United States Department of Labor
Employees' Compensation Appeals Board

W.L., Appellant	)	
and	)	**Docket Nos. 09-1545 & 09-1546**
	)	**Issued: April 23, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
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 May 27, 2009 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated November 6, 2008 and May 7, 2009, under case number xxxxxx309. On May 29, 2009 he filed a timely appeal from merit Office decisions dated July 17, 2008 and February 20, 2009, under case number xxxxxx389. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case. The Board consolidates the two case records and will consider all of the issues in this decision.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability as of May 5, 2008; (2) whether appellant sustained a lower back injury in the performance of duty on May 5, 2008; and (3) whether the Office abused its discretion by denying appellant authorization for lumbar laminectomy/spinal fusion surgery.

FACTUAL HISTORY

Appellant, a 63-year-old truck driver, injured his lower back on October 29, 2007 while pushing heavy cases of wire mail off a truck. He filed a Form CA-1 claim for benefits on October 31, 2007, which the Office accepted for lumbosacral sprain under case number xxxxxx309. Appellant stopped work on October 29, 2007 and returned to work on November 7, 2007.

In treatment notes dated October 29, 2007, Dr. Alphonse J. DiGiovanni, a Board-certified surgeon, received by the Office on November 14, 2007, indicated that appellant had sustained a work-related lumbosacral strain on October 29, 2007. He had appellant undergo x-rays of the lumbar spine, which showed degenerative changes throughout the lumbar spine, most prominent from the L3-4 level to the L5-S1 level, Grade 1 anterolisthesis of L4 on L5 and Grade 1 retrolisthesis of L3 on L4.

In a report dated October 30, 2007 from Chestertown Family Medicine, it was noted that appellant injured his lower back on October 29, 2007 while unloading a truck and pushing a heavy cart. Appellant was instructed to take one week off work and was scheduled to undergo a magnetic resonance imaging (MRI) scan, which he underwent on November 2, 2007. The results of the MRI scan demonstrated multilevel degenerative disc disease, spondylosis with severe degenerative spondylolisthesis at L4-5, retrolisthesis and small left disc herniation at L3-4, right posterolateral disc herniation at L5-S1, and stenosis at L3-4, L4-5 and L5-S1.

In a January 11, 2008 report, Dr. Brian J. Sullivan, a specialist in neurosurgery, stated that appellant had experienced no significant difficulties with his low back until October 2007; since that time, he had experienced some axial low back discomfort with radicular and claudication symptoms, greater on the right side. He related that appellant had pain with prolonged standing and limited walking. Dr. Sullivan stated that he had appellant undergo the November 2, 2007 lumbar MRI scan due to the persistent, intense discomfort he experienced while walking. He opined that appellant's symptoms were consistent with spondylolisthesis and relatively severe spinal canal stenosis as shown by the MRI scan. Dr. Sullivan advised that appellant might require surgery to ameliorate his condition if it did not improve with aggressive nonsurgical treatment.

In a May 9, 2008 report, Dr. Wayne D. Benjamin, Board-certified in family practice, indicated that appellant had to leave work early on May 5, 2008 because of severe back pain related to the October 29, 2007 back injury; he noted that appellant had been unable to work for the remainder of the week. He stated that appellant had severe muscular pain in the lower back, with disc desiccation, Grade 1 spondylolisthesis, spinal stenosis at L4-5 and herniated discs.

In a May 23, 2008 report, Dr. Sullivan stated that based on his May 20, 2008 examination appellant had significant low back and neurogenic claudication symptoms. He reiterated the findings that he noted in his January 2008 examination and advised that appellant had since undergone aggressive nonsurgical treatment. Dr. Sullivan again stated his belief that appellant could benefit from surgical intervention and stated that at this point appellant wanted to "move forward with surgery." He indicated his intention to schedule appellant for an L2 to L4-5

decompressive laminectomy, instrumented posterolateral fusion, reduction of dislocation and interbody fusion.

Dr. Sullivan noted that appellant had continued to experience significant discomfort with his back since October 29, 2007, when his problems commenced, and advised that he had a significant flare-up of his discomfort on May 5, 2008 which caused him to stop working. He stated that this flare-up was "approximately" related to his October 29, 2007 work injury.

