



twisting, walking, standing and rising from a chair over the course of that day. She sought immediate treatment from Dr. Andre McShan, Board-certified in occupational medicine.

In a report dated December 4, 2006, Dr. McShan stated that appellant reported a one-day history of low back pain that began at work. He stated that her pain was possibly related to extended standing, bending and lifting. Appellant reported that she was performing her usual duties when she felt sharp pain in her right hip and lower back. She stated that she had a 10- to 20-year history of similar back complaints. Dr. McShan noted that her gait and lower extremity reflexes and sensation were normal. In the lumbar spine, he found tenderness on the right side and decreased extension and bilateral rotation with pain. Dr. McShan stated that an x-ray revealed degenerative changes, but no fractures. He diagnosed lumbar strain, prescribed medication and returned her to regular duty. On December 6, 2006 a physician's assistant, Carla Harris provided appellant with work restrictions. On December 13, 2006 Dr. McShan modified the work restrictions and added diagnoses of back pain and lumbar pain. From December 4, 2006 to January 26, 2007 appellant received conservative treatment through Dr. McShan.

On February 16, 2007 the Office notified appellant that the evidence she had submitted was insufficient to establish that her injury was related to her employment.

On March 9, 2007 appellant provided a written statement and several medical records. She stated that, on December 4, 2006, she was performing her usual duties, which included lifting packages, twisting at the mid-section of the back, bending and other physical activities. Over the course of the day, these actions aggravated her preexisting degenerative disc disease. She provided the February 24, 2006 report of Dr. Carrie Collins, an osteopathic physician, who stated that appellant had lumbar degenerative disc disease and osteoarthritis in both knees. Dr. Collins requested that appellant be provided with a job that allowed her to change positions frequently as her condition was worsened by prolonged standing. On December 4, 2006 Dr. McShan stated that appellant had a more than 10-year history of low back pain, which was presumably related to bending and lifting. He opined that appellant's condition was caused or aggravated by her employment because her multiple-years of physical activity led to the degenerative changes in her spine.

On February 5, 2007 appellant underwent a magnetic resonance imaging (MRI) scan of her lumbar spine. The study revealed a right lateral disc bulge with mild-to-moderate neural foramen narrowing at L4-5, broad-based disc bulge with mild neural foramen narrowing at L3-4 and mild to moderate disc desiccation from L3 to S1. On February 9, 2007 Dr. Francisco Caycedo, an orthopedic surgeon, reported that appellant was working as usual on December 4, 2006, when she began feeling pain in the hips and lower back. Appellant indicated that she had experienced back pain intermittently for 18 years. Dr. Caycedo noted that appellant's MRI scan showed multiple disc pathology with arthritic changes that showed the long duration of the problem. He diagnosed lumbar strain. Dr. Caycedo opined that appellant's spinal condition was not a work-related injury because he found no episode or injury that could be connected with her symptoms. On February 26, 2007 Dr. Claudio Bondulich, a Board-certified family practitioner, stated that appellant was under his care for lumbar degenerative disc disease. He recommended that appellant lift or push no more than 15 pounds and stand for no more than 30 minutes an hour.

By decision dated March 29, 2007, the Office denied appellant's claim. It accepted that she performed the work-related activities as alleged, but found that she had not established that her claimed condition was related to these events. Following this decision, the Office received copies of several medical and physical therapy reports that were already in the record.

On October 2, 2007 appellant filed a request for reconsideration. The request was not accompanied by new medical reports or new legal arguments.

By nonmerit decision dated October 17, 2007, the Office denied appellant's request for reconsideration on the grounds that she had presented no relevant and pertinent evidence not previously considered, advanced no relevant legal argument and demonstrated no error on the part of the Office in issuing its decision.

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

An employee seeking benefits under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing 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 filed within the applicable time limitation; that an injury was sustained while in the performance of duty; and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>2</sup>

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office must first determine whether "fact of injury" has been established. "Fact of injury" consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred. The second component of "fact of injury" is whether the incident caused a personal injury and, generally, this can be established only by medical evidence.<sup>3</sup>

When determining whether the implicated employment factors caused the claimant's diagnosed condition, the Office generally relies on the rationalized medical opinion of a physician.<sup>4</sup> To be rationalized, the opinion must be based on a complete factual and medical background of the claimant<sup>5</sup> and must be one of reasonable medical certainty,<sup>6</sup> explaining the

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Caroline Thomas*, 51 ECAB 451 (2000); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>3</sup> *Ellen L. Noble*, 55 ECAB 530 (2004).

<sup>4</sup> *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>5</sup> *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>6</sup> *John W. Montoya*, 54 ECAB 306 (2003).

nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>7</sup>

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

The Office accepted that appellant was bending, twisting and rising from seating while in the performance of duty on December 4, 2006. The issue to be resolved is whether she has established an injury causally related to these accepted activities.

