



## **ISSUES**

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation benefits, effective July 15, 2016, finding that he no longer had disability causally related to his accepted January 29, 2002 employment injury; and (2) whether appellant has met his burden of proof to establish continuing employment-related disability or residuals on or after July 15, 2016.

## **FACTUAL HISTORY**

On January 31, 2002 appellant, then a 55-year-old truck driver, filed a traumatic injury claim (Form CA-1) alleging that on January 29, 2002 he injured his lower back when lifting a gate on his truck while in the performance of duty. OWCP accepted the claim for lumbar strain. It subsequently expanded the acceptance of the claim to include lumbosacral neuritis or radiculitis and disorder of sacrum (lumbosacral).

On August 22, 2005 OWCP issued a loss of wage-earning capacity determination, finding that the actual wages of appellant's modified tractor trailer operator position met or exceeded the current wages of his job when injured. It found that the position of modified tractor trailer operator represented his wage-earning capacity with no wage loss.

On September 10, 2010 appellant underwent an authorized anterior lumbar fusion at the L4-5 level, with an anterior plate fixation. OWCP paid him wage-loss compensation for temporary total disability on the supplemental rolls as of September 10, 2010 and on the periodic rolls, effective October 24, 2010.

On March 7, 2016 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions to Dr. Alexander Doman, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the status of appellant's accepted January 29, 2002 employment injury.

In a March 24, 2016 report, Dr. Doman reviewed the SOAF and the medical evidence of record. He described the January 29, 2002 employment injury, noted the accepted conditions of lumbar strain, lumbosacral radiculopathy, and sacrum disorder, and that appellant was taking pain medication. Dr. Doman also noted that appellant had a long history of "intermittent aching back pain prior to the injury" and indicated that it was "not severe enough that [appellant] needed to seek medical attention." He explained that appellant continued to complain of back pain following the injury, underwent an anterior lumbar fusion operation on September 10, 2010, at the level of L4-5, and did not return to work. Dr. Doman advised that appellant continued to have back pain, was taking narcotic pain medication, and also complained of "vague pain that extends into [appellant's] left and right lower leg." He noted findings on physical examination that he classified as intentional gross symptom magnification with complaints of severe pain with mild axial compression over the shoulders as well as light pressure over the subcutaneous tissue and with any range of motion of the lumbar spine, and complaints of severe back pain with simple attempts to flex appellant's knees while in the prone position in a nonphysiologic and nonanatomic manner. Dr. Doman found no signs of muscular atrophy and that appellant had a negative straight leg raising test. He indicated that x-rays of appellant's lumbar spine and pelvis revealed a solid lumbar fusion of L4-5 with well-placed screw fixation anteriorly at the level of L4-5 with interbody fusion.

Dr. Dorman also noted a nerve conduction velocity study of the posterior tibial nerve on the left was normal. In response to OWCP's questions, he reported that appellant's current diagnosis was "malingering patient." Dr. Dorman explained that there were no objective findings that substantiated any ongoing orthopedic etiology to appellant's complaints and that there were "numerous findings during the physical examination which lead this examiner to conclude in the strongest possible way that [appellant] is malingering." He opined that there currently were no disabling residuals causally related to the work injury, appellant's original disability had fully resolved, appellant did not suffer from any nonjob-related disability, and he was fully capable of returning to his duties as a truck driver without restrictions. Dr. Dorman completed a work capacity evaluation (Form OWCP-5c) on March 24, 2016 indicating that appellant had reached maximum medical improvement and could return to his usual job without restrictions.

In a report dated March 10, 2016, Dr. Asutosh Vyas, a pain medicine specialist, noted that appellant presented for follow-up for low back pain. He noted that appellant attributed his pain to a "lifting injury in 2002 while trying to lift the tailgate of a truck." Dr. Vyas indicated that a magnetic resonance image (MRI) scan revealed left neuroforaminal disc bulge/protrusion at L4-5 with bilateral neuroforaminal stenosis and that an October 4, 2012 MRI scan showed discectomy with fusion at L4-5 level, mild facet arthropathy at L5-S1 left, left asymmetrical at L4-5 level as well as L2-3 and L3-4 levels. He reviewed a lumbar spine MRI scan dated April 8, 2014 and noted that it showed postsurgical and degenerative changes at the L2-3 and L3-4 levels and congenital spinal stenosis. Dr. Vyas indicated that appellant had varying degrees of facet degenerative joint disease and neural foraminal stenosis at the L3-4, L4-5, and L5-S1 levels. He referred to the April 8, 2014 thoracic spine MRI scan and noted mild multilevel thoracic disc degeneration with cervical kyphosis and mild thoracic dextroscoliosis, status post procedure. Dr. Vyas explained that appellant related pain in the low back, down both legs, and denied any new pain. He diagnosed low back pain, discogenic in origin, multilevel degenerative disc disease, lumbosacral radiculopathy, multi-level spinal stenosis, worse at the L2-3 and L3-4 levels, lumbar facet arthropathy with spondylosis, worse at the L3-4 to L5-S1 levels, right greater than left, sacroilitis, right greater than left low back pain, myofascial in origin, post status two lumbar spinal surgeries, including anterior lumbar fusion, and a history of long term opioid use with dependency. Dr. Vyas also found that appellant had comorbid conditions, which required continued treatment, including depression. He explained that, due to appellant's "excruciating low back pain," appellant needed to undergo transforaminal epidural injections on the right at L5 and S1 levels on March 15, 2015 would undergo future injections, and that there were options for surgery. Dr. Vyas saw appellant on April 7, 2016 and repeated his findings.

