



## **ISSUES**

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 13, 2015, because he no longer had residuals of his accepted September 6, 2011 employment injury; and (2) whether appellant established any continuing residuals or employment-related disability after October 13, 2015.

## **FACTUAL HISTORY**

On September 9, 2011 appellant, then a 49-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on September 6, 2011, he experienced pain down his lower middle back and left outer thigh when he pulled hard on a hook while pulling mail at work. He stopped work on September 9, 2011. OWCP accepted appellant's claim for lumbar sprain, left hip and thigh sprain, and aggravation of preexisting degenerative disc disease. It paid medical and wage-loss compensation benefits for intermittent periods of disability on the supplemental rolls from October 22, 2011 until June 30, 2012.<sup>4</sup> OWCP placed appellant's claim on the periodic rolls, effective July 1, 2012.

By letter dated February 25, 2014, the employing establishment's Office of Inspector General advised OWCP that an investigation had begun of appellant as to possible misrepresentation of material fact in claiming FECA benefits. It noted that intermittent surveillance had been conducted between May 3 and October 29, 2013. A summary was provided of appellant's observed physical activities.

OWCP referred appellant to Dr. Manhal Ghanma, a Board-certified orthopedic surgeon, on March 20, 2014, along with a statement of accepted facts (SOAF) and a copy of the medical record, for a second opinion examination to determine whether he continued to suffer residuals and remained disabled due to his September 6, 2011 employment injury. In an April 11, 2014 report, Dr. Ghanma reviewed appellant's history and provided findings on physical examination. He reported that there were no objective examination findings of appellant's accepted conditions of lumbar strain, left hip strain, or aggravation of preexisting degenerative disc disease of the lumbar spine. Dr. Ghanma opined that appellant's current lumbar complaints related to a worsening of his degenerative changes. He concluded that appellant was able to perform his job duties without restrictions.

Appellant submitted various letters dated April 29 to July 1, 2014 from Dr. Timothy J. Nice, an orthopedic surgeon, to OWCP. Dr. Nice noted his disagreement with Dr. Ghanma's April 11, 2014 second opinion report. He described appellant's September 6, 2011 employment injury and the medical treatment he had received. Upon physical examination, Dr. Nice reported positive straight leg raise testing at 70 degrees and muscle spasms of appellant's lumbar spine. He also noted symptoms in appellant's left leg consistent with chronic L4 radiculopathy.

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<sup>4</sup> Appellant was released to light duty on September 6, 2011. The employing establishment however, was unable to accommodate his restrictions. OWCP paid disability compensation. On November 14, 2011 appellant returned to full duty. He was placed back on work restrictions effective December 6, 2011. OWCP paid disability compensation because the employing establishment was unable to accommodate his restrictions. In January 2012, appellant's physician advised that he was totally disabled from work.

Dr. Nice opined that appellant's 2011 employment injury was a "substantial aggravation of preexisting disc disease that culminated in a herniated disc." He indicated that although appellant's claim was accepted for back strain, he was hesitant to enforce that diagnosis because he had *bona fide* studies that showed chronic left L5 radiculopathy. In the July 1, 2014 letter, Dr. Nice related that a recent lumbar spine magnetic resonance imaging (MRI) scan showed midline bulging at L2 with caudally extruded disc material to the left of midline causing moderate left anterior thecal sac compression, disc bulging at L4 and L5, and disc disease at L4 and L3. He reported that appellant was unable to work. Dr. Nice provided examination notes which contained his examination findings and noted diagnoses of lumbar sprain and radiculopathy of the sacral and sacrococcygeal region.

In a June 6, 2014 electromyography (EMG) and nerve conduction velocity (NCV) study, Dr. Matthew M. Keum, Board-certified in physical medicine and rehabilitation, related appellant's complaints of chronic lower back pain radiating to both legs, left greater than right. He indicated that electrodiagnostic testing showed evidence of chronic left L5 radiculopathy and subacute right L5 radiculopathy and bilateral S1 proximal conduction delay.

