



## **ISSUES**

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation effective April 29, 2018 as she no longer had disability causally related to her March 14, 2002 employment injury; and (2) whether she has met her burden of proof to establish continuing employment-related disability after April 29, 2018.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 29, 2002 appellant, then a 46-year-old field representative, filed a traumatic injury claim (Form CA-1) alleging that on March 14, 2002 she sustained a neck sprain and other injuries in a motor vehicle accident while in the performance of duty. OWCP accepted her claim for cervical strain, a cervical herniated nucleus pulposus, lumbar strain, and post-traumatic headaches.<sup>5</sup>

Appellant underwent a right carpal tunnel release on November 7, 2002 and a left carpal tunnel release on March 20, 2003. On July 17, 2003 she underwent an authorized anterior cervical discectomy and fusion at C5-6 and C6-7. On March 3, 2004 appellant underwent an authorized right L4-5 discectomy.

On August 19, 2011 OWCP paid appellant wage-loss compensation for total disability for the period from July 17, 2003 through August 2, 2011. In 2013, it paid her wage-loss compensation for total disability retroactive to March 1, 2012.<sup>6</sup>

On January 4, 2017 OWCP referred appellant to Dr. Andrew Newman, an orthopedic surgeon, for a second opinion examination. It provided Dr. Newman with a statement of accepted facts (SOAF) setting forth the accepted conditions. The SOAF indicated that appellant had undergone two cervical discectomies.

In a report dated January 22, 2017, Dr. Newman discussed appellant's history of a March 14, 2002 employment injury and her complaints of low back and neck pain and bilateral

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<sup>4</sup> Docket No. 15-0583 (issued August 26, 2015).

<sup>5</sup> By decision dated May 23, 2002, OWCP denied appellant's claim after finding that the medical evidence was insufficient to show that she sustained a diagnosed condition due to the accepted employment-related March 14, 2002 motor vehicle accident. On June 9, 2003 an OWCP hearing representative reversed the May 23, 2002 decision and accepted the claim for cervical strain, a cervical herniated disc, lumbar strain, and post-traumatic headaches.

<sup>6</sup> By decision dated April 10, 2014, OWCP found that appellant had not established that she sustained bilateral carpal tunnel syndrome or disability from March 29 to July 15, 2003 causally related to her March 14, 2002 employment injury. On April 15, 2014 appellant, through counsel, requested an oral hearing before an OWCP hearing representative, which was held on August 15, 2014. By decision dated November 5, 2014, an OWCP hearing representative affirmed the April 10, 2014 decision. Appellant appealed to the Board. By decision dated August 26, 2015, the Board affirmed the November 5, 2014 decision. It found that the medical evidence was insufficient to show that appellant had sustained bilateral carpal tunnel syndrome or disability from March 29 to July 15, 2003 causally related to her March 14, 2002 employment injury.

carpal tunnel syndrome. He noted that she had undergone a right knee replacement which she attributed to the employment injury, and also a cervical fusion at C5-6 and C6-7. Dr. Newman indicated that appellant had rheumatoid arthritis causing bilateral knee problems. On examination of the lumbar spine, he found evidence of symptom magnification. Dr. Newman opined that appellant had no further disability or need for medical treatment due to her March 14, 2002 employment injury. He indicated that she had work restrictions as a result of nonemployment-related degenerative changes in the cervical and lumbar spine and her right total knee replacement.

In an attending physician's report (Form CA-20) dated February 27, 2017, Dr. Steven H. Ressler, an anesthesiologist, diagnosed a herniated lumbar disc and provided findings of chronic low back and cervical pain after surgery. He checked a box marked "yes" that the condition was caused or aggravated by the March 14, 2002 employment-related motor vehicle accident and opined that appellant was totally disabled. In a narrative report of even date, Dr. Ressler diagnosed employment-related lumbar and cervical radiculopathy due to a herniated nucleus pulposus following lumbar and cervical surgery, chronic low back pain, and chronic cervical pain.

