



## ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective January 28, 2016.

## FACTUAL HISTORY

On March 5, 2011 appellant, then a 28-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained muscle spasms after lifting the back gate of a mail delivery vehicle on that date. He sought treatment at the emergency room and received a diagnosis of lumbosacral strain. Appellant returned to light-duty work on March 10, 2011.

Appellant filed a claim for a recurrence of disability (Form CA-2a) on April 30, 2011 alleging that on that date he stopped work due to continuing back pain. OWCP accepted his claim for lumbar sprain on May 5, 2011 noting that his claim had been initially handled to allow for payment of a limited amount of medical expenses. Appellant returned to light-duty work on July 28, 2011.

On October 24, 2011 Dr. Nancy V. Rodway, a physician Board-certified in occupational medicine, examined appellant and reviewed the results of his magnetic resonance imaging (MRI) scan. She diagnosed thoracic strain and T8-9 disc herniation which she attributed to appellant's lifting incident at work. Dr. Rodway opined that appellant was partially disabled. She provided work restrictions on November 14, 2011. On November 21, 2011 Dr. Rodway noted that she had first examined appellant on May 6, 2011 due to complaints of left-sided back pain caused by lifting up a rear door on his mail truck. Appellant exhibited spasm to his left rhomboid and left piriformis. Dr. Rodway diagnosed lumbar and thoracic sprain and returned appellant to full duty on July 4, 2011.

OWCP authorized wage-loss compensation benefits from June 4 through 30, 2011 on December 15, 2011. The employing establishment removed appellant from employment, effective December 3, 2011. On December 29, 2011 OWCP's medical adviser opined that appellant's T8-9 disc herniation was causally related to his March 5, 2011 lifting incident. He recommended that appellant's claim be expanded to include a herniated disc at T8-9. By decision dated January 12, 2012, OWCP accepted thoracic herniated disc at T8-9 as due to appellant's March 5, 2011 employment incident.

Dr. Rodway completed a report on January 11, 2012 and continued to support appellant's work restrictions including lifting no more than 10 pounds, no climbing, twisting, pulling, or pushing. She indicated that appellant could drive a vehicle for one hour a day. Dr. Rodway prohibited appellant from performing a mounted route.

In a letter dated January 23, 2012, OWCP requested that the employing establishment provide the reasons for appellant's termination to determine whether he was eligible for further wage-loss compensation payments through OWCP. The employing establishment submitted a copy of a letter of warning dated March 19, 2011 that it had issued to appellant for unsatisfactory work performance, and failure to work in a safe manner. In a notification of personnel action

(Form SF-50) dated December 3, 2011, appellant's last day in pay status was December 3, 2011 due to termination of his appointment.

OWCP entered appellant on the periodic rolls on March 8, 2012. Dr. Emad Mikhail, a physician Board-certified in pain medicine, provided appellant with a series of thoracic epidural steroid injections. Appellant underwent an additional thoracic magnetic resonance imaging (MRI) scan on June 25, 2013 which again demonstrated stable disc herniation at T9-10. The radiologist noted that the prior MRI scan identified the disc herniation at T8-9, but did not include the odontoid process, making it likely that the numbering of T8-9 was actually T9-10. Appellant also underwent a lumbar MRI scan on the same date which demonstrated an unremarkable lumbar spine with mild bilateral foraminal narrowing at L4-5. On July 15, 2013 Dr. Rodway diagnosed thoracic strain with thoracic disc bulge. She continued to opine that appellant was partially disabled.

Dr. Rodway referred appellant for a functional capacity evaluation (FCE) on February 7, 2014. No response was received. The evaluation was found to be conditionally valid, as the results represented the level that appellant perceived was his capacity, even though he could physically do more. Appellant was found capable of medium work, eight hours a day, sitting eight hours a day, standing four hours a day, and walking six to seven hours a day. He could lift above the shoulders 6 pounds frequently and 17 pounds occasionally, he could lift from the waist 41 pounds occasionally and 19 pounds frequently, and he could lift from the floor 30 pounds occasionally. Appellant was able to push 44 pounds occasionally and pull 39 pounds occasionally. He could carry 62 pounds on both the right and left frequently, and carry 75 pounds on the right and 70 pounds on the left occasionally. On March 7, 2014 Dr. Rodway returned appellant to work on March 7, 2014 with restrictions in keeping with the FCE.

