



## ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective May 31, 2015 as she no longer had any residuals or disability causally related to her accepted employment-related injury.

## FACTUAL HISTORY

On July 22, 2008 appellant, then a 52-year-old casual mail handler, filed a traumatic injury claim (Form CA-1) alleging that on July 20, 2008 she fell while putting equipment on a truck.<sup>4</sup> Appellant claimed to have injured her neck, back, chest, shoulder, and hip. She stopped work on July 20, 2008 and did not return. On September 8, 2008 OWCP accepted appellant's claim for cervical and lumbar strain/sprain, trapezius strain, left upper arm and shoulder strain/sprain, left hip strain/sprain, and multiple contusions (left shoulder, chest, left upper extremity, left hip, and back).<sup>5</sup> Appellant received continuation of pay then wage-loss compensation for temporary total disability beginning September 4, 2008. She was ultimately placed on the periodic compensation rolls.<sup>6</sup> In September 2010 appellant underwent OWCP-approved left shoulder surgery. She continued to receive wage-loss compensation for temporary total disability.

Based on the results of functional capacity evaluations from September 2008 through April 2014 as well as her clinical impression, appellant's treating physician, Dr. Daisy Rodriquez, a Board-certified internist, noted that appellant had numerous physical restrictions and remained totally disabled from working. The records indicate that appellant had also been diagnosed with cervical herniated nucleus pulposus, neuropraxia, cervical radiculopathy, lumbosacral bulging discs, protruding disc, lumbar radiculopathy, degenerative joint disease bilateral hips, hamstring tendinosis, bilateral hip bursitis, gait abnormality and chronic pain.

On May 12, 2014 OWCP referred appellant, a copy of her medical records, a statement of accepted facts (SOAF), and a list of questions to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion examination to determine appellant's current condition and her ability to return to full time.

In a May 30, 2014 report, Dr. Smith noted appellant's history of injury and his review of her medical records and presented examination findings. He opined that if the only accepted conditions for the July 20, 2008 work injury were soft tissue strains and contusions, then appellant had long since reached maximum medical improvement. Dr. Smith opined that all her sprains and contusions resolved without residuals and required no additional diagnostic testing or

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<sup>4</sup> Appellant indicated that her foot got caught in a hole/crack, which caused her to fall.

<sup>5</sup> OWCP further noted that appellant had also received treatment for cervical and lumbar herniated nucleus pulposus (HNP), as well as cervical and lumbar radiculopathy. It advised appellant that for additional consideration of these conditions, she needed to submit medical evidence regarding the relationship between the diagnosed conditions and the injury she sustained on July 20, 2008.

<sup>6</sup> At the time, appellant was capable of performing sedentary work, but the employing establishment had separated her from service effective September 3, 2008.

treatment. He further opined that appellant could return to regular-duty full-time work. Dr. Smith also noted that appellant was being treated for factors outside the scope of the accepted conditions listed on the SOAF, which included various nerve conditions, magnetic resonance imaging (MRI) abnormalities from her neck and back, and x-ray findings of degenerative joint disease of the hips and a fracture of the left fibula, as well as a gait abnormality and chronic pain syndrome. He advised that those conditions appeared to be nonindustrial and not accepted by OWCP as related to the July 20, 2008 work injury.

In an October 7, 2014 letter, OWCP requested a supplemental report from Dr. Smith as to whether any residuals from the authorized left shoulder rotator cuff repair and acromioplasty of September 23, 2010 remained. In an October 29, 2014 supplemental report, Dr. Smith re-reviewed his notes, clinical examination findings, and examination report along with the additional information from OWCP regarding the left shoulder rotator cuff repair and acromioplasty of September 23, 2010. He indicated that when he examined appellant in May 2014, she had a benign examination of her shoulder which suggested an excellent result from her surgery. Therefore, upon that basis, he concluded that the accepted conditions, including the accepted left shoulder condition, had resolved without residual.

Dr. Rodriguez continued to note that appellant had numerous physical restrictions and that she was disabled from work. She continued to list appellant's other conditions pertaining to cervical herniated nucleus pulposus, neuropraxia, cervical radiculopathy, lumbosacral bulging discs, protruding disc, lumbar radiculopathy, degenerative joint disease bilateral hips, hamstring tendinosis, bilateral hip bursitis, gait abnormality, and chronic pain.

On December 8, 2014 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits. It found that Dr. Smith's second opinion report established the weight of the medical evidence that she no longer had any residuals of her accepted work-related conditions or continued disability from work as a result of the July 20, 2008 employment injury. Appellant was afforded 30 days in which to submit additional evidence or argument.

Appellant submitted reports from Dr. Rodriguez dated October 30 and November 25, 2014. Dr. Rodriguez reiterated that appellant had numerous physical restrictions and was disabled from work due to the accepted work-related conditions and other conditions previously identified. Diagnostic testing was also submitted.