On May 12, 2016 OWCP proposed to terminate appellant's wage-loss compensation benefits because he was no longer disabled from work as a result of the accepted January 29, 2002 employment injury. It found that the weight of medical evidence rested with the March 24, 2016 report of Dr. Dorman, who found that appellant was no longer totally disabled from work due to his accepted conditions. OWCP afforded appellant 30 days to submit additional evidence or argument in writing, if he disagreed with the proposed termination.

In a letter dated June 10, 2016, appellant through counsel, responded to OWCP's notice and argued that Dr. Dorman did not provide a rationalized report, as he did not discuss the medical documentation from the treating physicians. Counsel further argued that Dr. Dorman did not assess appellant's preinjury baseline, did not respond to the questions from OWCP, and did not provide

more than a “conclusory answer to every question, without explanation.” He argued that Dr. Doman “simply responds that [appellant] is malingering” and that no physical examination findings were provided. Furthermore, counsel argued that Dr. Doman should have discussed whether appellant’s emotional condition and his prescribed narcotics would affect appellant’s ability to return to work. He argued that OWCP had not met its burden of proof to terminate benefits or at the least, that a conflict was created in the medical evidence regarding appellant’s ability to return to work.

In a May 5, 2016 report, Dr. Vyas repeated his prior diagnoses and opinion. He also saw appellant on June 2 and 16 and July 14, 2016.

In a June 20, 2016 report, Dr. Christopher R. Edwards, a Board-certified orthopedic surgeon, noted that appellant had chronic pain in his legs and buttocks. He also noted that appellant had an anterior lumbar fusion in 2010 and had chronic worsening pain. Dr. Edwards examined appellant and found positive neuromechanical findings and that x-rays revealed evidence of an anterior lumbar fusion device.

By decision dated July 14, 2016, OWCP terminated appellant’s wage-loss compensation, effective July 15, 2016, finding that he no longer had disability causally related to his accepted employment injury.

OWCP subsequently received a July 13, 2016 lumbar myelogram with postmyelogram computerized tomography (CT), which related that the lumbar fusion at L4-5 was a solid anterior bony fusion, some persistent posterior osteophytes were seen narrowing the foramen, with small disc bulging and hypertrophic endplate changes seen at multiple levels mildly narrowing the neural foramen.

In a July 28, 2016 report, Dr. Edwards reviewed the July 13, 2016 myelogram and CT scans and found that appellant had a solid fusion. He explained that a functional capacity evaluation (FCE) was warranted to determine appellant’s work capacity.

On August 4, 2016 appellant, through counsel, requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review.

In an August 11, 2016 report, Dr. Vyas saw appellant for follow-up of low back pain. He examined appellant and noted depression and recommended that appellant continue treatment. Dr. Vyas explained that, because appellant was receiving a controlled substance and opioid medication, appellant would be monitored. He also explained that, due to appellant’s excruciating low back pain, appellant was scheduled to undergo approved transforaminal epidural injections on the right at L5 and S1 levels. Dr. Vyas continued to treat appellant on August 16, September 8, October 6, November 3, and December 1 and 29, 2016.

An August 23, 2016 FCE conducted by a physical therapist, revealed that appellant provided a “self-limited-effort” which demonstrated patterns of movement and physiological responses which were inconsistent with maximal effort. The examiner noted that there was inconsistency between the test results and the referral diagnosis. Additionally, the examiner recommended that, based on the demonstrated results of the evaluation and related clinical

observations, appellant should be returned to work and have unrelated issues addressed by his personal physician.

In a November 4, 2016 report, Dr. Edwards noted that the FCE revealed that appellant could return to work.

Following a hearing held on April 18, 2017, by decision dated June 7, 2017, the hearing representative affirmed the July 14, 2016 decision.

Dr. Vyas continued to treat appellant and repeated his findings in reports dated April 20, May 18, June 14, July 12, August 9, September 6, and November 1, 2017, and January 24, February 21, March 21, April 18, May 9, June 6 and 20, July 6, and August 3 and 29, 2018. In the June 14, 2017 report, he noted that appellant needed to continue his treatment and that his conditions had not resolved.

In a March 8, 2017 report, Connie M. Ward, PhD, a clinical psychologist, diagnosed major depressive disorder, recurrent, moderate. She noted that appellant was in constant pain and opined that he had limited mobility which hampered his ability to do his job “even in a limited capacity. Dr. Ward explained that he was unable to return to his date-of-injury employment because he was unable to stand or sit for a prolonged period of time without medications which rendered him “unable to do any job.” She explained that appellant was not emotionally able to concentrate, focus, or take supervision because of his depression and rumination.