In a Form CA-2a dated May 27, 2008, appellant alleged that he sustained a recurrence of disability as of May 5, 2008. He stated on the form that the recurrence occurred while he was moving heavy containers of mail.[1]

On June 3, 2008 Dr. Sullivan requested authorization to perform lumbar surgery.

On June 5, 2008 the Office denied authorization to perform lumbar surgery.

By letter dated June 5, 2008, the Office advised appellant that it required additional factual and medical evidence, including a medical report, to support his claim that his current condition/or disability as of May 5, 2008 was caused or aggravated by his accepted October 29, 2007 employment injury.

In order to determine whether appellant had any current disability or condition causally related to his accepted October 29, 2007 lumbar strain injury, the Office referred appellant for a second opinion examination with Dr. Robert Allen Smith, a Board-certified surgeon. In a June 30, 2008 report, Dr. Smith stated that appellant had an objectively normal neurological examination. He noted that his range of motion of the lumbar spine was self-limited due to complaints of pain. Dr. Smith stated that several reports of record indicated that appellant had spondylolisthesis, degenerative disease of the spine and neurogenic claudication; he stated, however, that none of these conditions were accepted as being related to the work incident of October 29, 2007. He advised that appellant did not demonstrate any findings of ongoing back strain and that therefore the accepted condition had resolved, with no need for surgery or additional treatment. While Dr. Smith outlined work restrictions for appellant, he opined that these were not related to his employment. He disagreed with Dr. Sullivan's opinion that appellant required spinal surgery since the condition which would be corrected by this surgery was not an accepted condition.

By decision dated July 17, 2008, the Office denied appellant's claim for a recurrence of disability due to the absence of medical and factual evidence demonstrating how the claimed recurrence was related to the original work-related injury. It further found based on Dr. Smith's report that appellant did not require any additional treatment for his accepted lumbosacral strain condition.

By letter dated July 25, 2008, appellant's attorney requested an oral hearing to discuss the issue of recurrence of disability, which was held on December 2, 2008. At the hearing, appellant

[1] Appellant noted on the form that he had received physical therapy for his back on a thrice-weekly basis from December 17, 2007 to April 23, 2008.

stated that after he injured his back on October 29, 2007 he underwent physical therapy, which improved his condition and permitted him to return to work until May 5, 2008, when he reinjured his back while pushing heavy mail containers.

On July 28, 2008 the claimant filed a Form CA-1 traumatic injury claim under case file number xxxxxx389, alleging that he sustained a lower back injury in the performance of duty on May 5, 2008 while unloading heavy mail containers off the truck. Appellant's supervisor, Mr. Harris, stated on the form that appellant had previously led him to believe that he sustained a recurrence of his October 2007 disability and claimed not to be aware that appellant had sustained a new injury on May 5, 2008. He indicated that appellant stopped work and sought medical attention on May 5, 2008.

In an August 1, 2008 report, Dr. Sullivan reiterated that appellant had experienced no difficulties with his lumbosacral spine until October 2007, at which time he began having excruciating low back discomfort, as noted in his January 2008 report. He stated that appellant continued to have significant difficulties with his lumbosacral spine until May 5, 2008, when he experienced a significant flare-up. Dr. Sullivan restated his opinion that this flare-up and his need for ongoing nonsurgical treatment was work related; he noted that the radiographic changes shown by the MRI scan predated his October 2007 injury, but were asymptomatic until his work injury. Dr. Sullivan again suggested the option of surgical intervention.

In an August 28, 2008 report, Dr. Benjamin indicated that he was treating appellant for a lower back injury that he originally sustained in October 2007 and that he reinjured his back on May 9, 2008.[2]

On September 26, 2008 the Office advised appellant that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits. It asked appellant to submit a comprehensive medical report from his treating physician describing his symptoms and the medical reasons for his condition, and an opinion as to whether his claimed condition was causally related to his federal employment. The Office requested that appellant submit the additional evidence within 30 days.

By decision dated November 6, 2008, the Office found that appellant failed to submit medical evidence sufficient to establish that he sustained a lower back injury in the performance of duty on May 5, 2008.

