

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

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**J.M., Appellant**

**and**

**DEPARTMENT OF THE NAVY,  
PHILADELPHIA NAVAL SHIPYARD,  
Philadelphia, PA, Employer**

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**Docket No. 10-177  
Issued: October 1, 2010**

*Appearances:*  
*Alan J. Shapiro, Esq.,* for the appellant  
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 28, 2009 appellant filed a timely appeal from an August 28, 2009 decision of the Office of Workers' Compensation Programs terminating his compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUES**

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective March 15, 2009 on the grounds that his accepted lumbar injuries had ceased without residuals; and (2) whether appellant established that he was totally disabled on and after March 15, 2009 due to the accepted injuries.

On appeal, counsel asserts that the Office's August 28, 2009 decision is contrary to fact and law.

## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated February 14, 1989,<sup>1</sup> the Board reversed a December 21, 1987 Office decision suspending his compensation benefits. The facts of the case as set forth in the prior decision are incorporated by reference. The relevant facts are set forth below.

The Office accepted that on June 18, 1984 appellant, then a 33-year-old lineman, sustained an acute lumbar strain, chronic lumbar sprain and aggravation of a preexisting L5 compression fracture when he used his legs to stop a 5,000 pound equipment cart that was about to strike him. After a brief return to duty, appellant stopped work and did not return. He received compensation on the periodic rolls beginning on December 23, 1984.<sup>2</sup>

Dr. Abraham H. Rosenzweig, an attending Board-certified orthopedic surgeon, submitted chart notes from July 1984 through January 1985 noting the June 18, 1984 injury and appellant's improving lumbar symptoms. He noted that in 1971, appellant sustained a right femur fracture and L5 compression fracture in a motor vehicle accident, resulting in a 1½ inch leg length discrepancy.<sup>3</sup> Dr. Rosenzweig advised that appellant also sustained 1979 and March 1984 occupational lumbar injuries due to heavy lifting. He diagnosed an acute lumbosacral strain and status post severe L5 compression fracture with a possible extruded disc fragment. Dr. Rosenzweig prescribed a lift for appellant's right shoe and found that he had reached maximum medical improvement.<sup>4</sup>

A March 16, 1984 magnetic resonance imaging (MRI) scan showed a compression fracture of the L5 disc with marked comminution.

Dr. Robin Roy Lockwood, an attending Board-certified orthopedic surgeon, submitted reports from January 1990 to November 1992 noting lumbar radiculopathy into both lower extremities. He opined that the June 18, 1984 injury permanently aggravated the preexisting L5 fracture.<sup>5</sup>

Dr. Dan S. Cohen, an attending Board-certified orthopedic surgeon, submitted reports from July 1 through November 1993. On examination, he found obliteration of fat at L5 nerve root on the right, right-sided radiculopathy, a left paralumbar flank deformity, a three centimeters leg length discrepancy and an old L5 fracture with degenerative changes L4 through S1. Dr. Cohen obtained an August 12, 1993 MRI scan that showed an L5-S1 compression fracture

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<sup>1</sup> 40 ECAB 542 (1989).

<sup>2</sup> Appellant received vocational rehabilitation services intermittently from April 1985 through 1993 and completed courses in marine propulsion technology.

<sup>3</sup> In the motor vehicle accident, appellant also sustained right knee, right hip, facial and bilateral foot fractures requiring surgical reconstruction.

<sup>4</sup> A December 1, 1989 electromyogram (EMG) showed an old L5 left nerve root injury.

<sup>5</sup> An October 23, 1992 MRI scan showed moderate degenerative disc disease, an L5-S1 retrolisthesis and disc bulge, moderate disc bulge at L4-5 and anterior wedging at L5.

impinging the thecal sac on the right, significant degeneration of the L4-5 disc and a previous L5 fracture. He recommended a lumbar fusion.

In a February 3, 1994 report, an Office medical adviser stated that appellant did not need lumbar surgery as he had no neurologic deficit. In April 1994, the Office obtained a second opinion from Dr. Jaime M. Benavides, a Board-certified orthopedic surgeon, who opined that appellant needed surgery as he had nearly absent knee and ankle deep tendon reflexes bilaterally. The Office obtained another second opinion from Dr. Peter John Millheiser, a Board-certified orthopedic surgeon, who on July 18, 1994 found that the 1984 injury contributed to lumbar radiculopathy with permanent lower extremity impairment.

