

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

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**M.J., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE,  
McGUIRE AIR FORCE BASE, NJ, Employer**

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**Docket No. 14-0990  
Issued: July 20, 2015**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JAMES A. HAYNES, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On March 25, 2014 appellant, through counsel, filed a timely appeal from a December 6, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) finding that appellant did not establish continuing disability for work after the prior termination of his compensation benefits. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 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 OWCP met its burden of proof to terminate appellant's wage-loss and medical compensation benefits effective December 31, 2012 as the accepted injury had ceased without residuals; and (2) whether appellant has established that he was disabled for work on and after December 31, 2012 due to an accepted lumbar contusion.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

OWCP accepted that on March 12, 1990 appellant, then a 32-year-old sheet metal mechanic, sustained a lumbar contusion when he stumbled on uneven ground and fell against the corner of a steel plate protruding from a truck bed. Following a period of light duty, appellant stopped work on July 29, 1990 and did not return. He received wage-loss compensation on the daily and periodic compensation rolls.

Appellant was first treated on March 13, 1990 by Dr. Alan D. Denison, an attending Board-certified family practitioner, who diagnosed a muscle contusion. Dr. Daniel Tran, an attending family practitioner, diagnosed a lumbar spine sprain on March 22, 1990.<sup>2</sup> A June 19, 1990 lumbar computerized tomography (CT) scan showed a small midline disc herniation at L4-5 with facet arthropathy at L5-S1.<sup>3</sup>

Dr. Samuel L. Friedman, an attending osteopathic physician Board-certified in family practice, submitted reports from July 30, 1990 to February 19, 1993 finding appellant totally disabled for work due to back pain attributable to the accepted lumbar contusion.

On June 7, 1993 OWCP obtained a second opinion from Dr. Stanley Askin, a Board-certified orthopedic surgeon. Dr. Askin opined that appellant's ongoing symptoms and the disc bulges noted on imaging studies were due to idiopathic degenerative disc disease and not the accepted contusion. He found appellant able to perform full-time light duty.<sup>4</sup>

Dr. Friedman submitted reports dated from September 17, 1993 to March 22, 2004 finding appellant totally disabled for work due to back pain. He prescribed physical therapy. In reports dated April 11, 2008 to May 22, 2012, Dr. Scott Dorfner, an attending osteopathic physician Board-certified in internal medicine, found appellant totally and permanently disabled for work, due to lumbar pain. He noted that physical therapy failed to alleviate appellant's symptoms.

On August 3, 2012 OWCP obtained an updated second opinion report from Dr. Askin. Dr. Askin reviewed the medical record and statement of accepted facts. On examination, he observed tenderness to palpation of the left lower posterior ribcage and left posterior iliac crest, restricted lumbar motion in all planes, normal sensation throughout the lower extremities, negative straight leg raising tests bilaterally, and no lumbar spasm. Dr. Askin noted that appellant did not exert full effort in lower extremity strength testing. He diagnosed age-related degenerative lumbar disc disease unrelated to the accepted lumbar contusion. Dr. Askin stated that appellant had no "objective findings of his compensable condition" and that the "original

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<sup>2</sup> In a March 26, 1990 report, Dr. Charles J. Landow, an attending Board-certified urologist, diagnosed a possible left renal contusion, which was later ruled out by imaging studies.

<sup>3</sup> A July 23, 1990 magnetic resonance imaging (MRI) scan showed a mild disc bulge at L4-5 and bilateral pars defect at L5. An August 5, 1991 lumbar MRI scan showed an increased disc protrusion at L4-5.

<sup>4</sup> On June 17, 2008 OWCP obtained a second opinion from Dr. Zohar Stark, a Board-certified orthopedic surgeon, finding that the accepted contusion had completely resolved without residuals and that appellant could resume full-duty work.

work injury ha[d] long since resolved.” He opined that appellant had reached maximum medical improvement as of his June 7, 1993 examination and was still able to perform full-time work, with restrictions attributable only to age-related changes. Dr. Askin noted that appellant did not require additional treatment related to the accepted injury and that there was “nothing medically reasonable or necessary regarding his continued interaction with Dr. Dorfner.”

By notice dated November 30, 2012, OWCP advised appellant that it proposed to terminate his wage-loss and medical compensation benefits because the accepted injury had ceased without residuals, based on Dr. Askin’s opinion as the weight of the medical evidence.

In response, appellant submitted a December 21, 2012 letter, stating that he would soon submit evidence from a new physician. He did not submit additional evidence prior to December 31, 2012.

By decision dated December 31, 2012, OWCP terminated appellant’s wage-loss and medical benefits effective that day, based on Dr. Askin’s opinion as the weight of the medical evidence.

