



## **ISSUE**

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 13, 2016, because the accepted lumbar sprain and neck sprain had resolved with no residuals.

On appeal counsel asserts that the employment injury caused additional conditions. She questioned whether the referee physician was properly selected. Counsel also maintained that the statement of accepted facts (SOAF) was insufficient and that the referee's report was speculative and of insufficient rationale to meet OWCP's burden.

## **FACTUAL HISTORY**

This case has previously been before the Board. The facts as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts of the prior appeals are set forth below.

On April 27, 2005 appellant, a 59-year-old nurse, sustained employment-related lumbar and neck strains while lifting a patient. She received compensation for temporary total disability on the periodic rolls. Appellant retired effective June 30, 2006 and on July 20, 2006 received a voluntary separation incentive payment in the amount of \$25,000.00, with a net payment of \$16,760.01.

Appellant returned to a modified position as a clerk in the appointment center at the employing establishment on December 5, 2011. On January 17, 2012 OWCP reduced her compensation to reflect her earnings. On February 12, 2012 appellant began a position as a modified utilization review nurse.<sup>3</sup>

On March 2, 2012 appellant filed a claim for compensation (Form CA-7) claiming four hours of wage loss for a physician visit, and four hours of leave without pay on February 29, 2012. On March 15, 2012 she filed additional claims for compensation for the period March 1 to 29, 2012, indicating that she stopped work on her physician's orders.

In a March 15, 2012 decision, OWCP found that appellant's earnings as a nurse, beginning February 12, 2012, fairly and reasonably represented her wage-earning capacity with zero loss. In an April 27, 2012 decision, it found that her actual earnings as an appointment clerk for the period December 5, 2011 to February 12, 2012 fairly and reasonably represented her wage-earning capacity and reduced her compensation, effective December 5, 2011, when she

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<sup>3</sup> Both positions were identified as transitional assignments with sedentary duties consisting of data entry, scanning and answering telephones. The specific duties were different including that in the clerk position appellant was responsible for scheduling, canceling and rescheduling patient appointments, and in the nurse position she was to review clinical data and documentation in the computerized patient record system. The annual salary for the clerk position was \$36,384.00 and for the nursing position \$78,212.00.

assumed the position. OWCP determined that appellant's wage-earning capacity was 42 percent.<sup>4</sup>

On August 6, 2012 appellant filed a recurrence claim (Form CA-2a). She indicated that her modified duties of sitting and typing data into a computer for eight hours a day caused excruciating pain in her neck, shoulders, low back, and legs, and that the pain became so severe on February 28, 2012 that she stopped work. Appellant resigned from the employing establishment effective March 12, 2012, stating that it was for medical reasons. She began treatment with Dr. Patrick H. Waring, Board-certified in anesthesiology and pain medicine.

In a February 21, 2013 decision, OWCP denied appellant's recurrence claim, finding that the medical evidence of record was insufficient to establish that her accepted conditions had worsened. On April 30, 2013 counsel appealed the February 21, 2013 decision to the Board. She continued to submit reports from Dr. Waring who diagnosed lumbar disc disease, lumbar spondylosis, and lumbar disc displacement.

By order dated November 4, 2013, the Board found that OWCP should have adjudicated appellant's recurrence claim beginning February 28, 2012 under the standard of whether she had established that the March 15, 2012 loss of wage-earning capacity (LWEC) determination should be modified. The Board remanded the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve her appeal rights.<sup>5</sup>

In a February 26, 2014 decision, OWCP found that appellant had not met her burden of proof to modify the LWEC decision. In an August 21, 2014 decision, the Board found that, as she had not been performing the utilization review nurse position for 60 days when OWCP issued the March 15, 2012 decision, the decision was erroneous on its face. Accordingly, the Board reversed the March 15, 2012 LWEC decision and remanded the case for proper adjudication of appellant's claims for wage loss beginning March 1, 2012.<sup>6</sup>

Subsequent to the Board's August 21, 2014 decision, appellant elected FECA compensation, effective March 1, 2012. She was paid wage-loss compensation retroactive to March 1, 2012 and was placed on the periodic compensation rolls.

