

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

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<b>B.M., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-0101</b>
	)	<b>Issued: December 15, 2021</b>
<b>U.S. POSTAL SERVICE, PHILADELPHIA</b>	)	
<b>NETWORK DISTRIBUTION CENTER,</b>	)	
<b>Philadelphia, PA, Employer</b>	)	
_____	)	

*Appearances:* *Case Submitted on the Record*  
*Michael D. Overman, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 29, 2020 appellant, through counsel, filed a timely appeal from a May 26, 2020 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.<sup>3</sup>

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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.*

<sup>3</sup> Appellant submitted additional evidence to OWCP following the May 26, 2020 decision. However, the Board's *Rules of Procedures* 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.*

## **ISSUES**

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective March 20, 2019, as he no longer had disability or residuals causally related to his accepted September 26, 2017 employment injury; and (2) whether appellant has met his burden of proof to establish continuing disability or residuals causally related to his accepted September 26, 2017 employment injury on or after March 20, 2019.

## **FACTUAL HISTORY**

On September 28, 2017 appellant, then a 70-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on September 26, 2017, he sustained injuries to the right hip and buttocks when an all-purpose container struck his left hip and he fell on his right hip, while in the performance of duty. He stopped work on that date.

A November 6, 2012 magnetic resonance imaging (MRI) scan of appellant's lumbar spine interpreted by Dr. Thomas Chayapruks, a Board-certified diagnostic radiologist, revealed advanced multilevel degenerative changes, most severe at L2-3 and L4-5.

A September 27, 2017 MRI scan of appellant's hips, interpreted by Dr. Antoni J. Parellada, a Board-certified diagnostic radiologist, revealed end-stage left hip joint osteoarthritis with subchondral marrow edema and diffuse maceration of the labrum and moderate right hip joint osteoarthritis.

In October 13, 2017 reports, Dr. Christopher Selgrath, Board-certified in orthopedic surgery, noted that he had treated appellant over the years for osteoarthritis of the left hip. He explained that appellant's condition was worsened by the work-related accident of September 26, 2017, and that appellant had an acute aggravation of preexisting osteoarthritis of the left hip and joint with new acute disc injury of the lumbar spine. Dr. Selgrath's diagnoses included: primary osteoarthritis of the left hip; contusion of left hip, initial encounter; strain of lumbar region, initial encounter; and left hip pain. He noted that there appeared to be no acute edema soft tissue abnormality on the left hip MRI scan and that appellant had a mild-to-moderate contusion, with an anticipated full recovery within four to six weeks. Dr. Selgrath explained that appellant's computerized tomography (CT) and MRI scans were consistent with preexisting end-stage degenerative joint disease of the left hip, which could have flared up due to temporary aggravation by the recent trauma; however, he indicated that he did not believe the work-related injury had anything to do with causing the abnormalities or contributing to any further damage.

A November 3, 2017 MRI scan of the lumbar spine, read by Dr. Joel Swartz, a Board-certified diagnostic radiologist, demonstrated disc desiccation with disc bulging in the lumbar spine, facet arthritis and neuroforaminal stenosis, posterior ligamentous thickening resulting in severe-to-critical canal stenosis at L2-3, no fracture, dislocation, or focal disc herniation, and borderline congenital stenosis.

On November 20, 2017 OWCP accepted the claim for temporary aggravation of unilateral primary osteoarthritis of the left hip, contusion of the left hip, and lumbar spine strain. It paid appellant compensation for disability from work on the supplemental rolls from November 11, 2017 to June 8, 2018.

In a March 1, 2018 report, Dr. Laura Ross, an attending osteopathic Board-certified orthopedic surgeon, provided a detailed history of the September 26, 2017 employment injury. She noted that appellant had back issues in 2012, left hip issues since 2015, and that at the time of the September 26, 2017 employment incident he was scheduled to undergo left hip replacement surgery. Dr. Ross diagnosed left hip osteoarthritis and contusion, lumbar spine sprain/strain, lumbar spine disc herniations, thoracolumbar radiculopathy, and lumbar radiculopathy. She opined that the conditions were a direct result of the work incident. Dr. Ross explained that, although the claimant had a history of previous disc herniation at L2-3 and L4-5, the conditions were exacerbated by the work incident. She explained that she had compared the MRI scans from 2012 and 2017, and there was objective worsening of the disc herniations at these levels in addition to worsening disc degeneration at L1-2, L3-4, and L5-S1. Dr. Ross further explained that the work-related incident involved the impact and the trauma of being struck by a power jack on the left side, causing appellant to fall on a concrete floor on his right side from a standing position, which led to worsening of the underlying disc herniations and overall disc degeneration of the lumbar spine that was objectively demonstrated on the MRI scans performed prior to and following the incident. She noted that appellant had new complaints of persistent and severe pain in the left leg, left lateral thigh, left buttock region, and radiation of symptoms down the left leg and into the lower leg and foot. Dr. Ross indicated that, although appellant had underlying degenerative joint disease of the left hip and was already scheduled to undergo a left hip replacement prior to his injury, “his symptoms are not typical to symptoms of degenerative joint disease and are not attributed to the underlying condition.” She opined that the “aforementioned injuries can be directly attributed to the work-related incident that occurred on September 26, 2017.” Dr. Ross explained that she relied upon objective medical evidence, including multiple diagnostic studies of the lumbar spine, pelvis, and hips, correlated by her own physical examinations, which were consistent with appellant’s description of the injury.