In a report dated July 11, 2014, Dr. Sami Moufawad, a Board-certified physiatrist and Board-certified in pain management, noted appellant's history of injury on March 5, 2011, his work stoppage, and his medical treatment. Appellant reported lower back pain with no radiation. On examination Dr. Moufawad found positive skin roll test in the lower lumbar paraspinals with a few trigger points scattered in the lower lumbar area. Appellant exhibited lumbar range of motion of 40 degrees of forward flexion and 20 degrees of extension. He had minimal reversal of the lumbar lordosis with tight hip extensors bilaterally. Neurological examination of appellant's lower limbs demonstrated pain inhibition at the hip girdle, hip flexors, and abductors bilateral with negative straight leg raising. Dr. Moufawad diagnosed thoracic disc displacement, lumbosacral sprain, and lumbar sprain. He reviewed appellant's lumbar and thoracic MRI scans on August 15, 2014 and again diagnosed thoracic disc displacement, lumbosacral sprain, and lumbar sprain.

On September 11, 2015 OWCP requested a supplemental report from Dr. Rodway. It referred appellant for a second opinion evaluation on October 1, 2015 with Dr. Richard Deerhake, a Board-certified orthopedic surgeon. In a report dated November 11, 2015, Dr. Deerhake reviewed the statement of accepted facts and described appellant's history of injury. He noted appellant's accepted conditions and medical treatment. Dr. Deerhake performed a physical examination and found that appellant walked with a normal gait pattern, walked on his heels and toes without difficulty, and was able to bend forward to touch his toes. Appellant could also perform a full squat. Dr. Deerhake found no paraspinal spasms or list, and

normal back posture. He noted that appellant's neurologic examination was normal in his lower extremities. Dr. Deerhake determined that appellant's T8-9 disc herniation was no longer active or present to any significant degree and that appellant had normal functional abilities. He recommended a new FCE to determine current work restrictions. Dr. Deerhake noted that appellant had minimal residual symptoms related to his work injury, but no significant disability. He opined, "It would be my opinion there are not work-related conditions that are still present and active in this claimant. Appellant has reached maximum medical improvement in my opinion and for him to get back to work an FCE would be helpful in an effort to try to define if he has any limitations in terms of his activities." Dr. Deerhake completed a work capacity evaluation indicating that appellant had no restrictions, but that he needed an FCE to determine his deficiencies.

On December 17, 2015 OWCP provided appellant with a notice of proposed termination of his medical benefits and wage-loss compensation based on Dr. Deerhake's November 11, 2015 second opinion report. It allowed appellant 30 days for a response. No further response was received.

By decision dated January 28, 2016, OWCP terminated appellant's medical benefits and wage-loss compensation effective that date. It found that Dr. Deerhake's November 11, 2015 report was entitled to the weight of the medical evidence and established that appellant had no disability or medical residuals as a result of his accepted employment injury.

### **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>4</sup> After it has determined that an employee has disability causally related to his or 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>5</sup> Furthermore, 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 require further medical treatment.<sup>7</sup>

### **ANALYSIS**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's medical benefits and wage-loss compensation effective January 28, 2016.

OWCP accepted appellant's claim for T8-9 disc herniation, as well as lumbar sprain. Appellant's attending physicians, Drs. Rodway, Mikhail, and Moufawad supported his continued

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<sup>4</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>5</sup> *Id.*

<sup>6</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>7</sup> *Id.*

medical residuals and partial disability for work through August 15, 2014. OWCP then referred appellant for a second opinion evaluation with Dr. Deerhake on November 11, 2015.

Dr. Deerhake provided an accurate history of injury and reviewed appellant's medical records. He found that appellant's thoracic disc herniation was no longer active or present "to any significant degree." Dr. Deerhake did not discuss or address whether appellant continued to experience residuals of his accepted lumbar sprain. He did not respond to OWCP's request for a diagnosis, but opined that appellant's current residual symptoms were related to his work injury. Dr. Deerhake did not respond to OWCP's queries regarding the extent of appellant's disability for work, but indicated "there are not work-related conditions still present." However, he further indicated that an FCE would be helpful to define if appellant had any limitations in terms of his activities. Finally, on the work capacity evaluation, Dr. Deerhake indicated that appellant had no restrictions, but again recommended an FCE to determine his deficiencies.

The Board finds that Dr. Deerhake's report is internally inconsistent and insufficient to establish that appellant has no medical residuals or disability due to his March 5, 2011 lifting incident. While Dr. Deerhake indicated that appellant's accepted thoracic herniated disc was no longer active, he qualified this statement by adding "to any significant degree." He further opined that appellant's current residual symptoms were related to his work injury. Dr. Deerhake indicated both that appellant required a functional capacity evaluation to determine his work restrictions and opined that he had no disability from work. As there is no clear, well rationalized medical opinion evidence establishing that appellant's accepted conditions had resolved without residuals requiring further medical treatment and that appellant had no disability for work due to his accepted conditions, OWCP has not met its burden of proof to terminate appellant's medical benefits and wage-loss compensation benefits effective January 28, 2016.

### **CONCLUSION**

The Board finds that OWCP has not met its burden of proof to terminate appellant's medical benefits and wage-loss compensation effective January 28, 2016.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 28, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 17, 2016  
Washington, DC

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

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board