By letter dated November 14, 2008, received by the Office on November 17, 2008, appellant's attorney requested an oral hearing in response to the November 6, 2008 Office decision denying appellant's claim that he sustained a lower back injury in the performance of duty on May 5, 2008. The hearing requested for this claim was held on March 18, 2009.

In a January 5, 2009 report, received by the Office on January 26, 2009, Dr. Benjamin stated that appellant injured his back on May 5, 2008 while pushing cages out of a postal truck. He advised that this injury had resulted in severe incapacitating back pain radiating down both

[2] Appellant's attorney agreed at the December 2, 2008 hearing that Dr. Benjamin needed to clarify whether the May 5, 2008 work incident was a recurrence of appellant's October 2007 disability or a new injury.

legs. Dr. Benjamin noted his disagreement with Dr. Smith's opinion that appellant's current condition was not work related based on the fact that he was able to work on a regular basis until his initial injury of October 29, 2007 and because he was reinjured on May 5, 2008. He stated that appellant's current symptoms resulted from an aggravation of a preexisting condition, which he was not aware of prior to the injury of May 5, 2008. Dr. Benjamin stated that he believed appellant's symptoms were aggravated by the injury of May 5, 2008 because he did not have these symptoms prior to May 5, 2008.

By decision dated February 20, 2009, an Office hearing representative affirmed the July 17, 2008 decision denying compensation for an alleged recurrence of disability, pursuant to case file number xxxxxx309.

By decision dated May 7, 2009, an Office hearing representative affirmed the November 6, 2008 decision denying appellant's claim that he sustained a lower back injury in the performance of duty on May 5, 2008, under case file number xxxxxx389. He found that appellant was a credible witness and he accepted that appellant experienced an incident at work on May 5, 2008 in which he hurt his back. The hearing representative noted, however, that no physician of record indicated a history of the May 5, 2008 work incident until August 1, 2008, when Dr. Sullivan stated that he experienced a flare-up of his discomfort while working on May 5, 2008. He also noted that Dr. Benjamin stated in his August 28, 2008 report that the claimant had an "original injury" as of October 2007 and was "reinjured" as of May 2008, and stated in his January 5, 2009 report that appellant injured his back on May 5, 2008 while pushing cages out of a postal truck. The hearing representative found that these "belated" reports of a May 5, 2008 work injury did not constitute evidence sufficient to establish that the May 5, 2008 work incident occurred at the time, place and in the manner alleged. Based on these discrepancies, the hearing representative found that appellant failed to meet his burden to prove fact of injury. He therefore stated that he was not required to consider the medical evidence of record.

LEGAL PRECEDENT -- ISSUE 1

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.[3] 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.[4]

[3] *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. §10.121(a).

[4] *See* 20 C.F.R. § 10.5(x); *Donald T. Pippin*, 54 ECAB 631 (2003).

ANALYSIS -- ISSUE 1

In the instant case, appellant has failed to submit any medical opinion containing a rationalized, probative report which relates his claimed recurrence of disability for work as of May 5, 2008 to his accepted lumbosacral strain 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 condition. Appellant has failed to submit evidence to show that he sustained a worsening of his lower back condition as of May 5, 2008. As he did not submit medical evidence sufficient to establish that he sustained a recurrence of his work related, October 29, 2007 lower back condition, the Office properly denied compensation in its July 17 and February 20, 2008 decisions.

In support of his claim, appellant submitted reports from Drs. Benjamin and Sullivan. In a May 9, 2008 report, Dr. Benjamin indicated that appellant had to leave work early on May 5, 2008 because of severe back pain related to the October 29, 2007 back injury; he noted that appellant had been unable to work for the remainder of the week. He stated in his August 28, 2008 report that he was treating appellant for a lower back injury that he originally sustained in October 2007 and that appellant reinjured his back on May 9, 2008. In his January 5, 2009 report, Dr. Benjamin noted that appellant injured his back on May 5, 2008 while pushing heavy mail cages out of a postal truck, which resulted in severe incapacitating back pain radiating down both legs. His opinion on causal relationship is of limited probative value in that he did not provide adequate medical rationale in support of his conclusions.[5] Dr. Benjamin did not describe appellant's May 5, 2008 accident in any detail or how the accident would have been competent to cause the claimed recurrence of disability as of May 5, 2008. Moreover, his opinion is of limited probative value for the further reason that it is generalized in nature and equivocal. Dr. Benjamin stated in his May 9 and August 28, 2008 reports that the May 5, 2008 incident was related to the October 29, 2007 work injury; however, he subsequently stated in his January 5, 2009 report that appellant's condition/disability as of May 5, 2008 was caused by an underlying, preexisting condition.