An April 17, 2018 electromyography (EMG) scan interpreted by Dr. Brad Tinkelman, Board certified in neurology, revealed ongoing left L4-5 radiculopathy and underlying sensory motor neuropathy, likely due to age and wear.

On October 1, 2018 OWCP referred appellant to Dr. Robert F. Draper, a Board-certified orthopedic surgeon for a second opinion evaluation to determine the status of appellant’s accepted conditions. Dr. Draper was also asked to address whether appellant had preexisting left hip osteoarthritis, L2-3, L4-5 lumbar disc pathology, with left lower extremity radiculitis, which were caused or temporarily/permanently aggravated by the accepted employment injury.

In an October 26, 2018 report, Dr. Draper noted appellant’s history of injury and medical treatment. He concluded that appellant’s accepted medical conditions from the September 26, 2017 employment injury had resolved. Dr. Draper explained that the work injury did not produce a permanent aggravation of the preexisting degenerative disc disease of the lumbar spine or the underlying osteoarthritis of the left hip. He noted that his opinion was based upon his review of imaging studies which did not show any evidence of fracture or dislocation, and no traumatic pathology. Dr. Draper opined that “[a]ll of the pathology evidence on the imaging studies are preexisting conditions. It is my opinion that the preexisting conditions are not materially worsened by this accident.” He explained that appellant had a temporary aggravation of the preexisting conditions of the low back and the left hip, which would last two to four weeks, at most six months, and not years. Dr. Draper advised that any discomfort in these areas lasting longer than six months was due to preexisting conditions, not the employment injury, and that appellant’s degenerative

conditions had returned to the preinjury level according to the pathology documented on the imaging studies.

In a November 1, 2018 report, Dr. Ross reiterated that appellant suffered from a series of degenerative conditions to the spine at the L2-3 and L4-5 levels, as well as degenerative joint disease to the left hip, which were materially worsened by the accepted work injury of September 26, 2017. She opined that the work injury caused a permanent aggravation of the underlying disc and left hip conditions. Dr. Ross noted that appellant had been off work since November 11, 2017, and was permanently unable to return to work.

OWCP determined that there was a conflict in the medical opinion evidence between Dr. Ross, the attending physician, and Dr. Draper, OWCP's referral physician, regarding the status of his employment-related conditions. It referred appellant, the case record, and a statement of accepted facts (SOAF) to Dr. Joseph Jelen, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Jelen was specifically asked to address whether appellant had residuals of the accepted September 26, 2017 employment injury, whether appellant had preexisting left hip osteoarthritis and degenerative disc disease at L2-3 and L4-5, with left lower extremity radiculopathy, and whether appellant's September 26, 2017 employment injury contributed to the additional diagnoses by cause, temporary or permanent aggravation.

In a January 8, 2019 report, Dr. Jelen, the impartial medical examiner (IME), noted appellant's history of injury and medical treatment and provided physical examination findings. He noted appellant's accepted diagnoses of temporary aggravation of unilateral primary osteoarthritis of the left hip, contusion of the left hip, and strain of the lumbar spine. Dr. Jelen related that appellant had no residuals of the September 26, 2017 employment injury. He opined that appellant had recovered from his hip contusion, and hip and lumbar strains. Dr. Jelen also noted "present symptoms, based on objective evidence and record review over present preexisting conditions." He explained that radiculopathy was present and appellant was a candidate for a hip replacement prior to the injury. Dr. Jelen opined that the work injury did not worsen the condition and explained that the MRI scan after the November 3, 2017 accident showed "no marrow edema to suggest contusion," there was no mention of disc herniation, and all discs were described as bulging, which was a chronic condition. He noted the April 17, 2018 EMG showed ongoing left L4-5 lumbar radiculopathy that was not described as acute. Dr. Jelen opined that any aggravation was temporary and had resolved. He further opined that appellant had returned to his preinjury level and any residual symptoms were from the progression of his preexisting condition. Dr. Jelen noted that appellant might need ongoing pain care for conditions unrelated to the work injury and opined that appellant had reached maximum medical improvement (MMI). He advised that appellant had no limitations as a result of the work injury and explained that appellant's limitations were secondary to his preexisting severe arthritis of the left hip that would require hip replacement.

