

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

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S.S., Appellant )

and )

**U.S. POSTAL SERVICE, POST OFFICE,  
San Francisco, CA, Employer**)

**Docket No. 15-1160  
Issued: January 11, 2016**

*Appearances:*

*Mark Coby, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On April 27, 2015 appellant, through counsel, filed a timely appeal of a December 3, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 to consider the merits of the case.

**ISSUES**

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's compensation and medical benefits effective May 13, 2013; and (2) whether appellant has established any continuing medical condition or disability on or after May 13, 2013 due to his March 9, 1987 employment injury.

On appeal counsel argues that the second opinion physician's report was not entitled to the weight of the medical evidence, that OWCP failed to adequately weigh the recent reports from appellant's treating physician, and that there remains a conflict of medical opinion requiring referral to an impartial medical examiner.

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

## **FACTUAL HISTORY**

On March 13, 1987 appellant, then a 40-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on March 9, 1987, as he was stepping out of his truck, the step gave way causing him to fall face down injuring his lower back, left shoulder, and hips. Appellant's attending physician, Dr. Sanford H. Lazar, an orthopedic surgeon, examined appellant on April 13, 1987. He noted a previous back injury in January 1983 which was still causing appellant pain. Dr. Lazar diagnosed degenerative intervertebral disc at L4-5 which had been aggravated by the fall at work on March 9, 1987. Appellant underwent a computerized tomography (CT) scan on May 18, 1987 which demonstrated disc bulges at L3-4 and L4-5 with facet hypertrophy and spinal stenosis.

OWCP on August 14, 1987 accepted aggravation of an existing disability and on April 11, 1988 expanded the acceptance to include aggravation of degenerative disc disease in the lumbar spine and sprain of the lumbar back.

Appellant underwent a magnetic resonance imaging (MRI) scan on December 1, 1988 which demonstrated mild bulging or protrusion of the L4-5 disc and mild bulging of the L3-4 disc.

Appellant was placed on the periodic compensation rolls effective November 14, 1987.

Dr. Lazar continued to provide treatment for appellant through October 2, 2000 and continued to opine that appellant was totally disabled. OWCP referred appellant for a second opinion evaluation. On March 19, 2001 Dr. Stanley Baer, a Board-certified orthopedic surgeon, diagnosed chronic lumbar strain and disc derangement at L4-5 and L5-S1. He opined that appellant was totally disabled and continued to experience residuals of the accepted employment injury. Dr. Baer noted that appellant had symptoms of psychological overlay.

In another second opinion report dated May 17, 2004, Dr. John R. Chu, a Board-certified orthopedic surgeon, diagnosed chronic low back pain with a history of degenerative disc disease at L3-4, L4-5, and L5-S1. He found no objective signs of neurologic injury, but appellant had a significant pain response to light stimulation of appellant's back which could not be explained on an anatomic basis. Dr. Chu opined that appellant sustained a temporary aggravation of his underlying degenerative disc disease at L3-4 and L4-5. He reported that appellant could return to light-duty work.

Appellant underwent a lumbar MRI scan on May 28, 2004 which demonstrated an L3-4 broad-based disc bulge with right lateral protrusion, L4-5 broad-based disc bulge with right neural foraminal narrowing, and L5-S1 right paracentral protrusion which contacted the right S1 nerve root.

Dr. Michael S. Sutro, a treating Board-certified orthopedic surgeon, examined appellant on November 4 and 11, 2004 and diagnosed progressive lumbar and cervical degenerative disc disease. He also noted a significant subjective pain response with light stimulation of his back which could not be explained on an anatomic basis. Dr. Sutro found that appellant was disabled due to chronic pain due to a work-related aggravation of multilevel lumbar degenerative disc disease.

