

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**R.H., Appellant**

**and**

**DEPARTMENT OF AGRICULTURE, FOREST  
SERVICE, Wenatchee, WA, Employer**

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**Docket No. 08-2488  
Issued: September 3, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 17, 2008 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated June 12, 2008. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant sustained a recurrence of disability due to his lower back condition as of December 22, 2004.

**FACTUAL HISTORY**

This is the second appeal before the Board. Appellant, a 65-year-old laborer, injured his head, lower back, right shoulder, right arm, left leg and right leg when he was knocked into a ditch on May 5, 2004. He filed a claim for benefits on May 10, 2004, which the Office accepted for right shoulder abrasion, right forearm contusion, left thigh contusion, right calf contusion, right knee abrasion, head contusion and lumbar strain. Appellant returned to work without restrictions on June 21, 2004.

On January 12, 2005 appellant filed a Form CA-7 claim for compensation for the period December 22, 2004 to January 22, 2005. Several reports dated December 22, 2004 from Dr. Douglas Burns, a Board-certified physiatrist, indicated that appellant was disabled from work due to low back and right leg pain.

By decision dated June 28, 2005, the Office denied appellant's claim for recurrence of disability, finding that he submitted insufficient medical evidence to establish that his disability was related to his accepted employment injury.

In order to determine appellant's current condition, the Office referred him to Dr. Joan Sullivan, a Board-certified orthopedic surgeon, for a second opinion examination. Appellant submitted reports dated March 24 and May 19, 2006. In her March 24, 2006 report, Dr. Sullivan advised that his work-related condition had not resolved, that he was totally disabled from performing full duty and that he was quite symptomatic and impaired. She stated that appellant's multilevel spondylosis had been aggravated by the accepted injury and that his possible L5 radiculopathy should be accepted as employment related. Dr. Sullivan asserted on May 19, 2006 that his lumbar spine injury was more than just a strain and was still symptomatic. She stated her opinion that appellant's preexisting spinal condition had been aggravated by the employment injury based on the fact that he was asymptomatic prior to the May 2004 work injury.

By decision dated September 7, 2006, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

In an August 21, 2007 decision,<sup>1</sup> the Board set aside the September 7, 2006 decision. The Board found that the Office erred in failing to review and consider Dr. Sullivan's reports, which constituted relevant evidence pertaining to the issue of whether there was a causal relationship between appellant's accepted May 2004 injuries and his claimed condition/disability as of December 22, 2004. The Board therefore remanded the case to the Office for a review of the merits of his claim and to specifically consider the reports of Dr. Sullivan which addressed the issues of disability and causation. The complete facts of this case are set forth in the Board's August 21, 2007 decision and are herein incorporated by reference.

The Office referred appellant, the case record and the statement of accepted facts to Dr. Chester S. McLaughlin, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated December 7, 2007, Dr. McLaughlin stated that more-probably-than-not appellant's current back condition was markedly aggravated by the injury of May 5, 2004. He advised that appellant's condition presently rendered him unable to perform the full scope of his usual work duties, and that his condition has worsened due to the May 2004 injury. Dr. McLaughlin stated that, while it is possible that appellant's age-related lumbar spondylosis might be a factor in his level of impairment, his disability was primarily due to his May 2004 employment injury. He based this opinion on the reduction in motion of the lumbar spine, perceived weakness of dorsiflexion of the left ankle and right great toe, and the reduction in intensity of the Achilles tendon reflexes may be a contributing factor.

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<sup>1</sup> Docket No. 07-487 (issued August 21, 2007).

In a supplemental report dated April 24, 2008, Dr. McLaughlin stated:

“It is my impression that [appellant] had preexistent lumbar spondylosis. To the best of my knowledge, this was asymptomatic prior to the industrial injury under study. Based on my experience, the industrial injury lighted up or aggravated the preexistent lumbar spondylosis.

“[Appellant] was pain free with regards to his low back until the injury of May 5, 2004. This is when he had the forceful impact to the left side when the bucket of a backhoe hit his hip region.”

