



## **FACTUAL HISTORY**

Appellant, then a 41-year-old foreman, injured his back and left ring finger on September 27, 2002 when he slipped and fell while walking on a damaged metal step. He filed a claim for benefits on October 1, 2002, which the Office accepted for thoracic strain, herniated/bulging disc of the thoracic region and fractured left ring finger.

A magnetic resonance imaging (MRI) scan of the thoracic region dated January 6, 2003 indicated that appellant had a mild left paracentral disc bulge at T7-8 and a mild right paracentral disc bulge at T6-7, without impingement.

In reports dated July 23, 2003, Dr. Leonid Selya, an orthopedic surgeon, stated that appellant had a herniated nucleus pulposus at T6-7 and T7-8 secondary to the September 27, 2002 employment injury. In a January 28, 2004 report, he stated that appellant's condition remained the same, with discogenic, thoracic low back pain due to herniation of nucleus pulposus at T6-7 and T7-8. Dr. Selya advised that appellant's condition was causally related to the work-related injury.

In reports dated February 20, 2008 and January 21, 2009, Dr. Selya reiterated that appellant had sequelae of an acute herniation at T6-7 and T7-8, causally related to his September 27, 2002 work injury with discogenic pain. He referred appellant to a pain management specialist to address his symptoms. Dr. Selya stated that appellant walked with a decompensated, antalgic gait and noted that his lumbar and cervical motions were limited due to reproduction of his thoracic pain. He advised that appellant's condition was stable but failed to improve since the September 2002 employment injury. Dr. Selya did not expect any improvement in appellant's condition and believed that he would not be able to return to productive employment. He found appellant permanently disabled.

In order to determine appellant's current condition and whether he still had residuals from his accepted conditions, the Office referred appellant to Dr. Robert J. Smith, Board-certified in orthopedic surgery, for a second opinion examination. In a May 4, 2009 report, Dr. Smith stated findings on examination, reviewed the medical history and the statement of accepted facts, and noted that the claim had been accepted for a finger fracture, back strain and herniated and bulging discs in the thoracic region. He stated that the results of the January 6, 2003 thoracic MRI scan indicated bulges at the T6-7 and T7-8 without any evidence of neurological impingement and no evidence of any fracture; the MRI scan did not explicitly state that appellant had an acute herniation of the thoracic spine, as Dr. Selya had found. Dr. Smith stated that appellant's finger fracture had long since healed with no ongoing abnormalities. He found no evidence that appellant had any ongoing back strain and a functional capacity examination in 2002 indicated that he was capable of light- to medium-duty work. Dr. Smith agreed that appellant could perform such work given his ongoing symptomatology and such work restrictions were related to his nonindustrial degenerative disc disease as opposed to any specific residuals from the September 2002 employment injury.

Dr. Smith concluded that appellant no longer required any further treatment, diagnostic testing or formal pain management since his back strain had resolved along with his finger fracture. He reiterated that there appeared to be no evidence based on review of the

January 2003 thoracic MRI scan that appellant had any herniated disc in his thoracic spine or any evidence of nerve impingement causally related to the September 27, 2002 work injury. Dr. Smith stated that he agreed with the MRI scan radiologist's conclusion that the January 6, 2003 scan revealed mild disc bulges at T6-8, without impingement. He opined that appellant had a degenerative condition, but that the sequelae of the accepted injury had resolved.

The Office found that there was a conflict in the medical evidence between Drs. Selya and Smith regarding whether appellant had residuals from the September 27, 2002 employment injury. It referred appellant to Dr. Michael J. Franchetti, a Board-certified orthopedic surgeon, for an impartial examination to resolve the conflict. In an October 14, 2009 report, Dr. Franchetti stated that appellant sustained a thoracic strain due to his September 27, 2002 injury, in addition to a fractured left finger, which had healed uneventfully with no residuals. He concurred with Dr. Smith's opinion that, even though appellant's injury was accepted for a bulging disc condition, it was at most a minimal bulge which was not causing any neural compression. The condition was due to age-related degenerative changes and not traumatic in nature. Dr. Franchetti agreed with Dr. Smith that appellant clinically had no ongoing thoracic spinal injury or strain due to the September 27, 2002 work injury.

Dr. Franchetti found that appellant no longer had any objective clinical findings of his accepted conditions, which had resolved without sequelae from an orthopedic standpoint. He advised that appellant continued to have complaints of mild mid-back pain but showed no evidence of any persistent thoracic injury. Based on his examination, appellant was unable to perform his regular duties as a maintenance foreman. Dr. Franchetti opined, however, that any work restrictions were related to appellant's degenerative thoracic spine condition rather than residuals of the September 27, 2002 work injury. He advised that appellant currently had a resolved thoracic strain, healed left finger fracture and degenerative disc disease of the thoracic spine. Dr. Franchetti concluded that appellant's age-related degenerative thoracic conditions precluded his return to his usual job but were not permanently aggravated or worsened by his 2002 work injury.

On November 5, 2009 the Office issued a notice of proposed termination of compensation to appellant. It found that the weight of the medical evidence, as represented by the opinion of Dr. Franchetti, the impartial medical specialist, established that appellant's work-related disability had resolved and that he had no residuals from his accepted conditions. The Office allowed appellant 30 days to submit additional evidence or legal argument concerning the proposed termination.

In a November 18, 2009 report, Dr. Selya restated his diagnosis of disc herniations at T6-7 and T7-8 and disagreed with Dr. Franchetti's opinion that appellant had no residuals of the September 2002 employment injury. He asserted that appellant had been diagnosed with thoracic herniation based on MRI scan findings and that Dr. Franchetti failed to recognize the discogenic nature of appellant's symptoms. Dr. Selya opined that Dr. Franchetti incorrectly labeled appellant's condition as a thoracic strain. He advised that it was not necessary for appellant to demonstrate severe cord compression to become symptomatic. Dr. Selya explained that discogenic low back pain, particularly in the thoracic area, could develop without any frank cord compression.

