United States Department of Labor
Employees' Compensation Appeals Board

JAMES R. ESTRADA, Appellant	)	
and	)	**Docket No. 04-1268**
	)	**Issued: November 10, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Toledo, OH, Employer	)	

Appearances:
Terrance L. Farris, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 6, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 11, 2004 and November 24, 2003 merit decisions. Under 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 appellant has established that he sustained an injury to his lower back while in the performance of duty on July 25, 2001; (2) whether appellant sustained a recurrence of disability as of July 25, 2001 causally related to his accepted employment injuries; and (3) whether the Office abused its discretion by denying appellant authorization for back surgery.

FACTUAL HISTORY

This is the second appeal before the Board. On August 19, 1987 appellant, a 31-year-old clerk, filed a claim for benefits, alleging that he sustained an injury to his lower back on

August 19, 1987. The Office accepted the claim for lower back strain. By decision dated March 9, 1990, the Office reduced appellant's compensation based on his wage-earning capacity as a personnel worker. An Office hearing representative affirmed the March 9, 1990 decision by decision dated January 2, 1992. In a March 23, 1994 decision,[1] the Board reversed the Office's decisions and reinstated appellant's compensation. The Office subsequently accepted the conditions of chronic pain syndrome and aggravation of degenerative disc disease at L5-S1. Appellant returned to light duty as a modified general clerk on July 8, 1999.

On July 30, 2001 appellant filed a claim for benefits based on traumatic injury, alleging that he sustained an injury to his lower back while pushing a heavy mail cart on July 25, 2001. Appellant submitted a treatment note dated July 26, 2001 from Dr. William D. Richardson, Board-certified in internal medicine, who stated:

> "[Appellant] is unable to work due to acute flare up of chronic back pain that is musculoskeletal in nature."

In an August 23, 2001 report, Dr. Jonathan A. Gold, a Board-certified neurological surgeon, stated that appellant had sustained back and leg pain from a work injury which occurred in July when he was pushing a mail cart. He opined that pushing the cart resulted in a reexacerbation of his back and right leg pain. Dr. Gold recommended that appellant undergo an L5-S1 hemilaminectomy.

In a report dated September 20, 2001, Dr. Richardson stated that appellant's low back condition could be exacerbated by very minimal activity such as standing, bending, pushing, coughing, and many other seemingly incidental mild activities. He stated:

> "When a patient with chronic pain, such as [appellant] experiences an increase in pain levels, we give the patient instruction to take extra precautions such as temporarily avoiding any physical activity, applying heat and ice, taking medications, and resting until the pain levels decrease. Because of the circumstances of the situation, [appellant] states that he reluctantly agreed to push the cart before seeing the nurse against his better judgment, fearing a reprimand. According to his report, his back pain increased significantly and he developed further symptoms and disability afterward. As noted in my previous narrative, a magnetic resonance imaging [MRI] scan was done on August 8 that showed degenerative disc disease at the L5[-]S1 level with posterior protrusion more on the right than left which abuts the S1 nerve root within the canal and latter recess, perhaps slightly displacing it posteriorly and therefore perhaps causing [appellant] symptoms."

By letter dated October 2, 2001, the Office requested a supplemental report from Dr. Richardson, asking him to address the objective findings in correlation with the mechanism of injury. The Office specifically asked Dr. Richardson to evaluate whether appellant had an objective diagnosed condition that was caused, aggravated, accelerated or precipitated by the

[1] Docket No. 93-799 (issued March 23, 1994).

July 25, 2001 work incident, in addition to MRI scan findings from August 12, 1998 and August 8, 2001. The Office also asked Dr. Richardson to state whether these findings represented the natural progression of the underlying disease; *i.e.*, whether his current condition and complaints would have been the same regardless of the July 25, 2001 work incident.

