

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

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<b>E.M., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 09-1987</b>
	)	<b>Issued: April 1, 2010</b>
<b>DEPARTMENT OF THE NAVY, NAVAL AIR</b>	)	
<b>SYSTEMS COMMAND, San Diego, CA,</b>	)	
<b>Employer</b>	)	

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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 31, 2009 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated October 21, 2008 and June 15, 2009. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits; and (2) whether appellant has established continuing disability after October 21, 2008, causally related to the accepted employment injury.

**FACTUAL HISTORY**

Appellant, a 58-year-old aircraft mechanic, filed a Form CA-2 claim for benefits on June 28, 2005, alleging that he developed a lower back condition causally related to factors of

employment.<sup>1</sup> The Office accepted the claim for temporary aggravation of lumbar/lumbosacral degenerative disc disease.<sup>2</sup>

On September 10, 2007 appellant filed a Form CA-7 claim for a schedule award.

In order to determine whether appellant had any impairment stemming from his accepted condition and the nature and extent of his current disability, the Office referred appellant to Dr. Thomas J. Sabourin, Board-certified in orthopedic surgery, for a second opinion examination.

In a May 5, 2008 report, Dr. Sabourin stated that appellant sustained a temporary aggravation of his underlying condition, which apparently had ceased. He noted that a magnetic resonance imaging (MRI) scan showed changes at the L4-L5 level. Dr. Sabourin stated, however, that appellant had severe subjective complaints of lower back pain which were unlikely to have been caused by his accepted condition. He noted no neurological deficit on examination and advised that there was apparently some exaggeration of his symptoms. Dr. Sabourin advised that the severity and duration of appellant's symptoms were disproportionate to the accepted condition, which had resolved. He did not indicate that appellant had any ratable permanent impairment of his lower extremities stemming from his accepted condition.<sup>3</sup>

On September 15, 2008 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. Sabourin, the second opinion physician, established that his accepted, employment-related temporary aggravation of lumbosacral degenerative disc disease had resolved and that he had no residuals from the work injury.<sup>4</sup> The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination. Appellant did not submit any additional medical evidence.

By decision dated October 21, 2008, the Office terminated appellant's compensation, finding that Dr. Sabourin's opinion represented the weight of the medical evidence.

On October 30, 2008 appellant requested an oral hearing, which was held on March 20, 2009.<sup>5</sup>

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<sup>1</sup> The Office indicated that appellant also filed a Form CA-1 claim for traumatic injury in which he alleged that he sustained a lower back injury on March 17, 2004. However, the form is not contained in the instant record.

<sup>2</sup> Appellant continued to work on light duty with restrictions.

<sup>3</sup> In a July 16, 2008 report, an Office medical adviser rated a three percent permanent impairment of appellant's left and right lower extremities based on Dr. Sabourin's findings. However, the record contains no documentation indicating that any further development of a schedule award was undertaken.

<sup>4</sup> The Office noted that it had requested additional medical evidence from appellant in support of his schedule award claim, but that it had not received such evidence.

<sup>5</sup> As noted above, appellant stated that he did not miss any time from work due to his accepted employment injury.

By decision dated June 15, 2009, an Office hearing representative affirmed the October 21, 2008 termination decision, finding that the Office met its burden to terminate compensation.

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

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>6</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>7</sup>

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

In this case, the Office based its decision to terminate appellant's compensation on the opinion of Dr. Sabourin, the Office referral physician. In his May 5, 2008 report, Dr. Sabourin noted that appellant demonstrated subjective complaints of severe lower back pain but advised that the severity and duration of his symptoms were disproportionate to the accepted condition. He asserted that appellant's current symptoms were most likely not attributable to his accepted condition, a temporary aggravation of lumbosacral degenerative disc disease, which had resolved. Dr. Sabourin found no neurological deficit on examination and advised that there was apparently some exaggeration of his symptoms.

The Board finds that the Office properly found that Dr. Sabourin's referral opinion represented the weight of the medical evidence and negated a causal relationship between appellant's current condition and his accepted condition, a temporary aggravation of lumbosacral degenerative disc disease. Dr. Sabourin's report is sufficiently probative, rationalized and based upon a proper factual background. The Office therefore properly relied on his opinion in its October 21, 2008 termination decision.

### **LEGAL PRECEDENT -- ISSUE 2**

Once the Office properly terminated appellant's compensation in its October 21, 2008 decision, the burden of proof shifted to appellant to establish continuing disability.<sup>8</sup>

### **ANALYSIS -- ISSUE 2**

Appellant did not submit any additional medical evidence. Thus, the Office hearing representative properly found in his June 15, 2009 decision that appellant had submitted no evidence sufficient to undermine the Office's finding in its October 21, 2008 termination decision that the opinion of Dr. Sabourin represented the weight of the medical evidence. As the

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<sup>6</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>7</sup> *Id.*

<sup>8</sup> *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

record lacks medical evidence establishing continuing disability after October 21, 2008, appellant did not meet his burden of proof to establish continuing disability. The Board therefore affirms the October 21, 2008 and June 15, 2009 Office decisions.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 15, 2009 and October 21, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 1, 2010  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board