

**United States Department of Labor  
Employees' Compensation Appeals Board**

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A.A., Appellant )

and )

DEPARTMENT OF THE ARMY, FORT )  
HAMILTON, DEPARTMENT OF PUBLIC )  
WORKS, Brooklyn, NY, Employer )

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**Docket No. 21-0222**  
**Issued: November 17, 2021**

*Appearances:*  
*James D. Muirhead, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 10, 2020 appellant, through counsel, filed a timely appeal from a June 23, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### **ISSUES**

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective February 9, 2015, as he no longer had disability or residuals causally related to the accepted December 9, 2013 employment injury; and (2) whether appellant has met his burden of proof to establish continuing disability or residuals causally related to his accepted December 9, 2013 employment injury on or after February 9, 2015.

### **FACTUAL HISTORY**

On December 18, 2013 appellant, then a 57-year-old general engineer, filed a traumatic injury claim (Form CA-1) alleging that on December 9, 2013 he injured his back, coccyx, head, right arm, and right leg when he slipped down a flight of steps while in the performance of duty. He stopped work on December 9, 2013. On February 3, 2014 OWCP accepted the claim for lumbar sprain, sprain of the right leg and knee, cracked tooth, loss of teeth due to trauma, and extraction.

On February 4, 2014 appellant underwent a lumbar magnetic resonance imaging (MRI) scan which demonstrated multilevel degenerative disc changes in the lumbar spine, spondylolisthesis L2-3 with bilateral facet joint hypertrophic arthropathy and moderate central canal stenosis, slight retrolisthesis of L4 with respect to L5, annular bulge L4-5 abutting the right L5 nerve root, superimposed left lateral/foraminal disc herniation at L4-5, and mild bulging of the annulus at L5-S1.

On April 2, 2014 appellant underwent electromyogram and nerve conduction velocity (EMG/NCV) studies which were normal with no evidence of radiculopathy.

In a report dated July 1, 2014, Dr. Dean T. Filion, an osteopath, examined appellant due to his December 9, 2013 employment injury and noted that he was "very dramatic" and had difficulty with functional mobility. He noted that appellant reported diffuse pain across the low back with occasional radiation into his legs, but that his EMG/NCV was unremarkable. Dr. Filion found that his neurologic examination revealed patchy diminished sensation which did not follow any dermatomal pattern. He also noted that appellant had no obvious weakness in motor strength, but reported numbness when performing toe raises. Dr. Filion diagnosed L4-5 herniated disc, lumbar degenerative disc disease, lumbar degenerative joint disease, and lumbar stenosis. He found that appellant was unable to return to work and referred him for surgical evaluation. Dr. Filion noted that he exhibited Waddell signs with low back pain with axial cervical compression and less so with truncal twisting which was indicative of a nonorganic pain pattern. He discharged appellant from care.

On July 3, 2014 Dr. Stanley Knep, a Board-certified neurologist, noted appellant's history of injury and diagnosed degeneration of the thoracic or thoracolumbar intervertebral disc,

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

degeneration of lumbar or lumbosacral intervertebral disc, and lumbosacral root lesions. He reported that appellant was experiencing severe thoracic and lumbar pain with radiation down the right leg in the L5 distribution, likely secondary to the herniated disc at L4-5.

In an August 27, 2014 note, Dr. Knep diagnosed lumbosacral root lesion, degeneration of thoracic or thoracolumbar intervertebral disc, and headache. He found slight weakness of the L5 innervated muscles with impaired sensation that correlated to the herniated disc at L4-5.

On August 5, 2014 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions to Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, for a second opinion examination.

In his August 15, 2014 report, Dr. Lakin reviewed the SOAF as well as medical records and performed a physical examination. He found that appellant's motor examination was normal in the bilateral upper extremities while his thoracic and lumbosacral spine revealed minimal tenderness in the paravertebral midline and musculature. Dr. Lakin reported that sensation was decreased in the entire right lower extremity as compared to the left while appellant's motor examination in the lower extremities was normal. He diagnosed lumbosacral sprain and sprain of the right leg. Dr. Lakin found that his examination of appellant's right knee was unremarkable and that examination of the lumbosacral spine did not follow any anatomic patterns. He determined that appellant had no employment-related disability as there was no correlation of subjective and objective complaints. Dr. Lakin noted that EMG/NCV testing of the lower extremities was normal. He found that appellant had reached maximum medical improvement (MMI), no longer required further medical treatment, and could return to his date-of-injury position without restrictions.

On September 15, 2014 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on Dr. Lakin's report. It afforded him 30 days to respond in writing if he disagreed with the proposed termination.

In a September 4, 2014 report, Dr. Arash Emami, a Board-certified orthopedic surgeon, noted appellant's fall on December 9, 2013 that resulted in a lumbar spine injury. On physical examination, he found mild paraspinal spasms, sensation grossly intact, and present and equal reflexes. Dr. Emami reviewed appellant's MRI scan and found lumbar disc herniation at L4-5 with impingement of the L5 nerve root. He recommended a lumbar laminectomy, foraminotomy at L4-5 and discectomy at L4-5. Dr. Emami found that appellant was totally disabled from work.