By letter dated June 7, 2018, appellant through counsel, requested reconsideration of the June 17, 2017 decision. Counsel argued that the June 14, 2017 report from Dr. Vyas was sufficient to create a conflict. He also noted that appellant was denied the renewal of appellant’s operator’s license due to his heavy use of pain killers. Counsel argued that the SOAF was not accurate and that appellant had developed an emotional condition and was advised that the claim would be developed; however, no development had occurred despite medical evidence showing that the conditions arose due to the accepted work injury. He argued that it was premature to propose a termination of benefits without appropriate development of the emotional condition. Counsel also noted that narcotic medications were prescribed and approved by OWCP.

By decision dated September 5, 2018, OWCP denied modification of the June 7, 2017, decision.

On September 3, 2019 appellant through counsel, requested reconsideration.

Dr. Vyas continued to treat appellant and submitted reports from April 5 to November 19, 2019. The reports repeated his previous findings that appellant had continued back pain, which was worsening. Dr. Vyas examined appellant and diagnosed low back pain which was discogenic in origin, lumbosacral radiculopathy, right greater than left, multi-level spinal stenosis, worse at L2-3 and L3-4 levels, lumbar facet arthropathy with spondylosis, worse at L3-4 to L5-S1, right greater than left; sacroilitis, right greater than left, low back pain, myofascial in origin, status post two lumbar spinal surgeries, to include an anterior lumbar fusion, history of long-term use of opioid with dependency, comorbid conditions to include noninsulin-dependent diabetes mellitus, hypertension, depression, and diabetic neuropathy. He recommended continued

treatment for depression and hypertension. Dr. Vyas indicated that, due to the fact that appellant was on controlled substances and opioid medications, appellant would be monitored.

By decision dated December 11, 2019, OWCP denied modification of the September 5, 2018 decision. It found that the weight of the medical evidence rested with Dr. Doman, the second opinion physician.

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

Once OWCP accepts a claim and pays compensation, it bears the burden of proof to justify termination or modification of benefits.<sup>4</sup> It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>5</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

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

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective July 15, 2016.

Dr. Doman's opinion is conclusory in nature and does not contain sufficient medical reasoning to establish that appellant is no longer disabled from work due to his accepted January 29, 2002 employment injury.<sup>7</sup>

Dr. Doman opined in his March 24, 2016 report that appellant could perform the duties of his date-of-injury job and was capable of returning to his regular job as a truck driver. He noted that appellant continued to have complaints of back pain and was taking chronic narcotic pain medication. Dr. Doman indicated, however, that appellant's complaints were due to intentional gross symptom magnification. In this regard he related that appellant had complaints of severe pain with mild axial compression over the shoulders as well as light pressure over the subcutaneous tissue, pain with any range of motion of the lumbar spine, and complaints of severe back pain with simple attempts to flex his knees while in the prone position. Dr. Doman opined that there were no objective findings that substantiated any ongoing orthopedic etiology to appellant's complaints and that there were "numerous findings during the physical examination which lead this examiner to conclude in the strongest possible way that [appellant] is malingering." However, he did not explain the "numerous" findings which would substantiate that appellant was malingering.

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<sup>4</sup> See *J.O.*, Docket No. 19-0850 (issued October 22, 2020); *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>5</sup> *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

<sup>6</sup> *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

<sup>7</sup> See *A.C.*, Docket No. 19-1522 (issued July 27, 2020); *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *S.B.*, Docket No. 18-0700 (issued January 9, 2019); *S.J.*, Docket No. 17-0543 (issued August 1, 2017).

Furthermore, while Dr. Doman referred to x-ray and electromyography findings, he did not specifically address the MRI scan diagnostic studies of record at the time of his evaluation which ostensibly provided evidence of objective lumbar findings.

Moreover, while Dr. Doman concluded that appellant's original disability had fully resolved and appellant was fully capable of returning to his duties as a truck driver without restrictions, he acknowledged that appellant remained on narcotic medications. He did not explain how appellant would be able to perform his duties as a truck driver while on narcotic medication. As such, Dr. Doman's report was insufficient to establish that appellant was no longer disabled from working his date-of-injury position.<sup>8</sup>

As the medical evidence of record is insufficient to establish that appellant no longer has disability causally related to his accepted January 29, 2002 employment injury, the Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits.<sup>9</sup>

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective July 15, 2016.<sup>10</sup>

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<sup>8</sup> See *D.A.*, Docket No. 18-0476 (issued October 10, 2018).

<sup>9</sup> See *D.W.*, Docket No. 18-0123 (issued October 4, 2018); *Willa M. Frazier*, 55 ECAB 379 (2004).

<sup>10</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot. The Board also notes that OWCP has not issued a final decision regarding appellant's request to expand acceptance of his claim to include depression.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 11, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 4, 2021  
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board