Dr. Richardson submitted a handwritten October 2, 2001 report in which he stated:

> "The diagnosed condition that resulted from the incident of July 25, 2001 is protrusion of the disc placing pressure on the sacral nerve roots causing urinary incontinence because of dysfunction of the external urethral sphincter muscles. The findings represent the result of the extra physical effort at the time of the incident occurring on July 25, 2001 based on the patient's complaints that were primarily reported indicating the development of urinary incontinence. The increased pain and disability that [appellant] experienced were due to increased inflammation of the back muscles due to acute strain and spasms of the muscles. I believe he would have pain, but not as severe and not as disabling and could not have [caused] the urinary incontinence if the incident of July 25 had not occurred."

In a report dated December 18, 2001, Dr. Kenneth Zehnder, a Board-certified orthopedic surgeon, advised that appellant had reinjured his back pushing his cart at work on July 25, 2001. He stated that most of appellant's pain was in the lumbar spine and radiated down both his legs, especially the right, which radiated from his buttocks to the anterior knee to the great toe. Dr. Zehnder related that appellant had various episodes of numbness in the legs and was complaining of occasional incontinence of urine and bowels. He noted that an MRI scan appellant underwent in August had revealed moderate degenerative disc disease at L5-S1 with posterior protrusions, greater on the right. Dr. Zehnder concurred with Dr. Gold's recommendation to perform a hemilaminectomy of L5-S1 and agreed that appellant was a good surgical candidate.

The Office referred appellant for a second opinion examination with Dr. Edwin S. Carter, a Board-certified orthopedic surgeon. In a report dated May 29, 2002, Dr. Carter advised that there were no objective findings to suggest that appellant sustained a back injury on July 25, 2001. He advised that, while appellant could have had some mild back strain at that time, his symptoms were the same after as before that episode and there was no objective evidence that he had any injury at that time. Dr. Carter stated that appellant's subjective complaints did not correlate with the objective findings; appellant had no findings to suggest herniated disc or any severe injury. He advised that appellant did have spondylolysis but this was developmental and was in no way related to a single episode of injury.

Dr. Carter further opined that back surgery was not necessitated by the July 25, 2001 injury or the August 20, 1987 work injury. He advised that appellant's back condition would have progressed to its present level with or without the July 25, 2001 or August 20, 1987 work injuries. Dr. Carter concluded that there was no real evidence anywhere of a significant pathologic condition related to an injury, especially July 25, 2001, to suggest that surgery would be worthwhile.

By decision dated June 25, 2002, the Office denied appellant's claim for benefits based on traumatic injury, finding that he failed to submit sufficient medical evidence in support of his claim.

On July 18, 2002 appellant filed a notice of recurrence, alleging that on July 25, 2001, he sustained a recurrence of his August 20, 1987 injury. In a July 18, 2002 letter to the Branch of Hearings and Review, appellant contested the Office's refusal to grant him compensation for his total disability and stated that several physicians who examined him had recommended that he undergo back surgery.

Dr. Richardson completed a July 23, 2002 Form CA-20 in which he stated that appellant had injured his back while pushing a cart and had sustained low back pain and a herniated disc at L5-S1 based on an MRI scan. He checked a box indicating that he believed these conditions were caused or aggravated by an employment activity; *i.e.*, pushing a heavy cart, and stated that this activity had aggravated his preexisting low back condition stemming from his 1987 accepted work injury. In a report dated October 17, 2002, Dr. Richardson advised that appellant had initially been injured in 1987. He stated:

> "After the first injury [appellant] was given a course of therapy including physical therapy, facet blocks, and medication. There was an increase in pain and disability reported on July 26, 2001, which he indicated occurred after pushing a cart of mail that he estimated weighed about 60 pounds on July 25, 2001. He also noted a loss of control of urine and stool in addition to the increase of pain and disability. [Appellant] did not respond to physical therapy and medications and was referred to a neurosurgeon and surgery was recommended and finally done in August 2002, when he had an L5-S1 hemilaminectomy. Following surgery he continued to have back pain with radiation into the lower extremities particularly the right leg."

