



and accepted a lumbar disc herniation. Appellant lost no time from work and returned to full-time duty as an air traffic controller. On May 15, 2002 he filed a traumatic injury claim alleging that he sustained injuries to his back on May 15, 2002 when he slipped on a wet floor. There is no indication that appellant stopped work. The Office assigned this case claim number A9-092024437 and accepted the condition of radiculopathy. The Office subsequently consolidated appellant's claims under claim number A9-092024437.<sup>1</sup>

On June 17, 2002 appellant filed a claim for recurrence of total disability commencing June 17, 2002, due to an alleged worsening of his back condition. The record reflects that appellant was placed in an administrative position October 2002, as the medical clearance needed for his air traffic controller position had been temporarily suspended.<sup>2</sup> Appellant returned to work in an administrative capacity on October 22, 2002. He claimed wage-loss compensation from June 17 to November 7, 2002.

Appellant alleged that he was incapable of working on June 17, 2002 as he realized his May 3, 2001 injury was a worsening problem. He stated that his supervisor counseled him on June 14, 2002 regarding his job performance and alleged that his May 3, 2001 injury had caused a negative impact on his job performance. Appellant noted that, before the claimed recurrence of June 17, 2002, he had reinjured his back three times. The first incident involved a November 2001 nonwork-related injury which occurred when he lost his balance while standing on bleachers during a football game. The second incident involved the May 15, 2002 work-related slip and fall. The third incident involved an October 3, 2002 nonwork-related injury which occurred when he was ejected while riding a lawn mover.

Appellant submitted reports from Dr. Susan Dukar, a Board-certified family practitioner. In a July 23, 2002 attending physician's report (Form CA-20), she diagnosed chronic lower back pain and opined with a check mark "yes" that the condition was causally related to a fall at work. In an August 22, 2002 report, Dr. Dukar noted appellant's history of back injuries, both work and nonwork related and opined that his chronic low back pain was due to recurrent injury without any obvious surgically correctable lesion. In an August 27, 2002 duty status report, she opined that appellant was totally disabled from June 17, 2002 onward as his air traffic control duties would be restricted by the prescribed medications. In a September 11, 2002 report, Dr. Dukar opined that the diagnosis of lumbar disc herniation with nerve compression and resultant chronic lower back pain and emotional components (anxiety and depression) arose directly out of the injuries appellant sustained on May 3, 2001 and May 15, 2002.

Appellant also submitted diagnostic testing and medical reports from Dr. Mark A. Cobb, a Board-certified neurosurgeon. In a July 25, 2002 report, he noted that the onset of appellant's symptoms occurred approximately one year earlier when a handrail gave way and he fell several steps forward. Dr. Cobb advised that appellant had low back pain with radiation to the buttocks bilaterally and occasionally radiation to the posterior leg on the right with no associated motor

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<sup>1</sup> The record additionally reflects that appellant has an emotional condition claim with a date of injury of August 27, 2003 under claim number A9-20380116.

<sup>2</sup> The employing establishment noted that, for the period October 6 to 19, 2002, there were no administrative duties available for appellant, whose medical clearance had been temporarily suspended.

sensory or reflex changes. He noted that x-rays provided no explanation for appellant's symptoms. Dr. Cobb opined that post-traumatic essentially nonradiating pain was notoriously difficult to elucidate. On August 7, 2002 he reported the results of additional objective testing and opined that overall there was no abnormal movement or structure. Dr. Cobb stated that he was unable to determine the etiology of appellant's back pain symptoms.

By letter dated October 9, 2002, the Office requested further information from Dr. Dukar with regard to appellant's disability from work commencing June 17, 2002.

The Office referred appellant for a second opinion evaluation with Dr. James M. Donley, a Board-certified orthopedic surgeon, on whether his 2002 disability was related to the 2001 fall.

On October 14, 2002 the Office received a response from Dr. Dukar, who opined that appellant had radiculopathy due to a disc herniation, but she did not know whether it arose from the May 3, 2001 or the May 15, 2002 injury. She opined that his multiple injuries to his back resulted in a worsening of his chronic back pain and probably resulted in his work stoppage on June 17, 2002. Dr. Dukar additionally stated that appellant's anxiety and depression were a result of his chronic pain and the uncertainty of his career. On November 7, 2002 she advised that he was off all significant medications and could return to his regular work activities.

In a November 13, 2002 report, Dr. Donley noted appellant's history, set forth his examination findings and advised that his lumbar x-rays and magnetic imaging scans revealed degenerative changes at L5-S1 with no herniated discs. He advised that appellant had degenerative disc disease of the lumbar spine which preexisted the May 3, 2001 work injury and opined that the work injury had aggravated his condition. Dr. Donley stated that appellant's fractures of his lower left ribs from a fall on the bleachers had healed and were nonwork related. He stated that his degenerative disc disease was inactive and opined that he was capable of performing his regular work. Back mobilization, stabilization exercise program and physical therapy were recommended.

By decision dated December 20, 2002, the Office denied appellant's claim for a recurrence of disability for the period June 17 to November 7, 2002, on the basis that the medical evidence did not establish that his May 3, 2001 work injury caused a material worsening of his condition.

