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

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| **T.M., Appellant** | ) | |
| | ) | **Docket No. 17-0915** |
| **and** | ) | **Issued: August 29, 2017** |
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| **U.S. POSTAL SERVICE, POST OFFICE, Indianapolis, IN, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On March 9, 2017[1] appellant filed a timely appeal from a September 16, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits effective, May 18, 2016; and (2) whether appellant met his burden of proof to establish continuing employment-related disability after May 18, 2016.

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from September 16, 2016, the date of OWCP's last decision was March 15, 2017. Since using March 20, 2017, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 9, 2017, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

On appeal appellant contends that, based on his medical conditions, he cannot return to full duty as a rural carrier which requires him to lift up to 70 pounds.

## ***FACTUAL HISTORY***

On January 20, 2009 appellant, then a 42-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that he had spine and myofascial pain which his physician attributed to his September 22, 2003 motor vehicle accident and subsequent work duties.[2] He became aware of his condition on September 22, 2003 and related it to factors of his federal employment on September 24, 2009.

Appellant had filed a prior claim, File No. xxxxxx705, which OWCP accepted for a cervical strain and concussion due to a September 22, 2003 motor vehicle accident. He stopped work immediately following this employment-related incident and returned to work four hours a day with no limitations on December 29, 2003.

In an April 5, 2010 decision, OWCP denied appellant's occupational disease claim under File No. xxxxxx689. On April 16, 2010 appellant requested an oral hearing before an OWCP hearing representative. In a June 11, 2010 decision, an OWCP hearing representative set aside the April 5, 2010 decision and remanded the case to OWCP for further development of the medical evidence. OWCP's hearing representative combined the two claims with File No. xxxxxx689 serving as the master file. Following further development, on August 19, 2010 OWCP accepted the claim for aggravation of cervical and lumbar degenerative disc disease.

On September 27, 2010 appellant filed a claim for compensation (Form CA-7) for the period August 28 to September 23, 2010. On November 9, 2010 OWCP denied the claim as the medical evidence of record at that time did not establish total disability during the claimed period due to his accepted work injuries. On December 9, 2010 appellant requested reconsideration. In a January 20, 2011 decision, OWCP vacated the November 9, 2010 decision and approved appellant's claim for compensation. It paid wage-loss compensation benefits on the supplemental rolls until it placed appellant on the periodic compensation rolls beginning July 3, 2011.

In an October 14, 2015 medical report, Dr. T. Lynette Green-Mack, an attending Board-certified physiatrist, examined appellant and diagnosed cervical disc derangement without myelopathy, cervicogenic headaches, sacroiliitis, low back pain, sciatica of the left leg, and postconcussion headaches/migraines. She opined that his conditions were caused by his September 22, 2003 employment injuries. Dr. Green-Mack placed appellant on permanent restrictions as provided by "Dr. Lee" in 2014 and reduced his work hours to three to four hours a day. She noted that he was on chronic opioid therapy which could affect his ability to operate a work-related vehicle in various climates. Dr. Green-Mack further noted that appellant's job required repetitive lifting and carrying which exacerbated his condition and caused him to stop work as of 2010.

[2] OWCP assigned File No. xxxxxx689.

On October 7, 2015 OWCP referred appellant to Dr. Larry R. Lett, a Board-certified neurologist, for a second opinion to determine whether he continued to have residuals or disability due to the accepted employment-related conditions.[3] In a November 6, 2015 report, Dr. Lett examined appellant and diagnosed cervicalgia and lumbago. He noted that appellant had subjective complaints of pain that were not objectively validated. Dr. Lett advised that he was physically capable of performing his date-of-injury position without limitations.

On February 4, 2016 OWCP determined that there was a conflict in the medical opinion between Dr. Green-Mack and Dr. Lett as to whether appellant had any continuing residuals or disability due to the accepted employment injuries.