Dr. Richardson stated that appellant underwent surgery on August 20, 2002 for central herniated disc at the L5-S1 level with impingement on the S1 nerve root. He advised that this surgery was performed on the basis of a repeat MRI scan of the lumbar spine dated August 8, 2001 which showed degenerative disc disease at the L5-S1 level with disc herniation primarily on the right. Dr. Richardson related complaints of chronic musculoskeletal pain involving the low back and lower extremities, mostly on the right. He stated that appellant continued to be totally disabled for work due to his accepted, work-related condition.

By decision dated December 19, 2002, the Office denied the recurrence of disability claim. The Office found that appellant failed to submit medical evidence sufficient to establish that the claimed condition or disability as of July 25, 2001 was caused or aggravated by his accepted injuries.

By letter dated January 20, 2003, appellant requested an oral hearing, which was held on August 20, 2003.

By decision dated November 12, 2003, an Office hearing representative affirmed the June 25 and December 19, 2002 Office decisions. The hearing representative also denied appellant's request to authorize back surgery.

By letter dated February 10, 2004, appellant's attorney requested reconsideration. Appellant submitted a December 29, 2003 report from Dr. Richardson, who stated findings on examination, outlined work restrictions for appellant which he opined were due to "recurrent back pain" and essentially reiterated many of his previous findings and conclusions. Dr. Richardson also cited texts from medical literature pertaining to chronic musculoskeletal pain. He described a scenario, taken from one of these texts, which he considered similar to that experienced by appellant, and stated:

> "The patient developed irritation of the involved muscles due to a number of triggers such as physical trauma, immobilization, emotional tension and/or irritation. This led to increased pain and muscle tension. The tightening of the muscle produced decreased circulation in that area, swelling and retention of irritating metabolites such as lactic acid and histamines, this led to further inflammation. There were many episodes of inflammation which led to microscopic fibrous reactions which led to limited muscle elongation, restricted joint movement, tendon function limitation and fascial shortening which then created increasing functional disability. It would appear that this is the situation in [appellant's] case. This began at the time of the original injury in 1987 and has continued through the years and is continuing now. The episode on July 25, 2001 appeared to be a major episode, causing a marked increase in inflammation, muscle dysfunction, pain and disability.
>
> "Another conclusion reached as a result of the episode on July 25, 2001 is that in my opinion [appellant] is no longer an employable individual and therefore is totally and permanently disabled. Prior to this episode [appellant] seemed to be able to carry out his responsibilities by pacing himself and avoiding strenuous activity when his back was 'acting up.' His restrictions would have to be increased to the point where he would not be able to carry out the responsibilities that his work would entail. And therefore I feel he is unemployable. His symptoms were not resolved after the July 25 episode. His symptoms were in fact increased. He was increasingly unable to carry out physical activities."
>
> Dr. Richardson stated, based on the above scenario:
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> "The fact that [appellant] is now able to do less and less physically in association with the above findings suggests that he has experienced continuing injuries over the years and following the incident on July 25 the findings on the MRI [scan] and at surgery and the nerve conduction studies plus the physical finding and the decrease in physical activity strongly indicate that this was the 'straw that broke the camel's back' in appellant's case."

By decision dated March 11, 2004, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing that the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[5] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[6] The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized 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.[7]

ANALYSIS -- ISSUE 1

The Office accepted that appellant experienced the employment incident at the time, place and in the manner alleged. However, there is disagreement between Dr. Richardson, the attending physician, and Dr. Carter, the referral physician, regarding whether appellant's alleged lumbar sprain, herniated disc at L5-S1 and urinary incontinence conditions were causally related to this incident. In his September 20, 2001 report, Dr. Richardson stated findings on examination and related appellant's history of injury. He advised that appellant's preexisting low

[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] *John J. Carlone*, 41 ECAB 354 (1989).

[6] *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(a)(14).

