

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

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**JULIAN GARCIA, Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
TRANSPORTATION SECURITY  
ADMINISTRATION, Albuquerque, NM, Employer**

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) **Docket No. 04-1868**  
) **Issued: January 10, 2005**  
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*Appearances:*  
*Julian Garcia, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On July 22, 2004 appellant filed a timely appeal from the May 10, 2004 merit decision of the Office of Workers' Compensation Programs, terminating his compensation effective May 16, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this termination case.

**ISSUE**

The issue is whether the Office properly terminated appellant's compensation benefits effective May 16, 2004 on the grounds that he no longer had any residuals or disability causally related to his April 6, 2003 employment injury.

**FACTUAL HISTORY**

On April 6, 2003 appellant, then a 41-year-old transportation security screener, filed a traumatic injury claim alleging that on that date he hurt his back while removing heavy bags from a belt. He stopped work on the date of injury and has not returned to work. The Office

accepted appellant's claim for a lumbosacral sprain/strain and he received appropriate compensation.

In an August 25, 2003 medical report, Dr. Jonathan Burg, an attending Board-certified physiatrist, indicated that on physical examination appellant continued to have marked instability in his legs on the right with very positive straight leg raising on the right. He released him to sedentary work which only allowed him to sit down. On June 3, 2003 Dr. Michael Freedman, appellant's treating Board-certified neurologist, diagnosed a lumbar strain and reported symptom magnification.

By letter dated September 9, 2003, the Office referred appellant along with a statement of accepted facts, medical records and a list of specific questions to Dr. William K. Jones, a Board-certified orthopedic surgeon, for a second opinion medical examination scheduled for September 25, 2003.<sup>1</sup>

Dr. Jones submitted an October 9, 2003 medical report, in which he provided a history of appellant's April 6, 2003 employment injury and his findings on objective and physical examination. He also reviewed his medical records. In response to the Office's questions, Dr. Jones stated:

"I have not found any positive diagnosis of a neurological or orthopedic nature at this time other than the mention of a lumbar strain in the report of Dr. Freedman on June 3, 2003. I have not found any conclusive diagnoses as listed by Dr. [Benjamin] Chan[, a Board-certified family practitioner,] other than subjective based impressions."

\* \* \*

"I do not have any objective evidence to substantiate [appellant's] subjective complaints other than the fact that his underwear is soiled. The cause of his bowel and bladder incontinence is undetermined.

"[Appellant's] present state seems certainly connected to his work injury; however, there is not a diagnosed condition that has objective findings for substantiation.

"The diagnosed condition of lumbosacral strain is within a reasonable medical probability connected to the factors of employment as described in the statement of accepted facts.

"I do not know of any additional aggravating events.

"I do not know of any nonindustrial or preexisting disability.

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<sup>1</sup> In a September 26, 2003 letter, the Office advised appellant that his appointment with Dr. Jones had been rescheduled for October 9, 2003.

“[Appellant] continues to suffer residuals of the injury. The medical reasons for this opinion are that his symptoms began at the time he had the significant strain at work while lifting a heavy object and he is [sic] continuing to have the subjective complaints of low back pain and incontinence. The prognosis is guarded. My recommendations for treatment would include psychological evaluation and assistance with pain management.

“The subjective complaints are not substantiated by objective findings.

“[Appellant’s] physical limitations are essentially complete, primarily because of his subjective complaints and self-considered incapacitation. I do not have any preexisting conditions that might account for any restrictions.

“[Appellant], in my opinion, is incapable of being gainfully employed because of his subjective complaints. I do not have objective evidence on which to base any restrictions of his activities other than those restrictions which are self-imposed. I do not think he needs orthopedic treatment or evaluation in the future.”

In an accompanying work capacity evaluation, Dr. Jones indicated that appellant was unable to perform his usual job duties and noted his physical restrictions.

By letters dated November 5, 2003, the Office referred appellant to Dr. Mark L. Berger, a Board-certified neurologist, and to Dr. Levon D. Tashjian, a Board-certified psychiatrist, for a second opinion medical evaluation.