The Office referred appellant to Dr. George R. Harper, Board-certified in orthopedic surgery, for an additional second opinion examination. In a May 21, 2008 report, Dr. Harper stated that there was no medical evidence in the record which noted a change in appellant’s condition beginning December 22, 2004 that rendered him unable to perform the full scope of his duties. He stated:

“[Appellant] currently has some disabilities that stem from residuals of his injury. These include subjective symptoms. However, there are no objective findings to suggest that the patient had objective worsening of his previous existing degenerative disc disease that prevents him from returning to his work.

“[Appellant] does have other significant disabilities. He has intermittent claudication in his lower extremities. [Appellant] has some peripheral neuropathies, etiology unknown. At age 70, with preexisting widespread degenerative arthritis in the lumbar spine, it seems likely the claimant could not presently return to the type of work that he was doing previously.”

Dr. Harper advised that appellant was still suffering from some residuals of his work injury. He stated, however, that he did not have any objective findings to substantiate his subjective discomfort. Dr. Harper opined that appellant had had preexisting lumbar degenerative disc disease and sustained some permanent, subjective worsening related to the May 2004 work injury. He did not expect appellant’s symptoms to improve and concluded that he did not need any additional physical treatment or evaluation.

By decision dated June 12, 2008, the Office denied appellant compensation for a recurrence of his accepted lower back condition, finding that Dr. Harper’s referral opinion represented the weight of the medical evidence.

### **LEGAL PRECEDENT**

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury, and who supports that conclusion with sound medical

reasoning.<sup>2</sup> A recurrence of disability is defined as the inability to work caused by a spontaneous change in a medical condition which results from a previous injury or illness without an intervening injury or new exposure in the work environment that caused the illness.<sup>3</sup>

### ANALYSIS

The Board finds that the case is not in posture for decision.

In its August 21, 2007 decision, the Board found that the Office erred in failing to review and consider Dr. Sullivan's reports and remanded the case to the Office for a review of the merits of appellant's claim and to specifically consider the reports of Dr. Sullivan which addressed the issues of whether there was a causal relationship between appellant's accepted May 2004 injuries and her claimed condition/disability as of December 22, 2004. The Office, however, did not review Dr. Sullivan's reports, as the Board had instructed. Apparently, as an alternative, it referred appellant to Drs. McLaughlin and Harper for second opinion examinations, and found that the weight of the medical evidence was represented by Dr. Harper's second opinion that there was no objective worsening of his previous existing degenerative disc disease which prevented him from returning to work or that rendered him unable to perform the full scope of his work duties. The Board notes that it is impossible to assess the "weight of the evidence" until all the evidence has been acknowledged and evaluated. The weight of unconsidered evidence is by definition unknown. Both referral physicians, however, indicated that appellant had significant findings and additional conditions from the accepted low back injury.

Dr. McLaughlin opined that appellant's disability was primarily due to his May 2004 employment injury, which had markedly worsened and aggravated his condition and had presently rendered him unable to perform his usual work duties. He also noted that appellant had preexisting lumbar spondylosis which was asymptomatic prior to the May 2004 employment injury, which led him to conclude that his current condition was aggravated by the work injury. Dr. Harper advised that appellant currently had some disability stemming from residuals of his 2004 work injury in addition to subjective complaints of low back pain.

Based on medical evidence indicating that appellant had significant findings and additional conditions from the accepted lower back condition and the continuing failure to review Dr. Sullivan's reports as previously instructed the Board will set aside the Office's June 12, 2008 decision and again remand the case to the Office to specifically consider the reports of Dr. Sullivan. If necessary, the Office should then refer the case record and a statement of accepted facts to an appropriate medical specialist to evaluate whether appellant sustained a recurrence of his lower back condition as of December 22, 2004. After such development as it deems necessary, the Office shall issue a *de novo* decision.

### CONCLUSION

The Board finds that the case is not in posture for decision.

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<sup>2</sup> *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

<sup>3</sup> *See* 20 C.F.R. § 10.5(x); *Donald T. Pippin*, 54 ECAB 631 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 12, 2008 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further action consistent with this decision.

Issued: September 3, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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