In a January 9, 2013 letter, counsel requested a hearing, held April 10, 2013 by video link. At the hearing, he asserted that Dr. Askin did not fully consider the medical record as he did not opine that the accepted March 12, 1990 injury also caused a herniated L4-5 disc.

Following the hearing, counsel submitted an April 10, 2013 report from Dr. Laura E. Ross, an attending osteopathic physician also a Board-certified orthopedic surgeon. Dr. Ross stated that on review of Dr. Askin’s report, she disagreed with some but not all of his assertions. She opined that the L4-5 herniated disc was related to the accepted March 12, 1990 lumbar contusion because it was visible on the June 19, 1990 CT scan. Dr. Ross previously referred appellant to Dr. James G. Lowe, a Board-certified neurosurgeon. Dr. Lowe provided a March 27, 2013 report diagnosing herniated discs and radiculopathy at multiple levels. He noted that appellant related the onset of neck and back symptoms to the March 12, 1990 injury.

By decision dated June 12, 2013, an OWCP hearing representative affirmed OWCP’s December 31, 2012 decision, finding that the additional evidence submitted was insufficient to outweigh Dr. Askin’s report. He found that Dr. Lowe and Dr. Ross did not explain how and why the accepted March 12, 1990 lumbar contusion would continue to totally disable appellant for work on and after December 31, 2012.

In September 9 and 16, 2013 letters, counsel requested reconsideration. He asserted that new medical evidence established a conflict of opinion with Dr. Askin. Counsel provided an August 5, 2013 report from Dr. Steven J. Valentino, an attending osteopathic physician and also a Board-certified orthopedic surgery, relating appellant’s belief that his left-sided sciatica originated with the March 12, 1990 injury. He also related appellant’s complaints of neck pain with paresthesias into the left arm. Counsel opined that “[b]ased on [appellant’s] history his complaints and disability are related to his [work-related injury].” He also provided a September 11, 2013 report from Dr. Scott Murphy, an osteopathic physician Board-certified in psychiatry. Dr. Murphy stated that on March 12, 1990, appellant “fell off a truck and his back hit a metal man hole cover,” causing multiple herniated cervical and lumbar discs.

By decision dated December 6, 2013, OWCP denied modification on the grounds that the additional medical evidence submitted was insufficient to establish that appellant continued to have residuals of the accepted injuries on and after December 31, 2012. It found that Dr. Murphy's report was based on an inaccurate history as he stated that appellant fell off a truck. OWCP further found that Dr. Murphy and Dr. Valentino did not explain how the accepted lumbar contusion would continue to disable appellant for work on and after December 31, 2012. It noted that Dr. Askin provided a detailed explanation, based on a complete medical and factual history, of why appellant's condition was no longer related to the accepted injury. Therefore, Dr. Askin's opinion continued to represent the weight of the medical evidence.

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

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>5</sup> Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>6</sup>

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

OWCP accepted that appellant sustained a lumbar contusion on March 12, 1990 when he stumbled and fell against the corner of a steel plate. Appellant stopped work on July 29, 1990 and did not return. He received compensation for total disability.

Dr. Friedman, an attending osteopathic physician Board-certified in family medicine, found appellant totally disabled for work between July 30, 1990 to March 22, 2004 from lumbar pain and a herniated L4-5 disc. He opined that the accepted contusion caused these diagnoses, but did not explain his medical rationale in reaching this conclusion. Similarly, Dr. Dorfner, an attending osteopathic physician, also Board-certified in internal medicine, found appellant totally and permanently disabled for work from April 2011 to May 2012 due to lumbar pain, but did not specify the reasons that the accepted contusion would disable appellant for work for 22 years.

OWCP obtained a second opinion from Dr. Askin, a Board-certified orthopedic surgeon, who provided June 7, 1993 and August 3, 2012 reports which found that the accepted contusion had ceased without residuals. Dr. Askin explained that detailed clinical examinations performed on June 7, 1993 and August 3, 2012 revealed no objective signs of the accepted contusion. He noted in the latter report his observation that appellant did not exert full effort on strength testing. Dr. Askin explained that appellant's suboptimal effort raised questions about the extent of his condition. He opined that appellant reached maximum medical improvement by June 7, 1993 and required no further treatment relevant to the accepted lumbar contusion. OWCP terminated appellant's wage-loss and medical benefits effective December 31, 2012, based on Dr. Askin's report. It determined that this report was the weight of the medical evidence.

