



residuals or disability causally related to his accepted September 24, 2012 employment injury; and (2) whether appellant has established that he had continuing disability after February 9, 2014.

### **FACTUAL HISTORY**

On October 4, 2012 appellant, then a 46-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his neck, back, left wrist, and left leg as a result of a September 24, 2012 employment-related motor vehicle accident. OWCP initially accepted the claim for neck sprain, lumbosacral strain, and left wrist sprain. It paid wage-loss compensation benefits on the supplemental rolls as of November 19, 2012.

Appellant came under the care of Dr. Allen Young, an occupational medicine specialist, in October 2012, who noted the history of injury and provided examination findings. An assessment of neck sprain, sprain and strain of unspecified site of left wrist and lumbosacral sprain were provided. In November 2012, Dr. Young prescribed physical therapy three times a week, which appellant attended. He also continued to place appellant off work, following a brief return to modified duty on November 19, 2012.

In a January 2, 2013 report, Dr. Young noted that the magnetic resonance imaging (MRI) scan of the cervical spine showed changes consistent with time, and no acute herniated nucleus pulposus or nerve impingement. The MRI scan of the lumbar spine showed a disc protrusion on the right at L4-5 with foraminal stenosis on the right, which he indicated did not really correlate with appellant's acute left-sided leg symptoms. Dr. Young found that, while physical therapy had helped the lower back to a point, appellant needed four weeks of chiropractic therapy three times a week to get him back to work. In a February 1, 2013 letter, he noted that the MRI scan report indicated that there was a subluxation of L5 on S1, which he was attributing to the work-related injury. Dr. Young indicated that appellant never had any significant lower back issues prior to the work injury and explained that the forces generated by one car hitting another car would have caused a snapping of the spine and the persistent symptoms he now had.

On February 4, 2013 OWCP accepted the additional condition of subluxation at L5-S1.

In his February 11, 2013 report, Dr. Young diagnosed subluxation L5-S1 and again requested chiropractic therapy three times a week, for four weeks

On February 13, 2013 appellant came under the care of Dr. Ryan J. Carlton, a chiropractic physician, for diagnosis of lumbosacral sprain/strain and subluxation L5-S1. Dr. Carlton also noted that the x-rays taken on February 13, 2013 showed grade 1 spondylolisthesis.

In a November 19, 2013 report, Dr. Young related that appellant continued with the same lower back pain into the posterior left leg and sometimes both legs. Examination findings included mild-to-moderate tenderness at the left L5 paraspinal and the L5 spinous process and range of motions findings at T12. Dr. Young noted pain at the end range, especially with extension. He indicated that appellant still had symptoms from the work injury and that authorization was needed for a pain management specialist. Dr. Young also reviewed a

November 19, 2013 modified job offer from the employing establishment and indicated which duties of the modified job appellant was able to perform.

In November 2013, OWCP referred appellant for a second opinion evaluation with Dr. Paul Bachwitt, a Board-certified orthopedic surgeon, in order to determine whether appellant continued to have residuals of his work-related conditions and to determine whether he was able to return to work in a full-duty capacity. The December 21, 2012 statement of accepted facts (SOAF)<sup>3</sup> and the November 20, 2013 questions to the second opinion examiner noted that the claim had been accepted for neck sprain, lumbosacral sprain, and left wrist sprain. Dr. Bachwitt was asked to evaluate whether appellant had residuals of the accepted conditions, or whether he had any other conditions causally related to the accepted injury.

In a December 19, 2013 report, Dr. Bachwitt, OWCP's referral physician, reviewed the SOAF and appellant's medical records, and set forth examination findings. He noted in detail appellant's history of medical treatment, including Dr. Young's recommendation that appellant undergo chiropractic treatment for subluxation at L5-S1. Dr. Bachwitt noted appellant's chiropractic treatment at Davis Chiropractic Clinic.

Dr. Bachwitt opined that appellant's cervical, left wrist, and lumbosacral sprain/strains had all resolved with no residuals and that appellant had no other conditions causally related to the accepted injury. He noted that physical examination of the cervical and lumbar spine revealed no evidence of a radiculopathy or an operative disc lesion and examination of the left wrist was within normal limits. Dr. Bachwitt advised that simple sprain/strains should have resolved within two to three months at the most and it had now been more than one year. He also reviewed x-rays taken in the office. X-rays of the lumbar spine showed moderate degenerative changes in the lower lumbar spine, compatible with appellant's age, and grade 1 spondylolisthesis. There was no evidence of an instability pattern of either an angular or translational fracture and no fractures, dislocation, or subluxations were noted. Dr. Bachwitt also noted that the December 12, 2012 MRI scan of the lumbar spine showed degenerative changes at the lower two levels at L4-5. He opined that appellant could return to full-duty work as a rural carrier without restrictions. Dr. Bachwitt also found that there was no need for any further medical treatment.

