

FACTUAL HISTORY

OWCP accepted that on February 13, 2012 appellant, then a 47-year-old city letter carrier, sustained a left-sided lumbar strain when he fell from a chair.² Appellant stopped work at the time of injury and did not return. He received compensation for total disability.

Dr. Samy F. Bishai, an attending orthopedic surgeon, followed appellant beginning on May 1, 2012. He found appellant totally disabled for work due to the accepted February 13, 2012 injury, with lumbar pain and left-sided radiculopathy. Dr. Bishai noted that appellant had no prior back problems “as far as he knows.”³ In reports from July 11 to October 3, 2012, Dr. Ramon Berenguer, an attending family practitioner, found appellant disabled for work due to a lumbosacral strain with lumbar radiculopathy.

On July 23, 2012 OWCP obtained a second opinion report from Dr. Peter Millheiser, a Board-certified orthopedic surgeon, who reviewed the medical record and a statement of accepted facts. On examination, Dr. Millheiser found full motion of the lumbar spine, bilaterally positive supine straight leg raising tests, and negative sitting straight leg raising tests. He diagnosed a resolved lumbar sprain. Dr. Millheiser opined that appellant had no objective residuals of the accepted injury.

In a July 30, 2012 letter, OWCP advised appellant that the medical evidence indicated that his lumbar conditions were degenerative and not traumatic in nature. It requested that he submit an updated report from his attending physician, explaining how and why the February 13, 2012 injury would cause or aggravate his ongoing lumbar conditions. In response, appellant submitted an August 22, 2012 report from Dr. Bishai, opining that because appellant’s degenerative disc disease was asymptomatic prior to the February 13, 2012 injury, his ongoing back and leg symptoms were related to the “new injury as well as an aggravation of preexisting problems within his back.”⁴

In a September 11, 2012 addendum, Dr. Millheiser stated that “[t]he aggravation of the lumbosacral degenerative disc disease was temporary and would have resolved well in the past.”

In a September 25, 2012 report, Dr. Bishai stated that on May 1, 2012 based on a review of his medical file and a clinical examination, he concluded that appellant’s “injuries that he sustained in the accident of February 13, 2012 [were] directly the result of this accident and that this is a case of aggravation of preexisting conditions.” He noted that, while appellant had lumbar conditions prior to February 13, 2012, they were asymptomatic before the accepted

² In a February 13, 2012 report, Dr. Albert Lambert, a physician specializing in emergency medicine, diagnosed an acute episode of lumbar pain and administered medication. Dr. Carlos Roig, an attending orthopedic surgeon, followed appellant beginning on February 14, 2012. He diagnosed a lumbar sprain and held appellant off work through March 2012. April 3, 2012 nerve conduction velocity showed findings consistent with right L5 radiculopathy. Appellant participated in physical therapy from April to November 2012.

³ August 6 and February 16, 2012 lumbar computerized tomography scans showed disc bulges from L3 to S1.

⁴ A September 19, 2012 MRI scan showed “disc herniation with thecal sac impingement at L5-S1 and disc bulge with spinal canal stenosis at L4-5.” A nerve conduction study showed evidence of left L4-5 nerve root entrapment.

injury. Dr. Bishai opined that, “without a doubt, [he had] established the connection and the cause and effect between the symptoms that [appellant] is having now of back pain and radiculopathy with the injuries that he suffered on February 13, 2012.”

On October 23, 2012 OWCP found a conflict of medical opinion between Dr. Millheiser, for the government, and Dr. Bishai, for appellant, regarding the nature and extent of any ongoing condition related to the accepted lumbar sprain. To resolve the conflict, it selected Dr. Richard Linn, a Board-certified orthopedic surgeon.

In a November 23, 2012 report, the employing establishment’s Office of the Inspector General (OIG) advised OWCP that surveillance videos taken from May to October 2012 demonstrated that appellant was physically active at the same time his physicians found him totally disabled for work. Appellant was observed lifting, bending, driving, stooping, using a garden hose to clean equipment, unloading vehicles, and carrying a child. OWCP imaged the investigative report into the case record and included the surveillance video discs as physical evidence associated with the case record.