Appellant requested an oral hearing which was held February 24, 2004. With respect to the circumstances surrounding his work stoppage on June 17, 2002, appellant testified that he was counseled about safety-related issues due to his air traffic control performance on June 15, 2002. He stated that, when he realized that his work performance was being adversely impacted by his lack of sleep, he called in sick on June 17, 2002. Appellant submitted a March 8, 2004 report from Dr. Dukar in which she opined that appellant needed to remain off work from June 24 to November 7, 2002 for treatment of chronic sleep loss and chronic back pain due to the May 3, 2001 back injury. Dr. Dukar related that the various medications he had taken were sedating and restricted him from performing his duties as an air traffic controller. She stated that she released appellant to return to work on November 7, 2002 as his condition had improved.

By decision dated May 18, 2004, an Office hearing representative affirmed the Office's December 20, 2002 decision. The Office hearing representative found that appellant's decision to stop work on June 17, 2002 had little to do with his back condition, but more about his job performance. The Office hearing representative further found that the medical evidence of record did not contain a well-rationalized opinion supporting total disability from work for the period between June 17 to November 2002.

In a letter dated July 6, 2004, appellant requested reconsideration. He argued that the issue in the case was not a recurrence, that the Office misinterpreted the evidence and that he was misled as to the type of information required to meet his burden of proof. Appellant stated that he had pain and difficulty sleeping since his May 3, 2001 fall and that this affected his work performance. He submitted medical evidence and documents previously of record along with two excuse slips from Dr. Dukar dated June 24 and 27, 2002, which noted that he was undergoing medical testing for his back injury.

By decision dated September 15, 2004, the Office denied modification of the May 18, 2004 decision.

In a November 22, 2004 letter, appellant requested reconsideration of the September 15, 2004 decision. He argued that the Office should have accepted the condition of aggravation of his preexisting degenerative disc disease. Medical evidence previously of record was submitted.

By decision dated January 14, 2005, the Office denied modification of the September 15, 2004 decision.

In a January 27, 2005 letter, appellant requested reconsideration. He argued that the Office should have accepted an aggravation diagnosis and that the Office had the burden of proof. Appellant stated that he was able to work during the claimed period of June 17 to November 17, 2002, but was unaware that light duty was available for him. He also argued that he suffered residuals of his accepted work-related injury prior to his intervening injuries. Appellant submitted copies of Dr. Dukar's August 27, 2002 duty status report and physician notes from Dr. David Greer, a Board-certified family practitioner, dated November 4 and 16, 2001, concerning the nonwork-related event of November 2001 when he fell and hit his back on the bleachers during a football game.

By decision dated February 17, 2005, the Office denied appellant's request for reconsideration, finding that the evidence submitted were irrelevant, immaterial and repetitious to the issue for determination.

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

A recurrence of disability means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition, which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>3</sup> A claimant, for each period of disability claimed, has the burden of proving

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<sup>3</sup> 20 C.F.R. § 10.5(x).

by the preponderance of the reliable, probative and substantial evidence that he or she is disabled for work as a result of the employment injury. Whether a particular injury causes an employee to be disabled for employment and the duration of that disability, are medical issues which must be established by probative and substantial evidence.<sup>4</sup>

In order to establish that appellant's claimed recurrence of the condition was caused by the accepted injury, medical evidence of bridging symptoms between his present condition and the accepted injury must support the physician's conclusion of a causal relationship.<sup>5</sup> The Board has held that the mere belief that a condition was caused or aggravated by employment factors or incidents is insufficient to establish a causal relationship between the two.<sup>6</sup> The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>7</sup>

### ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbar disc herniation on May 3, 2001 and a radiculopathy on May 15, 2002. On June 17, 2002 appellant filed a recurrence claim alleging that he had loss of sleep due to his low back pain. He stated that he stopped work as he realized his condition was impacting his job performance. Appellant claimed lost time from work for the period of June 17 through November 7, 2002. Appellant has the burden of establishing that he sustained a recurrence of disability on or after June 17, 2002 causally related to his May 3, 2001 work injury.

Appellant has not submitted sufficient medical evidence to establish his claim. At the onset, the Board notes that he had at least two documented intervening back injuries since the May 3, 2001 injury which were sustained prior to the claimed recurrence injury on June 17, 2002.<sup>8</sup> The vast majority of Dr. Dukar's reports contain no discussion of the causal relationship, if any, between appellant's diagnosed conditions and the May 3, 2001 employment incident or contain only a check mark, without further explanation to indicate that such a causal relationship existed. The Board has held that a physician's form report which merely checks the box marked "yes" to the inquiry as to whether the condition for which treatment is rendered is causally related to the history of injury as given, is of diminished probative value as it constitutes a conclusion without the benefit of any medical rationale.<sup>9</sup> Moreover, medical conclusions

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<sup>4</sup> *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>5</sup> *See Ricky S. Storms*, 52 ECAB 349 (2001).

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

<sup>7</sup> *Fereidoon Kharabi*, *supra* note 4.