The Office found a conflict of medical opinion between Dr. Cohen and the Office medical adviser regarding the need for lumbar surgery. To resolve the conflict, it selected Dr. Samuel S. Steiner, a Board-certified orthopedic surgeon, as impartial medical examiner. In a November 11, 1994 report, Dr. Steiner observed a 1½ inch leg length discrepancy and reduced sensation in the left foot. He diagnosed an L5 compression fracture preexisting the accepted 1984 injury. In an April 19, 1995 supplemental report, Dr. Steiner opined that it was difficult to assess causal relationship 10 years after the 1984 injury.

Dr. Cohen submitted reports from April 1995 to September 2008, finding appellant totally and permanently disabled for work due to chronic lumbar instability and nerve root compression.<sup>6</sup> He observed normal neurologic findings. Dr. Cohen opined that the 1984 injury caused a herniated L5-S1 disc and permanent aggravation of underlying lumbar conditions.

On August 1, 2008 the Office obtained a second opinion from Dr. Richard Glatzer, a Board-certified orthopedic surgeon, who opined that appellant's symptoms were due only to the nonoccupational L5 compression fracture. In an August 12, 2008 supplemental report, Dr. Glatzer opined that the June 1984 injury had resolved as appellant had no consistent neurologic findings.

The Office found a conflict of medical opinion between Dr. Cohen, for appellant, and Dr. Glatzer, for the government, regarding residuals of the accepted June 1984 injury. To resolve the conflict, the Office selected Dr. Jeffrey Haimes, a Board-certified orthopedic surgeon, as impartial medical examiner.

In a December 17, 2008 report, Dr. Haimes reviewed the medical record and statement of accepted facts provided by the Office. On examination, he found bilaterally absent L4 knee jerk and S1 ankle jerk reflexes and positive straight leg raising tests. Dr. Haimes obtained x-rays showing an L5 compression fracture with degenerative changes at L4-5 and L5-S1. He diagnosed spinal stenosis from L2 to S1, an old L5 compression fracture and secondary back pain. Dr. Haimes opined that the June 1984 injury caused a lumbar sprain and temporary aggravation of the L5 fracture. He found that any residuals of the June 1984 injury had ceased.

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<sup>6</sup> A September 12, 2008 MRI scan performed for Dr. Cohen showed severe lateral recess stenosis at L2-3 and bilateral foraminal stenosis at L4-5, L5-S1 retrolisthesis and a degenerated disc, indicative of long-standing lumbar problems. Dr. Cohen opined that these findings were work related as they occurred at the same level as the accepted June 1984 injury.

Appellant's current findings were due to spinal stenosis caused by aging and the 1971 compression fracture. Dr. Haimes concluded that the accepted aggravation was temporary as there were no direct objective findings.

By notice dated January 15, 2009, the Office proposed to terminate appellant's compensation benefits on the grounds that the accepted June 1984 lumbar injuries ceased without residuals, based on Dr. Haimes' opinion as the weight of the medical evidence. In response, appellant submitted a January 27, 2009 letter from Dr. Cohen, opining that the L5 compression fracture did not cause lumbar instability as appellant was able to perform heavy labor until the 1984 injury.

By decision dated February 26, 2009, the Office terminated appellant's wage loss and medical compensation benefits effective March 15, 2009 on the grounds that the accepted injuries had ceased without residuals. It accorded Dr. Haimes the weight of the medical evidence.

In a March 6, 2009 letter, appellant requested a telephonic hearing, held June 10, 2009. At the hearing, counsel asserted that the Office accepted a permanent aggravation of the L5 fracture, whereas Dr. Haimes diagnosed only a temporary exacerbation. Also, Dr. Cohen diagnosed a permanent aggravation.

By decision dated August 28, 2009, the Office hearing representative affirmed the February 26, 2009 decision terminating appellant's compensation.

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

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>7</sup> Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>8</sup>

Section 8123 of the Federal Employees' Compensation 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>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>7</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

<sup>8</sup> *Id.*

<sup>9</sup> 5 U.S.C. § 8123; see *Charles S. Hamilton*, 52 ECAB 110 (2000).

