



of lying in a gutter while lifting and changing a flat tire on his vehicle. He stopped work on February 13, 1989. Following the injury, appellant worked five hours a day on March 21 and 22, 1989.

By decision dated June 7, 1990, the Office accepted appellant's claim for aggravation of recurrent lumbar radiculoneuropathy. It paid wage-loss compensation for temporary total disability commencing March 22, 1989.

In medical reports dated March 22, 2006 to March 10, 2009, Dr. Jonathan S. Staub, an attending Board-certified internist, advised that appellant was totally disabled for work due to his February 6, 1989 employment injury.

On June 1, 2009 the Office referred appellant, together with a statement of accepted facts and medical record, to Dr. James A. Maulsby, a Board-certified orthopedic surgeon, for a second opinion on the nature and extent of his employment-related residuals and disability. In a June 16, 2009 report, Dr. Maulsby reviewed a history of appellant's February 6, 1989 employment injury, medical treatment and background. He listed complaints of pain. On physical examination, Dr. Maulsby reported essentially normal findings with limited range of motion of the lumbar spine. He diagnosed degenerative disc disease of the thoracic and lumbar spine and failed surgical back with continued chronic pain. Dr. Maulsby found no evidence of symptom magnification. He advised that appellant's greatest pain was in the upper thoracic spine which was not related to the February 6, 1989 injury. Dr. Maulsby also had controlled hypertension and diabetes mellitus. He stated that he would address the Office's questions regarding appellant's continuing residuals and disability after obtaining diagnostic studies and a functional capacity evaluation (FCE).

In a June 17, 2009 report, Dr. Maulsby advised that a June 16, 2009 FCE determined that appellant was unable to return to work as a driver due to weakness, noting that the position required him to lift heavy objects. Appellant could not engage in repetitive bending and lifting. Dr. Maulsby found, however, that appellant could work eight hours a day in a sedentary position in the business management field in which he was trained and educated. A June 16, 2009 electromyogram (EMG) study failed to reveal any evidence of radiculopathy or radiculitis. A topographical pain drawing indicated that appellant's pain was primarily in the thoracic spine and not in the lumbar spine, which established that his current complaints were not related to his low back conditions. Dr. Maulsby noted that the statement of accepted facts did not provide that appellant's thoracic spine, was an accepted condition. He advised that appellant had reached maximum medical improvement regarding his lumbar spine. Appellant did not have chronic pain syndrome.

In a June 22, 2009 report, Dr. Maulsby noted that the June 16, 2009 EMG study also revealed severe chronic diffuse axonal polyneuropathy which could be associated with diabetes mellitus, thyroid dysfunction, myeloma, nutritional deficit, alcohol or heavy metals. The diagnosed condition was not produced by an acute injury. The EMG of the biceps femoral muscles showed myopathic rather than neuropathic features. Dr. Maulsby stated that the EMG findings documented that appellant's symptoms were not related to the accepted low back condition or continued radiculitis. Chronic bilateral L4-5 radiculopathy was noted which suggested radiculopathy from a spinal stenosis but that the February 6, 1989 injury had resolved

as confirmed by the EMG studies. Dr. Maulsby further advised that appellant's subjective complaints did not outweigh the objective evidence and none of his current conditions were causally related to the February 6, 1989 employment injury. The cause of appellant's ongoing symptoms primarily involved pain in the thoracic spine for which he was currently being treated. He had no residuals of the accepted condition. Appellant had permanent restrictions, but could perform sedentary work and undergo restaurant or office management training.

On August 3, 2009 the Office issued a proposed termination of appellant's wage-loss compensation and medical benefits based on Dr. Maulsby's medical opinion.

In an August 13, 2009 letter, appellant disagreed with the Office's proposed action. He contended that Dr. Maulsby was biased. Appellant contended that, after undergoing physical therapy that was ordered by the Office, he was bedridden for three weeks. He sought medical treatment to control residual pain from his surgeries and argued that the EMG test results were inconsistent.

In a September 4, 2009 decision, the Office terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the opinion of Dr. Maulsby reported the weight of medical evidence.

On September 16, 2009 appellant, through his attorney, requested a telephonic oral hearing with an Office hearing representative.

In an August 13, 2009 report, Ken Barrow, a physician's assistant, stated that he had treated appellant since September 2007 for pain management. He noted that appellant was injured in 1989 and had undergone multiple back surgeries. Mr. Barrow related that a recent EMG study confirmed the diagnosis of chronic lumbar radiculopathy at L4-5 and that an FCE found that appellant could perform sedentary work with frequent repositioning. He was unsure as to how appellant would be able to maintain gainful employment in light of the frequent repositioning requirement. Mr. Barrow opined that appellant remained totally disabled.

In an August 28, 2009 report, Dr. Staub noted appellant's February 1989 employment injury and subsequent back pain following surgical treatment. He advised him to avoid any lateral movements due to risk of reinjury and chronic pain. Physical therapy provided limited results and appellant required chronic pain management. Dr. Staub advised that appellant had significant depression that seemed to be secondary to the February 1989 injury and chronic pain. Noting that appellant had been on disability for 20 years, he opined that it would be extremely difficult if not impossible to find any kind of occupation for him.

In an October 6, 2009 report, Dr. Mark A. Pithan, a Board-certified neurologist, noted appellant's long-standing history of back problems, six back surgeries and multilevel radiculopathies of the legs. He stated that a recent EMG study raised the possibility of myopathy. Dr. Pithan listed essentially normal findings on physical examination and diagnosed lumbago (back pain). In an October 27, 2009 report, he advised that appellant's "CK" level was normal which made a diagnosis of myopathy less likely. Dr. Pithan again listed essentially normal findings on physical examination and diagnosed polyneuropathy secondary to diabetes.