[7] *Id.*

back condition could be exacerbated by activities like standing, bending, pushing, coughing and other moderate physical activities. He stated that appellant's back pain increased significantly after the July 25, 2001 work incident, with appellant developing further symptoms and disability. In addition, Dr. Richardson related that an MRI scan showed degenerative disc disease at the L5-S1 level with primarily right-sided, posterior protrusion. Dr. Richardson stated in his October 2, 2001 report that appellant had a diagnosed condition of protrusion of the disc placing pressure on the sacral nerve roots, which caused urinary incontinence because of dysfunction of the external urethral sphincter muscles. He stated that this condition resulted from the July 25, 2001 work incident. Dr. Richardson further stated that these findings of injury were caused by the extra physical effort appellant exerted at the time the July 25, 2001 incident occurred, consistent with appellant's complaints. He opined that the increased pain and disability that appellant experienced were due to increased inflammation of the back muscles due to acute strain and spasms of the muscles. Dr. Richardson concluded that appellant would have experienced pain had the July 25, 2001 incident not occurred, but it would not have been as severe and disabling and could not have caused his urinary incontinence.[8]

In a report dated May 29, 2002, Dr. Carter advised that there were no objective findings to suggest that appellant sustained a back injury on July 25, 2001. He stated that, although appellant could have sustained a mild back strain at that time, his symptoms were the same as before the incident and that appellant's back condition would have progressed to its present level whether or not he experienced a mild back strain on July 25, 2001. Dr. Carter concluded, in any case, that there was no objective evidence appellant had sustained a disabling injury on that date. He opined that appellant's subjective complaints did not correlate with the objective findings and advised that he had no findings to suggest herniated disc or any other severe injury. Dr. Carter advised that appellant did have spondylolysis but this was developmental and was in no way related to a single episode of injury.

When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."[9] It was therefore incumbent upon the Office to refer the case to a properly selected impartial medical examiner, using the Office procedures, to resolve the existing conflict. Accordingly, as the Office did not refer the case to an impartial medical examiner, there remains an unresolved conflict in medical opinion.

In order to resolve the conflict of medical opinion, the Office should, pursuant to 5 U.S.C. § 8123(a), refer appellant, the case record, a statement of accepted facts to an appropriate, impartial medical specialist or specialists for a reasoned opinion to resolve the

[8] In its June 25, 2002 decision, the Office rejected Dr. Richardson's October 2, 2001 report because "he did not provide an explanation of the MRI [scan] findings" and stated that appellant "would have pain irrespective of the July 25, 2001 work incident." These were not sufficient reasons to reject Dr. Richardson's report, as he provided a probative, rationalized medical report which included a diagnosed condition, a description of how the condition was causally related to the work incident and the process by which a work-related injury could have occurred based on appellant's history.

[9] Section 8123(a) of the Act provides in pertinent part, "[i]f there is a 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." *See Dallas E. Mopps*, 44 ECAB 454 (1993).

aforementioned conflict regarding whether appellant has established that on July 25, 2001, he sustained an injury in the performance of duty. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[10]

LEGAL PRECEDENT -- ISSUE 2

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[11]

ANALYSIS -- ISSUE 2

In the instant case, the record does not contain any medical opinion showing a change in the nature and extent of appellant's injury-related conditions. Indeed, appellant has failed to submit any medical opinion containing a rationalized, probative report which relates his condition or disability as of July 25, 2001 to his 1987 employment injury. The medical reports post July 25, 2001 relate appellant's worsened condition to new trauma, not a spontaneous recurrence of appellant's 1987 condition. For this reason, he has not discharged his burden of proof to establish his claim that he sustained a recurrence of disability as a result of his accepted employment injury.