OWCP found a conflict of medical opinion regarding appellant's ability to work and referred appellant for an impartial medical examination in 2005 with Dr. Richard R. Tavernetti, a Board-certified orthopedic surgeon. In his January 24, 2005 report, Dr. Tavernetti noted that appellant's examination was clouded by an exaggeration of disability and pain. He opined that appellant could not return to work for more than two hours a day. Dr. Tavernetti found that appellant exhibited residuals of his employment injury which was an aggravation of a preexisting condition.

Dr. Sutro continued to provide medical care and examined appellant on August 10, 2007 and on March 10, 2008 and diagnosed chronic disabling pain and depression which were permanent in nature. He referred appellant to Dr. Arkady Gendelman, a Board-certified family practitioner, who completed form reports indicating that appellant could sit up to two hours a day, lift two pounds for 30 minutes and drive for a total of one hour. In reports dated October 13, and 24, 2011 and July 10, 2012, Dr. Gendelman noted that he began examining appellant in 2005 and found appellant disabled due to axial and radicular symptoms of multilevel lumbar degenerative disc disease and psychiatric problems.

OWCP referred appellant for another second opinion evaluation with Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, on October 23, 2012. In a report dated December 30, 2012, Dr. Swartz reviewed appellant's medical history. He discussed the May 28, 2004 MRI scan. Dr. Swartz found that appellant was tender and sensitive to light touch on the skin of his lumbar spine. He noted that reflexes were absent in the lower extremities and that appellant had a burning sensation to pinwheel testing of the left thigh and total hypoesthesia over the right thigh and right medial lower leg. Dr. Swartz reported normal motor function in the lower extremities, but give-way collapsing weakness with strength testing of the feet and toes. He noted that almost every movement brought a response of groaning, moaning, and expressions of agony. Dr. Swartz found substantial pain behavior during appellant's examination. He concluded that there were no valid objective findings, but rather substantial pain behavior, with exaggerated and magnified responses.

Dr. Swartz noted that acute pain was brought about by light stimulation of his back and body movements which would be considered an example of pain behavior or symptom magnification. He noted that appellant's MRI scan studies had not revealed any nerve root or spinal cord compression but consisted of multilevel degenerative disc disease with mild protrusion of L3-4 and L5-S1. Dr. Swartz diagnosed resolved strain of the lumbar spine with nonindustrially-related underlying and preexisting multilevel degenerative disc disease without any neurologic deficit or injury. He opined that appellant's multilevel disc disease at L3-4 and L4-5 with multiple disc bulges, facet hypertrophy, and spinal stenosis were temporarily aggravated by his March 9, 1987 employment injury. Dr. Swartz opined that the temporary aggravation would not have lasted more than three years and that appellant's temporary total disability would have ceased by March 9, 1990. He reviewed appellant's date-of-injury position and stated that appellant could not currently lift 75 pounds due to his age. Dr. Swartz noted that appellant could lift up to 25 pounds for four to six hours a day.

OWCP proposed to terminate appellant's medical and compensation benefits in a letter dated April 8, 2013. It relied on the findings in Dr. Swartz' December 30, 2012 report. By decision dated May 13, 2013, OWCP terminated appellant's medical and wage-loss benefits

effective May 13, 2013. Appellant requested an oral hearing before OWCP's Branch of Hearings and Review on May 22, 2013.

Appellant submitted a report dated July 29, 2013 from Dr. Fred F. Naraghi, a Board-certified orthopedic surgeon. Dr. Naraghi noted appellant's history of stepping down from his truck when the step broke and reported that appellant slipped and fell backwards. He examined appellant and found limited range of motion and pain to palpation in the lumbar spine. Dr. Naraghi reported palpable paraspinal muscle spasms with mild decreased light touch sensation in the right S1 distribution. He diagnosed herniated nucleus pulposus, radiculopathy right lower extremity, lumbar spinal stenosis, and cervical radiculopathy. Dr. Naraghi opined, "In absence of evidence to the contrary, it is with reasonable medical probability and more than likely that injuries to his neck and back are as a result of his work-related injuries." He found that appellant was permanently disabled.