In a December 5, 2012 report, Dr. Linn reviewed the complete medical record and a statement of accepted facts. The statement of accepted facts provided to him noted the presence of the investigative report and surveillance video in the case record. Dr. Linn also stated that he reviewed the employing establishment’s investigative report and two hours of surveillance videos of appellant’s activities obtained between April 20 and October 25, 2012. On examination, he found restricted lumbar motion and an antalgic gait favoring the left leg. Dr. Linn obtained x-rays showing bilateral L5 spondylosis and degenerative facet disease from L3 to S1 with foraminal narrowing. He diagnosed a lumbar strain with exacerbation of underlying degenerative disc disease, with left sacroilitis vs. left lumbar radiculitis. Dr. Linn explained that appellant’s clinical presentation, subjective complaints, and activities as observed in the surveillance video were inconsistent with objective findings on imaging studies. He noted that appellant had not sought medical treatment since September 2012, and that “the exacerbation would have completed as of that date.” Dr. Linn found appellant able to perform light-duty work, but recommended a functional capacity evaluation to determine precise work tolerances.

In December 19, 2012 and January 16, 2013 reports, Dr. Berenguer held appellant off work due to lumbar disc syndrome, lumbar radiculopathy, an L4-5 disc herniation, and moderate-to-severe central canal stenosis from L3 to S1.

On February 7, 2013 OWCP described activities shown in surveillance videos from May 1 to October 25, 2012, including bending with one knee on the ground, leaning into a vehicle to remove a child from a car seat, removing a child from a vehicle while carrying a shoulder bag, pushing garbage cans to the curb, carrying a child, spraying with a garden hose, lifting a stroller from a minivan, rinsing equipment with a garden hose, bending, turning, leaning,

and carrying groceries from his vehicle to his residence. Appellant had a minor motor vehicle accident on October 12, 2012, bumping a vehicle in front of him.⁵

In a February 14, 2013 report, Dr. Bishai noted appellant's continuing complaints of bilateral lumbar radiculopathy with numbness in the left lower extremity. He diagnosed lumbosacral strain, lumbar disc syndrome, herniated lumbar discs, and neuroforaminal stenosis from L3 to S1 bilaterally.⁶

By notice dated March 5, 2013, OWCP advised appellant that it proposed to terminate his wage-loss compensation benefits on the grounds that the accepted lumbar sprain had ceased without residuals, based on Dr. Linn's opinion as the weight of the medical evidence. It noted the presence of the employing establishment's investigative report and surveillance video in the case record.

In response, appellant submitted a March 7, 2013 letter requesting a copy of Dr. Linn's report. He submitted March 13 and April 10, 2013 reports from Dr. Bishai, noting limited lumbar motion. A March 20, 2013 magnetic resonance imaging (MRI) scan showed disc bulges at L4-5 and L5-S1 with significant stenosis. Dr. Bishai noted that appellant's pain symptoms had become increasingly severe. He disagreed with Dr. Millheiser's opinion that appellant had full lumbar motion, and contended that Dr. Linn misinterpreted the record. Dr. Bishai opined that appellant remained totally disabled for work due to herniated lumbar discs with severe radiculopathy. Appellant also submitted physical therapy notes dated from July 2012 to May 2013.

By decision dated April 25, 2013, OWCP terminated appellant's wage-loss and medical benefits effective May 4, 2013 on the grounds that the accepted lumbar sprain and ceased without residuals, based on Dr. Linn's opinion as the weight of the medical evidence.

In a May 15, 2013 letter, appellant requested a telephonic oral hearing, held October 31, 2013. At the hearing, her representative contended that she was entitled to continuing wage-loss and medical compensation benefits as the accepted condition remained active and disabling. He also indicated that appellant had not asked the employing establishment for a copy of the surveillance video.

Appellant submitted additional medical evidence. In reports from March 20 to December 18, 2013 reports, Dr. Berenguer held her off work due to lumbar disc syndrome, lumbar stenosis, and lumbar radiculopathy. He held appellant off work. In a July 30, 2013 report, Dr. Bishai found her condition unchanged and repeated prior diagnoses.

