



## **ISSUE**

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 18, 2019, as he no longer had residuals or disability causally related to his accepted February 8, 2012 employment injury.

## **FACTUAL HISTORY**

On February 23, 2012 appellant, then a 59-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that he experienced lower back pain on February 8, 2012 when he lifted a bag while in the performance of duty. He stopped work on February 8, 2012 and has not returned. On February 15, 2012 appellant underwent an L4-S1 hemi-laminectomy with L5 discectomy, interbody fusion, and instrumentation. OWCP accepted the claim for displacement of lumbar intervertebral disc without myelopathy and postprocedural fever. It paid appellant wage-loss compensation on the periodic rolls, effective August 26, 2012.

Appellant continued to receive medical treatment for his back. Medical records from a pain management clinic, dated September 9, 2014 through September 12, 2019, noted that appellant received treatment for low back pain related to a lumbar postlaminectomy syndrome condition, lumbar degenerative disease, and lumbar radiculopathy with no change in his condition.

In May 15 and November 11, 2017 reports, Dr. David B. Lotman, a Board-certified orthopedic surgeon serving as a second opinion examiner, noted limitations in lumbar range of motion. He assigned permanent restrictions for full-time light-duty demand work.

OWCP subsequently referred appellant to Dr. Omar D. Hussamy, a Board-certified orthopedic surgeon serving as a second opinion examiner. In a report dated December 19, 2018, he indicated that the accepted conditions which were still active included pain, tenderness, and decreased range of motion. Dr. Hussamy's OWCP-5c form indicated that appellant was not at maximum medical improvement and could not work.

On August 7, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF), the case record, and a set of questions to Dr. Jon D. Donshik, a Board-certified orthopedic surgeon, for another second opinion evaluation regarding the status of his February 8, 2012 employment injury and work capacity.

In a September 6, 2019 report, Dr. Donshik noted his review of appellant's medical history and described the February 8, 2012 employment injury. He also reviewed recent diagnostic testing of the pelvis, two views of the thoracic spine, and six views of the lumbar spine. Upon examination Dr. Donshik observed that appellant ambulated without assistive devices and had difficulty heel walking, toe walking, and could not tandem walk without losing his balance. Examination of the cervical spine revealed full range of motion with no deformity, spasm, pain with range of motion, or significant tenderness to palpation. Examination of the thoracolumbar spine revealed pain with flexion, extension, and left and right lateral bending. Dr. Donshik indicated that appellant was able to flex to his knees and had 15 degrees of thoracolumbar extension, 20 degrees of left and right lateral bending, and diffuse tenderness to palpation throughout the thoracolumbar spine without evidence of spasms. The bilateral lower extremities revealed midline incisions

corresponding to his total knee replacements with no evidence of sensory deficit or motor deficit. Reflexes were absent at the patellas in the ankles with negative Babinski and negative clonus.

Dr. Donshik opined that the residuals of appellant's accepted employment-related conditions had ceased and he was no longer disabled from work as a result of the accepted employment-related conditions. He indicated that, while appellant continued to complain of significant pain following his surgery, no neurologic deficit was found on physical examination. Dr. Donshik noted that appellant had restricted range of motion and that the imaging studies demonstrated postoperative changes, but nothing worrisome. He opined that the accepted condition of lumbar disc displacement intervertebral without myelopathy no longer applied as the disc was excised during the 2012 surgery. Dr. Donshik opined that the surgical procedure was related to the employment incident and that no additional recovery would occur. He opined that, from a physical standpoint, appellant should be able to return to his date-of-injury position, noting that the only thing that prevented him from returning to work were his complaints of pain. Dr. Donshik indicated that it was certainly possible that appellant had continued pain, as not every patient benefits following their surgical procedure. He further opined that no additional care or treatment was required. Dr. Donshik completed a work-capacity evaluation form (Form OWCP-5c), which indicated that appellant could work his usual position on a full-time basis without restrictions and that he was capable of performing up to heavy-duty demand strength levels.

OWCP received September 13 and October 10, 2019 progress reports from Dr. Nathaniel Drourr, Board-certified in pain medicine, who noted that appellant was followed for chronic low back pain related to lumbar postlaminectomy syndrome, lumbar degenerative disease, and lumbar radiculopathy. Dr. Drourr indicated that appellant's pain started on February 8, 2012 while at work and that he had a lumbar fusion at L5-S1. He indicated that appellant's pain was exacerbated while standing, sitting, bending, twisting, and changing positions from sitting to standing. A functional assessment of the low back indicated a severe disability due to pain. Dr. Drourr provided assessments of lumbar postlaminectomy syndrome, lumbar spondylosis, lumbar degenerative disc disease, lumbar facet joint pain, low back pain, and other chronic pain. He opined that appellant had legitimate, disabling chronic pain secondary to the diagnosed conditions and which required opiate therapy as a medical necessity now and for the foreseeable future.

