

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

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C.G., Appellant )

and )

DEPARTMENT OF JUSTICE, U.S. MARSHALS )  
SERVICE, Trenton, NJ, Employer )  
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**Docket No. 24-0557**  
**Issued: September 6, 2024**

*Appearances:*

*Jason S. Lomax, Esq., for the appellant<sup>1</sup>*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On May 1, 2024 appellant, through counsel, filed a timely appeal from an April 30, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has met his burden of proof to expand the acceptance of his claim to include additional conditions of the lumbar spine as causally related to the accepted December 24, 2018 employment injury.

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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> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On December 28, 2018 appellant, then a 37-year-old supervisory deputy marshal, filed a traumatic injury claim (Form CA-1) alleging that on December 24, 2018, he sustained low back pain when he picked up a 25-pound dumbbell when working out at a fitness center as a “mandatory fit participant” while in the performance of duty.<sup>3</sup> In an associated statement, appellant recalled that his knees buckled and he fell to the floor. He was transported to a hospital emergency department by ambulance. OWCP assigned OWCP File No. xxxxxx810.<sup>4</sup>

Under the current claim, in a December 24, 2018 report, Dr. Katelyn Courtney, an osteopath Board-certified in emergency medicine, recounted a history of an injury earlier that day. She obtained a computerized tomography (CT) scan of the lumbar spine, which revealed a diffuse disc bulge at L4-5 causing mild central narrowing. Dr. Courtney diagnosed lumbar strain.

A December 31, 2018 magnetic resonance imaging (MRI) scan of the lumbar spine revealed a moderate-sized central to right paracentral disc herniation at L4-5 generating mild-to-moderate mass effect on the ventral thecal sac and right lateral recess.

In a March 22, 2019 report, Dr. Anupam Sinha, an osteopath Board-certified in physiatry, recounted a history of the December 24, 2018 employment injury and subsequent treatment. He first examined appellant on January 2, 2019. On examination, Dr. Sinha observed slight limitation of lumbar flexion, and mild tenderness to palpation of the right lumbosacral junction. He diagnosed an L4-5 disc herniation with mild right-sided lumbar radiculopathy, “aggravated by his work[-]related training exercises performed on December 24, 2018.” Dr. Sinha released appellant to full duty effective January 2, 2019. He opined that appellant’s lumbar disc herniation was a “permanent injury.”

By decision dated April 11, 2019, OWCP accepted the claim for lumbar sprain.

By separate decision also dated April 11, 2019, OWCP denied expansion of acceptance of the claim to include aggravation of an L4-5 disc bulge with right-sided radiculopathy.

Thereafter, OWCP received a December 27, 2018 report by Dr. Michael W. Molter, an osteopath Board-certified in physiatry, wherein he diagnosed low back pain and lumbar radiculopathy.

In a January 2, 2019 report, Dr. Sinha diagnosed lumbar radiculopathy with symptoms of L4-5 disc herniation.

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<sup>3</sup> In a March 19, 2019 letter, the employing establishment confirmed that appellant was required to participate in the “FIT” physical training program and pass a fitness test every six months.

<sup>4</sup> Previously, under OWCP File No. xxxxxx491, appellant filed Form CA-1 alleging that on October 29, 2007 he sustained low back pain when he leaned over to pick up a weight during required physical training while in the performance of duty. A November 13, 2007 magnetic resonance imaging (MRI) scan of the lumbar spine revealed a broad-based central disc herniation at L4-5, with mild splaying of both traversing L5 nerve roots. OWCP ultimately accepted the claim for back sprain.

On April 29, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Thereafter, OWCP received a December 24, 2018 report by Dr. Courtney, wherein she diagnosed lumbar strain and L4-5 disc bulge.

Following a preliminary review, by decision dated July 3, 2019, OWCP's hearing representative vacated OWCP's April 11, 2019 decision, which denied expansion of acceptance of the claim, and remanded the case to obtain clarification from Dr. Sinha.

In a development letter dated July 19, 2019, OWCP requested that Dr. Sinha review a statement of accepted facts (SOAF) and provide a well-rationalized opinion explaining whether the December 24, 2018 physical training aggravated the diagnosed L4-5 lumbar disc herniation with mild right-sided radiculopathy, whether the condition had resolved, and if additional treatment was required.