Medical evidence relevant to the issue in this case includes a July 29, 2005 magnetic resonance imaging (MRI) scan of the cervical spine that was unremarkable except for straightening of the normal lordotic posture which could be due to muscle spasm or positioning. A lumbar spine MRI scan of that day revealed a herniation at L5-S1 which appeared less

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<sup>4</sup> OWCP procedures in effect at the time OWCP issued the wage-earning capacity determination provided that OWCP could make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity, and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

<sup>5</sup> Docket No. 13-1261 (issued November 4, 2013). On December 3, 2013 the Board issued an erratum, noting that appellant was represented by counsel.

<sup>6</sup> Docket No. 14-0970 (issued August 21, 2014).

pronounced than on a previous 2001 examination, lumbar facet arthrosis, and subtle bulging at L4-5.<sup>7</sup> A July 2, 2008 cervical spine MRI scan showed straightening of the cervical lordosis with subtle scoliosis and disc pathology at C3-4 and C4-5 without neurocompression. A lumbar spine MRI scan that day demonstrated mild facet disease without neurocompression on descending or exiting nerve roots. A March 3, 2015 MRI scan of the lumbar spine demonstrated degenerative changes in combination with disc and facet pathology, and bilateral renal cysts.

In reports dated August 27, 2014 and March 16, 2015, Dr. Waring noted appellant's complaint of back pain, provided physical examination findings, and diagnosed cervical spondylosis without myelopathy, thoraco-lumbosacral radiculitis, lumbosacral spondylosis without myelopathy, lumbar disc displacement without myelopathy, and localized osteoarthritis in the pelvic region. He advised that she was totally disabled due to spinal disability and provided cervical and lumbar physical restrictions.

In July 2015, OWCP referred appellant to Dr. Simon Finger, an orthopedic surgeon, for a second opinion. In an August 7, 2015 report, Dr. Finger noted the history of injury, his review of the medical record including MRI scan findings and her complaint of chronic neck, hip, and radiating back pain. His examination demonstrated that appellant could heel and toe walk and could minimally squat. Straight leg raises were negative. Lower extremity and cervical spine range of motion was full. Lumbar spine range of motion was somewhat limited. Dr. Finger opined that, while appellant was injured on April 27, 2005 and could have temporarily aggravated preexisting lumbar degenerative disc disease on April 27, 2005, the accepted conditions had resolved, and her degenerative spine condition was age related. He indicated that she needed no further orthopedic care for the work-related conditions and was at maximum medical improvement regarding the accepted conditions.

On August 11, 2015 Dr. Joseph Francis Sejud, an emergency medicine specialist, noted appellant's report of the employment injury, the accepted conditions of cervical and lumbar strains, and that she had been unable to work since and had retired. He reported limited range of motion of the neck and lumbar spine with no lumbar paraspinal tenderness or muscle spasm found on examination.

In a September 24, 2015 report, Dr. Joseph B. Boucree, a Board-certified orthopedic surgeon, noted the history of injury and appellant's complaint of radiating neck and back pain which had recently worsened. Examination demonstrated paraspinal cervical and lumbar tenderness with moderate restriction of cervical and lumbar spine range of motion. Sensory was intact to light touch and pinprick through the upper and lower extremities. Right shoulder strength was limited, and there was bilateral trochanteric tenderness present on hip examination. Straight leg raising produced bilateral back pain, and gait was slightly antalgic. Dr. Boucree reviewed x-ray and MRI scan reports. He diagnosed degenerative disc disease of the cervical and lumbar spines, osteoarthritis of the lumbar spine with radiculopathy, bilateral lumbar radiculopathy, hip and shoulder bursitis, arthropathy of lumbar facet joint, herniated lumbar intervertebral disc, and neural foraminal stenosis of the lumbar spine.

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<sup>7</sup> A lumbar spine MRI scan dated in 2001 is not found in the case record before the Board.

Dr. Sejud again saw appellant on September 22, 2015. He noted his review of Dr. Finger's report and disagreed with his findings. Dr. Sejud advised that, based on his two examinations, appellant had considerable disability which would preclude her from full-time employment. He reported lumbar paraspinal tenderness and decreased cervical and lumbar range of motion on examination. Dr. Sejud opined that the employment injury was clearly more extensive than a lumbar strain. He noted MRI scan findings of a disc herniation and advised that appellant required continued orthopedic care. On October 1, 2015 appellant was seen by Dr. Jason Pellegrin, a chiropractor, for physical therapy. Dr. Pellegrin diagnosed lumbar sprain/strain.