In a letter dated October 27, 2014, appellant, through counsel, objected to the proposed termination of wage-loss and medical benefits.

On October 28, 2014 OWCP requested a supplemental report from Dr. Lakin addressing whether the acceptance of appellant's claim should be expanded to include other medical conditions and whether the findings on the MRI scan were due to his accepted employment injury.

In a January 28, 2015 report, Dr. Lakin opined that the findings on the MRI scan were degenerative age-related changes which preexisted appellant's accepted employment injury. He further noted that appellant's subjective and objective findings did not correlate based on his physical examination. Dr. Lakin found that appellant had no objective signs of radiculopathy on

examination or from EMG/NCV testing which did not correlate with the MRI scan findings. He concluded that appellant had no disability from work and there was no need for further medical treatment.

By decision dated February 25, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, effective February 9, 2015, based on the reports from Dr. Lakin. On March 4, 2015 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

A hearing was held on October 16, 2015.

In a report and treatment notes dated November 4, 2015, Dr. Ki Soo Hwang, a Board-certified orthopedic surgeon, noted appellant's history of falling in the performance of duty. He performed a physical examination and diagnosed lumbar spinal stenosis with right lower extremity radiculopathy. Dr. Hwang noted that appellant's lower back pain with radiculopathy began shortly after his fall in 2013. He opined that the slip and fall injury was the direct cause of his debilitating pain. Dr. Hwang recommended spine surgery.

By decision dated January 28, 2016, OWCP's hearing representative affirmed the February 25, 2015 termination decision and found that appellant had not established continuing disability or residuals causally related to his accepted employment injury.

On March 3, 2016 appellant, through counsel, requested reconsideration of the January 28, 2016 decision. Counsel provided a February 18, 2016 report from Dr. Emami, who reviewed Dr. Lakin's reports and disagreed with his conclusions. Dr. Emami opined that, while appellant's MRI scan findings of stenosis and retrolisthesis could be a preexisting condition, the disc herniation at L4-5 would be most likely as a result of the work-related accident. He recommended spine surgery.

By decision dated May 31, 2016, OWCP denied modification of its prior decisions.

On June 7, 2016 appellant, through counsel, requested reconsideration.

By decision dated June 23, 2020, OWCP denied modification of its prior decisions.

### **LEGAL PRECEDENT**

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> 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

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<sup>4</sup> See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

employment.<sup>5</sup> OWCP's 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>

Section 8123(a) of FECA which 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>9</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>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 the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>11</sup>

### ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective February 9, 2015.

The evidence of record establishes that, as of February 9, 2015, the date OWCP terminated appellant's wage-loss compensation and medical benefits, there was disagreement between Dr. Lakin, OWCP's second opinion physician, and Dr. Emami, appellant's treating physician, as to whether appellant had continuing disability and residuals from his accepted employment injury and accepted condition of lumbar sprain.

OWCP relied upon the second opinion findings of Dr. Lakin in determining that appellant had no continuing residuals or disability warranting further wage-loss compensation or medical benefits. Dr. Lakin noted in his August 15, 2014 and January 28, 2015 reports that appellant had no objective signs of radiculopathy on examination or on EMG/NCV testing which did not

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<sup>5</sup> *S.P.*, Docket No. 20-0196 (issued June 24, 2020); *R.P.*, *id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>6</sup> *S.P.*, *id.*; *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>7</sup> *R.P.*, *supra* note 4; *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *see also A.P.*, Docket No. 08-1822 (issued August 5, 2009); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>8</sup> *See R.P.*, *supra* note 4; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake*, *id.*

<sup>9</sup> 5 U.S.C. § 8123(a); *see R.P.*, *supra* note 4; *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

<sup>10</sup> 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

<sup>11</sup> *See R.P.*, *supra* note 4; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

correlate with his MRI scan findings. He concluded that appellant had no disability and no need for further medical treatment.

On September 4, 2014 Dr. Emami reviewed appellant's MRI scan and found lumbar disc herniation at L4-5 with impingement of the L5 nerve root. He noted positive findings including mild paraspinal spasms and recommended a lumbar laminectomy, foraminotomy at L4-5 and discectomy at L4-5 finding that appellant was totally disabled.

As Dr. Lakin concluded that appellant was able to resume his date of injury position without restrictions and Dr. Emami concluded that appellant remained totally disabled for work, there is an unresolved conflict in the medical evidence. OWCP should have resolved the conflict of medical opinion evidence before terminating compensation.<sup>12</sup> As it failed to resolve the conflict of medical opinion evidence, the Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective February 9, 2015.

### CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective February 9, 2015.<sup>13</sup>

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<sup>12</sup> *K.L.*, Docket No. 19-0729 (issued November 6, 2019); *P.P.*, Docket No. 17-0023 (issued June 4, 2018).

<sup>13</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 23, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 17, 2021  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board