Thereafter, OWCP received reports dated April 17 and May 24, 2019 by Dr. Sinha, wherein he diagnosed L4-5 disc herniation with mild right lumbar radiculopathy. Dr. Sinha opined in both reports that "[t]his injury is a direct result of his work required strength training exercises performed on [December 24, 2018.]" In his May 24, 2019 report he explained that: "The weighted barbell squats performed on 12/24/18 produced a direct load on [appellant's] lumbar spine, aggravating the preexisting L4-5 disc herniation. ... His lumbar disc herniation is a permanent injury."

By decision dated October 7, 2019, OWCP denied expansion of acceptance of the claim to include aggravation of an L4-5 disc bulge with right-sided radiculopathy.

On October 18, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated December 12, 2019, an OWCP hearing representative set aside OWCP's October 7, 2019 decision. The hearing representative remanded the case to OWCP to administratively combine the present claim with OWCP File No. xxxxxx491, and to obtain a second opinion on whether acceptance of the claim should be expanded to include an L4-5 disc herniation.

On December 19, 2019 OWCP referred appellant, the medical record, a SOAF, and a series of questions to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation. It requested that Dr. Askin determine whether acceptance of the claim should be expanded to include aggravation or causation of the diagnosed L4-5 disc herniation.

In a January 17, 2020 report, Dr. Askin recounted a history of injury and treatment, and reviewed the medical record and SOAF. On examination, he observed a 1.5 cm discrepancy in calf circumference, left greater than right, lumbar side bending limited to 20 degrees bilaterally, and less flexibility crossing the right leg over the left than when crossing the left leg over the right. Dr. Askin opined that acceptance of appellant's claim should not be expanded to include an L4-5 disc problem by causation or aggravation as it was a "baseline condition precedent." He explained that appellant's preexisting, age-related degenerative disc disease could precipitate episodic pain such as following required physical training in 2007 and on December 14, 2018, but that there

were no residuals of the accepted condition and no additional treatment required. Dr. Askin contended that appellant had not sustained the lumbar sprain as specified in the SOAF as there was no identified partial ligament tear to support that diagnosis. He returned appellant to full, unrestricted duty.

By decision dated February 7, 2020, OWCP denied expansion of acceptance of appellant's claim to include aggravation of an L4-5 disc bulge with right-sided radiculopathy.<sup>5</sup>

On March 5, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on June 11, 2020.

By decision dated August 26, 2020, OWCP's hearing representative set aside OWCP's February 7, 2020 decision and remanded the case to obtain a supplemental report from Dr. Askin. She directed OWCP to administratively combine appellant's claims under OWCP File No. xxxxxx810 and File No. xxxxxx491. On August 28, 2020 OWCP administratively combined appellant's claims under OWCP File Nos. xxxxxx810 and xxxxxx491, with the former serving as the master file.

In a development letter dated September 3, 2020, OWCP requested that Dr. Askin submit a supplemental report, utilizing the SOAF as his sole frame of reference, to determine whether the October 29, 2007 employment incident was competent to cause or aggravate lumbar disc degeneration.

In a September 8, 2020 report, Dr. Askin opined that appellant's findings on lumbar diagnostic imaging studies were not caused by the October 29, 2007 or December 24, 2018 employment injuries. He attributed appellant's lumbar symptoms to the motion of arthritic facet joints. Dr. Askin indicated that the accepted lumbar sprain had resolved without residuals.

By decision dated June 29, 2021, OWCP denied expansion of acceptance of appellant's claim to include aggravation of an L4-5 disc bulge with right-sided radiculopathy.

On July 21, 2021 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on November 8, 2021.

By decision dated July 11, 2022, OWCP's hearing representative affirmed the June 29, 2021 decision.