OWCP determined that a conflict existed between Dr. Newman and Dr. Ressler regarding appellant's current condition and the extent of any employment-related disability. It referred appellant to Dr. Thomas O'Dowd, a Board-certified orthopedic surgeon, for an impartial medical examination. OWCP sent the referral letter to her counsel at his address of record.

In a report dated July 11, 2017, Dr. O'Dowd reviewed the history of appellant's March 14, 2002 employment injury and her subsequent medical treatment, including surgery on her lumbar and cervical spine. He discussed her complaints of neck pain radiating into both arms and low back pain with intermittent radiation into the right side. Dr. O'Dowd noted that appellant had no significant complaints of headaches. He found some evidence of enhancement on physical examination. Regarding the cervical spine, Dr. O'Dowd related:

"I find no evidence of significant residual neck pain that could be related to the accident in March of 2002.

"[Appellant] has no significant objective neurological abnormalities in the upper extremities that could be related to this. Her cervical spine exam[ination] is variable and benign and I find no objective evidence of ongoing symptom complex related to her accepted cervical sprain and strain and herniation in the cervical spine."

Dr. O'Dowd concluded that appellant's accepted cervical condition had "completely resolved" and that she required no further medical treatment.

Dr. O'Dowd further determined that appellant had no ongoing lumbar symptoms, noting that an examination revealed "no objective abnormalities." He found that she required no further treatment. Dr. O'Dowd related, "It is not clear that [appellant's] surgical treatment was related to that motor vehicle accident from 2002, but there is no residual compression as of the 2013 [magnetic resonance imaging] MRI [scan] that I personally reviewed." He advised that she required no further medical treatment. Dr. O'Dowd concluded that he was unable to address whether appellant had a preexisting lumbar or cervical spine condition. He related, "However, I can state [appellant] has subjective symptoms only with no objective abnormalities in the cervical and lumbar spine that would require further treatment." Dr. O'Dowd found that appellant had no

further disability due to her March 14, 2002 employment injury. He related that she could return to her usual employment, but should limit extensive walking due to her nonemployment-related knee condition. In a work capacity evaluation (OWCP-5c), Dr. O'Dowd determined that appellant could not climb or kneel and should change positions from sitting every two hours. He opined that she could return to her usual employment.

On March 6, 2018 OWCP advised appellant of its proposed termination of her wage-loss compensation and medical benefits as the evidence established that she no longer had employment-related residuals or disability due to her March 14, 2002 employment injury. It afforded her 30 days to submit additional evidence or argument if she disagreed with the proposed termination.

On March 14, 2018 counsel noted that OWCP had not provided him with the correspondence scheduling the examination with Dr. O'Dowd and had failed to provide him with the SOAF until after the examination. He asserted that the SOAF failed to indicate that she underwent authorized lumbar surgery. Counsel noted that Dr. O'Dowd had indicated that he did not have medical records from before appellant's employment injury and had not reviewed MRI scans obtained following the injury.

In a report dated April 17, 2018, Dr. Ressler discussed appellant's history of a cervical fusion in 2003 and lumbar discectomy in 2004. He advised that she had radiculopathy of the bilateral extremities treated with injections and nerve blocks. Dr. Ressler diagnosed cervical and lumbar facet disease causally related to the March 14, 2002 employment injury. He indicated that appellant had an "inability to return to meaningful employment as a result of the work[-]related injury and subsequent treatments for her ongoing cervical and lumbar ailments." Dr. Ressler advised that she also had left knee and right shoulder pain unrelated to her March 14, 2002 employment injury that disabled her from her usual employment duties. He indicated that at most appellant could perform sedentary work, but could not drive or perform more than limited walking due to her knee condition.

By decision dated April 24, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits effective April 29, 2018. It found that the opinion of Dr. O'Dowd, the impartial medical examiner (IME), represented the special weight of the evidence and established that she had no further residuals or disability due to her accepted employment injury.