A November 11, 2015 MRI scan of the cervical spine demonstrated minimal disc bulges with no spinal canal narrowing or significant foraminal narrowing. On November 16, 2015 Dr. Boucree performed an epidural steroid injection. In treatment notes dated January 7 to May 12, 2016, he noted review of the November 11, 2015 MRI scan study,<sup>8</sup> reiterated his diagnoses, and indicated that appellant had marginal improvement from the steroid injection. Physical examination demonstrated cervical and lumbar tenderness with mild restriction of cervical and moderate restriction of lumbar spine range of motion.<sup>9</sup>

OWCP determined that a conflict in medical evidence had been created between Dr. Waring and Dr. Finger regarding appellant's work capabilities, and in June 2016 referred her to Dr. Gordon Nutik, a Board-certified orthopedic surgeon, for an impartial evaluation.<sup>10</sup>

In a July 21, 2016 report, Dr. Nutik noted the history of injury, his review of the medical record including diagnostic studies, appellant's description of her medical care, and her complaints of radiating neck, back, and shoulder pain. His x-ray of the cervical spine that day showed no fractures or hypertrophic changes, normal cervical lordosis and patent foramina. Disc heights were maintained. X-ray of the lumbosacral spine showed no fractures with normal lumbar lordosis. Disc heights were maintained. Degenerative facet changes were seen at L4-5 and L5-S1 with sclerotic bone changes. Sacroiliac joints and hip joints were patent. Osteophytes were present about the right and left acetabulum. Examination of the neck revealed a normal cervical lordosis. Dr. Nutik found no pain to palpation about the cervical spine, trapezius, or sternomastoid muscles, and there was no spasm of the neck muscles. Neurologic examination of the arms revealed normal sensation to light touch and equal muscle testing. No atrophy was present. Speed test and impingement sign were negative. Tinel's test was negative at the elbows and wrists. Right wrist examination demonstrated pain about the volar aspect with

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<sup>8</sup> Dr. Boucree also referenced a November 11, 2015 electromyogram and nerve conduction velocity study that is not found in the case record before the Board.

<sup>9</sup> By decision dated February 22, 2016, OWCP found that an overpayment of compensation in the amount of \$11,792.76 had been created because appellant received FECA compensation and Social Security Administration retirement benefits concurrently for the period April 12, 2012 through May 3, 2016. Appellant repaid the overpayment in full.

<sup>10</sup> The record contains an OWCP ME023 and bypass logs. OWCP had initially referred appellant to Dr. Richard Meyer, also Board-certified in orthopedic surgery. The bypass logs found in the record document the reasons physicians were bypassed until, first, Dr. Meyer was selected and, second, the selection of Dr. Nutik. Dr. Meyer was bypassed because he wished to see medical records before an appointment could be made.

no swelling present. Dr. Nutik found no pain to palpation about the thoracic spine or paravertebral muscles. Low back examination revealed normal lumbar lordosis with pain to palpation laterally to the right hip, and no pain to palpation about the lumbar spine, paravertebral, or gluteal muscles, and no spasm of the back muscles. Neurologic examination of the legs showed decreased sensation to light touch about the left great toe with equal muscle power present, and no right or calf atrophy. The right hip had localized pain. There was no pain to palpation about the feet. Dr. Nutik noted that review of records indicated that appellant had a prior history of low back complaints before the April 27, 2005 injury, as shown by lumbar spine MRI scans in 2001 and 2002 which revealed a disc herniation at L5-S1. He opined that, based on the history and review of records, she had soft tissue strains about the neck and lower back related to the April 27, 2005 injury which should have resolved and were not actively aggravating at the time of his examination. Dr. Nutik advised that, while it was possible that there may have been a temporary aggravation of underlying nonspecific degenerative changes about the neck and lower back caused by the April 27, 2005 work injury, these should have resolved, noting documentation for underlying disc abnormality at the L5-S1 that preexisted the April 27, 2005 injury. He noted that appellant had not worked since 2012 and as such was deconditioned. Thus, appellant had a poor prognosis for return to gainful activity. Dr. Nutik found no objective clinical findings that suggested additional restriction from those found on a 2011 functional capacity evaluation, which recommended a sedentary work, which she could presently perform.