On March 3, 2015 OWCP declared a conflict in the medical opinion between Dr. Smith and Dr. Rodriguez regarding work-related continuing disability. It referred appellant to Dr. William H. Simon, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In an April 29, 2015 report, Dr. Simon noted the history of injury, his review of the medical records and the SOAF, and presented examination findings. He noted that appellant was injured on July 20, 2008 when she was moving mail from inside of a truck to the outside on a loading platform and, as she moved, her left foot went into a defect on the surface of the loading platform and she fell to the left onto her left side. In discussing appellant's medical records, he noted that she did not sustain a permanent injury at the time of her fall at work in 2008.

Dr. Simon noted no evidence of fracture, dislocation, or disc herniation related to her fall. He noted that her documented studies revealed that she had longstanding, progressive, degenerative changes in her neck and back prior to the 2008 fall. Those degenerative changes were slowly progressive in nature and corresponded to the fact that she felt worse with the passage of time. Dr. Simon noted that this subjective worsening feeling was due to the progressive, degenerative changes and were unrelated to any trauma she sustained as a result of a soft tissue injury at work in 2008. He concluded that the multiple conditions accepted as work-related injuries had resolved with no residual disability and that appellant was able to return to full duty. Dr. Simon explained that the diagnosed degenerative conditions were preexisting and unrelated to the July 2008 work injury. He further opined that there was no evidence of a permanent injury or a fracture, dislocation, or disc herniation related to the work injury. Dr. Simon indicated that even if appellant required further rehabilitation because of the underlying degenerative changes in her neck and back, she would have healed and been rehabilitated by early 2009 from her traumatic soft tissue injuries plus the rehabilitation for her underlying preexisting degenerative changes. He further indicated that she had restrictions in terms of lifting, bending and standing which were based on her progressive degenerative change in her neck and back and that she was able to return to sedentary work even with those degenerative changes.

By decision dated May 20, 2015, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits effective May 31, 2015. Special weight was accorded to Dr. Simon's impartial medical opinion that appellant no longer had any residuals related to her accepted conditions or continued disability from work as a result of the July 20, 2008 work injury.

On June 9, 2015 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on February 18, 2016.

Numerous diagnostic test results including magnetic resonance imaging (MRI) scan reports of the cervical spine, left shoulder, and pelvis were submitted along with medical reports from Dr. Rodriguez, dated August 6, October 1, November 24, 2015 and January 7 and March 3, 2016. Dr. Rodriguez continued to opine that appellant had numerous physical restrictions and was disabled from work.

By decision dated May 2, 2016, an OWCP hearing representative affirmed OWCP's May 20, 2015 decision.

### **LEGAL PRECEDENT**

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.<sup>7</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>8</sup> Furthermore, the right to medical

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<sup>7</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>8</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition that requires further medical treatment.<sup>9</sup>

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.<sup>10</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 examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>11</sup> 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 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.<sup>12</sup>

### ANALYSIS

OWCP accepted appellant's July 20, 2008 traumatic injury claim for cervical and lumbar strain/sprain, trapezius strain, left upper arm and shoulder strain/sprain, left hip strain/sprain, and multiple contusions (left shoulder, chest, left upper extremity, left hip and back). It authorized a September 23, 2010 left shoulder rotator cuff repair and acromioplasty. Appellant received wage-loss compensation for temporary total disability dating back to September 4, 2008. Dr. Rodriguez, appellant's treating physician, diagnosed appellant with series of conditions, including several degenerative conditions, and opined that she had work-related continuing disability. Dr. Smith, the second opinion physician, opined that the accepted conditions had resolved and that there was no continuing injury or disability related to the July 2008 work injury. OWCP properly found a conflict in medical opinion existed between Dr. Rodriguez and Dr. Smith, which required referral to an impartial medical examiner.

OWCP referred appellant to Dr. Simon, the impartial medical specialist, to resolve the conflict in medical opinion evidence regarding continuing residuals and disability. It found that termination of her wage-loss compensation and medical benefits were justified based on the impartial medical opinion of Dr. Simon. The burden of proof is on OWCP to support the termination of appellant's compensation benefits.<sup>13</sup>

The Board finds that Dr. Simon's report is entitled to the special weight of the medical opinion evidence and establishes that appellant's employment-related conditions and any

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<sup>9</sup> *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

<sup>10</sup> 5 U.S.C. § 8123(a).

<sup>11</sup> 20 C.F.R. § 10.321.

<sup>12</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

<sup>13</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

disability from her accepted condition had resolved. Dr. Simon's report further establishes that her other diagnosed medical conditions are not causally related to or a consequence of the July 20, 2008 work-related incident.