By decision dated December 7, 2009, the Office terminated appellant's compensation, finding that Dr. Franchetti's opinion represented the special weight of the medical evidence.

By letter dated December 9, 2009, counsel requested an oral hearing, which was held on March 22, 2010. At the hearing, he argued that the Office erred in relying on Dr. Franchetti's impartial medical opinion, as he disregarded the statement of accepted facts by asserting that appellant did not have herniated discs in his thoracic region stemming from the September 27, 2002 incident.

In a January 13, 2010 report, Dr. Selya reiterated that appellant still experienced sequelae of acute herniations at T6-7 and T7-8 sustained at work on September 27, 2002. He advised that appellant became progressively disabled with signs of chronic low back pain and was currently limited in his ability to ambulate, sit or stand. Dr. Selya opined that appellant's clinical condition was quite stable and that he had reached maximum medical improvement. He found appellant permanently disabled.

By decision dated June 8, 2010, an Office hearing representative affirmed the December 7, 2009 termination decision, finding that the Office met its burden to terminate compensation. The fact that Dr. Franchetti believed that a previously accepted medical condition was not causally related to the claimed work injury did not mean that he changed the statement of accepted facts, as contended. Rather, Dr. Franchetti provided his medical opinion on the issue of whether appellant had a continuing work-related condition and disability associated with the injury of September 27, 2002. The hearing representative advised that Dr. Franchetti had opined that appellant's thoracic disc condition, while still present, was not causally related to the fall he sustained on September 27, 2002 and presented valid reasons for his opinion.

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

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened to order to justify termination or modification of compensation benefits.<sup>2</sup> After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>3</sup>

Section 8123(a) of the Act 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>4</sup>

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

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<sup>2</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>3</sup> *Id.*

<sup>4</sup> 5 U.S.C. § 8123(a).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>5</sup>

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

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

The Board will affirm the Office's finding that appellant has no residuals from his work-related fractured left ring finger. The medical evidence of record is unrefuted with regards to this issue. Dr. Selya, appellant's treating physician, submitted no conflicting opinions and counsel has not contested the Office's finding. Appellant's left ring finger fracture has resolved with no residuals.

Regarding the accepted thoracic strain, the Board notes that as early as July 23, 2003, Dr. Selya reported that appellant's current thoracic condition was of the T6-8 discs. Dr. Selya no longer made any findings relating to thoracic strain after July 23, 2003. Dr. Smith, the second opinion physician and Dr. Franchetti, the impartial medical specialist, both confirmed that appellant's accepted strain had resolved. The medical evidence of record therefore establishes that this condition has resolved.

The Office properly determined that a conflict existed in the medical evidence between Dr. Selya and Dr. Smith as to whether appellant had continuing residuals of the accepted of herniated/bulging thoracic disc condition. While the Office had accepted this condition as a herniated/bulging disc, Dr. Selya and Dr. Smith disagreed as to whether the bulging discs seen on the 2003 MRI scan were causing neural compression as of examinations in 2009. It referred appellant to Dr. Franchetti for an impartial medical evaluation. The Office based its decision to terminate his compensation on the October 14, 2009 report of Dr. Franchetti.

The Board finds that Dr. Franchetti's referee report established that the residuals of appellant's accepted herniated/bulging discs of the thoracic region had ceased and that his report was entitled to the weight of the evidence. Dr. Franchetti reviewed the medical record, including the 2003 MRI scan, the statement of accepted facts and he performed a thorough examination of appellant. He determined that appellant's thoracic disc condition was a minimal disc bulge, which was not causing any neural compression. Dr. Franchetti explained that appellant's current thoracic complaints were due to an age-related degenerative condition, which was not caused or aggravated by his employment injury. He concluded that appellant's accepted conditions had all resolved.

While appellant objected to Dr. Franchetti's characterization of his thoracic disc condition as a bulging disc, he was appropriately informed by the statement of accepted facts that the claim had been accepted for herniated/bulging thoracic disc. Dr. Franchetti evaluated the case record and examined appellant. He agreed with the initial radiologists' reading of the 2003 MRI scan, that the bulging of the thoracic discs in 2003 were not causing nerve impingement. Dr. Franchetti concluded that appellant's current thoracic condition was due to an age-related

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<sup>5</sup> *I.J.*, 59 ECAB 408 (2008).

degenerative process. Based upon his thorough evaluation of the record and examination of appellant, Dr. Franchetti's impartial medical opinion is entitled to the weight of the evidence.

**LEGAL PRECEDENT -- ISSUE 2**

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability which continued after termination of compensation benefits.<sup>6</sup>

**ANALYSIS -- ISSUE 2**

After the Office terminated appellant's compensation benefits on December 7, 2009, he submitted a January 13, 2010 report from Dr. Selya to the record. Dr. Selya reported that appellant's medical condition was stable and otherwise repeated opinions expressed in earlier reports. The Board has held that an additional report from a treating physician, which essentially repeats earlier findings and conclusions, is insufficient to overcome the weight accorded to an impartial medical specialist report. Dr. Selya was on one side of the conflict in medical opinion that gave rise to the impartial medical examination. As such, his additional report is not sufficient to establish entitlement to continuing disability.

**CONCLUSION**

Under the circumstances described above, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits and he has not established an employment-related continuing disability following the termination of his benefits.

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<sup>6</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 8, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 1, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board