In an October 10, 2019 report, Dr. Tifani Gleeson, Board-certified in occupational medicine, noted her review of appellant's case record. She noted appellant's employment injury and the accepted conditions. Dr. Gleeson indicated that Dr. Donshik had performed a thorough review, that he noted the only objective finding was restricted lumbar motion, and that appellant could return to full duty. She opined that Dr. Donshik's release to full duty was in variance to prior independent examiners, which supported light demand work, and the treating provider, who endorsed total disability. Dr. Gleeson recommended that an impartial medical examination be conducted to settle the variance in permanent work capacity.

On October 28, 2019 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because his February 8, 2012 employment injury had resolved with no disabling residuals. It found that the weight of medical evidence rested with the September 6, 2019 report of Dr. Donshik, who found that appellant's accepted conditions had resolved, with no residuals or continuing disability from work. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if he disagreed with the proposed termination.

In response, OWCP received a November 11, 2019 statement from appellant with attached evidence previously of record.

In a November 7, 2019 progress report, Dr. Droure continued to provide prior assessments of lumbar postlaminectomy syndrome, lumbar spondylosis, lumbar degenerative disc disease, lumbar facet joint pain, low back pain, and other chronic pain. He included a new assessment of right leg swelling. Dr. Droure continued to opine that appellant had legitimate, disabling chronic pain secondary to his diagnoses, which required opioid therapy and anti-inflammatory medication.

By decision dated December 18, 2019, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective December 18, 2019. It found that the weight of medical evidence rested with Dr. Donshik, OWCP's second opinion examiner, who concluded in a September 6, 2019 report that he had no residuals or disability due to his accepted February 8, 2012 employment injury.

### **LEGAL PRECEDENT**

According to FECA,<sup>3</sup> 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>4</sup> OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>5</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>7</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>8</sup>

### **ANALYSIS**

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 18, 2019.

OWCP terminated appellant's wage-loss compensation and medical benefits based on the September 6, 2019 report of Dr. Donshik, an OWCP second opinion examiner, who reviewed appellant's history and noted that his claim was accepted for lumbar disc displacement intervertebral without myelopathy. Upon examination of his lumbar spine, Dr. Donshik observed appellant had restricted range of motion and that the imaging studies demonstrated postoperative

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<sup>3</sup> See *supra* note 1.

<sup>4</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>5</sup> *A.G.*, Docket No. 18-0749 (issued November 7, 2018); see *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>6</sup> *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>7</sup> *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

<sup>8</sup> *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

changes, but nothing worrisome, and that there were no neurological deficits. He opined that the accepted condition of lumbar disc displacement intervertebral without myelopathy was no longer applicable as the disc was excised in the 2012 surgery. Dr. Donshik further opined that the surgical procedure was related to the employment incident and indicated that no further recovery was expected. He opined that, from a physical standpoint, appellant should be able to return to his date-of-injury position, noting that the only thing that prevented him from returning to work were his complaints of pain. Dr. Donshik opined that appellant was able to return to his date-of-injury position without restrictions and that he could work up to a heavy demand level.

Although Dr. Donshik opined that the accepted condition of lumbar disc displacement intervertebral without myelopathy was no longer applicable as the disc was excised in the 2012 surgery, he also indicated that appellant had restricted range of motion, the imaging studies demonstrated postoperative changes, and he had continued complaints of pain with no neurological deficits on physical examination as a consequence of his accepted injury.<sup>9</sup> Considering the internal inconsistencies in his report, Dr. Donshik failed to explain which objective findings of record established that the accepted lumbar disc displacement intervertebral without myelopathy had resolved. He merely noted that the disc was excised in 2012 and, while it was certainly possible that appellant had continued pain, not every patient benefits following their surgical procedure. Also, considering the fact that an OWCP second opinion examiner had previously opined in a December 19, 2018 report that appellant still suffered from residuals of his accepted employment injury, had not reached maximum medical improvement, and could not work,<sup>10</sup> Dr. Donshik's conclusion that his accepted condition had resolved and that he could return to his date-of-injury position without restrictions is conclusory at best.<sup>11</sup> Therefore, the Board finds that Dr. Donshik's opinion is inconsistent with the other medical evidence of record and is conclusory in nature as it does not contain sufficient medical reasoning to establish that appellant no longer had residuals or disability due to his accepted February 8, 2012 employment injury.<sup>12</sup>

Due to the lack of probative value of Dr. Donshik's report, the Board finds that OWCP erred in relying on his opinion as the basis to terminate appellant's wage-loss compensation and medical benefits for the accepted conditions. The Board therefore finds that OWCP has not met its burden of proof.

### **CONCLUSION**

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 18, 2019, as he no longer had residuals or disability causally related to his accepted February 8, 2012 employment injury.

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<sup>9</sup> See *L.D.*, Docket No. 19-0308 (issued July 24, 2019).

<sup>10</sup> See *supra* note 5.

<sup>11</sup> See *J.W.*, Docket No. 19-1014 (issued October 24, 2019).

<sup>12</sup> See *J.W.*, *id.*; *S.B.*, Docket No. 18-0700 (issued January 9, 2019); *S.W.*, Docket No. 18-0005 (issued May 24, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 18, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 12, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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