Appellant underwent a lumbar spine MRI scan by Dr. David Horejs, a Board-certified diagnostic radiologist. In a June 26, 2014 report, Dr. Horejs noted midline bulging at L2-3 with caudally extruded disc material to the left of midline causing moderate left anterior thecal sac compression, increased signal suggesting edema in the posterior L3 disc and midline herniation and caudal extension causing mild anterior thecal sac compression, disc bulging at L4-5 more prominent to the right of midline causing mild anterior thecal sac flattening and potentially significant right neural foramen stenosis, and midline bulging at L5-S1 without thecal sac compression but more prominent protrusion into the left neural foramen with probable left L5 nerve root impingement.

OWCP determined that a conflict in the medical evidence existed between Dr. Nice, appellant's treating physician, and Dr. Ghanma, OWCP's referral physician, with respect to his employment-related conditions and disability. It referred appellant, along with a SOAF and a copy of the record, to Dr. Mark Berkowitz, a Board-certified orthopedic surgeon, to resolve the conflict. In an August 26, 2014 report, Dr. Berkowitz reviewed the SOAF and recounted appellant's medical history, and noted that appellant had work-related diagnoses of lumbar strain, left hip strain, and aggravation of preexisting degenerative disc disease of the lumbar spine. He indicated that appellant had not worked since January 2012. Dr. Berkowitz related appellant's current complaints of constant lower back pain, which ran to his left hip and down his left leg. He discussed appellant's medical records and conducted an examination. Dr. Berkowitz reported no redness, erythema, increased or decreased temperature, masses, or deformities in appellant's lumbosacral spine area. He noted normal lumbar lordosis and no paraspinal muscle spasms, guarding, or tenderness to palpation over the midline or sacroiliac joints. Straight leg raise testing was 90 degrees bilaterally. Dr. Berkowitz indicated that examination of appellant's left hip showed no tenderness to palpation of the left hip or over the left greater trochanteric area. Sensation examination was intact in the lower extremity. Dr. Berkowitz diagnosed lumbar strain, left hip strain, and aggravation of preexisting degenerative disc disease of the lumbar spine. He also reported nonwork-related conditions of left L5 radiculopathy and subacute right L5 radiculopathy.

Dr. Berkowitz opined that, upon physical examination, he did not find any objective examination findings, other than appellant's subjective lower back pain complaints, to support that the residuals of each of the accepted conditions of lumbar strain, left hip strain, and aggravation of preexisting degenerative disc disease were still present. He explained that motor strength was intact and there was no evidence of muscle atrophy or radicular symptoms. Dr. Berkowitz indicated that according to the *Official Disability Guidelines*, the soft tissue injuries of lumbar strain, left hip strain, and aggravation of preexisting degenerative disc disease should have resolved with the passage of time. He further reported that appellant's condition of aggravation of preexisting degenerative disc disease had returned to its preinjury status and the employment-related aggravation had ceased. Dr. Berkowitz noted that according to the surveillance video in the record, appellant did not appear to be very limited in the function of his lower back. He related that appellant's current condition appeared to relate to the natural aging process of the lumbar spine, appellant's preexisting degenerative disease of the lumbar spine, and his current obesity. Dr. Berkowitz opined that appellant "appear[ed] to be medically able to perform the duties of his date[-]of[-]injury job as a mail handler." He reported that "objective findings in the file, including surveillance videos, and comprehensive physical examination supports that [appellant] was able to perform heavy lifting without apparent difficulty when he thought that nobody was observing his activities."

Appellant was also treated by Dr. Jerome B. Yokiell, a Board-certified anesthesiologist. In progress notes dated October 2, 2014 and January 8, 2015, Dr. Yokiell related appellant's continued complaints of chronic back pain with radiation down the left lower extremity. He noted that appellant was taking Percocet four times a day and Neurontin three times a day. Upon physical examination of appellant's lumbar spine, Dr. Yokiell reported tenderness to palpation over the lumbosacral region, increasing pain with range of motion of the lumbar spine, and increasing pain with straight leg raise testing on the left approximate 40 degrees. He diagnosed lumbar sprain, lumbar disc displacement, and lumbar disc degeneration.

On November 26, 2014 OWCP expanded acceptance of appellant's claim to include aggravation of preexisting herniated discs at L3-4, L4-5, and L5-S1 and left-sided lumbar radiculopathy.

