which was being held by several soldiers. He had just cut the manhole plate and the soldiers were holding it when he stepped down, lost his balance and fell backwards injuring his low back." Dr. Murphy opined that the March 12, 1990 occupational injury remained symptomatic and that appellant had not fully recovered. He disagreed with Dr. Askin's assessment of a lumbar contusion only, as appellant required extensive treatment, "and the supporting diagnostic studies including MRI and EMG testing identifying his spinal related injuries from that incident. Dr. Askin has minimized the injuries that [appellant] sustained in that incident and it is my opinion that his description of the injury is inaccurate and that his conclusions are based on a diagnosis of a lumbar contusion only."

By decision dated November 25, 2015, OWCP denied modification of its prior decision, finding that Dr. Murphy's reports were insufficiently rationalized to meet appellant's burden of proof to establish continuing disability, or to create a conflict with Dr. Askin's opinion.

On January 4, 2016 appellant, through counsel, again requested reconsideration. Counsel asserted that an enclosed December 20, 2015 report from Dr. Murphy provided sufficient medical rationale to meet appellant's burden of proof. He also contended that Dr. Murphy's opinion was sufficient to create a conflict of medical opinion with Dr. Askin, requiring appointment of an impartial medical specialist under 5 U.S.C. § 8123(a).

In a December 20, 2015 report, Dr. Murphy noted reviewing the Board's July 20, 2015 decision. He related that, on March 12, 1990, appellant fell backwards onto the corner of a metal manhole cover, striking his lower back. Appellant was taken to a hospital, where he presented with hematuria. Dr. Murphy provided a complete treatment history, emphasizing that appellant had been followed continuously since the March 12, 1990 employment injury. He opined that a June 1990 computerized tomography (CT) scan showed L4-5 and L5-S1 disc herniations, correlating "exactly with his abnormal findings on EMG testing for radiculopathy at the associated levels where the injuries occurred in the lumbar spine." Dr. Murphy found that the March 12, 1990 incident caused "thoracic and lumbar contusion, lumbar disc herniation at L4-5 and L5-S1, lumbar radiculopathy."

In a March 8, 2016 report, Dr. Murphy reiterated that appellant's lumbar disc herniations, lumbar radiculopathy, and aggravation of degenerative lumbar disc disease remained "directly related to the work-related incident of March 12, 1990."

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<sup>6</sup> On April 7, 2015 appellant underwent a right L4-5 and L5-S1 transforaminal epidural steroid injection

By decision dated March 31, 2016, OWCP denied reconsideration of the merits, finding that counsel's letter and accompanying medical reports did not constitute new, relevant evidence. It found that his assertion of a conflict of medical opinion between Dr. Askin and Dr. Murphy was repetitive of his prior arguments. OWCP further found that Dr. Murphy's December 20, 2015 and March 8, 2016 reports were cumulative, as they were highly similar to his opinions previously of record.

### **LEGAL PRECEDENT**

To require the office to reopen a case for merit review under section 8128(a) of FECA,<sup>7</sup> section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>8</sup> Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>9</sup>

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>10</sup> He or she need only submit relevant, pertinent new evidence not previously considered by OWCP.<sup>11</sup> When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>12</sup>

### **ANALYSIS**

In the prior appeal, the Board issued a July 20, 2015 decision affirming OWCP's December 6, 2013 merit decision, finding that appellant had not established continued disability from work commencing December 31, 2012 due to an accepted March 12, 1990 lumbar contusion.

Counsel requested reconsideration on August 25, 2015, contending that reports from Dr. Murphy, an attending osteopathic physician Board-certified in emergency medicine, coupled with January 2013 electrodiagnostic and imaging studies, were sufficient to meet appellant's burden of proof in establishing continuing disability. Alternatively, he contended that there was

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<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.606(b)(3).

<sup>9</sup> *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

<sup>10</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>11</sup> *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>12</sup> *Annette Louise*, 54 ECAB 783 (2003).

a conflict of medical opinion between Dr. Murphy and Dr. Askin, a Board-certified orthopedic surgeon and second opinion physician.

In reports from April 9, 2014 to August 25, 2015, Dr. Murphy opined that appellant sustained herniated lumbar discs and bilateral L5 radiculopathy in the March 12, 1990 incident, and these conditions continued to be active and totally disabling. He asserted that January 15, 2013 electrodiagnostic studies, which were negative for lumbar radiculopathy or neuropathy, and a January 17, 2013 MRI scan that demonstrated multilevel lumbar disc herniations, supported that these diagnoses were occupationally related.

OWCP denied modification by decision dated November 25, 2015, finding that Dr. Murphy's reports were insufficiently rationalized to meet appellant's burden of proof or to conflict with Dr. Askin's opinion.

Counsel again requested reconsideration on January 4, 2016, asserting that additional reports from Dr. Murphy were sufficient either to meet appellant's burden of proof or to create a conflict with Dr. Askin's opinion. He provided a December 20, 2015 report from Dr. Murphy, opining that the March 12, 1990 employment incident caused herniated lumbar discs and lumbar radiculopathy, as supported by electrodiagnostic and imaging studies. Counsel reiterated this opinion on March 8, 2016. OWCP denied reconsideration on March 31, 2016, finding that counsel's letter and accompanying documents were either repetitious or irrelevant.

The Board finds that OWCP appropriately denied reconsideration. Counsel's assertion of a conflict between Dr. Askin and Dr. Murphy was duplicative of his August 25, 2015 request for reconsideration. Dr. Murphy's December 20, 2015 and March 8, 2016 reports are repetitive of his April 9 and July 23, 2014, and August 25, 2015 reports previously of record. Evidence which is duplicative, cumulative, or repetitive in nature is insufficient to warrant reopening a claim for merit review.<sup>13</sup> Counsel's argument and Dr. Murphy's additional reports are therefore insufficient to warrant reconsideration of the merits.

Appellant did not meet any of the three criteria to warrant further merit review of his case. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, counsel contends that Dr. Askin's opinion cannot represent the weight of the medical evidence as it is insufficiently rationalized, equivocal, and does not discuss imaging studies. This argument pertains to the merits of the claim, which are not before the Board on the present appeal.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

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<sup>13</sup> *Denis M. Dupor*, 51 ECAB 482 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 31, 2016 is affirmed.

Issued: December 14, 2016  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board