Appellant also submitted a report dated August 15, 2013 from Dr. James R. Liles, a Board-certified psychiatrist, who diagnosed major depressive disorder and attributed this condition to appellant's employment injuries.<sup>2</sup>

Dr. Naraghi completed a supplemental report on August 23, 2013 and reviewed the medical records. He opined that appellant also sustained a cervical injury in 1987 as a result of his fall.

Appellant testified at the oral hearing on August 29, 2013 and described his ability to walk for one block and his necessity to sleep on the floor. He stated that he could drive for about 20 minutes and performed very limited household chores. Appellant testified that his back pain extended into his right hip and leg.

In a report dated September 26, 2013, Dr. Naraghi reviewed a September 9, 2013 MRI scan and found herniated nucleus pulposus at L5-S1 with right S1 nerve root impingement, multilevel disc bulges, radiculopathy of the right lower extremity, lumbar spinal stenosis, and cervical radiculopathy.

By decision dated November 20, 2013, OWCP's hearing representative found that OWCP had met its burden of proof to terminate appellant's compensation benefits in its May 13, 2013 decision. She found that Dr. Swartz' report was entitled to the weight of the medical evidence and established that there was no objective evidence of a permanent change in appellant's preexisting degenerative disc disease due to the accepted employment injury. The hearing representative further found that Dr. Naraghi's reports lacked medical reasoning to support his opinion that appellant had any ongoing medical condition as a result of the accepted employment injury.

Counsel requested reconsideration through a letter dated February 12, 2014. He argued that Dr. Naraghi's reports created a conflict in medical opinion evidence. In a report dated February 10, 2014, Dr. Naraghi noted appellant's history of injury in 1987 and again noted that appellant slipped and fell backwards. He reviewed appellant's recent MRI scan and found a

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<sup>2</sup> As OWCP has not issued a final decision regarding appellant's claim for a psychiatric condition, the Board will not address this issue. 20 C.F.R. § 501.2(c).

dorsal annular tear at L4-5 with a disc bulge. Dr. Naraghi diagnosed herniated nucleus pulposus of L5-S1 with right nerve root impingement. He opined that this condition was likely a result of progression of the pathology that started from the 1987 employment injury. Dr. Naraghi further opined that appellant's symptoms of back pain, right leg pain, and numbness and weakness radiating into the lateral aspect of his right foot and plantar aspect of his right foot was a classic presentation for right S1 pathology. He noted that appellant had no prior back pain preceding the 1987 employment injury. Dr. Naraghi opined that appellant's 1987 fall was a traumatic injury and that injury to the disc in 1987 could cause a rapid progression of any degenerative process.

Appellant underwent a lumbar MRI scan on September 9, 2013 which demonstrated degenerative disc disease of the lumbar spine, disc bulges at L3-4, L4-5, and L5-S1. This test indicated possible contact with the traversing right S1 nerve root.

In a decision dated March 6, 2014, OWCP reviewed the merits of appellant's claim and denied modification of its prior decisions. It found that Dr. Naraghi was relying on an inaccurate description of the employment injury and appeared to be unaware of appellant's history of back conditions. OWCP further noted that as appellant's initial MRI scan did not demonstrate a herniated disc at L5-S1, a more recent test with this finding would have to be supported by medical reasoning explaining how appellant's 1987 employment injury resulted in an additional condition almost 20 years later.

Counsel requested reconsideration through a form completed on April 15, 2014. OWCP received a report dated April 3, 2014 from Dr. Naraghi in which he reviewed a recent electromyogram (EMG) test. Dr. Naraghi repeated his version of appellant's 1987 employment fall and stated that it made no difference whether appellant fell backward or forward. He opined that the disc bulge found on the MRI scan in 1988 could certainly be within the nomenclature for a herniated disc.