On April 30, 2018 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

An oral hearing was held on August 28, 2018. Counsel contended that Dr. Newman's opinion was not probative as he relied upon a SOAF which indicated that she had undergone two cervical discectomies, rather than a cervical fusion and lumbar discectomy. He further asserted that Dr. O'Dowd had not reviewed all of the MRI scans or early medical records, yet he had attributed her condition to preexisting conditions. Counsel contended that both physicians failed to address whether appellant had limitations due to her accepted post-traumatic headaches.

On October 3, 2018 the employing establishment related that upon its review the operative reports were not of record. It noted, however, that Dr. Newman had reviewed appellant's history of surgeries.

On October 18, 2018 counsel submitted the July 17, 2003 and March 3, 2004 operative reports. He asserted that Dr. O’Dowd had failed to review the diagnostic studies and that Dr. Newman relied upon a SOAF that failed to indicate that appellant underwent a lumbar discectomy on February 2, 2004.

By decision dated November 13, 2018, OWCP’s hearing representative affirmed in part and reversed in part the April 24, 2018 decision. He found that OWCP properly terminated appellant’s wage-loss compensation based on the opinion of Dr. O’Dowd, but that it had not met its burden of proof to terminate entitlement to medical benefits. The hearing representative instructed OWCP to obtain all the diagnostic studies, update the SOAF to include all surgeries, and obtain a supplemental report from Dr. O’Dowd regarding whether she had residuals of her accepted employment injury such that she required further medical treatment.

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

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee’s benefits.<sup>7</sup> After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>8</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>9</sup>

Section 8123(a) of FECA provides in pertinent part: “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> In situations where there exist opposing reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.<sup>11</sup>

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

The Board finds that OWCP properly terminated appellant’s wage-loss compensation effective April 29, 2018 as she no longer had disability causally related to her March 14, 2002 employment injury.

OWCP accepted that appellant sustained cervical strain, a cervical herniated nucleus pulposus, lumbar strain, and post-traumatic headaches causally related to her March 14, 2002 employment injury. Appellant underwent an authorized cervical discectomy and fusion at C5-6

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<sup>7</sup> *M.M.*, Docket No. 17-1264 (issued December 3, 2018).

<sup>8</sup> *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

<sup>9</sup> *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

<sup>10</sup> 5 U.S.C. § 8123(a); *J.K.*, Docket No. 18-1250 (issued June 25, 2019).

<sup>11</sup> 20 C.F.R. § 10.321; *T.D.*, Docket No. 17-1011 (issued January 17, 2018).

and C6-7 on July 17, 2003 and an authorized right L4-5 discectomy on March 3, 2004. OWCP paid appellant wage-loss compensation beginning July 17, 2003.

OWCP properly determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Ressler, and Dr. Newman, a second opinion examiner, regarding whether she had further employment-related disability or residuals due to her accepted employment injury. In order to resolve the conflict, it referred her to Dr. O'Dowd, a Board-certified orthopedic surgeon, for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a).

The Board finds that the special weight of the evidence is represented by the thorough, well-rationalized opinion of Dr. O'Dowd, the IME selected to resolve the conflict in medical opinion.<sup>12</sup> In his July 11, 2017 report, Dr. O'Dowd reviewed appellant's factual and medical history, including her history of cervical and lumbar surgeries, and provided detailed findings on physical examination. He indicated that she had no significant complaints of headaches. Dr. O'Dowd opined that appellant had no neck pain or objective neurological findings of the upper extremities due to her cervical sprain or herniation and indicated that the accepted cervical condition had resolved. He further found that she had no objective abnormalities related to the lumbar spine, noting that a 2013 MRI scan showed no residuals compression. Dr. O'Dowd opined that appellant had no further disability causally related to her March 14, 2002 employment injury, and that any limitations were related to nonemployment-related conditions. His opinion has reliability, probative value, and convincing quality with respect to whether she had further employment-related disability. Dr. O'Dowd provided a thorough factual and medical history and accurately summarized the relevant medical evidence.<sup>13</sup> He provided rationale for his opinion by explaining that appellant had no objective findings of cervical sprain, a cervical herniation, or lumbar sprain. Dr. O'Dowd further noted that she had no further complaints of headaches. He reached a reasoned conclusion regarding appellant's employment-related disability. Dr. O'Dowd's opinion thus represents the special weight of the evidence and establishes that she had no further disability causally related to her March 14, 2002 employment injury.<sup>14</sup>