Dr. Nice further reported in a March 3, 2015 progress note that MRI scan and electrical studies showed severe spine disease. He related that examination of appellant showed that he was in a terrible state. Dr. Nice noted that appellant was unable to work at this time.

In a March 6, 2015 lumbar spine computerized tomography (CT) scan report, Dr. Aliye Bricker, a Board-certified diagnostic radiologist, noted a history of lumbago. He reported degenerative changes notable for mild central canal stenosis and moderate-severe right foraminal stenosis at L4-5, severe left foraminal stenosis at L5-S1, and possible central disc protrusion at L3-4 resulting in moderate central canal stenosis.

Appellant was also treated by Dr. Michael D. Eppig, an orthopedic spine surgeon. In a March 27, 2015 progress note, Dr. Eppig related that appellant had no change in his overall symptoms and his chief complaint was still central low back pain. He reported that physical examination showed normal heel walk and toe walk and intact sensation in the lower extremities. Dr. Eppig indicated that a computerized axial tomography (CAT) scan of the lumbar spine

revealed severe stenosis at L4 and L5 and a vacuum disc at both L4-5 and L5-S1 with loss of disc height.

In progress notes dated April 16 and July 7, 2015, Dr. Yokiell related appellant's complaints of continued low back pain radiating down the left lower extremity to the ankle and intermittent numbness in the left ankle. Upon physical examination of appellant's lumbar spine, he reported tenderness to palpation in the midline lumbar region but no spasms or trigger points. Dr. Yokiell related that appellant had increasing pain with straight leg raise testing on the left, approximately 40 degrees, and increasing pain with range of motion of the lumbar spine. Examination of appellant's lower extremities showed no pedal edema and normal range of motion. Dr. Yokiell diagnosed lumbar sprain, lumbar disc displacement, and lumbar disc degeneration. He recommended that appellant continue with pain medication.

OWCP proposed to terminate appellant's wage-loss compensation and medical benefits in a decision dated September 10, 2015. It found that the weight of medical evidence rested with the opinion of the impartial medical examiner, Dr. Berkowitz, who determined in an August 26, 2014 report that there were no objective findings to demonstrate continued residuals of his accepted September 6, 2011 employment injury. Appellant was advised that he had 30 days to submit additional evidence or argument if he disagreed with the decision.

Appellant submitted a September 22, 2015 report by Jennifer Dehlman, a certified nurse practitioner. Ms. Dehlman noted appellant's complaints of chronic low back pain resulting from a workers' compensation injury. She provided examination findings of tenderness to palpation of the lumbosacral spine and no paravertebral spasm. Ms. Dehlman indicated increased pain with flexion of the lumbosacral spine. Straight leg raise testing revealed increased back pain bilaterally. Ms. Dehlman diagnosed lumbar sprain, lumbar disc displacement, and lumbar disc degeneration. She recommended that appellant continue with pain medication.

In a September 24, 2015 letter to counsel, Dr. Nice indicated that he reviewed Dr. Berkowitz's August 26, 2014 report. He related that he did not understand how after a detailed and thorough report, Dr. Berkowitz could opine that appellant did not have a significant injury or, at the very least, an injury severe enough to aggravate a preexisting lumbar problem. Dr. Nice explained that he agreed with Dr. Berkowitz that appellant had chronic spondylitic changes, chronic disc disease, and spinal stenosis. He discussed the medical treatment that appellant received. Dr. Nice reported that based on appellant's history of issues with his back over the past four years, it was his opinion, as well as the opinion of all other surgeons, that appellant's back condition had indeed worsened and that it did not get dramatically worse until the 2011 episode that took him out of work. He noted that appellant had worked for the employing establishment for 20 years until the September 6, 2011 work injury. Dr. Nice concluded that appellant was unable to work.

By decision dated October 13, 2015, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective that date. It determined that the medical evidence appellant submitted after the September 10, 2015 proposed termination of compensation benefits was insufficient to alter the recommendation to terminate his medical and wage-loss compensation benefits. OWCP found that the medical evidence failed to demonstrate

that appellant continued to suffer residuals or continuing disability as a result of his September 6, 2011 employment injury.