By decision dated and finalized January 15, 2014, an OWCP hearing representative affirmed the April 25, 2013 decision terminating appellant's wage-loss and medical benefits. She found that Dr. Linn's opinion continued to carry the weight of the medical evidence, as he

⁵ In a February 11, 2013 letter, the employing establishment's OIG advised OWCP that its surveillance of appellant's activities revealed an "active lifestyle, was capable of walking, bending, twisting, turning, leaning, driving, entering, and existing a vehicle, sitting, standing, ... shopping, pushing, pulling, and lifting and carrying heavy objects, all without incident."

⁶ A February 12, 2013 functional capacity evaluation showed restricted lumbar motion in all planes.

presented detailed medical rationale explaining that the accepted lumbar sprain had ceased. The hearing representative found that the additional medical evidence submitted did not support any ongoing condition causally related to the accepted injury.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁷ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁸

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 (known as a referee physician or impartial medical specialist) who shall make an examination.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a lumbar strain on February 13, 2012. Appellant received compensation for total disability based on the opinions of Dr. Bishai, an attending orthopedic surgeon, and Dr. Berenguer, an attending family practitioner, who found appellant totally disabled for work from May 1, 2012 onward due to left-sided radiculopathy, lumbar stenosis, and herniated lumbar discs.

OWCP obtained a second opinion from Dr. Millheiser, a Board-certified orthopedic surgeon, who submitted July 23 and September 11, 2012 reports opining that the accepted lumbar strain had resolved without residuals. It then found a conflict between Dr. Bishai, for appellant, and Dr. Millheiser, for the government, and selected Dr. Linn, a Board-certified orthopedic surgeon, to resolve it. Dr. Linn provided a December 5, 2012 report reviewing the medical record and statement of accepted facts. He provided detailed medical reasoning explaining that the accepted lumbar strain and resolved no later than September 2012, with no objective effect on underlying degenerative disc disease. Therefore, OWCP terminated appellant's wage-loss and medical benefits effective May 4, 2013, based on Dr. Linn's report as the weight of the medical evidence.

Dr. Bishai supported a causal relationship between the accepted lumbar strain and appellant's ongoing lumbar condition based on the temporal coincidence between the injury and appellant's symptoms. He noted both that appellant had no prior back problems and that he had preexisting problems that were quiescent prior to the injury. Dr. Bishai explained on September 25, 2012 that this temporal relationship "without a doubt" established "the cause and effect between" appellant's ongoing symptoms" and the February 13, 2012 lumbar strain.

⁷ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁸ *Id.*

⁹ 5 U.S.C. § 8123.

However, the Board has held that a temporal relationship alone is insufficient to establish causal relationship.¹⁰

Dr. Berenguer found appellant disabled for work from July 11, 2012 onward due to lumbar radiculopathy, herniated lumbar discs, and central canal stenosis. However, he did not explain his medical reasoning for supporting a continuing causal relationship between the accepted lumbar strain and appellant's ongoing condition. Dr. Berenguer's opinion is therefore of diminished probative value.¹¹

Thus, neither Dr. Bishai nor Dr. Berenguer's reports are sufficiently accurate and supported by medical rationale to outweigh the opinion of Dr. Linn, whose reports were based on a complete and accurate factual and medical history and contained extensive medical reasoning explaining that the accepted lumbar contusion had ceased without residuals prior to May 4, 2013. The Board therefore finds that OWCP's January 15, 2014 decision affirming the termination was proper under the law and facts of the case.

On appeal, appellant's representative contends that OWCP wrongfully selected Dr. Millheiser as second opinion physician as he had also served as a second opinion physician under appellant's claim in File No. xxxxxx888, examining appellant on May 21, 2012. The Board notes that Dr. Millheiser did serve in this capacity, as noted in the Board's decision and order in appellant's prior claim.¹² However, OWCP's procedures do not explicitly prohibit a physician from serving as a second opinion examiner in multiple claims for the same employee. Its procedures provide, that the "method for selecting second opinion physicians is more flexible, since a strict rotation of physicians is not required for this type of examination."¹³

Appellant's representative also contended that the employing establishment violated 20 C.F.R. § 10.506 and the Board's decisions in *J.M.*,¹⁴ and *F.S.*,¹⁵ by showing the surveillance video to Dr. Linn and not providing a copy to appellant as he requested. The Board notes that there is no evidence of record that the employing establishment contacted Dr. Linn. Rather, the employing establishment provided the investigative report and surveillance videos to OWCP. OWCP followed its procedures for including the investigative report and video in the case record

¹⁰ *Louis R. Blair, Jr.*, 54 ECAB 348 (2003).