The additional evidence submitted prior to OWCP's termination of appellant's compensation is insufficient to overcome the special weight afforded to Dr. O'Dowd as the IME. In an April 17, 2018 report, Dr. Ressler reviewed appellant's medical history and diagnosed cervical and lumbar facet disease as a result of her 2002 employment injury. He found that she could perform sedentary work, but could not drive or walk more than limited distances as a result of her knee condition. Dr. Ressler also opined that appellant's employment injury prevented her from resuming "meaningful employment." However, he failed to provide rationale for his opinion regarding the extent of her disability or how it was caused or aggravated by her accepted employment injury.<sup>15</sup> Further, Dr. Ressler was on one side of the conflict regarding the extent of her employment-related disability. Reports from a physician who was on one side of a medical

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<sup>12</sup> *R.P.*, Docket No. 19-0057 (issued May 16, 2019).

<sup>13</sup> *A.G.*, Docket No. 19-0113 (issued July 12, 2019).

<sup>14</sup> *See J.K.*, *supra* note 10.

<sup>15</sup> *See P.L.*, Docket No. 19-0268 (issued July 9, 2019).

conflict resolved by an IME are generally insufficient to overcome the special weight accorded to the opinion of the IME or to create a new conflict.<sup>16</sup>

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

When OWCP properly terminates compensation benefits, the burden shifts to appellant to establish continuing disability after that date causally related to the accepted injury.<sup>17</sup> To establish causal relationship between the accepted conditions as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such causal relationship.<sup>18</sup>

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

The Board finds that appellant has not met her burden of proof to establish continuing employment-related disability after April 29, 2018.

Subsequent to the termination of appellant's wage-loss compensation, counsel submitted copies of her lumbar and cervical surgery reports. He contended that Dr. O'Dowd had failed to review all diagnostic studies and that the SOAF was inaccurate as it failed to include appellant's lumbar surgery. Dr. O'Dowd, however, summarized the medical evidence and indicated that he had reviewed a 2013 MRI scan. He noted that he had not reviewed medical evidence predating the injury. Dr. O'Dowd further discussed appellant's history of lumbar surgery. As discussed, his opinion is detailed and reasoned and thus represents the special weight of the evidence.<sup>19</sup>

On appeal counsel contends that the SOAF was inaccurate as it failed to specify that appellant underwent a lumbar discectomy on March 3, 2004 and did not indicate that it had authorized the cervical and lumbar surgeries. He asserts that the opinions of Dr. Newman and Dr. O'Dowd are consequently of diminished probative value. OWCP procedures, however, provide that medical treatment received is an optional element in the SOAF.<sup>20</sup> Further, as noted, Dr. O'Dowd discussed appellant's history of lumbar surgery in his report.<sup>21</sup>

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

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<sup>16</sup> *T.D.*, Docket No. 17-1011 (issued January 17, 2018).

<sup>17</sup> *L.C.*, Docket No. 18-1759 (issued June 26, 2019).

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

<sup>19</sup> *See supra* note 16.

<sup>20</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.6(a)(2) (September 2009).

<sup>21</sup> *See generally M.G.*, Docket No. 17-0708 (issued August 3, 2017) (finding that appellant had not raised a relevant legal argument when the SOAF mischaracterized the accepted condition as the IME properly referred to the correct diagnosis).

**CONCLUSION**

The Board finds that OWCP properly terminated appellant's wage-loss compensation effective April 29, 2018 as she no longer had disability causally related to her March 14, 2002 employment injury. The Board further finds that she has not met her burden of proof to establish continuing employment-related disability after April 29, 2018.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 13, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2019  
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