Dr. Simon provided an accurate history of injury, noting that appellant was injured when her left foot went into a defect on the surface of the loading platform, and she fell to the left onto her left side on July 20, 2008. He reviewed her medical history, her course of medical treatment, and provided his findings on physical examination. Dr. Simon also noted that at the time of injury, appellant did not have a permanent injury as there was no evidence of fracture, dislocation, or disc herniation related to her fall. He explained that her documented studies revealed that she had longstanding, progressive, degenerative changes in her neck and back prior to the 2008 fall and were unrelated to any trauma appellant sustained as a result of a soft tissue injury at work in 2008. He concluded that the multiple conditions accepted as work-related injuries had resolved with no residual disability and that appellant was able to return to full duty. Dr. Simon explained that even if appellant required further rehabilitation because of the underlying degenerative changes in her neck and back, she would have healed and been rehabilitated by early 2009 from her traumatic soft tissue injuries plus the rehabilitation for her underlying preexisting degenerative changes. He also noted that her restrictions in lifting, bending, and standing were based on her progressive degenerative change in her neck and back and indicated that she was still able to return to sedentary work even with those degenerative changes.

The Board finds that Dr. Simon's determination that appellant's accepted conditions had resolved and that she could return to work without restrictions is sufficiently detailed and supported to constitute the special weight of the medical evidence.<sup>14</sup> Dr. Simon also explained and provided rationale as to why her other diagnosed conditions, *i.e.*, multiple diagnosed disc and degenerative conditions, left leg fracture, bilateral hip bursitis, hamstring tendinosis, shoulder tendinitis and sprains/strains of the hip and back, were not related to the July 20, 2008 mechanism of work injury. His opinion is entitled to the special weight accorded an impartial medical examiner and constitutes the weight of the medical evidence.<sup>15</sup>

The medical evidence appellant submitted after the termination is insufficient to overcome the special weight accorded to Dr. Simon as an impartial medical specialist. The reports of Dr. Rodriguez gave rise to the conflict in medical opinion, which Dr. Simon resolved. The Board has long held that reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict.<sup>16</sup> While Dr. Rodriguez indicated in several reports that appellant had ongoing work-related disability and/or remaining residuals of her accepted medical condition, her reports were not well rationalized and, as explained by Dr. Simon, were based on preexisting degenerative conditions which were not caused or aggravated by the work-related incident. A medical opinion which is

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<sup>14</sup> *S.B.*, Docket No. 16-0933 (issued December 9, 2016); *M.H.*, Docket No. 12-1865 (issued April 1, 2013).

<sup>15</sup> See *Sharyn D. Bannick*, 54 ECAB 537 (2003).

<sup>16</sup> *D.C.*, Docket No. 16-0430 (issued August 29, 2016).

not well rationalized and is not based on objective medical evidence is of limited probative value.<sup>17</sup>

The Board concludes that Dr. Simon's opinion, that the residuals of appellant's accepted condition had resolved and that there is no residual disability or need for ongoing medical care, is entitled to the special weight accorded an impartial medical examiner.<sup>18</sup> OWCP therefore properly terminated her wage-loss compensation and medical benefits on March 31, 2015.

The Board additionally notes that OWCP properly followed the regulatory requirements in terminating appellant's compensation benefits. Appellant received a proposed notice of termination of benefits on December 8, 2014. After she submitted reports from Dr. Rodriguez, OWCP determined that a conflict existed in the medical evidence and referred her to Dr. Simon for an impartial medical evaluation. Following Dr. Simon's impartial medical report appellant's proposed termination was finalized. OWCP's regulations at section 10.541 addresses whether a second notice of proposed termination of compensation is required in this situation. This regulation states:

“(b) Evidence or argument which refutes the evidence upon which the proposed action was based will result in the continued payment of compensation. If the beneficiary submits evidence or argument which fails to refute the evidence upon which the proposed action was based, but which requires further development, OWCP will not provide the beneficiary with another notice of its proposed action upon completion of such development. Once any further development of the evidence is completed, [it] will either continue payment or issue a decision consistent with its prior notice.”<sup>19</sup>

The Board therefore finds that OWCP properly followed the regulatory requirements and met its burden of proof to terminate compensation benefits.

On appeal appellant contends that she continues to suffer physically, mentally, and financially from her July 20, 2008 work injury. As explained above, the special weight of the medical evidence rests with Dr. Simon's impartial medical opinion that the accepted medical conditions have resolved and that she can return to work without restrictions. He also clearly explained and provided rationale for why appellant's other diagnosed conditions were preexisting and not related to the July 20, 2008 mechanism of injury.

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits as of May 31, 2015 as she no longer had any residuals or disability causally related to her accepted employment-related injury.

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<sup>17</sup> See A.C., Docket No. 11-1339 (issued March 9, 2012).

<sup>18</sup> See *supra* note 13.

<sup>19</sup> 20 C.F.R. § 10.541.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 2, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 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