¹¹ *Deborah L. Beatty*, 54 ECAB 340 (2003).

¹² *J.C.*, Docket No. 13-1200 (issued November 1, 2013) (adjudicating the termination of compensation benefits pursuant to File No. xxxxxx888, accepted for a July 6, 2011 left medial meniscus tear; this claim is not before the Board on the present appeal).

¹³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5.b(2) (July 2011).

¹⁴ 58 ECAB 478 (2007) (where the Board affirmed OWCP's termination despite the existence of a surveillance video. After receiving a copy of the surveillance video appellant provided no evidence was presented to question its accuracy).

¹⁵ Docket No. 11-863 (issued September 26, 2012) (where the Board reversed OWCP's termination of benefits because it had relied on medical evidence obtained after the employing establishment investigators had contacted the physician directly).

and statement of accepted facts¹⁶ which was provided to Dr. Linn, the impartial referee physician in the case.¹⁷ The present case is therefore distinguishable from *J.M.*, and *F.S.*, where the employing establishment did contact physicians. Also, there is no evidence of record that appellant requested a copy of the video prior to the termination of benefits. He requested a copy of the impartial medical specialist's report on March 7, 2013, but did not ask for the investigative report or surveillance video. Therefore, appellant's representative's contention that OWCP did not provide a copy of the video as requested is not supported by the record.

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits.¹⁸

ANALYSIS -- ISSUE 2

As stated above, OWCP properly terminated appellant's wage-loss and compensation benefits effective May 4, 2013, based on the opinion of Dr. Linn, who opined that the accepted lumbar strain ceased without residuals. The burden then shifted to appellant to demonstrate that he continued to be disabled for work on and after December 31, 2012 due to the accepted injuries.¹⁹

Following the April 25, 2013 decision terminating appellant's wage-loss and medical compensation benefits, pursuant to a May 15, 2013 telephonic hearing, appellant submitted additional medical evidence. Dr. Berenguer provided reports from March 20 to December 18, 2013 finding appellant disabled for work due to lumbar disc syndrome, lumbar stenosis, and lumbar radiculopathy. In a July 30, 2013 report, Dr. Bishai found appellant's condition unchanged and repeated prior diagnoses. However, neither physician explained their reasoning as to why the accepted February 13, 2012 lumbar strain would continue to disable appellant for work on and after May 4, 2013. Therefore, the opinions of Dr. Bishai and Dr. Berenguer are of diminished probative value and are insufficient to meet appellant's burden of proof.²⁰ OWCP properly found that Dr. Linn's report continued to represent the weight of the medical evidence.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.4(a)(1) (September 2009) (all evidence on which the SOAF is based must be in the case record; investigative reports must be "subject to examination or rebuttal").

¹⁷ *Id.* at Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(c) (September 2010) (the referee physician should also receive a copy of the entire case record).

¹⁸ See *Virginia Davis-Banks*, 44 ECAB 389 (1993); see also *Howard Y. Miyashiro*, 43 ECAB 1101(1992).

¹⁹ *Id.*

²⁰ *Deborah L. Beatty*, 54 ECAB 340 (2003).

The Board finds that OWCP's January 15, 2014 decision finding that appellant did not establish that he continued to have residuals of the accepted injuries on and after May 4, 2013 is appropriate under the law and facts of the case.

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 and medical compensation benefits effective May 4, 2013 on the grounds that an accepted lumbar strain had ceased without residuals. The Board further finds that appellant has not established that he remained disabled for work on and after May 4, 2013 due to the accepted lumbar strain.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 15, 2014 is affirmed.

Issued: March 16, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board