<sup>8</sup> One was the November 2001 injury when he lost his balance while standing on bleachers during a football game. The second injury was the May 15, 2002 work injury. The Board notes that the third injury on October 3, 2002 occurred after the claimed recurrence of June 17, 2002.

<sup>9</sup> *Barbara J. Williams*, 40 ECAB 649 (1989).

unsupported by rationale are of diminished probative value and are insufficient to establish causal relation.<sup>10</sup> Although Dr. Dukar opined in her reports of October 14, 2002 and March 8, 2004 that appellant's radiculopathy due to disc herniation arose from his employment injuries, she did not provide a complete factual and medical background or a reasoned opinion on the relationship between appellant's work stoppage and the employment injury and the effect of the intervening injuries. This is important given the fact that Dr. Dukar would need to explain how the May 3, 2001 injury caused a material worsening of his back condition without intervening cause. In his reports of July 25 and August 2, 2002, Dr. Cobb advised that appellant's post-traumatic essentially nonradiating pain was notoriously difficult to elucidate and that he was unable to determine the etiology of appellant's back pain symptoms. Moreover, he did not discuss his disability for work during the period claimed. Dr. Donley, the second opinion examiner, had an accurate history of injury, including appellant's intervening injuries and opined that the only diagnosis was his degenerative disc disease which he stated was currently inactive. Although he noted the May 3, 2001 employment injury had aggravated his preexisting degenerative disc disease, there is no reasoned medical opinion establishing that any disability for the claimed period was attributable to his accepted injuries.

The Board notes that appellant raised the issue of entitlement to benefits because of his emotional condition and inability to perform his regular duties because of the medication he was under. The record reflects that he was placed in an administrative capacity on October 22, 2002 because of his job performance. However, the Office did not issue a decision on the emotional aspect of this claim or otherwise address these issues. Therefore, this issue is not before the Board on the present appeal.

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

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>11</sup> the Office's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent evidence not previously considered by the Office.<sup>12</sup> Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2), will be denied by the Office without review of the merits of the claim.<sup>13</sup>

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<sup>10</sup> *Albert C. Brown*, 52 ECAB 152 (2000).

<sup>11</sup> 5 U.S.C. § 8128(a) (providing that [t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application).

<sup>12</sup> 20 C.F.R. § 10.606(b)(2).

<sup>13</sup> 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

## ANALYSIS -- ISSUE 2

In his January 27, 2005 reconsideration request, appellant stated that the Office should have approved an aggravation diagnosis and argued that it was the Office's burden of proof to terminate or modify compensation once a claim is accepted. He called into question the Office's development of his claim and asserted that the Office had misrepresented facts. Appellant also asserted that he was not aware that light-duty work was available during the claimed period of June 17 to November 17, 2002.

The Board finds that appellant has presented no new legal argument, nor has he shown that the Office misapplied the law. His arguments are repetitious of those previously considered and fail to show that the Office erroneously applied or interpreted a point of law or advance a point of law or fact not previously considered by the Office.<sup>14</sup> To the extent that any of his arguments are new, the Board notes that the underlying issue in this case involves whether appellant has established a recurrence of disability on or after June 17, 2002 causally related to his May 3, 2001 employment injury. As previously stated, an individual who claims a recurrence of disability due to an accepted employment injury has the burden of establishing the claim. Moreover, causal relationship is a medical issue and can be established only by medical evidence. Thus, appellant's contentions pertaining to the accepted diagnosis, the Office's development of the claim and the availability of alternative duty are insufficient to require the Office to conduct a merit review as they lack a reasonable color of validity are considered immaterial.<sup>15</sup>

Thus, appellant's request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Consequently, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, appellant must submit relevant and pertinent new evidence not previously considered by the Office. He has not submitted any new medical evidence to support that he sustained a recurrence of disability for the claimed period. Appellant also resubmitted medical evidence from Dr. Dukar which was previously of record. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>16</sup> The medical notes appellant submitted from Dr. Greer reported treating him for his nonwork-related incident of November 2001 but did not address the alleged recurrence of disability or causal relation for the period being claimed. The evidence submitted is, therefore, not considered relevant and pertinent evidence and is

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<sup>14</sup> See *Robert P. Mitchell*, 52 ECAB 116 (2000).

<sup>15</sup> See *Vincent Holmes*, 53 ECAB 468 (2002) (while the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity).

<sup>16</sup> *Roger W. Robinson*, 54 ECAB \_\_\_\_ (Docket No. 03-348, issued September 30, 2003).

insufficient to warrant further merit review.<sup>17</sup> Accordingly, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly refused to reopen his case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **CONCLUSION**

The Board finds that appellant did not submit sufficient evidence to establish a recurrence of disability on or after June 17, 2002. The Board further finds that the Office properly denied the January 27, 2005 request for reconsideration without merit review of the claim.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the nonmerit decision dated February 17, 2005 and the merit decisions of January 14, 2005 and September 15 and May 18, 2004 of the Office of Workers' Compensation Programs are affirmed.

Issued: November 22, 2005  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

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

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<sup>17</sup> *Kevin M. Fatzner*, 51 ECAB 407 (2000) (evidence that does not address the particular issue involved does not constitute a basis for reopening a case).