On October 16, 2015 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. A hearing was held on June 6, 2016. Appellant testified that he still experienced severe back pain that ran down his left hip to his ankle. He indicated that his back symptoms severely limited his daily activities and required him to take pain medication five times a day. Appellant referenced the various doctors who had treated him and the conservative medical treatment he had received, including spinal injections. He noted that he had not worked since December 2011 and had not sustained any other accidents or injuries since 2011.

In a June 14, 2016 letter to counsel, Dr. Nice reiterated that he felt that appellant had a “significant exacerbation of his disc disease in his lumbar spine” because of his job. He noted that diagnostic examinations confirmed that appellant had a disc herniation at L5 and chronic L5 radiculopathy. Dr. Nice indicated that Dr. Berkowitz also noted this pathology, but came to an entirely different conclusion. He related that he believed Dr. Berkowitz’s conclusion was based on his viewing of the video surveillance. Dr. Nice reported that all the doctors who had seen appellant opined that appellant was unable to work because of his ongoing spine pathology. He noted that he did not understand why OWCP was giving so much weight to the opinion of Dr. Berkowitz as compared to these other physicians.

By decision dated July 29, 2016, an OWCP hearing representative affirmed the October 13, 2015 decision terminating appellant’s wage-loss compensation and medical benefits. He found that OWCP properly accorded the special weight of medical evidence to the medical opinion of Dr. Berkowitz, the impartial medical examiner, who determined that appellant’s September 6, 2011 employment injuries had ceased.<sup>5</sup>

On December 8, 2016 appellant, through counsel, requested reconsideration. He resubmitted Dr. Nice’s June 14, 2016 letter.

Dr. Yokiell continued to treat appellant. In an August 18, 2016 progress note, he indicated that appellant returned with continued complaints of low back pain radiating down the left lower extremity. Dr. Yokiell reported examination findings of tenderness to palpation in the midline lumbar region, increasing pain with straight leg raise testing at approximately 40 degrees, and pain with range of motion of the lumbosacral spine. He recommended that appellant continue his home exercising program.

By decision dated March 7, 2017, OWCP denied modification of its July 29, 2016 decision. It found that OWCP properly relied on the medical opinion of Dr. Berkowitz, the impartial medical examiner, who determined that appellant’s September 6, 2011 employment injuries had ceased. OWCP determined that there was no medical evidence in the record, which

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<sup>5</sup> On October 24, 2016 appellant, through counsel, filed an appeal before the Board. By letter dated November 7, 2016, counsel requested that the appeal be dismissed. On December 6, 2016 the Board issued an *Order Dismissing Appeal* in Docket No. 17-0095 which granted appellant’s request. See *Order Dismissing Appeal*, Docket No. 17-0095 (issued December 6, 2016).

contained a rationalized opinion from a physician to establish that appellant continued to experience residuals or disability as a result of the September 6, 2011 employment injury.

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

According to FECA, once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.<sup>6</sup> 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> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>8</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>9</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>10</sup>

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>11</sup> 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>12</sup> When there exists 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>13</sup>

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

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits, effective October 13, 2015.

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<sup>6</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>7</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

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

<sup>9</sup> *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

<sup>10</sup> *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *A.P.*, *id.*

<sup>11</sup> 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

<sup>12</sup> 20 C.F.R. § 10.321.

<sup>13</sup> *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

OWCP accepted that appellant sustained a lumbar sprain, left hip and thigh sprain, and aggravation of preexisting degenerative disc disease. It later expanded appellant's claim to include aggravation of preexisting herniated discs and left-sided lumbar radiculopathy. Appellant stopped work and received wage-loss compensation and medical benefits until October 13, 2015. In an April 11, 2014 report, Dr. Ghanma, an OWCP referral physician, determined that appellant's employment injuries had resolved and that he was no longer disabled from work. In various letters dated April 29 to July 1, 2014, Dr. Nice, appellant's treating physician, opined that appellant continued to have work-related residuals and disability. To resolve the conflict between appellant's physicians and the referral physician, OWCP referred appellant to Dr. Berkowitz for an impartial examination. The Board finds that OWCP properly determined that a conflict in medical opinion existed and referred appellant for an impartial medical examination in order to resolve the conflict, pursuant to 5 U.S.C. § 8123(a).