In a January 30, 2023 report, Dr. Robert W. Macht, a general surgeon, recounted a history of the October 29, 2007 and December 24, 2018 employment injuries and treatment. On examination, he observed tenderness to palpation of the right lower back region, and limited lumbar motion in all planes. Dr. Macht diagnosed strain of ligaments of lumbar spine, and lumbar intervertebral disc displacement. He opined that appellant's L4-5 disc degeneration had been

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<sup>5</sup> By notice dated February 10, 2020 and finalized March 16, 2020, OWCP terminated appellant's wage-loss compensation and medical benefits as the weight of the medical evidence established that he no longer had any disability or residuals causally related to his accepted December 24, 2018 employment injury. Following a July 6, 2020 telephonic hearing, by decision dated September 17, 2020, an OWCP hearing representative affirmed the March 16, 2020 decision.

caused by the October 29, 2007 employment incident because there was no increase in L4-5 disc degeneration from the November 13, 2007 lumbar MRI scan to the December 31, 2018 lumbar MRI scan. Dr. Macht also opined that the December 24, 2018 employment injury permanently aggravated lumbar intervertebral disc displacement. He noted that the lumbar strain and intervertebral disc displacement were permanent conditions.

On April 10, 2023 appellant, through counsel, requested reconsideration of OWCP's July 21, 2022 decision.

Thereafter, OWCP received a February 8, 2023 report by Dr. Macht, wherein he reviewed Dr. Askin's January 17, 2020 report. Dr. Macht opined that the December 24, 2018 lumbar strain/sprain permanently aggravated preexisting lumbar disc displacement. He disagreed with Dr. Askin's diagnosis of facet joint disease as there was no radiological evidence of arthritic spinal joints.

By decision dated June 30, 2023, OWCP denied modification of the July 11, 2022 decision.

In a January 10, 2024 report, Dr. Macht opined that appellant continued to have lumbar strain and intervertebral disc displacement causally related to the October 29, 2007 and December 24, 2018 employment injury.

On March 8, 2024 appellant, through counsel, requested reconsideration of the June 30, 2023 decision.

Thereafter, OWCP received November 7, 2007 and December 5, 2007 reports by Dr. Theodore D. Conliffe, a Board-certified physiatrist, wherein he recounted appellant's history of lower back pain with MRI scan evidence of L4-5 disc protrusion. Dr. Conliffe diagnosed lumbar disc herniation and lower back pain. Appellant underwent an intra-articular injection on December 12, 2007.

By decision dated March 18, 2024, OWCP denied modification of the June 30, 2023 decision.

On April 4, 2024 appellant, through counsel, requested reconsideration.

By decision dated April 8, 2024, OWCP denied modification of the March 18, 2024 decision.

On April 19, 2024 appellant, through counsel, requested reconsideration.

Thereafter, OWCP received an April 17, 2024 report by Dr. Macht, wherein he recounted that appellant had no back injuries or problems prior to the October 29, 2007 employment incident where he lifted weights, which "directly caused the herniated disc at L4-L5" with immediate signs and symptoms. He noted that while Dr. Askin was correct that in some individuals, disc degeneration could be age-related in nature, this did not apply to appellant's case. Dr. Macht opined that despite Dr. Askin's observation of facet joint arthritis, there was no radiographic evidence of degenerative or arthritic changes. The December 24, 2018 lumbar sprain/strain was superimposed on a disc problem at L4-5 similar to his condition in 2007, and had permanently aggravated his lumbar spine. Dr. Macht diagnosed acute L4-5 disc herniation sustained due to the

October 29, 2007 employment injury and acute lumbar sprain/strain sustained in the December 24, 2018 employment injury.

By decision dated April 30, 2024, OWCP denied modification of the April 8, 2024 decision.

### **LEGAL PRECEDENT**

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>6</sup>

To establish causal relationship between the claimed condition and the employment injury, an employee must submit rationalized medical evidence.<sup>7</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>8</sup> The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.<sup>9</sup>

Section 8123(a) provides that, if there is a 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> The implementing regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. 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. In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an independent medical examiner for the purpose of resolving

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<sup>6</sup> *L.F.*, Docket No. 20-0359 (issued January 27, 2021); *S.H.*, Docket No. 19-1128 (issued December 2, 2019); *M.M.*, Docket No. 19-0951 (issued October 24, 2019); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>7</sup> *L.F.*, *id.*; *T.K.*, Docket No. 18-1239 (issued May 29, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

<sup>8</sup> *S.L.*, Docket No. 24-0312 (issued May 14, 2024); *D.T.*, Docket No. 20-0234 (issued January 8, 2021); *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *T.K.*, *id.*; *I.J.* 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>9</sup> *See D.T.*, *id.*; *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

<sup>10</sup> 5 U.S.C. § 8123(a); *see C.C.*, Docket No. 20-0151 (issued July 30, 2020); *M.G.*, Docket No. 19-1627 (issued April 17, 2020); *R.C.*, Docket No. 12-0437 (issued October 23, 2012).