On January 6, 2014 OWCP notified appellant of a proposal to terminate his wage-loss compensation and medical benefits based on the opinion of Dr. Bachwitt, the second opinion physician, who opined that the residuals of the accepted work-related conditions had ceased and appellant was no longer disabled from work as a result of the accepted conditions. Appellant was afforded 30 days to submit additional information.

Appellant subsequently submitted claims for compensation (Forms CA-7) and a February 5, 2014 statement.

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<sup>3</sup> The SOAF included a July 11, 2013 addendum, which noted that appellant resumed work on May 13, 2013, but stopped again on May 15, 2013. The addendum further noted that OWCP accepted a recurrence of disability beginning May 15, 2013 and that he currently remained totally disabled.

By decision dated February 7, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits, effective February 9, 2014, as the weight of the medical evidence rested with the opinion of Dr. Bachwitt who found that appellant no longer had any residuals related to his accepted work-related medical conditions or continued disability from work as a result of the September 24, 2012 work injury.

On February 25, 2014 appellant requested an oral hearing with an OWCP hearing representative. Copies of evidence already of record were received.

Copies of claims for compensation Form CA-7 and reports from Dr. Young dated January 16 through March 12, 2014, which either noted appellant's experience with chiropractic treatment, or advised there was no change in his persistent back symptoms, were received. Dr. Young continued to indicate appellant's inability to return to his date-of-injury position as a rural carrier was based upon his persistent back symptoms and objective examination findings. He explained that appellant could not work full duty and that modified duty had not worked out, therefore, he remained off work. Dr. Young continued to request authorization for treatments at a pain clinic.

In a February 28, 2014 report, Dr. Carlton, a chiropractor, expressed his agreement with Dr. Young that appellant continued to have persistent symptoms with regard to his injury. He explained that, while most simple sprain/strain injuries should resolve within two to three months, there were exceptions to this rule and appellant was one of them. Dr. Carlton also agreed with Dr. Young that appellant should undergo a pain clinic evaluation.

An oral hearing was held telephonically on June 10, 2014. During the hearing, appellant testified as to the nature of his neck and back conditions prior to and after the work injury. He expressed his disagreement with the second opinion examination and questioned the medical evidence of record in his case, noting that a copy of a referral letter for another appellant was in his case file.

Following the hearing, a July 10, 2014 investigative report from the employing establishment's Office of Inspector General (OIG) was received along with physical exhibits regarding appellant's physical capacities. The OIG indicated that it had been conducting an investigation of appellant from November 2012 through June 2014 and determined that appellant had been misrepresenting his physical abilities to his physicians, the employing establishment, and OWCP. During the timeframe of the investigation, appellant reported that he was incapable of sorting and delivering letters, but he was observed mowing his lawn, weeding, building a fence, operating a farm tractor, caring for a horse, carrying a goat, carrying bags of feed and bales of hay, and carrying a ladder, among other strenuous physical activities.

By decision dated August 25, 2014, an OWCP hearing representative affirmed OWCP's February 7, 2014 termination decision.

On September 3, 2014 OWCP received an August 27, 2014 supplemental report of investigation from the OIG, which stated that it had interviewed appellant's treating physician and chiropractor and that both physicians reviewed video of appellant engaging in numerous activities including frequently operating a riding lawn mower, operating a weed-eater, building a

fence, operating a farm tractor, caring for a horse, carrying a goat or sheep, carrying bags of feed and bales of hay, and carrying a ladder among other strenuous physical activities.

Included with this report was a handwritten statement signed on August 21, 2014 from Dr. Young. He corrected his medical opinion based on videotaped surveillance performed over a period of 19 months beginning in December 2012. Dr. Young noted that he had not seen appellant in over four months, referenced a video of appellant building a fence and using a post hole digger, and opined that he could at least perform modified-duty work. He explained that the activities he observed on videotape were not consistent with the manner in which appellant presented himself upon examination, which had caused him to place him in a nonwork status when he could have been working at least in a modified capacity.

In an August 21, 2014 statement, appellant's chiropractor, Dr. Carlton, also opined that the activities he observed on videotape were inconsistent with the manner in which appellant presented himself to him. He noted that he had not seen appellant since September 30, 2013.

On September 23, 2014 counsel informed OWCP that she had been retained to represent appellant before OWCP. She requested an electronic copy of appellant's file. OWCP responded to counsel's request on October 1, 2014 and sent a complete copy of appellant's case file to counsel.

On December 16, 2014 appellant, through counsel, requested reconsideration. Counsel argued that a conflict in medical opinion existed between Dr. Bachwitt and Dr. Young regarding whether appellant's employment injuries had resolved. She also noted that Dr. Bachwitt was unaware that L5-S1 subluxation was an accepted condition, as this information had been omitted from both the SOAF and the November 20, 2013 list of questions OWCP forwarded him.