On February 11, 2016 OWCP referred appellant, together with a statement of accepted facts (SOAF),[4] the medical record, and a list of questions, to Dr. Neil H. Levine, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a March 24, 2016 report, Dr. Levine noted appellant's history, reviewed the SOAF, and reviewed the medical record. On examination, appellant complained of neck, mid-back, and low back pain, and migraine headaches. His affect was normal and he was able to sit up continuously for 45 minutes during the interview part of the evaluation. There was slight straightening of the cervical lordosis, but the lumbar lordosis was well maintained. Appellant walked with a slightly antalgic gait favoring the left leg. He was able to toe walk, but again favored the left leg. There was no gross deformity or obvious abnormality. Cervical spine range of motion was limited to 5 degrees of flexion, 26 degrees of extension, 40 degrees of external rotation to the left and right side, 30 degrees of lateral bending to the left, and 25 degrees on the right. Each shoulder had 145 degrees of active abduction and flexion, 40 degrees of extension, and 45 degrees of external rotation. Adduction, internal rotation, and excursion on the right were to the T11 which was 1 centimeter (cm) less than on the left. Lumbar spine motion was limited in all planes. Lateral bending to the right elicited pain in the midline and left lower back at L5-S1. Pain was reported with lateral bending to the left in the midline and left lower back. Extension was 18 degrees with pain in the midline and left lower back at L5-S1. With forward flexion, the fingertips reached to only within 39 cm from the floor and he had pain in the midline from L3 to S1 and in the left paraspinal area. There was tenderness to palpation in the midline of the cervical spine from C4 through T3. He also had tenderness to palpation in the left paraspinous muscles in the cervical spine from C3 to T3 and in the left upper trapezius muscle. There was no palpable muscle spasm in the cervical, thoracic, or lumbar spine. There was tenderness to palpation in the midline from L2 to S2 and in the area of the left paraspinous muscles from L2 to L5, left sacroiliac joint, and left piriformis muscle. A cervical compression was positive with appellant reporting pain radiating to the left shoulder. However, a Spurling's maneuver to the left and right side was negative. Shoulder examination revealed a negative full

[3] On October 16, 2015 OWCP advised appellant that he was being referred for a second opinion because the case record did not contain a 2014 report from Dr. Lee and it appeared that Dr. Green-Mack was referring to a 2011 report from a prior OWCP referral physician. The record contains an April 29, 2011 report from Dr. Albert C. Lee, a neurosurgeon and an OWCP referral physician, who opined that appellant continued to have symptoms referable to cervical strain, concussion, and cervical and lumbar degenerative disc disease and was not medically capable of returning to his rural letter carrier position as he was restricted lifting more than 25 pounds on a long-term basis.

[4] The SOAF noted the accepted injuries, appellant's date-of-injury duties, and his medical treatment.

can and empty can test bilaterally and a negative impingement sign bilaterally. Adson's test was negative. During quadrant loading in extension to the left appellant reported pain just to the left of the midline at L3-4. Patrick's maneuver on the right produced pain in the midline while during the same test on the left elicited pain in the midline and left lower back.

On neurological examination, there was decreased sensation in the left hand along the median nerve distribution. There were no motor deficits in either arm. Deep tendon reflexes biceps, triceps, and brachioradialis were 1+ and symmetrical. There was spotty decreased left leg sensation not following any specific dermatomal pattern. There were no motor deficits and all muscle groups in the legs were 5/5 except for the left quadriceps and hamstring muscles which were 5-/5 with giving away. Sitting straight leg raising examination on the right was negative and on the left appellant reported pain in the left lower back which was negative for sciatic nerve irritation/lumbar radiculopathy. During supine straight leg raising he again reported pain in the left lower back. Dr. Levine reported that a nonphysiologic examination revealed no giving away with flexion and extension of the left knee against resistance which was a positive Waddell sign. Spotty decreased sensation in the left leg and low back pain on axial rotation were also positive Waddell signs.

Dr. Levine diagnosed cervical spondylosis with a right paracentral disc herniation at C4-5 resulting in mild central canal and moderate right foraminal stenosis, and a small central disc herniation at C5-6 with minimal central canal and foraminal stenosis. He also diagnosed lumbar spondylosis with broad-based disc bulge and facet arthropathy at L4-5 and L5-S1 resulting in mild bilateral neuroforaminal narrowing and mild bilateral carpal tunnel syndrome by an electromyogram (EMG) study without clinical findings. Dr. Levine opined that the September 22, 2003 work injury did not result in any permanent structural injury. Appellant did not exhibit specific objective findings consistent with his subjective complaints of pain. Dr. Levine opined that he could perform his pre-injury employment as a permanent route rural mail carrier without restrictions. He recommended nonsteroidal anti-inflammatory drugs to treat degenerative changes in the cervical and lumbar spines. Dr. Levine maintained that surgery or injections were not indicated based on his objective findings.