Dr. Berger submitted a December 16, 2003 report, in which he provided a history of appellant’s April 6, 2003 employment injury, medical treatment, family and social background. He noted appellant’s current symptoms and provided his findings on physical, neurological and objective examination. In response to the Office’s questions, Dr. Berger stated:

“[Appellant] did suffer a lumbosacral strain as a result of his accident of April 6, 2003. That has resolved. At this point, [he] has multiple symptoms and subjective signs which have no organic basis. There are no current objective findings on examination or laboratory studies.

“The lumbar strain is not active or disabling at this time. This is supported by Dr. Jones’ orthopedic evaluation where he could find no positive diagnosis of an orthopedic problem.

“From a neurological standpoint, [appellant] is able to return to his work in federal security. There are no restrictions or job modifications. There are no specific neurological restrictions.

“[Appellant] has no evidence [of] any permanent problem from his work[-]related injury of April 6, 2003. He has no restrictions. [Appellant] is able to travel to and from work. He is able to walk without assistance. [Appellant] is able to feed himself without assistance. He can dress himself without assistance. [Appellant] can bathe himself without assistance. He can get out of bed without assistance.

[Appellant] can get outdoors without assistance. He can sit in a chair intermittently with frequent rest breaks.

“[Appellant] is able to return to any form of employment from a neurological standpoint.

“There are no specific neurological treatment recommendations at this time.”

By letter dated January 20, 2004, the Office referred appellant to Dr. Donald E. Fineberg, a Board-certified psychiatrist, for a second opinion medical examination.<sup>2</sup> He submitted a February 10, 2004 report revealing appellant’s medical, psychiatric, family and social background. Dr. Fineberg provided his findings on mental examination. On Axis 1, he diagnosed pain disorder associated with psychological factors and a general medical condition and he ruled out malingering. Dr. Fineberg was unable to provide a diagnosis on Axis 2. On Axis 3, he diagnosed status post lumbosacral strain, incontinence of undetermined origin. Dr. Fineberg diagnosed threatened loss of insurance support for back injury, physical complaints without complete explanation on Axis 4 and situation difficulties on Axis 5. He noted a current global assessment of functioning scale of 75 secondary to discouragement with situation. Dr. Fineberg opined:

“First and foremost, [appellant] does not suffer from any purely psychiatric disorder that would preclude his return to work activity.

“Second, with regard to his pain syndrome, ... [a]ll of the orthopedic and neurological evaluations to date have not produced any physical evidence to support the claims of [appellant]. Any time there is a combination of factors that includes: secondary gain and the marked discrepancy between the person’s claimed disability and the objective findings, the Diagnostic and Statistical Manual of Mental Disorders concludes: ‘Malingering should be strongly suspected.’”

In response to the Office’s questions, Dr. Fineberg stated:

“No psychiatric condition results from the April 6, 2003 incident that precludes work.

“All the physical complaints of pain and incontinence must be evaluated on the basis of the presence or absence of physical findings. It is outside the realm of psychiatric expertise to say whether the physical results of the April 6, 2003 incident could reasonably be expected to present themselves as [appellant] describes today.

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<sup>2</sup> Appellant failed to report to the scheduled examination with Dr. Tashjian. Consequently, by decision dated January 12, 2004, the Office suspended his compensation pursuant to 5 U.S.C. § 8123(d). In a January 15, 2004 letter, appellant apologized for missing the scheduled examination. By letter dated April 7, 2004, the Office advised him that compensation was being reinstated effective January 15, 2004.

“After the urology evaluation is completed it will be possible to determine whether any objective basis for the symptoms can be found and whether any basis for connection to the April 6, 2003 incident can be made.”

In an April 8, 2004 letter, the Office issued a notice of proposed termination of appellant’s compensation based on the medical reports of Dr. Jones, Dr. Berger and Dr. Fineberg.

After the issuance of its April 8, 2004 letter, the Office received a March 19, 2004 response from Dr. Denise R. Zwahlen-Minton, a Board-certified family practitioner, to questions posed by the employing establishment regarding appellant’s medical condition and ability to work. She indicated that appellant reported ongoing pain since his April 6, 2003 employment injury and noted his physical restrictions. Dr. Zwahlen-Minton further indicated that he was able to effectively interact with the public, maintain focus and awareness within a distracting and noisy environment, work in a stressful environment and view an x-ray monitor for 30 minutes at a time as required by his job duties.