On January 24, 2019 OWCP requested clarification from Dr. Jelen, noting that his report was unclear as to when the work-related temporary aggravation of appellant's left hip osteoarthritis had resolved.

In a February 4, 2019 addendum report, Dr. Jelen noted that Dr. Selgrath in his October 13, 2017 report advised that appellant had a mild-to-moderate hip contusion with no acute edema or soft tissue abnormality on the MRI scan and that full recovery was anticipated in four to six weeks. He advised that the aggravation had resolved by October 26, 2018, based on the report of

Dr. Draper, who examined appellant on that date and found no work injury-related residuals, and based on his assessment of appellant.

In a February 12, 2019 notice, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits, as he no longer had disability or residuals causally related to his accepted September 26, 2017 employment injury. It explained that the special weight of the medical opinion evidence rested with the opinion of Dr. Jelen, the IME. OWCP provided appellant 30 days to submit evidence or argument challenging the proposed termination action. No response was received.

By decision dated March 19, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits, effective March 20, 2019, as he no longer had disability or residuals causally related to his accepted September 26, 2017 employment injury.

On March 28, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. Subsequently, on April 16, 2019, counsel for appellant provided a report from Dr. Ross who noted that she "identified deficiencies in the opinion of the referee examiner."

In an April 8, 2019 report, Dr. Ross discussed the report from Dr. Draper, OWCP's referral physician. She noted that Dr. Draper advised that he saw "no evidence of permanent aggravation of the preexisting conditions based on the fact that the imaging studies do not show any evidence of fracture dislocation, no traumatic pathology at all. All the pathology evident in these imaging studies are preexisting conditions. It is my opinion that the preexisting conditions are not materially worsened by this accident." Dr. Ross indicated that Dr. Draper was "just going by the studies alone." She explained that "to fully evaluate this patient, one needs to not only look at the objective imaging studies, but also to listen to the subjective complaints of the patient and do a physical examination of the patient and put this all together to determine whether or not the patient has had traumatic injury." Dr. Ross also noted that Dr. Draper found that appellant had a temporary aggravation of the preexisting conditions for the low back and left hip that would last two to four months and at most six months, but would not last years, and that any discomfort in these areas lasting longer than six months would be due to the preexisting conditions and not the accident. However, she explained that "Dr. Draper is surmising based on no specific evidence or any documentation that I have ever read. I find that this is a generalized statement and does not apply to this patient and should not be used in this case."

Dr. Ross also discussed the report of Dr. Jelen, the IME, and noted that he reviewed all of the studies, evaluated the patient, and opined that the work injury did not contribute to the underlying radiculopathy, the hip arthritis, or the degenerative disc disease. However, she noted that Dr. Jelen found no marrow edema on the November 3, 2017 MRI scan, while this was clearly untrue. Dr. Ross noted that her report dated March 1, 2018, discussed the subchondral marrow edema revealed by the September 27, 2017 MRI scan of the left hip. She indicated that it appeared that Dr. Jelen did not review both the 2012 and 2017 MRI scans. Dr. Ross explained that appellant had previously noted disc herniations at L2-3 and L4-5, but upon reviewing the more recent November 3, 2017 MRI scan of the spine, which was post trauma, there was an exacerbation of those disc herniations. She advised that this was evidence on objective testing that showed that there had been injury as a result of the work incident. Dr. Ross also noted that Dr. Jelen in his February 4, 2019 addendum clarified that the aggravation of the preexisting degenerative disc disease had ceased by October 26, 2018, which was the date appellant was examined by

Dr. Draper. However, she indicated that Dr. Jelen's opinion was arbitrary and did not make any medical sense because he did not evaluate the patient on October 26, 2018. Dr. Ross referred to her March 1, 2018 report, noting that she found injury to appellant's left hip and low back, as well as radiculopathy down his left leg, as a result of the accident at work. She also noted that appellant currently had symptoms which were not present prior to the work-related injury, including shooting pain down his left leg that changed with different movements and complaints of persistent and severe pain in the left leg, left lateral thigh, and left buttock region, and radiation of symptoms down left leg and into the lower leg and foot. Dr. Ross opined that these persistent symptoms were related to a permanent aggravation of his low back and left hip underlying pathology due to the work injury. She advised that "it is imperative that you take another look at this case and reevaluate the facts, including the findings of an exacerbation of the disc herniations in the lumbar spine and the marrow edema in the left hip."

A telephonic hearing was held on July 25, 2019.

By decision dated October 9, 2019, OWCP's hearing representative affirmed the March 19, 2019 termination decision, finding that OWCP had met its burden of proof. However, she remanded the case for further development of the issue as to whether appellant had continuing employment-related disability or residuals. The hearing representative determined that OWCP should undertake further development of the medical evidence, to include providing the IME, Dr. Jelen, with a copy of Dr. Ross' April 8, 2019 report and the additional evidence received from appellant.