By decision dated December 3, 2014, OWCP reviewed the merits of appellant's claim and denied modification finding that the medical evidence failed to establish medical residuals or disability related to his March 9, 1987 employment injury. It found that Dr. Naraghi's reports were not based on an accurate factual background, were not sufficiently detailed, and did not create a conflict or overcome the weight of Dr. Swartz' report.

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

Once OWCP 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>3</sup> After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>4</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>5</sup> To terminate

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<sup>3</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>4</sup> *Id.*

<sup>5</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990).

authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>6</sup>

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

The Board finds that OWCP met its burden of proof to terminate appellant's medical and compensation benefits effective May 13, 2013.

OWCP referred appellant for a second opinion evaluation with Dr. Swartz on October 23, 2012. He completed a report dated December 30, 2012, reviewing appellant's history of injury and medical history. Dr. Swartz noted the May 28, 2004 MRI scan with disc bulges. On physical examination, he found that appellant was tender and sensitive to light touch on the skin of his lumbar spine and that reflexes were absent in the lower extremities. Dr. Swartz reported normal motor function in the lower extremities, but give-way collapsing weakness with strength testing of the feet and toes. He noted that almost every movement brought a response of groaning, moaning, and expressions of agony. Dr. Swartz concluded that there were no valid objective findings and that appellant exhibited pain behavior with exaggerated and magnified responses. He noted that appellant's MRI scan studies had not demonstrated any nerve root or spinal cord compression but consisted only of multilevel degenerative disc disease with mild protrusion of L3-4 and L5-S1. Dr. Swartz diagnosed resolved strain of the lumbar spine with preexisting multilevel degenerative disc disease without any neurologic deficit or injury. He opined that appellant's multilevel disc disease at L3-4 and L4-5 with multiple disc bulges, facet hypertrophy, and spinal stenosis was temporarily aggravated by his March 9, 1987 employment injury. Dr. Swartz opined that the temporary aggravation would not have lasted more than three years and that appellant's temporary total disability would have ceased by March 9, 1990. Dr. Swartz reviewed appellant's date-of-injury position and reported that appellant could lift no more than 25 pounds for four to six hours a day due to his age.

Dr. Swartz' report is based on an accurate history of injury, a review of the medical records, and his findings on physical examination. He found that appellant demonstrated symptom magnification and that the temporary aggravation of appellant's underlying degenerative disc disease beginning in 1987 had resolved by 1990. Dr. Swartz found that appellant did not require further medical treatment due to the accepted condition and that appellant's continuing disability was not due to his accepted employment injury, but due to his age and preexisting degenerative condition.

At the time Dr. Swartz issued his report there was no contemporaneous, rationalized medical evidence supporting appellant's continued disability and medical residuals due to his accepted employment injury. Dr. Gendelman's reports did not include a detailed history of injury, did not acknowledge the accepted condition, and did not provide any medical reasoning in support of his diagnosis of axial and radicular symptoms due to multilevel lumbar degenerative disc disease and psychiatric problems resulting in total disability.

For these reasons, the Board finds that OWCP met its burden of proof to terminate appellant's medical and wage-loss compensation benefits effective May 13, 2013.

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

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

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that he had disability causally related to his accepted employment injury.<sup>7</sup> To establish a causal relationship between the condition, as well as any disability claimed and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual background, supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's detailed opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.<sup>8</sup>

## **ANALYSIS -- ISSUE 2**

Following OWCP's May 13, 2013 termination of appellant's medical and wage-loss compensation benefits, appellant submitted a series of reports from Dr. Naraghi beginning on July 29, 2013. He provided a history of injury based on appellant's recollections that in 1987 while stepping from the truck the step broke and appellant slipped and fell backwards. Dr. Naraghi provided findings on examination including limited range of motion and pain to palpation in the lumbar spine as well as palpable paraspinal muscle spasms with mild decreased light touch sensation in the right S1 distribution. He opined that appellant's diagnosed conditions including herniated disc were more than likely a result of his work-related injuries. The Board finds that this report is not based on an accurate history of injury and does not address appellant's accepted condition of aggravation of underlying degenerative disc disease. The report does not contain medical reasoning explaining how Dr. Naraghi reached his conclusions based on testing occurring almost 20 years after the employment incident. His report does not adequately address the findings by appellant's previous attending physicians that he had preexisting lumbar degenerative disc disease and that this condition was aggravated by appellant's fall in 1987. Due to these deficiencies, these reports are insufficient to establish an additional employment injury or to establish continuing disability due to appellant's March 1987 employment injury.