The issue of causal relationship is medical in nature and must be resolved by probative medical evidence. On the day of the accepted employment events, appellant was seen by Dr. McShan, a Board-certified occupational physician, who reported that she had a 10 to 20 year history of lumbar pain. Dr. McShan stated that, on December 4, 2006, she developed sharp pains in her right hip and lower back that was possibly related to standing, bending and lifting at work. He noted that appellant's lower extremity movement, reflexes and sensation were normal, but that she had tenderness on the right side of the lumbar area, decreased lumbar extension and decreased bilateral rotation with pain. Dr. McShan stated that an x-ray of appellant's lumbar spine revealed degenerative changes. He diagnosed lumbar strain. On a physician's report form completed the same day, Dr. McShan made the additional diagnosis of degenerative joint disease. He stated that appellant's history of low back pain was presumably related to bending and lifting at work. Dr. McShan opined that her condition was caused or aggravated by her employment, because her years of physical activity had led to the degenerative changes in her spine.

The Board finds that the opinion of Dr. McShan is insufficient to establish that appellant's back condition is related to the accepted employment factors because it is speculative. Dr. McShan stated that appellant's lumbar strain was "possibly" related to her employment activities of standing, bending and lifting at work. The Board has held that medical opinions that are speculative or equivocal in character are of diminished probative value.<sup>8</sup> The Board also finds that the opinion Dr. McShan expressed on the physician's report was based on factors of appellant's employment that have not been accepted by the Office. Dr. McShan stated that several years of physical activity at work led to degenerative changes in appellant's spine. However, the Office has accepted only the work activities of December 4, 2006. Additionally, the Board notes that Dr. McShan did not provide rationale explaining how appellant's employment activities caused either the diagnosed strain or degenerative disc disease. The Board therefore finds that the reports of Dr. McShan are insufficient to establish an injury causally related to appellant's accepted employment events.

On February 9, 2007 Dr. Caycedo, an orthopedic surgeon, noted that appellant had experienced back pain intermittently for 18 years. He reported that she was performing her usual work duties on December 4, 2006 when she began feeling pain in the hips and lower back. Dr. Caycedo stated that an MRI scan conducted on February 5, 2007 showed multiple disc pathology with arthritic changes, which indicated the long duration of the problem. He opined

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<sup>7</sup> *Judy C. Rogers*, 54 ECAB 693 (2003).

<sup>8</sup> *D.D.*, 57 ECAB 734 (2006).

that appellant's lumbar strain was not a work-related injury because there was no episode or injury that could be connected with her symptoms. The Board finds that, on its face, this report does not support appellant's claim because Dr. Caycedo opined that appellant's condition was not work related.

On February 26, 2007 Dr. Bondulich, a Board-certified family practitioner, stated that appellant was under his care for lumbar degenerative disc disease and provided work restrictions. He did not offer an opinion as to the cause of appellant's condition. In the absence of this information, the Board finds that his opinion is of little probative value.<sup>9</sup>

The Board notes that the other medical reports in the record were completed by physician's assistants and physical therapists, who are not competent to render medical opinion under the Act as they are not considered physicians as defined under the Act.<sup>10</sup> Therefore, these reports are not probative under the Act.

The Board finds that appellant has not met her burden of proof to establish an injury causally related to the accepted employment events.

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

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits.<sup>11</sup> Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that: (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 new evidence not previously considered by the Office.<sup>12</sup> Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>13</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant met none of the regulatory requirements for a review of the merits of the Office's March 29, 2007 decision. Her October 2, 2007 request for reconsideration was not accompanied by any evidence or argument and the medical documents

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<sup>9</sup> See *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 474 (2006) ("Medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof.")

<sup>10</sup> *David P. Sawchuk*, 57 ECAB 316 (2006) (physical therapists are not "physicians"); *Roy L. Humphrey*, 57 ECAB 238 (2005) (physician's assistants are not "physicians" as defined under the Act).

<sup>11</sup> 5 U.S.C. § 8128(a).

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

<sup>13</sup> 20 C.F.R. § 10.608(b).

submitted after March 29, 2007 had already been previously considered. Therefore, appellant did not show that the Office erroneously applied or interpreted a specific point of law, did not advance any relevant legal arguments and did not present any relevant and pertinent new evidence. The Board finds that appellant is not entitled to further review on the merits of her case because she did not meet any of the requirements of section 10.606(b)(2).<sup>14</sup>

**CONCLUSION**

The Board finds that appellant has not established that she sustained a back injury in the performance of duty on December 4, 2006, as alleged. The Board further finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office Workers' Compensation Programs dated October 17 and March 29, 2007 are affirmed.

Issued: June 18, 2008  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>14</sup> 20 C.F.R. § 10.606(b)(2)(i)-(iii).