

disability due to his accepted September 22, 2008 employment injury; and (2) whether appellant has met his burden of proof to establish continuing employment-related disability or residuals on or after February 26, 2019.

FACTUAL HISTORY

On September 22, 2008 appellant, then a 59-year-old manager, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his lower back when he slipped on water in the men's bathroom while in the performance of duty. OWCP accepted the claim for a back contusion. It subsequently expanded its acceptance to include an exacerbation of both sciatica and lumbosacral radiculopathy. Appellant stopped work on September 22, 2008 and returned to full-time limited-duty work on January 12, 2009. He stopped work again on February 9, 2009.³ OWCP paid appellant wage-loss compensation on the supplemental rolls beginning March 22, 2010 and on the periodic rolls beginning June 6, 2010.⁴

An October 21, 2008 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated bilateral foraminal impingement at L3-4, L4-5, and L5-S1 with disc space narrowing and diffuse posterior disc bulging, and advanced spondylosis. A February 27, 2009 MRI scan of the lumbar spine revealed central disc bulges at L2-3 and L3-4 and a broad-based disc bulge at L4-5. An electromyogram (EMG) dated April 7, 2009 showed L4-5 left radiculopathy.

In a progress report dated July 19, 2017, Dr. David N. Lifschutz, a neurologist, opined that appellant had continued low back pain due to a September 22, 2008 employment injury. He noted that appellant had a history of a 1996 herniated disc due to an employment injury and a history of a laminectomy at L3 to L5, discectomy at L3-5, and posterolateral fusion at L3-4. Dr. Lifschutz diagnosed lumbosacral dorsopathy with an axial component/facet syndrome, chronic myofasciitis with a left radicular component, left L4-5 radiculopathy as demonstrated by electrodiagnostic studies, disc pathology at multiple levels, and nerve root impingement as demonstrated by MRI scan. Dr. Lifschutz attributed the diagnosed conditions to the September 22, 2008 employment injury and opined that appellant was permanently and totally disabled.

On September 5, 2017 OWCP referred appellant to Dr. Lynne Carmickle, a Board-certified neurologist, for a second opinion examination.

In a report dated September 19, 2017, Dr. Carmickle reviewed appellant's history of an injury in 1996 when he fell off a truck and a subsequent employment injury on September 22, 2008 at work. On examination she found full motor strength and a negative straight leg raise bilaterally without spasms. Dr. Carmickle reviewed the evidence of record. She indicated that the findings on examination had revealed symptom magnification without evidence of lumbosacral

³ By decision dated April 9, 2010, OWCP accepted that he had sustained an employment-related recurrence of disability on February 2, 2009.

⁴ OWCP previously accepted that appellant sustained: thoracic/lumbosacral neuritis/radiculitis due to a March 9, 1999 employment injury, assigned OWCP File No. xxxxxx941; a lumbar sprain due to a May 14, 2003 employment injury, assigned OWCP File No. xxxxxx169; and a lumbar sprain due to a February 9, 2009 employment injury, assigned OWCP File No. xxxxxx350. Appellant's claims have not been administratively combined.

radiculopathy. Dr. Carmickle found that appellant could return to his usual employment and that he had no “neurological impairment or disability related to the accident of September 22, 2008.”

In a progress report dated October 18, 2017, Dr. Lifschutz reiterated the diagnoses and causation finding as in his July 19, 2017 report. He opined that appellant was permanently and totally disabled from work. Dr. Lifschutz provided a similar report on January 17, 2018.

OWCP determined that a conflict in evidence arose regarding appellant’s current condition and disability. On April 10, 2018 it referred him to Dr. Andrea I. Reznik, a Board-certified neurologist, for an impartial medical examination.

In a report dated April 19, 2018, Dr. Reznik discussed appellant’s history of a slip and fall at work on September 22, 2008 and his prior history of a herniated disc treated with surgery in 1998. She reviewed the medical evidence of record, including the results of diagnostic testing. On examination Dr. Reznik found full strength, noting that appellant “gives way abruptly without resistance indicating [an] incomplete attempt at maintaining the strength due to a voluntary act.” She indicated that he had subjectively decreased sensation in the right hand and left lower extremity. Dr. Reznik found “exaggerated and nonorganic findings on a neurological examination.” She opined that appellant could perform his usual employment as a manager and required no further medical treatment. Dr. Reznik noted, “It is my impression that the neurological examination is essentially within a normal range for [his] age and underlying osteoarthritis, which of course is an age[-]related problem unrelated to the accident of September 22, 2008.”

On May 2, 2018 Dr. Lifschutz diagnosed lumbosacral dorsopathy with an axial component/facet syndrome, chronic myofascial pain with a left radicular component, evidence of left L4-5 radiculopathy, and disc pathology at multiple levels with nerve root impingement. He attributed the diagnosed conditions to the September 22, 2008 employment injury and found that appellant was permanently and totally disabled from employment.

In an attending physician’s report (Form CA-20) dated May 24, 2018, Dr. Lifschutz diagnosed a disc herniation and lumbar radiculopathy and checked a box marked “No” in response to the question of whether the condition was caused or aggravated by an employment activity. He found that appellant was totally disabled from work. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Lifschutz indicated that appellant was unable to perform all activities.