On April 14, 2016 OWCP proposed to terminate wage-loss compensation benefits because appellant no longer had disability causally related to the accepted September 22, 2003 employment injuries. It determined that the special weight of the medical evidence rested with the March 24, 2016 impartial medical report of Dr. Levine. Appellant was afforded 30 days to submit additional evidence or argument. He did not respond within the allotted time.

By decision dated May 17, 2016, OWCP terminated appellant's wage-loss compensation, effective May 18, 2016. It accorded special weight to Dr. Levine's March 24, 2016 report. OWCP did not terminate appellant's medical benefits.

On June 20, 2016 appellant requested reconsideration and submitted medical evidence. In an April 26, 2016 cervical spine magnetic resonance imaging (MRI) scan report, Dr. Mary E. Below, a Board-certified radiologist, provided an impression of changes of spondylosis, mild or mild-to-moderate central stenosis at C5-6 with a right paracentral protrusion/extrusion, mild central stenosis at C4-5, foraminal narrowing, severe left foraminal narrowing at C3-4, severe right foraminal narrowing at C4-5, and other changes of spondylosis as discussed above. She

also provided an impression of no compression fracture. In an April 26, 2016 lumbar spine MRI scan report, Dr. Below provided an impression of no compression fractures, significant central stenosis, or clear or direct nerve root impingement. In addition, she provided an impression of mild lateral recess narrowing.

In a May 24, 2016 report, Dr. Green-Mack noted a history of the September 22, 2003 employment injuries and restated her diagnoses of cervical disc derangement without myelopathy, cervicogenic headache, sacroiliitis, lumbar intervertebral disc displacement, and postconcussion headache. She reviewed the April 26, 2016 cervical and lumbar MRI scan results and reported the same examination findings as set forth in her October 14, 2015 report. Dr. Green-Mack also reiterated her prior opinion that appellant's conditions were caused by the September 22, 2003 employment injuries and that she agreed with Dr. Lee's permanent restrictions. She concluded that he was disabled for any gainful employment.

In a December 16, 2015 report, appellant's physical therapist noted a diagnosis of occipital neuralgia sciatica and ordered a functional capacity evaluation (FCE).

By decision dated September 16, 2016, OWCP denied modification of the May 17, 2016 decision. It found that the medical evidence submitted did not provide a rationalized medical opinion substantiating that appellant continued to be disabled due to the accepted employment conditions.

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

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation. After it has been determined that an employee has disability causally related to his or her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[5] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

Section 8123 (a) of FECA 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.[7] 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 examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[8] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the

[5] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[6] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[7] 5 U.S.C. § 8123(a).

[8] 20 C.F.R. § 10.321.

purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

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

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits, effective May 18, 2016.

OWCP accepted that appellant sustained an aggravation of cervical and lumbar degenerative disc disease while in the performance of duty and paid wage-loss compensation benefits. It subsequently determined that a conflict in medical evidence had been created between the opinions of Dr. Green-Mack, an attending Board-certified physiatrist, and Dr. Lett, an OWCP referral Board-certified neurologist, regarding whether appellant had any continuing residuals or disability causally related to the accepted employment injuries. OWCP then properly referred him to Dr. Levine, a Board-certified orthopedic surgeon, for an impartial evaluation.

The Board finds that Dr. Levine's impartial medical opinion is entitled to special weight and establishes that appellant no longer has any disability due to the accepted employment injuries. In his March 24, 2016 report, Dr. Levine reviewed the SOAF and the medical file and noted essentially normal findings on physical examination. He opined that while appellant needed nonsteroidal anti-inflammatory drugs to treat degenerative changes in his cervical and lumbar spine, appellant could perform his rural carrier position without restrictions. Dr. Levine reasoned that there were no objective findings consistent with his subjective complaints.

The Board finds that Dr. Levine provided a comprehensive, well-rationalized opinion in which he clearly found that appellant could return to his preinjury job. Dr. Levine had full knowledge of the relevant facts and the course of appellant's condition. His opinions were based on proper factual and medical history and on the statement of accepted facts. Dr. Levine's reports contained a detailed summary of the history of the claim.[10] Additionally, he addressed the medical records, examined appellant, and reached a reasoned conclusion regarding appellant's conditions.[11] Dr. Levine's opinion is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.[12] OWCP, therefore, properly terminated appellant's wage-loss compensation benefits on May 18, 2016 based on Dr. Levine's opinion.[13]

[9] *See M.W.,* Docket No. 16-0959 (issued October 6, 2016); *James P. Roberts,* 31 ECAB 1010 (1980).