Dr. Sullivan submitted reports dated January 5, May 23 and August 1, 2008. He stated that appellant experienced no difficulties with his lumbosacral spine until October 2007 at which time he began having low back pain. Although Dr. Sullivan opined that appellant experienced a significant flare-up of pain on May 5, 2008, he also indicated that he continued to have significant difficulties with his lumbosacral spine following the October 29, 2007 work injury for which he required ongoing nonsurgical treatment. His opinion was also generalized and equivocal, as he merely stated that this flare-up was "approximately" related to appellant's October 29, 2007 work injury.

The Office subsequently referred appellant to Dr. Smith. While Dr. Smith noted that various medical reports indicated that appellant had spondylolisthesis, degenerative disease of the spine and neurogenic claudication, he opined that none of these conditions were accepted as related to the October 29, 2007 work injury. He advised that appellant had an objectively normal neurological examination and stated that appellant did not demonstrate any findings of ongoing

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

back strain. While Dr. Smith provided work restrictions for appellant he stated that these were not related to appellant's employment. Finally, he disagreed with Dr. Sullivan's opinion that appellant required spinal surgery because it was not necessitated by an accepted condition.

The Board finds that the Office properly relied on Dr. Smith's referral opinion in its July 17, 2008 decision denying appellant compensation based on a recurrence of his work-related lumbosacral strain condition. 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.[6] Dr. Smith's report is sufficiently probative, rationalized and based upon a proper factual background. He fully discussed the history of injury which indicated that appellant's alleged disability as of May 2008 was not related to any accepted conditions. Dr. Smith stated that appellant had some physical restrictions but found that these were not work related; he found that appellant's neurological examination was normal and noted no findings of ongoing back strain. Although he did find that appellant had spondylolisthesis, degenerative disease of the spine and neurogenic claudication, he stated that these conditions were not related to the October 2007 lumbar strain injury and thus did not constitute a recurrence of disability.[7] Dr. Smith's opinion outweighs those submitted by Drs. Benjamin and Sullivan. The Board therefore finds that Dr. Smith's opinion constituted sufficient medical rationale to support the Office's July 17, 2008 and February 20, 2009 decisions denying compensation based on a recurrence of his work-related lumbosacral sprain.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under the Federal Employees' Compensation Act[8] 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.[9] 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.[10]

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.[11] Second, the employee

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

[7] *Donald T. Pippin*, *supra* note 4.

[8] 5 U.S.C. § 8101 *et seq*.

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

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

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

must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[12]

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty.[13] Nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an "injury" within the meaning of the Act. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and her subsequent course of action.[14] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may cause doubt on an employee's statements in determining whether he or she has established his or her claim.[15]

ANALYSIS -- ISSUE 2

In the present case, the Office found in its November 6, 2008 decision that appellant had established fact of injury and denied the claim for a May 5, 2008 traumatic injury based on insufficient medical evidence. In the May 7, 2009 decision, however, the Office hearing representative found that the record contained conflicting and inconsistent evidence regarding whether the claimed event occurred at the time, place and in the manner alleged; he therefore set aside the previous Office finding and concluded that appellant did not establish fact of injury. The Board finds, however, that appellant presented sufficient evidence to establish that appellant did push containers of mail at the time, place and in the manner alleged on May 5, 2008.[16] The Board notes that the hearing representative based his finding on the grounds that appellant only "belatedly" claimed that he sustained a new injury on May 5, 2008. He stated that no physician of record provided a history that appellant sustained a new injury on May 5, 2008 until Dr. Sullivan did so in his August 1, 2008 report. According to the hearing representative, the fact that appellant did not submit a report discussing an alleged May 5, 2008 injury until the August 1, 2008 report from Dr. Sullivan and the August 28, 2008 and January 5, 2009 reports from Dr. Benjamin[17] created a discrepancy in the evidence which cast doubt on whether he sustained an injury at the time, place and in the manner alleged on May 5, 2008.