On July 30, 2018 OWCP advised appellant of its proposed termination of his wage-loss compensation and medical benefits based on Dr. Reznik’s report finding that he had no further employment-related residuals or disability due to his September 22, 2008 employment injury. It afforded him 30 days to submit additional evidence or argument if he disagreed with the proposed termination. OWCP indicated that it was enclosing the April 19, 2018 report from Dr. Reznik.

On August 27, 2018 counsel advised that OWCP had not included a copy of Dr. Reznik’s April 19, 2018 report with the notice of proposed termination. In response, on August 28, 2018, OWCP resent the notice of proposed termination of compensation with a copy of the report from the impartial medical examiner (IME). It afforded appellant an additional 30 days to submit evidence or argument in response to the proposed termination.

Thereafter, OWCP received August 8, October 10, and December 12, 2018 progress reports from Dr. Lifschutz providing the same diagnoses, causation findings, and disability determinations as in his prior reports.

By decision dated February 25, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits effective February 26, 2019. It found that the opinion of Dr. Reznik, the IME, represented the special weight of the evidence and established that he had no further residuals or disability due to his accepted employment injury.

Subsequently, appellant submitted a progress report from Dr. Lifschutz dated February 20, 2019.

In a report dated March 27, 2019, Dr. Lifschutz advised that appellant's September 22, 2008 employment injury had resulted in an exacerbation of his low back pain and chronic low back pain. He described his treatment of appellant beginning February 10, 2009 and his current complaints of chronic low back pain with intermittent radiculopathy primarily into the left lower extremity and pain in the left more than the right buttocks. Dr. Lifschutz indicated that a thoracic spine MRI scan, obtained on January 31, 2019, had revealed diffuse disc bulges at T10-11 and T12-L1 with central canal stenosis, diffuse disc bulges with bilateral foraminal stenosis at L1-2, L2-3, and particularly at L5-S1, mild central canal stenosis at L1-2, and marked central canal stenosis at L2-3. He noted that appellant was status post laminectomy at L3 through L5, discectomy on the left at L4-5, and posterolateral fusion at L3 through L5. On examination Dr. Lifschutz found tenderness on palpation of the paraspinal/left gluteal muscles. He diagnosed lumbosacral dorsopathy with an axial component/facet syndrome, chronic myofascial pain with a left radicular component, evidence of left L4-5 radiculopathy, and disc pathology at multiple levels with nerve root impingement. Dr. Lifschutz attributed the diagnosed conditions to the September 22, 2008 employment injury and found that appellant was totally disabled from work.

On June 8, 2019 appellant, through counsel, requested reconsideration. Counsel contended that the March 27, 2019 report from Dr. Lifschutz established that appellant remained disabled due to his accepted employment injury.

By decision dated October 25, 2019, OWCP denied modification of the February 25, 2019 decision.

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.⁵ 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

⁵ *R.H.*, Docket No. 19-1064 (issued October 9, 2020); *M.M.*, Docket No. 17-1264 (issued December 3, 2018).

the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

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.”⁸ 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly terminated appellant’s wage-loss compensation and medical benefits, effective February 26, 2019, as he no longer had residuals or disability causally related to his accepted September 22, 2008 employment injury.

OWCP properly determined that a conflict in medical opinion existed between appellant’s attending physician, Dr. Lifschutz, and Dr. Carmickle, an OWCP referral physician, regarding whether he had continuing employment-related disability or residuals due to his accepted employment injury. In order to resolve the conflict, it referred him to Dr. Reznik for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a).

The Board finds that the weight of the evidence is represented by the thorough and well-rationalized opinion of Dr. Reznik, the IME selected to resolve the conflict in medical opinion.¹⁰ In her April 19, 2018 report, Dr. Reznik noted that appellant had a history of a previous disc herniation and surgery. She found full strength on examination with volitional weakness and subjective findings of a loss of sensation in the left lower extremity and right hand. Dr. Reznik reported that on examination she had found exaggerated and nonorganic findings. She opined that appellant could resume his usual employment without restrictions and required no further medical treatment. Dr. Reznik noted that his neurological examination was normal for his age and that he had findings of osteoarthritis that were consistent with age and unrelated to his September 22, 2008 employment injury. Her opinion has reliability, probative value, and convincing quality with respect to whether appellant had further employment-related disability based upon her finding of an essentially normal physical examination. Dr. Reznik provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹¹ She provided rationale for her opinion by explaining that appellant’s findings on examination were within normal limits for

⁶ *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

⁷ *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

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

⁹ 20 C.F.R. § 10.321; *T.D.*, Docket No. 17-1011 (issued January 17, 2018).

¹⁰ *R.P.*, Docket No. 19-0057 (issued May 16, 2019).

