



paid appropriate compensation.<sup>1</sup> On October 16, 1988 appellant underwent a total laminectomy at the L4 level, inferior at L3, L4 and L4-5, interbody fusion at L3-4 and L4-5 with Steffee plates at L3-5 bilaterally, which the Office authorized. On September 26, 1988 the Office placed appellant on the periodic compensation rolls.

By decision dated May 6, 1992, the Office granted appellant a schedule award for a 36 percent permanent loss of use of the right leg. Following a period of rehabilitation services, appellant started working part time as a cashier effective May 17, 1993.

By decision dated October 25, 1993, the Office found that appellant's actual earnings in part-time employment as a cashier represented his wage-earning capacity and reduced appellant's compensation effective May 17, 1993.

On December 29, 2002 appellant was treated at an emergency room for an incipient cauda equina syndrome. On December 31, 2002 he underwent a total laminectomy at L1-2 with spinal cord decompression; removal of L1-2 intervertebral disc via far left lateral approach; complete facetomy L1-2 left, partial right; and microscopic repair of dural tear along left L2 nerve root sleeve. He was discharged on January 5, 2003 and rehospitalized from January 14 to 17, 2003 for evaluation. Appellant did not return to work. On June 29, 2004 the Office accepted the condition of intervertebral disc disorder with myelopathy.

On September 8, 2003 appellant filed a claim for a recurrence of disability commencing December 27, 2002. He submitted the December 31, 2002 operative report, diagnostic studies and consultations performed in regard to the December 31, 2002 surgery and hospital stay. Medical reports from Dr. Sharon Marselas, a neurosurgeon who treated appellant since the original work injury and who performed both the October 16, 1988 and December 31, 2002 surgeries, were provided. In a report dated May 1, 2003, Dr. Marselas released appellant to return to his usual work, four hours daily.

In a September 30, 2003 letter, the Office found that the evidence was insufficient to establish that his recurrence of disability as of December 27, 2002 was related to his original work injury or employment factors. The Office advised appellant of the definition of a recurrence and requested a rationalized medical report regarding how his back condition was causally related to the accepted injury.

In a statement dated October 24, 2003, appellant noted that he had no new injuries and advised that Dr. Marselas had sent medical documents on October 7, 2003. The Office did not receive any additional evidence from Dr. Marselas.

By decision dated November 17, 2003, the Office denied appellant's recurrence of disability claim. The Office found that there was insufficient medical opinion with a history of

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<sup>1</sup> The record reflects that appellant missed work intermittently from November 27, 1987 through September 20, 1988. On September 13, 1988 appellant filed a traumatic claim for a back injury, which he alleged was sustained when he fell out of chair while in the performance of duty. The Office accepted the September 13, 1988 claim for a back strain.

the original injury, current clinical findings, a firm diagnosis, addressing the relationship of appellant's current condition with the accepted work-related conditions.

In an April 5, 2004 letter, appellant requested reconsideration. In a February 22, 2004 report, Dr. George J. Mathews, a Board-certified neurosurgeon, stated that appellant's care was transferred to him after Dr. Marselas closed her practice on January 1, 2004. He noted appellant's history of a two-level lumbar fusion in October 1988, return to light-duty work and subsequent lumbar laminectomy decompression and discectomy in December 2002. Dr. Mathews diagnosed post-traumatic disc injury syndrome and status post lumbar fusion L2-3, L3-4 and status post L1-2 decompression and discectomy. He advised that the surgery at the L1-2 level was a level adjacent to the prior surgery and was prone to deterioration causally related to the alterations produced by the 1988 operation. Dr. Mathews opined that appellant's 2002 operation and current disability were causally related to the original injury of October 22, 1987, because it represented a deterioration of the adjacent spinal segment. He stated that it was well known that, in lumbar fusion where spinal segments are immobilized, the adjacent segments deteriorate and can become symptomatic due to the strains placed on them by the fusion surgery. Dr. Mathews opined that appellant's condition that resulted in the 2002 operation was an evolution of pathology resulting from the trauma and subsequent treatment of the 1987 work injury. He submitted progress reports detailing appellant's status. Dr. Mathews opined that appellant was totally disabled due to a flare-up of his chronic back pain syndrome and that various new conditions, such as impotence and a toe lesion were causally related to the work accident, for which he was being treated.<sup>2</sup>

Copies of Dr. Marselas' treatment notes from 2000 to 2003, were provided with a November 8, 2000 lumbar myelogram. Duplicate copies of the surgical records were submitted together with a May 19, 2004 electromyogram of the lower extremities and nerve conduction velocity studies.

By decision dated July 2, 2004, the Office denied modification of the November 17, 2003 decision. The Office found that, although the medical evidence clearly described clinical findings to support the surgical procedures at L1-2 on December 31, 2002, there was no reasoned medical evidence that described how appellant's accepted condition at L4-5 caused or precipitated the need for surgery on December 31, 2002.

On August 20, 2004 appellant requested reconsideration. In an August 4, 2004 report, Dr. Mathews stated that appellant had a lumbar fusion from L2 to L4 years earlier and later developed severe pain in the low back radiating into the hips and legs. He was found to have a disc herniation and spinal stenosis at L1-2. A laminectomy and discectomy was performed at this level on December 31, 2002. Dr. Mathews stated that the rationale for relating this condition to the initial accident of October 22, 1987 was based on the fact that, following lumbar fusion, there was a tendency for the level above and below the fusion to degenerate due to the additional strain placed on these discs. He stated that the strain was greater in a two-level fusion, as appellant originally underwent, because of the mechanics involved. He opined that the

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<sup>2</sup> The Board notes that, although Dr. Mathews requested authorization of medical treatment for these conditions, the Office never issued a decision on these matters. Accordingly, the Board does not have any jurisdiction over those matters.

degeneration which occurred above the initial level of fusion and the surgery required to correct such degeneration was causally related to appellant's accepted injury.