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

[13] *Elaine Pendleton*, *supra* note 9.

[14] *See Joseph H. Surgener*, 42 ECAB 541, 547 (1991); *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

[15] *See Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

[16] *Id.*

[17] In his appeal to the Board, appellant's attorney stated that Dr. Benjamin submitted a May 5, 2009 report. The report is actually dated January 5, 2009.

As stated above, however, the Board has held that an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[18] Although no one witnessed the incident, and although appellant also claimed that he sustained a recurrence of disability on the date in question, appellant's statement that he experienced pain on May 5, 2008 while pushing heavy mail containers was not contradicted by any documentary evidence in the record. Appellant's supervisor, Mr. Harris, did not challenge appellant's account that he was involved in a work incident on May 5, 2008; he merely stated that he had been led to believe that appellant was claiming that incident as a recurrence of his October 2007 disability, not as a new injury. Mr. Harris noted on the Form CA-1 that appellant stopped work and sought medical attention on May 5, 2008. In addition, contrary to the hearing representative's finding, the record contains a report dated May 9, 2008 from Dr. Benjamin indicating that appellant had to leave work early on May 5, 2008 because of severe back pain related to the October 29, 2007 back injury.[19] Dr. Sullivan submitted a report dated May 23, 2008 stating that appellant had a significant flare-up of his discomfort on May 5, 2008 which caused him to stop working.

The Board finds that the totality of this evidence is sufficient to establish that appellant experienced an incident at work on May 5, 2008. The employing establishment did not controvert the claim. Under the circumstances of this case, therefore, the Board finds that appellant's allegations have not been refuted by sufficiently strong or persuasive evidence. The Board finds that the evidence of record is sufficient to establish that the incident in which appellant allegedly injured his lower back on May 5, 2008 occurred at the time, place and in the manner alleged.

The Board finds, however, that appellant failed to submit rationalized medical opinion evidence to sufficiently describe or explain the medical process by which the claimed May 5, 2008 work accident would have been competent to cause the claimed injuries. In this regard, the Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[20]

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.[21] Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

As noted above, Dr. Benjamin indicated in his May 9, 2008 report that appellant had to leave work early on May 5, 2008 because of severe back pain related to the October 29, 2007 back injury. He advised that appellant had severe muscular pain in the lower back, with disc desiccation, Grade 1 spondylolisthesis, spinal stenosis at L4-5 and herniated discs. In his

[18] *Supra* note 15.

[19] Dr. Benjamin also submitted a progress report dated June 3, 2008 in which he stated that appellant sustained an injury at work on May 5, 2008.

[20] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[21] *Id.*

August 28, 2008 report, Dr. Benjamin indicated that he was treating appellant for a lower back injury sustained on May 5, 2008 but noted that this was a reinjury of his initial October 29, 2007 lumbosacral strain. Finally, in his January 5, 2009 report, Dr. Benjamin stated that appellant injured his back on May 5, 2008 while pushing cages out of a postal truck and advised that this injury had resulted in severe incapacitating back pain radiating down both legs. He indicated that appellant's current symptoms resulted from an aggravation of a preexisting condition which he was not aware of prior to the May 5, 2008 injury.

Dr. Benjamin's reports are not probative with regard to causal relationship because they do not contain rationalized medical opinion evidence. While he presented a diagnosis of appellant's conditions as of May 5, 2008, he did not provide an opinion which sufficiently discussed the work relatedness of these conditions. Dr. Benjamin's opinion on causal relationship is of limited probative value in that he did not provide adequate medical rationale in support of his conclusions.[22] He did not describe the May 5, 2008 accident in any detail or state how the accident would have been competent to cause the claimed lower back condition. Dr. Sullivan only noted summarily in his May 23 and August 1, 2008 reports that appellant's current condition was causally related to the May 5, 2008 incident in which appellant strained his back while moving heavy mail containers.[23] There is no indication in the record, therefore, that appellant's claimed lower back condition as of May 5, 2008, was work related.

Appellant failed to provide a rationalized, probative medical opinion relating his current condition to any factors of his employment. Therefore, he failed to provide a medical report from a physician that the work incident of May 5, 2008 caused or contributed to the claimed lower back injury.