¹¹ *M.R.*, Docket No. 19-0518 (issued September 12, 2019); *A.G.*, Docket No. 19-0113 (issued July 12, 2019).

his age and nonemployment-related osteoarthritis. Dr. Reznik reached a reasoned conclusion regarding appellant's employment-related disability and need for further medical treatment. Her opinion thus represents the special weight of the evidence and establishes that he had no further disability causally related to his September 22, 2008 employment injury.¹²

The additional evidence submitted prior to OWCP's termination of appellant's compensation is insufficient to overcome the special weight afforded to Dr. Reznik as IME. In progress reports dated April 19, August 8, October 10, and December 12, 2018, Dr. Lifschutz diagnosed lumbosacral dorsopathy with an axial component/facet syndrome, chronic myofascial pain with a left radicular component, evidence of left L4-5 radiculopathy, a disc pathology at multiple levels with nerve root impingement. He attributed the diagnosed conditions to the September 22, 2008 employment injury and found that appellant was totally and permanently disabled from employment. However, Dr. Lifschutz failed to provide rationale for his opinion regarding the extent of his disability or how the diagnosed conditions were caused or aggravated by his accepted employment injury.¹³ Additionally, he was on one side of the conflict regarding whether appellant had continued employment-related disability or residuals. Reports from a physician who was on one side of a medical 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.¹⁴

In a Form CA-20 dated May 24, 2018, Dr. Lifschutz diagnosed a disc herniation and lumbar radiculopathy, and he found that appellant was totally disabled. He did not, however, provide an opinion in this report to explain whether appellant had continuing disability causally related to the employment injury. The Board has held that a mere conclusion without the necessary rationale as to whether a period of disability is due to an accepted employment injury is insufficient.¹⁵

On appeal counsel asserts that the termination of appellant's compensation is contrary to the medical evidence and prevailing law. As discussed, however, OWCP properly found that the opinion of the IME constituted the special weight of the medical evidence. The Board, therefore, finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits effective February 26, 2019.¹⁶

LEGAL PRECEDENT -- ISSUE 2

Once OWCP properly terminated compensation benefits, the burden shifts to appellant to establish continuing disability after that date causally related to the accepted injury.¹⁷ To establish causal relationship between the accepted conditions as well as any attendant disability claimed and

¹² *A.M.*, Docket No. 18-1243 (issued October 7, 2019). *See J.K.*, *supra* note 8.

¹³ *See P.L.*, Docket No. 19-0268 (issued July 9, 2019).

¹⁴ *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *I.J.*, 59 ECAB 408 (2008).

¹⁵ *A.T.*, Docket No. 19-0410 (issued August 13, 2019); *E.L.*, Docket No. 17-1632 (issued January 3, 2018).

¹⁶ *See R.A.*, Docket No. 17-1472 (issued December 6, 2017); *Sedi L. Graham*, 57 ECAB 494 (2006).

¹⁷ *See S.M.*, Docket No. 18-0673 (issued January 25, 2019); *L.C.*, Docket No. 18-1759 (issued June 26, 2019).

the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such causal relationship.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish continuing employment-related disability or residuals on or after February 26, 2019 due to his accepted employment injury.

Subsequent to the termination of his wage-loss compensation, appellant submitted a progress report from Dr. Lifschutz dated February 20, 2019 containing findings similar to those in his previously submitted progress reports. He also submitted a March 27, 2019 report from Dr. Lifschutz, who discussed his history of a September 22, 2008 employment injury and his continued symptoms of low back pain with radiculopathy mostly in the left lower extremity and left more than right buttocks. Dr. Lifschutz diagnosed lumbosacral dorsopathy with an axial component/facet syndrome, chronic myofascial pain with a left radicular component, evidence of left L4-5 radiculopathy, and disc pathology at multiple levels with nerve root impingement. He attributed the diagnosed conditions to the September 22, 2008 employment injury. Dr. Lifschutz found that appellant was totally disabled from work. He did not, however, provide rationale for his causation finding and disability determination and thus his opinion is of little probative value.¹⁹ Further, as discussed, the Board has long held that reports from a physician who was on one side of a medical conflict resolved by an IME are generally insufficient to overcome the special weight accorded to the report of the IME or to create a new conflict.²⁰ The Board finds that as Dr. Lifschutz was on one side of the conflict resolved by Dr. Reznik, his additional reports are of insufficient weight to overcome the special weight accorded to the IME or to create a new medical conflict.²¹ The Board thus finds that appellant has not established continuing residuals or disability after February 29, 2019.²²

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.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits effective February 26, 2019 as he no longer had residuals or disability causally related to his accepted September 22, 2008 employment injury. The Board further finds that he

¹⁸ *Id.*

¹⁹ *A.T.*, Docket No. 20-0334 (issued October 8, 2020) (a medical report is of limited probative value on a given medical issue if it contains a medical opinion which is unsupported by medical rationale).

²⁰ *See R.B.*, Docket No. 16-1481 (issued May 2, 2017).

²¹ *See G.T.*, Docket No. 17-1959 (issued June 22, 2018); *D.G.*, Docket No. 17-0608 (issued March 19, 2018).

²² *See A.M.*, Docket No. 17-1192 (issued September 19, 2018).

has not met his burden of proof to establish continuing employment-related disability or residuals on or after April 29, 2018 due to his accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the October 25, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 20, 2020
Washington, DC

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

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board