On September 1, 2016 OWCP proposed to terminate appellant's wage-loss and medical benefits. It found that Dr. Nutik's opinion that she no longer had disability or residuals due to the accepted conditions constituted the weight of the medical evidence.

Appellant, through counsel, disagreed with the proposed termination. Counsel questioned whether Dr. Nutik was properly selected, that the SOAF did not contain a discussion of medical evidence subsequent to 2011, and maintained that Dr. Nutik's opinion was conclusive and lacked sufficient rationale to meet OWCP's burden of proof. She further asserted that the medical evidence showed not only that appellant continued to suffer residuals and disability due to the work injury, but that the evidence was sufficient to warrant a formal upgrade of employment-related conditions.

Dr. Boucree continued to treat appellant. He performed lumbar epidural steroid injections on June 17 and August 8 and 29, 2016.

In a supplemental report, dated October 17, 2016, Dr. Nutik advised that appellant's soft tissue injuries involving the neck and lower back caused by the April 27, 2005 employment injury should have resolved, noting that she had a prior chronic lower back problem as documented by MRI scans, and that the April 27, 2005 injuries were superimposed on this preexisting condition and should have resolved to where she was at her preexisting condition where she had chronic low back symptoms.

By decision dated October 27, 2016, OWCP found that the weight of the medical evidence rested with the referee opinion of Dr. Nutik, and finalized the termination of appellant's wage-loss compensation and medical benefits.

## LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>11</sup> OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>12</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>13</sup> The implementing regulations provides 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>14</sup> When 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>15</sup>

## ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 13, 2016. The accepted conditions in this case are lumbar and neck sprains. Following retirement in 2006, appellant briefly returned to work in December 2011, continuing until she stopped on February 28, 2012. Based on the Board's August 21, 2014 decision,<sup>16</sup> she received wage-loss compensation retroactive to March 1, 2012 and was placed on the periodic compensation rolls.

OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Waring, an attending pain management specialist, and Dr. Finger, an OWCP referral orthopedic surgeon, regarding appellant's work capabilities. It referred her, along with a SOAF, a set of questions, and the medical record, to Dr. Nutik, a Board-certified orthopedic surgeon, for an impartial evaluation.

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<sup>11</sup> *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>12</sup> *Id.*

<sup>13</sup> 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

<sup>14</sup> 20 C.F.R. § 10.321.

<sup>15</sup> *V.G.*, 59 ECAB 635 (2008).

<sup>16</sup> *Supra* note 6.

In a July 21, 2016 report, Dr. Nutik noted the history of injury, his review of the medical record including diagnostic studies, appellant's description of her medical care, and her complaints of radiating neck and back, and shoulder pain. X-rays of the cervical and lumbosacral spine showed no fractures with degenerative facet changes seen at L4-5 and L5-S1. Dr. Nutik found no pain to palpation about the cervical spine, trapezius, or sternomastoid muscles, and there was no spasm of the neck muscles. Neurologic examination of the arms revealed normal sensation to light touch, equal muscle testing, and no atrophy. Dr. Nutik found no pain to palpation about the thoracic spine or paravertebral muscles. Examination of the low back revealed normal lumbar lordosis with pain to palpation laterally to the right hip, and no pain to palpation about the lumbar spine, paravertebral, or gluteal muscles, and no spasm of the back muscles. Neurologic examination of the legs showed decreased sensation to light touch about the left great toe with equal muscle power present, and no right or calf atrophy. Localized right hip pain was present. Dr. Nutik advised that appellant had a prior history of low back complaints before the April 27, 2005 injury, noting that lumbar MRI scans in 2001 and 2002 revealed a disc herniation at L5-S1. He opined that, based on the history and review of records, appellant sustained soft tissue strains about the neck and lower back related to the April 27, 2005 injury which were not actively aggravating at the time of his examination. Dr. Nutik advised that, while it was possible that there may have been a temporary aggravation of underlying nonspecific degenerative changes of the neck and lower back caused by the April 27, 2005 work injury, these should have resolved, noting documentation for underlying disc abnormality at the L5-S1 that preexisted the April 27, 2005 injury. He found no objective clinical findings to suggest that appellant had restrictions greater than those found on a 2011 functional capacity evaluation which recommended a sedentary level of work, which she could perform at present. In a supplemental report dated October 17, 2016, Dr. Nutik advised that her soft tissue injuries involving the neck and lower back caused by the April 27, 2005 employment injury should have resolved to her preexisting chronic low back symptoms.