The remainder of Dr. Naraghi's reports address additional conditions not previously accepted by OWCP. On August 23, 2013 Dr. Naraghi reviewed appellant's medical records and opined that appellant also sustained a cervical injury in 1987 as a result of his fall. In his September 26, 2013 report, Dr. Naraghi reviewed a September 9, 2013 MRI scan and found additional conditions which he opined were employment-related including herniated nucleus pulposus at L5-S1 with right S1 nerve root impingement, multilevel disc bulges, radiculopathy of the right lower extremity, lumbar spinal stenosis, and cervical radiculopathy. On February 10,

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<sup>7</sup> *George Servetas*, 43 ECAB 424, 430 (1992).

<sup>8</sup> *James Mack*, 43 ECAB 321 (1991).

2014 Dr. Naraghi noted appellant's history of injury in 1987 and again noted that appellant slipped and fell backwards. He reviewed appellant's recent MRI scan and found a dorsal annular tear at L4-5 with a disc bulge. Dr. Naraghi diagnosed herniated nucleus pulposus of L5-S1 with right nerve root impingement.

In support of his diagnoses, Dr. Naraghi noted the herniated disc was likely as a result of progression of the pathology that started from the 1987 employment injury. He noted that appellant had no prior back pain preceding the 1987 employment injury. Dr. Naraghi opined that appellant's 1987 fall was a traumatic injury and that injury to the disc in 1987 could cause a rapid progression of any degenerative process. On April 3, 2014 he repeated his version of appellant's 1987 employment fall and wrote that it made no difference whether appellant fell backward or forward. Dr. Naraghi opined that the disc bulge found on the MRI scan in 1988 could certainly also be within the nomenclature for a herniated disc.

The Board finds that Dr. Naraghi's reports are insufficient to establish additional conditions resulting from appellant's employment injury in 1987 or to establish continuing disability as a result of this injury. Dr. Naraghi does not address the central issue in this case, whether the aggravation of appellant's underlying degenerative disc disease was permanent or temporary. The weight of the medical evidence as represented by Dr. Swartz establishes that the aggravation was temporary. In order to overcome Dr. Swartz' report or to create a conflict with it, appellant must submit a report which has a clear and detailed factual basis. The contemporaneous medical reports describe appellant's employment incident as well as his preexisting degenerative disc condition in 1987. None of the physicians who examined appellant prior to Dr. Naraghi opined that appellant had sustained a herniated disc as a result of his employment incident and the initial diagnostic studies suggested that his disc disease did not extend to L5-S1. Furthermore, Dr. Naraghi's reasoning in support of his diagnoses, is in direct contrast to the accepted condition and the contemporaneous medical evidence. He opines that appellant's 1987 traumatic injury caused an accelerated degenerative process rather than the accepted history that appellant had a preexisting degenerative condition which was aggravated by the fall. Due to these deficits in the factual and medical history as well as the alteration of the underlying basis of appellant's claim, the Board finds that, contrary to counsel's arguments on appeal, Dr. Naraghi's reports are insufficient to establish appellant's claim for continuing disability or medical residuals as a result of his accepted 1987 employment injury or to create a conflict with Dr. Swartz' report.

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 medical and wage-loss benefits effective May 13, 2013. The Board further finds that appellant has failed to meet his burden of proof in establishing any continuing disability, medical residuals, or additional conditions as a result of the 1987 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 3, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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