By decision dated March 6, 2015, OWCP denied appellant's reconsideration request without conducting a merit review.

On August 11, 2015 appellant, through counsel, again requested reconsideration. Counsel argued that the accepted condition of L5 subluxation was not listed as an accepted condition in the SOAF provided to Dr. Bachwitt and that appellant was entitled to a referee examination to settle the conflict in medical opinion between Dr. Young and Dr. Bachwitt. She also argued that she was not provided with a copy of the surveillance video prior to it being presented to appellant's physician.

In a July 29, 2015 report with an August 10, 2015 amended report, Dr. Thomas E. Dannals, a family practitioner, advised that the March 9, 2015 electromyogram (EMG) found generalized peripheral neuropathy, sensory motor, and bilateral lumbar radiculopathies involving the L4-5 and S1 distribution. He opined that subluxation was present at L5-S1 due to the prior MRI scan and current symptoms. Dr. Dannals also opined that the radiculopathy report on the nerve conduction was related to a disc problem in the back. He indicated that he has known appellant for at least 20 years and he was not aware of any prior back injuries. Dr. Dannals diagnosed lumbar radiculopathy and opined that "more likely than not it is related to the MVA from September 24, 2012." He recommended a follow-up MRI scan and physical therapy. Dr. Dannals additionally recommended a referral to a neurosurgeon, physiatrist, or pain

specialist. He noted that, on examination, appellant had significant pain with bilateral straight leg raising at 90 degrees.

A March 26, 2015 EMG contained an impression of generalized peripheral neuropathy, sensory motor; and bilateral lumbar radiculopathies involving the L4-5 and S1 distribution.

By decision dated November 9, 2015, OWCP denied modification of the August 25, 2014 decision.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>4</sup> Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>5</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.<sup>6</sup> To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.<sup>7</sup>

Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>8</sup>

### **ANALYSIS**

On September 24, 2012 appellant was involved in a work-related motor vehicle accident. OWCP initially accepted his traumatic injury claim for left wrist sprain, neck sprain, and lumbosacral strain. On February 4, 2013 it expanded appellant's claim to include L5-S1 subluxation as an accepted condition. Appellant last worked on May 15, 2013. OWCP accepted a recurrence of disability beginning May 15, 2013, and it paid him wage-loss compensation for temporary total disability.

In November 2013, OWCP referred appellant for a second opinion evaluation by Dr. Bachwitt to determine the extent of an ongoing injury-related residuals. The SOAF, dated July 11, 2013, and OWCP's November 20, 2013 list of questions for the second opinion examiner, both indicated that appellant's accepted conditions included neck sprain, lumbosacral sprain, and left wrist sprain. Neither document referenced L5-S1 subluxation as an additional accepted condition.

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<sup>4</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>5</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>6</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

<sup>7</sup> *Calvin S. Mays*, 39 ECAB 993 (1988).

<sup>8</sup> *Richard F. Williams*, 55 ECAB 343, 346 (2004).

Dr. Bachwitt examined appellant on December 16, 2013, and in his December 19, 2013 report he opined that appellant's "cervical, left wrist and lumbosacral sprain/strains [had] all resolved." He explained that "[t]hese simple sprain/strains should have resolved within two to three months at the most and it has now been more than one year." Dr. Bachwitt found that appellant no longer suffered residuals of the "cervical, left wrist and lumbar sprain/strains," and was able to return to full-duty work as a rural carrier. He also advised that appellant did not require any further treatment for the subject injury. OWCP relied on Dr. Bachwitt's December 19, 2013 opinion in terminating appellant's wage-loss compensation and medical benefits, effective February 9, 2014.

Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>9</sup> In this instance, it neglected to inform the second opinion examiner, Dr. Bachwitt, that appellant's claim had also been accepted for L5-S1 subluxation. The Board has previously explained that when an OWCP medical adviser, a second opinion specialist, or an independent medical examining physician renders a medical opinion based on an incomplete or inaccurate SOAF or does not use the SOAF as the framework in forming the opinion, the probative value of the opinion is diminished, or negated altogether.<sup>10</sup> The Board finds that, because of the incomplete SOAF, OWCP failed to meet its burden of proof.<sup>11</sup>

The Board, therefore, finds that OWCP erred in relying on Dr. Bachwitt's report to terminate appellant's wage-loss compensation and medical benefits.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective February 9, 2014.<sup>12</sup>

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<sup>9</sup> *Richard F. Williams*, 55 ECAB 343, 346 (2004).

<sup>10</sup> *M.B.*, Docket No. 16-0559 (issued October 27, 2016); *see also J.D.*, Docket No. 15-0305 (issued August 5, 2015).

<sup>11</sup> *M.B.*, *id.*

<sup>12</sup> In light of the above findings and conclusion, Issue 2 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 9, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 15, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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