<sup>10</sup> *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

Where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.<sup>11</sup> If the specialist is unwilling or unable to clarify or elaborate on his or her opinion as requested, the case should be referred to another appropriate impartial medical specialist.<sup>12</sup> Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act<sup>13</sup> will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.<sup>14</sup>

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

The Office accepted that on June 18, 1984, appellant sustained an aggravation of a preexisting L5 compression fracture, an acute lumbar strain and chronic lumbar sprain. Appellant received medical and wage-loss compensation benefits on the periodic rolls until March 15, 2009, when the Office terminated his compensation on the grounds the accepted lumbar injuries had ceased without residuals.

Appellant was followed by Dr. Cohen, who advised that he was totally disabled for work due to the 1971 compression fracture, chronic lumbar instability and degenerative disc disease with no objective neurologic deficits. In a January 27, 2009 letter, Dr. Cohen advised that the 1984 injuries were permanent as appellant could no longer perform heavy lifting after the June 18, 1984 incident.

In August 2008, the Office obtained a second opinion from Dr. Glatzer, a Board-certified orthopedic surgeon, who opined that appellant's history of inconsistent neurologic findings indicated that the accepted 1984 injuries did not permanently worsen the underlying lumbar conditions.

The Office properly found a conflict of opinion between Dr. Cohen and Dr. Glatzer regarding whether the June 18, 1984 lumbar injuries had resolved. It selected Dr. Haimes, a Board-certified orthopedic surgeon, as impartial medical examiner. In a December 17, 2008 report, Dr. Haimes reviewed the complete medical record and statement of accepted facts. He performed a thorough clinical examination showing bilaterally absent L4 knee jerk and S1 ankle jerk reflexes. Dr. Haimes concluded that, based on the medical record and the type of neurologic deficits observed, the June 18, 1984 incident caused only a temporary aggravation of underlying degenerative disc disease. He explained that appellant's current findings were due to age-related degeneration and the sequelae of the 1971 fracture, not the accepted 1984 lumbar strain and sprain. The Office accorded Dr. Haimes the special weight of the medical evidence.

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<sup>11</sup> *Harry T. Mosier*, 49 ECAB 688 (1998).

<sup>12</sup> *Guiseppe Aversa*, 55 ECAB 164 (2003).

<sup>13</sup> 5 U.S.C. § 8123(a).

<sup>14</sup> *Harold Travis*, 30 ECAB 1071 (1979).

The Board finds that Dr. Haimes' opinion is sufficient to establish that the accepted lumbar strain, sprain and aggravation of the L5 fracture resolved without residuals. He based his opinion on a statement of accepted facts and the complete medical record. Dr. Haimes provided extensive medical rationale explaining that a permanent 1984 injury would have produced consistent neurologic deficits from that date onward. As the neurological condition varied over time, improving in the months after the injury, then worsening a decade later, Dr. Haimes opined that the accepted 1984 injuries were temporary, and had ceased without residuals. The Board finds that his opinion is well rationalized and based on a complete, accurate factual and medical history. Therefore, the Office properly accorded Dr. Haimes the weight of the medical evidence in terminating appellant's compensation benefits.<sup>15</sup> The Office's termination of appellant's medical and wage-loss compensation benefits was proper under the facts and the circumstances of this case.

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

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits.<sup>16</sup> For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.<sup>17</sup>

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

Appellant did not submit additional medical evidence following the Office's February 26, 2009 decision terminating his compensation benefits effective March 15, 2009. At the June 10, 2009 telephonic hearing, he asserted that the Office accepted a permanent aggravation of the preexisting L5 fracture, as found by Dr. Cohen. The Office accepted an aggravation of the L5 fracture, and it sought opinion from Dr. Haimes as to whether the aggravation was temporary or permanent. Therefore, appellant's contention that the Office accepted a permanent aggravation was incorrect. As noted, the February 26, 2009 decision accorded the special weight of the medical evidence to Dr. Haimes as the impartial specialist.

Appellant did not submit sufficient rationalized medical evidence to establish a causal relationship between his condition on and after March 15, 2009 and the accepted injuries. Therefore, he has failed to meet his burden of proof.

### **CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation benefits effective March 15, 2009 on the grounds that his accepted lumbar injury ceased without

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<sup>15</sup> *Jacqueline Brasch (Ronald Brasch)*, *supra* note 10.

<sup>16</sup> *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *see also Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

<sup>17</sup> *Alice J. Tysinger*, 51 ECAB 638 (2000).

residuals. The Board further find that appellant did not meet his burden of proof in establishing a continuing work-related disability on and after the termination of his compensation benefits on March 15, 2009.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 28, 2009 is affirmed.

Issued: October 1, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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