The only medical evidence which appellant submitted consisted of the reports from Drs. Richardson, Zehnder and Gold. The weight of the medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.[12] Dr. Richardson's reports provided a history of injury and a diagnosis of his current condition and indicated generally that appellant complained of disabling pain as of July 25, 2001, but did not constitute a probative, rationalized medical opinion sufficient to establish that appellant's disability as of July 25, 2001, was causally related to his low back strain, chronic pain syndrome and aggravation of degenerative disc disease at L5-S1. The July 23, 2002 form report from Dr. Richardson which provided a checkmark in support of causal relationship is insufficient to establish the claim. The Board has held that without further explanation or rationale, a checked box is insufficient to establish causation.[13]

[10] *Aubrey Belnavis*, 37 ECAB 206 (1985).

[11] *Terry Hedman*, 38 ECAB 222 (1986).

[12] *See Ann C. Leanza*, 48 ECAB 115 (1996).

[13] *Debra S. King*, 44 ECAB 203 (1992); *Salvatore Dante Roscello*, 31 ECAB 247 (1979).

Dr. Richardson stated in several reports that appellant had degenerative disc disease at the L5-S1 level with disc herniation primarily on the right and opined that appellant continued to be totally disabled for work due to his accepted, work-related condition. He indicated in his December 29, 2003 report that appellant's condition would not have worsened to the extent that it did if not for the occurrence of the July 25, 2001 work incident. Dr. Richardson advised that appellant could not have experienced the level of increased pain and muscle tension he did but for the trauma he underwent while pushing the cart on that date. He further stated that the July 25, 2001 work incident was "the straw that broke the camel's back." Dr. Richardson, however, did not explain the medical process through which any of appellant's accepted conditions would have been competent to cause the alleged recurrence of disability, nor did he indicate how appellant's pain symptoms as of July 25, 2001 were causally related to his accepted employment conditions. Dr. Richardson's opinion, therefore, is of limited probative value as it does not contain any medical rationale explaining how or why appellant's accepted conditions are causally related to his alleged recurrence of disability.[14] Drs. Gold and Zehnder stated summarily in their reports that pushing the cart on July 23, 2001 resulted in a reexacerbation of appellant's back and right leg pain and recommended that appellant undergo a hemilaminectomy at L5-S1. Neither Dr. Gold nor Dr. Zehner, however, related appellant's accepted conditions to his alleged recurrence of disability on July 25, 2001 with probative, rationalized medical evidence.

The reports from Drs. Richardson, Gold and Zehner do not constitute sufficient medical evidence demonstrating a causal connection between appellant's employment-related conditions and his alleged recurrence of disability. Causal relationship must be established by rationalized medical opinion evidence. The reports submitted by appellant failed to provide an explanation in support of his claim that he was totally disabled as of July 25, 2001. Thus, these reports did not establish a worsening of appellant's condition, and therefore do not constitute a probative, rationalized evidence demonstrating that a change occurred in the nature and extent of the injury-related condition.[15]

In addition, the Board finds that the evidence fails to establish that there was a change in the nature and extent of appellant's limited-duty assignment such that he no longer was physically able to perform the requirements of his light-duty job. The record demonstrates that appellant returned to work on July 8, 1999. Although appellant stopped working on July 25, 2001, he has submitted no factual evidence to support a claim that a change occurred in the nature and extent of his limited-duty assignment during the period claimed. Accordingly, as appellant has not submitted any factual or medical evidence supporting his claim that he was totally disabled from performing his light-duty assignment on July 25, 2001 as a result of his employment, appellant failed to meet his burden of proof. Thus, the Office properly found in its

[14] *William C. Thomas*, 45 ECAB 591 (1994).

[15] *Id*.

December 19, 2002, November 12, 2003 and March 11, 2004 decisions that appellant was not entitled to compensation based on a recurrence of his employment-related disability.[16]

As appellant has not submitted sufficient medical evidence to establish that the claimed condition and disability as of July 25, 2001 was caused or aggravated by his employment injury, appellant has not met his burden of proof in establishing that he sustained a recurrence of disability. The Board therefore affirms the March 11, 2004 Office decision affirming the November 12, 2003 denial of compensation based on a recurrence of his work-related disability.