On October 15, 2019 OWCP noted that it had received an April 8, 2019 report from Dr. Ross disagreeing with the report of Dr. Jelen. It requested that Dr. Jelen review the report and the additional medical records and treatment notes from February 21 through September 6, 2019, and provide an addendum with regard to whether they altered his opinion.

Dr. Jelen provided an October 21, 2019 addendum. With regard to Dr. Ross' comments relative to Dr. Draper's report, he noted that Dr. Ross inaccurately stated that Dr. Draper reached his conclusions by reviewing the studies alone. Dr. Jelen noted that Dr. Draper's report noted subjective complaints and documented extensive physical examination findings. With regard to Dr. Ross' comments regarding his own report, Dr. Jelen noted that Dr. Ross inaccurately stated that he found no marrow edema on the November 3, 2017 MRI scan of the lumbar spine and that he did not mention the bone marrow edema revealed in the September 27, 2017 MRI scan of the hip and pelvis. He noted that the November 3, 2017 MRI scan of the lumbar spine indicated no bone marrow to suggest contusion. Dr. Jelen also related that he had clearly reported the bone marrow edema of the hip and pelvis from the September 27, 2017 MRI scan and explained that it was from "end stage left hip joint osteoarthritis" and chronic arthritis, and did not represent an acute finding. Dr. Ross opined that the change in appellant's condition revealed by comparison of the November 11, 2012 and November 3, 2017 MRI scans of the spine was the result of an exacerbation caused by trauma from the work injury. However, Dr. Jelen opined, "this cannot be substantiated. This can occur, as degenerative changes evolve."

In a November 25, 2019 *de novo* decision, OWCP found that appellant's medical benefits and wage-loss compensation remained terminated effective March 20, 2019.

In a letter dated December 5, 2019, counsel for appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 13, 2020.

OWCP received an April 9, 2018 report from Dr. Douglas Diorio, Board-certified in family medicine, who noted appellant's history of injury and diagnosed chronic pain syndrome, other intervertebral lumbar disc displacement, lumbosacral radiculopathy, and neuralgia/neuritis. Dr. Diorio recommended interventional therapy, pain management, nerve conduction studies of the bilateral lower extremities, and a series of epidural steroid injections.

OWCP received a copy of a September 26, 2017 emergency room report indicating that appellant was admitted after being struck by a mail bin at work.

By decision dated May 26, 2020, OWCP's hearing representative affirmed the November 25, 2019 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

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 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>

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."<sup>9</sup> In situations where there exist opposing medical 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>10</sup>

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<sup>4</sup> See *M.E.*, Docket No. 20-0877 (issued August 2, 2021); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>5</sup> See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

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

<sup>7</sup> *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005). *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>8</sup> See *A.G., id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002).

<sup>9</sup> 5 U.S.C. § 8123(a).

<sup>10</sup> *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

## ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective March 20, 2019.

OWCP properly determined that there was a conflict in the medical opinion evidence regarding employment-related residuals and referred appellant, pursuant to section 8123(a) of FECA (5 U.S.C. § 8123(a)), to Dr. Jelen for an impartial medical examination and an opinion on the matter as to whether appellant had residuals of the accepted conditions of lumbar strain, left hip contusion and temporary aggravation of primary osteoarthritis of the left hip, and whether appellant's preexisting left hip osteoarthritis and degenerative disc disease at L2-3 and L4-5, with left lower extremity radiculopathy, were temporarily or permanently aggravated by the accepted employment injury. The Board finds, however, that the IME's opinion is not sufficiently rationalized to constitute the special weight of the medical opinion evidence.<sup>11</sup>

Dr. Jelen failed to provide an adequate medical rationale to explain how he determined that all of appellant's accepted conditions had resolved by October 26, 2018. He cited Dr. Draper's prior opinions, but did not offer his own opinion, based upon the entire medical record and specific findings from his own medical evaluation, which explained that appellant no longer had residuals of the accepted lumbar strain, left hip contusion, and temporary aggravation of unilateral left hip primary osteoarthritis. The Board has held that a medical report is of limited probative value regarding a given medical matter if it does not contain medical rationale explaining that matter.<sup>12</sup> The Board, therefore, finds that the IME report is insufficient to meet OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits for the accepted conditions.

The Board finds that Dr. Jelen's reports were not sufficiently rationalized to constitute the special weight of the medical evidence.<sup>13</sup> OWCP therefore did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

## CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective March 20, 2019.<sup>14</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *See T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

<sup>13</sup> *Supra* note 10

<sup>14</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.



**ORDER**

**IT IS HEREBY ORDERED THAT** the May 26, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 15, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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