In an August 26, 2014 report, Dr. Berkowitz reviewed appellant's history, including the SOAF, and accurately described the September 6, 2011 employment injury. He noted that according to the SOAF, appellant's work-related conditions were lumbar strain, left hip strain, and aggravation of preexisting degenerative disc disease of the lumbar spine. Upon physical examination, Dr. Berkowitz reported no paraspinal muscle spasms, guarding, or tenderness to palpation over the midline or sacroiliac joints of appellant's lumbosacral spine area. Examination of appellant's left hip showed no tenderness to palpation of the left hip or over the left greater trochanteric area. Dr. Berkowitz opined that upon physical examination he did not find any objective examination findings, other than appellant's subjective lower back pain complaints, to support that the residuals of each of the accepted conditions of lumbar strain, left hip strain, and aggravation of preexisting degenerative disc disease were still present. He indicated that appellant appeared to be medically able to perform the duties of his date-of-injury job. Based on this report, OWCP terminated his wage-loss compensation and medical benefits effective October 13, 2015.

The Board finds, however, that Dr. Berkowitz's opinion was based on an inaccurate and incomplete background and accordingly, failed to resolve the conflict in the medical evidence.<sup>14</sup> The Board notes that Dr. Berkowitz's August 26, 2014 report was based on the SOAF dated March 20, 2014, which listed appellant's accepted conditions as lumbar strain, left hip and thigh strain, and aggravation of preexisting degenerative disc disease of the lumbar spine. Following Dr. Berkowitz's August 26, 2014 report, however, OWCP expanded acceptance of appellant's claim to include aggravation of preexisting herniated discs and aggravation of left-sided lumbar radiculopathy. Although Dr. Berkowitz opined that appellant's September 6, 2011 employment injuries had ceased, his opinion only related to the accepted conditions of lumbar strain, left hip and thigh strain, and aggravation of preexisting degenerative disc disease of the lumbar spine. He was not aware of appellant's accepted conditions of aggravation of preexisting herniated discs and aggravation of left-sided lumbar radiculopathy nor opine on whether these accepted injuries had resolved.

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<sup>14</sup> See *T.H.*, Docket No. 17-0025 (issued June 28, 2017) (the Board reversed OWCP's decision that a claimant did not have any continuing residuals or disability after the termination of her wage-loss compensation and medical benefits because the referee medical examiner's opinion was based on an inaccurate and incomplete history).

The Board finds that, as OWCP did not provide Dr. Berkowitz with an updated SOAF, and, as such he did not address all of appellant's accepted conditions resulting from appellant's September 6, 2011 employment injury. OWCP, therefore, erred in terminating appellant's wage-loss compensation and medical benefits, effective October 13, 2015, based on a report that did not include all of appellant's accepted conditions.<sup>15</sup> It is well established that medical reports must be based on a complete and accurate factual and medical background and that medical opinions based on an incomplete or inaccurate history are of limited probative value.<sup>16</sup> Furthermore, OWCP procedures provide that accepted conditions must be included in a SOAF and that, when a referral physician renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is diminished.<sup>17</sup> Because Dr. Berkowitz's August 26, 2014 report was based on an SOAF that was incomplete, his opinion is of diminished probative value and should not be afforded the special weight of the medical evidence.

The Board finds, therefore, that OWCP erred by terminating appellant's compensation effective October 13, 2015 based on Dr. Berkowitz's August 26, 2014 impartial medical report. The Board will reverse OWCP's determination terminating appellant's wage-loss compensation and medical benefits.<sup>18</sup>

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 13, 2015.

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<sup>15</sup> See *N.C.*, Docket No. 15-1855 (issued June 3, 2016) (the Board reversed OWCP's decision terminating appellant's wage-loss compensation and medical benefits where the referee medical examiner did not include all of the claimant's accepted conditions).

<sup>16</sup> *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

<sup>17</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

<sup>18</sup> Given the disposition of the first issue, the Board finds that the second issue of continuing disability is moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 7, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 18, 2018  
Washington, DC

Patricia H. Fitzgerald, Deputy 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