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<sup>5</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

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

The Board finds that OWCP properly accorded Dr. Askin the weight of the medical evidence. Dr. Askin based his opinion on the complete medical record, a statement of accepted facts, and detailed clinical examinations.<sup>7</sup> The opinions of appellant's attending physicians were not of equal weight and did not create a conflict with that of Dr. Askin. Therefore, OWCP's December 31, 2012 decision terminating appellant's wage-loss and medical compensation benefits was proper under the law and facts of the 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 from OWCP 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>8</sup> For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.<sup>9</sup> The fact that a condition's etiology is unknown or obscures neither relieves appellant of the burden of establishing a causal relationship by the weight of the medical evidence, nor shifts the burden of proof of OWCP to disprove an employment relationship.<sup>10</sup>

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

Following OWCP's termination of appellant's wage-loss and medical compensation benefits effective December 31, 2012, the burden of proof shifted to appellant to demonstrate that he continued to be disabled for work on and after December 31, 2012 due to the accepted injuries.<sup>11</sup>

As part of the April 10, 2013 hearing, counsel submitted an April 10, 2013 report from Dr. Ross, an osteopathic physician also Board-certified in orthopedics, who diagnosed a herniated L4-5 disc on March 12, 1990. He relied on the temporal relationship between the onset of symptoms and the diagnosis of the disc herniation by June 19 and July 23, 1990 imaging studies. However, the Board has held that a temporal relationship alone is insufficient to establish causal relationship.<sup>12</sup>

Counsel also submitted a March 27, 2013 report from Dr. Lowe, a Board-certified neurosurgeon. Dr. Lowe reported that appellant attributed numerous herniated discs to the accepted March 12, 1990 incident. However, he did not provide his own clear opinion on that issue. OWCP affirmed the December 31, 2012 termination by decision issued June 12, 2013.

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<sup>7</sup> *Deborah L. Beatty*, 54 ECAB 240 (2003).

<sup>8</sup> *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *see also Howard Y. Miyashiro*, 43 ECAB 1101 (1992).

<sup>9</sup> *Alice J. Tysinger*, 51 ECAB 638 (2000).

<sup>10</sup> *Judith J. Montage*, 48 ECAB 292 (1997).

<sup>11</sup> *Virginia Davis-Banks*, *supra* note 8.

<sup>12</sup> *Louis R. Blair, Jr.*, 54 ECAB 348 (2003).

Counsel requested reconsideration in letters dated September 9 and 16, 2013 asserting that a conflict existed between Dr. Askin and Dr. Valentino, an osteopathic physician and Board-certified orthopedic surgery, and Dr. Murphy, an osteopathic physician, also Board-certified in psychiatry. In an August 5, 2013 report, Dr. Valentino noted that appellant believed the accepted March 12, 1990 incident caused herniated cervical and lumbar discs, but the doctor did not provide his own medical explanation to support appellant's belief. Because he did not explain his medical reasoning, his opinion is of diminished probative value.<sup>13</sup> Dr. Murphy noted in his September 11, 2013 report that appellant's March 12, 1990 injury was due to falling out of a truck onto the corner of a metal plate. This is not accurate. Appellant claimed that he stumbled at ground level and fell against the corner of a metal plate protruding from a truck bed. Dr. Murphy's opinion is of diminished probative value because it is based on a significantly inaccurate history of injury.<sup>14</sup> Thus, neither the reports of Dr. Valentino nor Dr. Murphy outweigh or create a conflict with the opinion of Dr. Askin.

Therefore, OWCP's December 6, 2013 decision finding that appellant did not establish that he continued to have residuals of the accepted injuries on and after December 31, 2012 is correct under the law and facts of the case. It properly denied modification as Dr. Murphy's and Dr. Valentino's opinions were insufficient to shift the weight of the medical evidence in appellant's favor or to require further development by OWCP.

On appeal, counsel contends that OWCP should have expanded the claim to include a herniated lumbar disc but the medical evidence of record does not support that the March 12, 1990 incident caused a herniated disc. He also asserts that Dr. Askin's opinion is insufficiently rationalized to represent the weight of the medical evidence. As stated above, Dr. Askin provided well-reasoned opinions explaining that appellant no longer had residuals of the accepted lumbar contusion as of December 31, 2012.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss and medical compensation benefits effective December 31, 2012 as the accepted injury had ceased without residuals. The Board further finds that appellant did not establish continuing work-related disability on and after December 31, 2012.

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<sup>13</sup> *Supra* note 7.

<sup>14</sup> *Douglas M. McQuaid*, 52 ECAB 382 (2001).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 6, 2013 is affirmed.<sup>15</sup>

Issued: July 20, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

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<sup>15</sup> Michael E. Groom, Alternate Judge, participated in the preparation of this decision but was no longer a member of the Board effective December 27, 2014.