LEGAL PRECEDENT -- ISSUE 3

Section 8103 of the Act[17] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[18] In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[19]

ANALYSIS -- ISSUE 3

In this case, the Office accepted that appellant had sustained the conditions of lower back strain, chronic pain syndrome and aggravation of degenerative disc disease at L5-S1 as a result of his 1987 employment injury. Dr. Gold stated in his August 23, 2001 report that appellant had sustained back and leg pain stemming from a July 25, 2001 work injury while he was pushing a mail cart. He advised that pushing the cart resulted in a reexacerbation of appellant's back and

[16] The Board notes that the Office improperly considered appellant's July 18, 2002 claim as a separate claim for recurrence of disability as of June 25, 2001 after denying his claim for a new, traumatic injury occurring on June 25, 2001 in its June 25, 2002 decision. If appellant is claiming a new employment incident caused a new injury, a CA-2a is not the appropriate form to file. A recurrence of disability includes a work stoppage caused by a spontaneous material change in the employment-related condition without an intervening injury. If the disability results from new exposure to work factors, an appropriate new claim should be filed; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3 (January 1995). Nevertheless, as the Office considered both claims separately and issued decisions pertaining to both claims, the Board has considered each claim in its turn. Any error resulting from the Office's separate considerations of the July 25, 2001 work incident is therefore harmless.

[17] 5 U.S.C. § 8101 *et seq*.

[18] 5 U.S.C. § 8103.

[19] *Daniel J. Perea*, 42 ECAB 214 (1990).

right leg pain and recommended that appellant undergo an L5-S1 hemilaminectomy. Appellant was referred to Dr. Zehnder, who stated in his December 18, 2001 report that an August 2001 MRI scan indicated moderate degenerative disc disease at L5-S1 with posterior protrusions, greater on the right. He concurred with Dr. Gold's recommendation to perform a hemilaminectomy of L5-S1 and opined that appellant was a good surgical candidate. However, Dr. Carter, the second opinion physician, stated in his May 29, 2002 report that back surgery was not necessitated by either the July 25, 2001 injury or the August 20, 1987 work injury. He opined that there was no real evidence anywhere of a significant pathologic condition related to an injury, especially one which allegedly had occurred on July 25, 2001, to suggest that surgery would benefit appellant. By decision dated June 25, 2002, the Office denied authorization for surgery because it was being proposed to repair a nonaccepted condition. Appellant underwent an L5-S1 hemilaminectomy on August 20, 2002. The Office affirmed the denial of authorization for surgery on December 19, 2002, November 12, 2003 and March 11, 2004, finding that appellant's surgery was not causally related to the accepted lower back strain, chronic pain syndrome and aggravation of degenerative disc disease at L5-S1 conditions and was not required to correct these accepted conditions, it did not constitute treatment for an accepted condition.

As the Board now finds that a conflict exists in the medical opinion evidence as to whether appellant also sustained a work-related back injury on July 25, 2001, the issue of whether appellant's L5-S1 hemilaminectomy was necessitated by this alleged injury is not in posture for decision. On remand, the impartial medical specialist shall also address whether appellant's hemilaminectomy was necessitated by an employment injury.

CONCLUSION

The Board sets aside the November 12, 2003 decision and the case is remanded to the Office for referral to an impartial medical specialist to resolve the conflict in medical evidence regarding whether appellant sustained an injury to his lower back in the performance of duty on July 25, 2001, which required back surgery. The Board finds that appellant has failed to establish that he sustained a recurrence of disability on July 25, 2001.

ORDER

IT IS HEREBY ORDERED THAT the November 12, 2003 decision is set aside and remanded for reconsideration of whether appellant sustained an injury on July 25, 2001 which required back surgery, and that the March 11, 2004 and November 12, 2003 decisions of the Office of Workers' Compensation Programs be affirmed in all other respects.

Issued: November 10, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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