By decision dated September 17, 2004, the Office denied modification of the July 2, 2004 decision. The Office found that appellant failed to provide medical evidence that established his recurrence of disability on December 27, 2002 was causally related to his accepted injury.

Appellant requested reconsideration and also filed an appeal before the Board. On January 12, 2005 the Board issued an Order Dismissing Appeal as appellant advised that he wished to withdraw his appeal to pursue reconsideration before the Office.<sup>3</sup>

In a letter dated January 20, 2005, appellant requested reconsideration. In a November 20, 2004 report, Dr. Mathews again reviewed history and opined that it was a medically accepted fact that spinal levels above and below lumbar fusions degenerated and became symptomatic overtime. According to medial literature, this deterioration became symptomatic following initial fusion surgery. The reason for this was extra strain placed on the moving parts of the spine above and below the segments that were rendered nonmobile by the fusion process. He further stated that, when this happens, surgery has to be extended upwards or downwards, decompression and sometimes even an extension of the existing was indicated. Dr. Mathews opined that this happened to appellant. The fusions, being solid, caused the spinal level above to overwork and deteriorate, which then went onto a degenerative compression of the neural elements. This caused a recurrence of severe pain, which forced appellant to stop work and required Dr. Marselas to surgically decompress the spine. Dr. Mathews opined that appellant's condition in 2002 and resulted in surgery were causally related to the injury of October 22, 1987. Dr. Mathews submitted additional progress reports and objective studies of appellant's ongoing condition.

By decision dated April 22, 2005, the Office denied modification of the September 17, 2004 decision.

### **LEGAL PRECEDENT**

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>4</sup> If the disability results from new exposure to work factors, the legal chain of causation from the accepted injury is broken and an appropriate new claim should be filed.<sup>5</sup>

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

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<sup>3</sup> Docket No. 05-406 (issued January 12, 2005).

<sup>4</sup> 20 C.F.R. § 10.5(x).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3 (May 1997); *Donald T. Pippin*, 54 ECAB 531 (2003).

that light duty can be performed, has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, 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.<sup>6</sup> In order to establish that his 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>7</sup> While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.<sup>8</sup>

For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove such relationship.<sup>9</sup>

### ANALYSIS

The Office adjudicated the issue of whether appellant established a recurrence of disability for the period December 27, 2002 to May 1, 2003, when Dr. Marselas released him to return to his usual work, four hours daily. While appellant submitted several reports from Dr. Marselas, these reports are of limited probative value as she did not provide a reasoned opinion regarding whether appellant's back condition and disability beginning December 27, 2002 and the December 31, 2002 surgery were causally related to the October 22, 1987 employment injury.

Appellant also submitted reports dated February 22, August 4 and November 20, 2004 from Dr. Mathews, his current treating physician. He addressed the causal relationship between appellant's disabling conditions beginning December 27, 2002 and the resultant December 31, 2002 surgery to the accepted employment injury. Dr. Mathews opined that appellant's back condition which culminated with the 2002 operation was an evolution of degenerative pathology arising from the October 22, 1987 work injury. He stated that the 2002 surgery at the L1-2 level was one level above the initial spinal fusion of 1988. Dr. Mathews noted that it was medically accepted that levels above and below lumbar fusions were prone to deterioration and to become symptomatic overtime due to the extra stress caused by the surgery. He stated that as the fusions are solid, they cause the level above or below to overwork resulting in deterioration and eventual compressing of the neural elements. Dr. Mathews stated that this caused a recurrence of severe pain, which forced appellant to stop working and required the 2002 surgical decompression.

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature and, while the claimant has the burden to establish entitlement to compensation, the

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<sup>6</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>7</sup> *See Ricky S. Storms*, 52 ECAB 349 (2001).

<sup>8</sup> *Id.*

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

Office shares responsibility in the development of the evidence.<sup>10</sup> Dr. Mathews opined that the 2002 operation represented a deterioration of an adjacent segment one level above the fusion performed in 1988 and opined that appellant's 2002 operation was causally related to the accepted injury. He provided rationale in support of his opinion, concerning the nature and effect of fusions and alterations to spinal segments. Although Dr. Mathews failed to provide sufficient rationale to discharge appellant's burden of proving by the weight of the reliable, substantial and probative evidence that his recurrence of disability on December 27, 2002 and subsequent surgery were due to his October 22, 1987 employment injury, Dr. Mathews' reports raise an unconverted inference of causal relationship sufficient to require further development by the Office.<sup>11</sup> There is no opposing medical opinion of record.

The case will be remanded to the Office for further development of the medical evidence to determine whether appellant's disability of December 27, 2002 and subsequent surgery were due to his October 22, 1987 employment injury and, if so, the nature and extent of any disability resulting therefrom.<sup>12</sup>

### CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has established that he sustained a recurrence of disability for the period December 27, 2002 to May 1, 2003, causally related to his accepted work-related conditions.

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<sup>10</sup> *Allen C. Hundley*, 53 ECAB 551 (2002).

<sup>11</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>12</sup> The Board notes that this case is distinguished from Board cases finding that, following a formal wage-earning capacity determination, the Office must evaluate the evidence to determine if modification of wage-earning capacity is warranted. In this case, the Office is not precluded from adjudicating the issue of a limited period of employment-related disability, December 27, 2002 to May 1, 2003, without a formal modification of the wage-earning capacity determination. *Katherine T. Kreger*, 55 ECAB \_\_\_\_ (Docket No. 03-1765, issued August 13, 2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated April 22, 2005 and September 17, 2004 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 19, 2006  
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