[10] *See R.G.,* Docket No. 16-0271 (issued May 18, 2017).

[11] *Michael S. Mina,* 57 ECAB 379 (2006) (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 analysis manifested, and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

[12] *See Melvina Jackson,* 38 ECAB 443 (1987).

[13] *Manuel Gill,* 52 ECAB 282 (2001).

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

Once OWCP properly terminates a claimant's compensation benefits, the burden of proof shifts to the claimant to establish that he has continuing disability after that date related to his accepted injury.[14] To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, a claimant employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.[15] Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[16]

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

Following the termination of his wage-loss compensation benefits appellant submitted Dr. Green-Mack's May 24, 2016 report. In this report, Dr. Green-Mack reiterated the findings of Dr. Below's cervical and lumbar MRI scan results, examination findings, diagnoses of cervical disc derangement without myelopathy, cervicogenic headache, sacroiliitis, lumbar intervertebral disc displacement, and postconcussion headache, and opined that these conditions were causally related to the accepted September 22, 2003 employment injuries as set forth in her prior report of October 14, 2015. She also opined that appellant was disabled for any gainful employment. However, Dr. Green-Mack failed to provide medical rationale explaining how appellant's residuals of the accepted employment injuries resulted in his continuing disability for work. The Board has held that a medical opinion not fortified by rationale is of diminished probative value.[17] Moreover, the Board has long held that reports from a physician who was on one side of a medical conflict that an impartial medical specialist resolved, are generally insufficient to overcome the special weight accorded to the report of the impartial medical specialist, or to create a new conflict.[18] The Board finds that as Dr. Green-Mack was on one side of the conflict resolved by Dr. Levine, Dr. Green-Mack's additional report is of insufficient weight to overcome the special weight accorded to Dr. Levine's opinion or to create a new medical conflict.

Dr. Below's April 26, 2016 cervical and lumbar MRI scan reports did not offer an opinion on the relevant issue of whether appellant had employment-related disability due to the accepted work-related conditions. The Board has found that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[19] The Board finds that Dr. Below's reports are insufficient to establish continuing employment-related disability.

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[14] *Id.*

[15] *Id.*

[16] *Paul Foster,* 56 ECAB 208 (2004); *Jacqueline M. Nixon-Steward,* 52 ECAB 140 (2000).

[17] *M.F.*, Docket No. 15-0081 (issued January 15, 2016); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[18] *R.B.*, Docket No. 16-1481 (issued May 2, 2017); *I.J.*, 59 ECAB 408 (2008).

[19] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006).

The December 16, 2015 report from appellant's physical therapist addressed appellant's cervical condition and ordered an FCE. However, this report is of no probative medical value as a physical therapist is not considered a physician as defined under FECA.[20]

Appellant has not provided a probative medical opinion to support that he was disabled due to his accepted employment-related injuries. The Board therefore finds that appellant has failed to meet his burden of proof to establish continuing disability after May 18, 2016.[21]

On appeal appellant contends that, based on his medical conditions, he cannot return to full duty as a rural carrier which requires him to lift up to 70 pounds. However, his own opinion on his ability to work would not be a substitute for probative medical evidence as lay persons are not physicians under FECA and, thus, are not competent to render medical opinions.[22] As found above, the medical record does not demonstrate that appellant was disabled for work on and after May 18, 2016 due to the accepted work injuries.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

## ***CONCLUSION***

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits effective, May 18, 2016. The Board further finds that appellant has failed to meet his burden of proof to establish continuing employment-related disability after May 18, 2016.

[20] 5 U.S.C. § 8101(2); *Jennifer L. Sharp*, 48 ECAB 209 (1996) (physical therapists). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

[21] *See G.G.*, Docket No. 15-0985 (issued August 21, 2015); *Virginia Davis-Banks*, 44 ECAB 389 (1993); *Dorothy Sidwell*, 41 ECAB 857 (1990).

[22] *See L.L.*, Docket No. 16-0896 (issued September 23, 2016); *James A. Long*, 40 ECAB 538 (1989).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 16, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 29, 2017
Washington, DC

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

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

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