The Board finds that Dr. Nutik provided a comprehensive, well-rationalized opinion in which he advised that, while it was possible that there may have been a temporary aggravation of underlying degenerative changes about the neck and lower back caused by the April 27, 2005 employment injury, these should have resolved and were not actively aggravating at the time of his examination. Dr. Nutik noted documentation of preexisting disc abnormality at the L5-S1. He found no basis on which to attribute any disability or continuing residuals to the accepted conditions. Dr. Nutik's opinion is therefore entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.<sup>17</sup>

The medical evidence appellant submitted prior to the termination was insufficient to overcome the special weight accorded Dr. Nutik. In reports dated July 7 and August 12, 2016, Dr. Boucree merely described her complaints, reported MRI scan findings, and discussed his examinations. He also provided lumbar epidural steroid injections and diagnosed lumbar radiculopathy. Dr. Boucree did not discuss the accepted conditions or provide a cause of the diagnosed condition.

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<sup>17</sup> See *Sharyn D. Bannick*, 54 ECAB 537 (2003).

The Board therefore concludes that Dr. Nutik's opinion that appellant had recovered from the accepted lumbar and neck sprains is entitled to the special weight accorded an impartial medical examiner,<sup>18</sup> and the additional medical evidence submitted is insufficient to overcome the weight accorded him as an impartial medical specialist regarding whether appellant had residuals of the accepted conditions. Moreover, none of the diagnoses of Dr. Waring, Dr. Boucree, or Dr. Sejud have been accepted.<sup>19</sup> OWCP therefore properly terminated appellant's compensation effective November 13, 2016.<sup>20</sup>

On appeal counsel questions whether Dr. Nutik was properly selected. The record contains sufficient documentation to support that Dr. Nutik was properly selected as impartial medical examiner. As noted,<sup>21</sup> the record contains an OWCP ME023 and bypass logs. The bypass logs found in the record document the reasons physicians were bypassed until Dr. Nutik was selected. Section 3-500 of OWCP procedures provides guidance for selecting impartial physicians.<sup>22</sup> OWCP followed these procedures in this case and properly selected Dr. Nutik as impartial medical examiner.<sup>23</sup>

Counsel also asserted on appeal that the SOAF was incomplete as it did not list medical evidence subsequent to 2011. In securing the opinion of a medical specialist, Section 2.809.3 of OWCP procedures provides that a SOAF and development questions are to be prepared by the claims examiner for use by the physician.<sup>24</sup> The claims examiner is required to set forth the relevant facts of the case, including the employee's date of injury, age, job held when injured, the mechanism of the injury, and any conditions claimed or accepted by OWCP.<sup>25</sup> The SOAF provided Dr. Nutik contained all the required information. Moreover, Dr. Nutik was provided with a complete copy of appellant's case record. The Board finds that there was no error in the SOAF.<sup>26</sup>

Accordingly, the Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits based on the opinion of the impartial examiner, Dr. Nutik.

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<sup>18</sup> *Id.*

<sup>19</sup> The Board notes that OWCP has not rendered a final decision regarding whether additional conditions should be accepted. The Board's jurisdiction is limited to reviewing final decisions of OWCP issued within 180 days of filing an appeal. 20 C.F.R. §§ 501.2(c) and 501.3(e); *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

<sup>20</sup> *Manuel Gill*, 52 ECAB 282 (2001).

<sup>21</sup> *Supra* note 10.

<sup>22</sup> *Supra* note 4 at Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500 (May 2013).

<sup>23</sup> *Id.*; *J.S.*, Docket No. 16-1097 (issued December 5, 2016).

<sup>24</sup> *Supra* note 4 at Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.3 (September 2009).

<sup>25</sup> *Id.*; *see A.C.*, Docket No. 09-0389 (issued October 7, 2009).

<sup>26</sup> *J.S.*, *supra* note 23.

**CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 13, 2016.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 27, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 1, 2017  
Washington, DC

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

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

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