In a December 1, 2009 report, Dr. Staub reiterated his diagnosis of polyneuropathy secondary to diabetes.

In a February 17, 2010 decision, an Office hearing representative affirmed the September 4, 2009 termination decision. The medical evidence was found to be insufficient to establish that appellant had any continuing employment-related residuals or disability.

### **LEGAL PRECEDENT**

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>1</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>2</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition that requires further medical treatment.<sup>3</sup>

### **ANALYSIS**

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits as of September 4, 2009. The Office accepted that he sustained an aggravation of recurrent lumbar radiculoneuropathy while in the performance of duty on February 6, 1989. It referred appellant to Dr. Maultsby for a second opinion evaluation.

Dr. Maultsby's June 16, 2009 report reviewed a history of appellant's February 6, 1989 employment-related injury and medical treatment. He found that appellant had, among other things, degenerative disc disease of the thoracic and lumbar spine and failed surgical back with continued chronic pain. Dr. Maultsby advised that he experienced greater pain in the thoracic spine which was not related to the accepted condition. His physical examination revealed essentially normal findings related to the lumbar spine with the exception of limited range of motion. Dr. Maultsby stated that additional diagnostic testing and an FCE were necessary before he could determine whether appellant had any continuing residuals or disability causally related to the February 6, 1989 injury. In a June 17, 2009 report, he reviewed the results of the June 16, 2009 FCE and EMG study. Dr. Maultsby found that, based on the FCE, appellant could not return to work as a driver due to weakness and inability to engage in repetitive bending and lifting as the position required him to lift heavy objects. He further found that his lumbar problems were not causally related to the accepted condition based on the EMG study. Dr. Maultsby stated that the EMG study did not reveal any evidence of radiculopathy or radiculitis. He advised that a topographical drawing showed that appellant's primary pain path

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<sup>1</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>2</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>3</sup> *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

was in the thoracic spine and not in the lumbar spine and thus not related to his low back condition. Dr. Maultsby further advised that appellant did not have chronic pain syndrome. His June 22, 2009 report found that appellant had no residuals of the February 6, 1989 condition which had resolved and he could perform sedentary work eight hours a day with restrictions in a management position for which he would receive training. Dr. Maultsby advised that his subjective complaints of pain did not outweigh the objective evidence, based on the EMG findings of severe chronic diffuse axonal polyneuropathy which may be associated with his nonemployment-related conditions and not the February 6, 1989 employment injury. He further advised that appellant's biceps femoral muscles showed myopathic rather than neuropathic features. Dr. Maultsby stated that his symptoms primarily involved pain in the thoracic spine.

The Board finds that Dr. Maultsby's reports represent the weight of the medical evidence and that the Office properly relied on his reports in terminating appellant's compensation benefits on September 4, 2009. Dr. Maultsby's opinion is based on proper factual and medical history as he reviewed a statement of accepted facts and appellant's prior medical treatment and test results. He also related his comprehensive examination findings in support of his opinion that the accepted work-related condition had resolved and that appellant could perform sedentary work eight hours a day with restrictions.

Dr. Staub's August 28, 2009 opinion that appellant's significant depression "seemed" to be secondary to the February 6, 1989 employment injury is speculative and unsupported by rationalized medical evidence explaining the nature of the relationship between his emotional condition and the accepted employment condition.<sup>4</sup> Moreover, he did not provide any medical rationale explaining how appellant's continued disability for work after 20 years was causally related to the accepted condition. Further, Dr. Staub's restriction focuses on a concern that performing a certain move will lead to aggravation of the accepted condition. The Board has consistently held that fear of future injury is not compensable.<sup>5</sup> Dr. Staub's concerns of future exacerbation do not establish that appellant is currently disabled. For the stated reasons, the Board finds that his report is of limited probative value in establishing that appellant has any residuals or disability causally related to the February 6, 1989 injury.

None of the medical evidence from Dr. Pithan provides any opinion addressing the causal relationship between the February 6, 1989 injury and appellant's current back condition and disability for work. The Board notes that his diagnosis of lumbago (back pain) is a symptom, not a compensable medical diagnosis.<sup>6</sup>

The August 13, 2009 report from Mr. Barrow, a physician's assistant, is of no probative value in establishing appellant's claim. A physician's assistant is not considered to be a "physician" as defined under the Act.<sup>7</sup> The Board finds, therefore, that Mr. Barrow's report does not constitute competent medical evidence to support appellant's claim.

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<sup>4</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>5</sup> *See Calvin E. King*, 51 ECAB 394 (2000).

<sup>6</sup> *C.F.*, 60 ECAB \_\_\_\_ (Docket No. 08-1102, issued October 10, 2008); *Robert Broome*, 55 ECAB 339 (2004).

<sup>7</sup> *Roy L. Humphrey*, 57 ECAB 238, 242 (2005); 5 U.S.C. § 8101(2).

There is no other medical evidence contemporaneous with the termination of appellant's benefits which supports that he has any continuing employment-related residuals or disability. The Office, therefore, met its burden of proof to terminate.

**CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation effective September 4, 2009 on the grounds that he no longer had any residuals or disability causally related to his accepted employment-related aggravation of recurrent lumbar radiculoneuropathy.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 19, 2011  
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