The Office also received Dr. Zwahlen-Minton’s March 29, 2004 report in which she assessed appellant’s pain. She stated that he had chronic back pain, anxiety/depression, right thigh mass and erectile dysfunction. In an April 28, 2004 referral form, Dr. Zwahlen-Minton recommended surgery on the right thigh mass. In a letter of the same date, she stated that, although appellant was capable of performing some form of work, she did not feel he had recovered to the point that he could return to his prior position. Dr. Zwahlen-Minton noted that she had referred him to a disability specialist to further clarify his physical capabilities. She submitted a copy of the April 26, 2004 referral form.

By decision dated May 10, 2004, the Office terminated appellant’s compensation effective May 16, 2004. The Office found that the weight of the medical opinion evidence established that appellant no longer had any residuals or disability causally related to his April 6, 2003 employment injury.<sup>3</sup>

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

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>4</sup> The Office’s burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup> If the Office, however, meets its

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<sup>3</sup> After the issuance of the Office’s May 10, 2004 decision, the Office received additional medical evidence. The Board cannot consider evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952); 20 C.F.R. § 501.2(c).

<sup>4</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>5</sup> See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that Dr. Berger and Dr. Fineberg constitute the weight of the medical evidence as the physicians provided an accurate factual and medical background in their reports. They conducted a thorough medical examination and provided a detailed review of appellant's medical records.

In an October 9, 2003 report, Dr. Jones found no positive diagnosis for an orthopedic or a neurological condition other than the accepted lumbar strain. Although he reported no objective evidence to support appellant's subjective complaints of continuing back pain and bladder incontinence, he reported that appellant continued to suffer from employment-related residuals. Dr. Jones concluded that no future orthopedic treatment or evaluation was necessary.

In light of Dr. Jones' report, in an attempt to secure a report from a neurological perspective, the Office referred appellant to Dr. Berger, who opined on December 16, 2003 that appellant's employment-related lumbosacral strain had resolved and that he was not disabled for work. He explained that the lumbosacral strain had resolved and was neither active nor disabling and that there were no objective findings on examination or laboratory studies to support the multiple symptoms and subjective signs. Dr. Berger noted that appellant could return to work in "federal security" with no neurological restrictions and no neurological treatment was recommended at that time.

Dr. Fineberg opined that appellant did not suffer from any psychological condition causally related to the April 6, 2003 employment injury that prevented him from returning to work. He noted that none of the orthopedic or neurological evaluations had produced any evidence to support appellant's claim of continuing residuals causally related to his accepted employment injury.

The Board finds that the opinions of Dr. Berger and Dr. Fineberg constitute the weight of the medical evidence for terminating appellant's compensation benefits on the grounds that he no longer has any residuals or disability causally related to his April 6, 2003 employment injury. Their reports are sufficiently well rationalized and based upon a proper factual background.

In support of his claim that he continued to suffer from residuals and to be disabled due to his April 6, 2003 employment injury, appellant submitted Dr. Zwahlen-Minton's March 19, 2004 response to questions posed by the employing establishment. She stated that he had ongoing pain since his April 6, 2003 employment-related injury, but that he could perform certain work duties. Dr. Zwahlen-Minton did not explain how or why appellant's ongoing back pain was caused by the accepted employment injury.

In a March 29, 2004 report, Dr. Zwahlen-Minton noted that appellant suffered from chronic back pain, anxiety/depression, right thigh mass and erectile dysfunction. In her April 28,

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<sup>6</sup> See *Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

2004 referral form, Dr. Zwahlen-Minton recommended surgery on the right thigh mass. However, she again failed to address whether these conditions and surgery were causally related to the accepted employment injury. In an April 28, 2004 report, Dr. Zwahlen-Minton failed to explain how or why appellant's disability for work in his date-of-injury position, was causally related to his April 6, 2003 employment injury. The Board finds that her reports and referral form are insufficient to establish that appellant has any continuing residuals or disability causally related to his April 6, 2003 employment injury.

**CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation on the grounds that he no longer had any residuals or disability causally related to his April 6, 2003 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 10, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member