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 this case is not in posture for decision.

Dr. Askin, in his January 17, 2020 report, opined that the 2007 and December 14, 2018 employment incidents precipitated lumbar pain related to preexisting, age-related, L4-5 degenerative disc disease, unrelated to the employment injuries. Dr. Askin, in his September 8, 2020 report, opined that the October 29, 2007 and December 24, 2018 employment injuries did not cause an L4-5 lumbar condition or any of the findings revealed by diagnostic imaging studies. He attributed appellant's lumbar symptoms to facet joint arthritis.

On the other hand, Dr. Macht, in reports dated from January 30, 2023 through April 17, 2024, opined that the October 29, 2007 and December 24, 2018 employment injuries caused and aggravated an L4-5 disc herniation. In a January 30, 2023 report, Dr. Macht opined that the October 29, 2007 employment injury caused appellant's L4-5 disc degeneration as there was no increase in L4-5 disc degeneration from the November 13, 2007 lumbar MRI scan to the December 31, 2018 lumbar MRI scan. He also opined that the December 24, 2018 employment injury permanently aggravated lumbar intervertebral disc displacement. In his February 8, 2023 report, Dr. Macht disagreed with Dr. Askin's January 17, 2020 diagnosis of facet joint arthritis as the diagnostic imaging studies did not reveal radiological evidence of arthritic spinal joints. Dr. Macht opined that the December 24, 2018 lumbar strain/sprain permanently aggravated preexisting lumbar disc displacement. In a January 10, 2024 report, Dr. Macht opined that appellant had continuing residuals of the October 29, 2007 and December 24, 2018 employment injuries. He explained in an April 17, 2024 report that the October 29, 2007 employment injury caused the L4-5 disc herniation, and the December 24, 2018 employment injury caused a lumbar sprain/strain. Dr. Macht noted that while Dr. Askin was correct that disc degeneration could be age-related in nature, this did not apply to appellant's case. Additionally, Dr. Macht opined that there was no radiographic evidence of facet joint arthritis as diagnosed by Dr. Askin.

As noted above, if there is a disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint a referee physician or impartial medical specialist who shall make an examination.<sup>12</sup> The Board finds that a conflict in medical opinion exists between Dr. Macht, for appellant, and Dr. Askin, for the government, regarding whether the acceptance of appellant's claim should be expanded to include additional lumbar conditions as causally related to the accepted October 28, 2007 and December 24, 2018 employment injuries.<sup>13</sup>

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<sup>11</sup> 20 C.F.R. § 10.321. *See also* *S.L.*, Docket No. 24-0220 (issued May 15, 2024); *J.H.*, Docket No. 22-0981 (issued October 30, 2023); *N.D.*, Docket No. 21-1134 (issued July 13, 2022); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>12</sup> *See E.B.*, Docket No. 23-0169 (issued August 24, 2023); *S.S.*, Docket No. 19-1658 (issued November 12, 2020); *C.S.*, Docket No. 19-0731 (issued August 22, 2019).

<sup>13</sup> *S.T.*, Docket No. 21-0906 (issued September 2, 2022); *S.M.*, Docket No. 19-0397 (issued August 7, 2019).

The Board, therefore, will remand the case for OWCP to refer appellant to an impartial medical specialist for resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).<sup>14</sup> After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

**CONCLUSION**

The Board finds that this case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 30, 2024 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 6, 2024  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>14</sup> *D.W.*, Docket No. 24-0157 (issued March 26, 2024); *Y.M.*, Docket No. 23-0091 (issued August 4, 2023); *V.B.*, Docket No. 19-1745 (issued February 25, 2021).