The Office advised appellant of the evidence required to establish his claim; however, appellant failed to submit such evidence. Appellant, therefore, did not provide a medical opinion to sufficiently describe or explain the medical process through which the May 5, 2008 work incident would have caused the claimed injury. Accordingly, as he has failed to submit any probative medical evidence establishing that he sustained an injury to his lower back in the performance of duty on May 5, 2008, the Office properly denied appellant's claim for compensation.

In his appeal brief, appellant's attorney argues that appellant sustained a new injury on May 5, 2008 which constituted an aggravation of a preexisting degenerative lumbar disc condition and made a mistake by filing a claim that the incident was a recurrence of his accepted October 2007 lumbosacral strain injury. He further argues that the hearing representative erred in his May 7, 2009 decision by failing to credit the February 20, 2009 finding of the previous hearing representative that appellant had established fact of injury based on the May 5, 2008 incident. The Board notes that it agrees with counsel's argument that the incident for a new

[22] *Supra* note 5.

[23] As appellant's attorney admitted at the December 2, 2008 hearing, the medical evidence appellant presented pertaining to the May 5, 2008 work incident is ambiguous; many of the medical reports from Dr. Benjamin and Dr. Sullivan indicated that appellant's disability/condition as of May 5, 2008 was attributable to the October 29, 2007 work injury, not the "new" May 5, 2008 work incident in which appellant strained his back pushing heavy containers.

traumatic injury claimed as of May 5, 2008 has been established; however, his argument is moot in light of the Board's determination that appellant failed to submit medical evidence sufficient to establish that the work incident of May 5, 2008 caused or contributed to any claimed lower back condition or disability.

LEGAL PRECEDENT -- ISSUE 3

Section 8103 of the Act[24] 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.[25] 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. It 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.[26]

Section 8123(a) of the Federal Employees' Compensation Act provides that, if there is 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.[27]

ANALYSIS -- ISSUE 3

In this case, the Office accepted that appellant had sustained a lumbosacral strain condition due to an October 29, 2007 work injury. Dr. Sullivan stated in his May 23, 2008 report that appellant continued to experience significant discomfort with his back since the October 2007 employment injury and advised that he had a significant flare-up of his discomfort on May 5, 2008 which caused him to stop working. He indicated that this flare-up was "approximately" related to the October 29, 2007 work injury. Based on these complaints and findings, Dr. Sullivan recommended surgical intervention in the form of L2 to L4-5 decompressive laminectomy, instrumented posterolateral fusion, reduction of dislocation and interbody fusion. On June 3, 2008 Dr. Sullivan formally requested authorization for lumbar spine fusion/laminectomy surgery. By letter dated June 5, 2008, the Office, however, found that the need for such surgery was not related to any employment-related incident or activity.

[24] 5 U.S.C. § 8101 *et seq*.

[25] *Id.* at § 8103.

[26] *Dale E. Jones*, 48 ECAB 648 (1997); *Daniel J. Perea*, 42 ECAB 214 (1990).

[27] 5 U.S.C. § 8123(a).

In order to determine whether appellant's proposed lumbar laminectomy/spinal fusion surgery was necessitated by an accepted condition, the Office referred appellant to Dr. Smith for a second opinion examination. As noted above, the only restriction on the Office's authority to authorize medical treatment is one of reasonableness. In his June 30, 2008 report, Dr. Smith explicitly ruled out a causal relationship between appellant's spondylolisthesis, degenerative disease of the spine and neurogenic claudication and the accepted October 29, 2007 work injury. He advised that appellant did not demonstrate any findings of ongoing back strain and that therefore the accepted condition had resolved, with no need for surgery or additional treatment. Dr. Smith concluded that appellant did not require spinal surgery since the condition which would be corrected by this surgery was not an accepted condition. In its July 17, 2008 decision, the Office found based on Dr. Smith's opinion that appellant did not require any additional treatment for his accepted lumbosacral sprain condition.

The Board finds that Dr. Smith's second opinion negated a causal relationship between appellant's condition and the proposed lumbar laminectomy/spinal fusion surgery. His opinion is sufficiently probative, rationalized and based upon a proper factual background. Therefore, given the fact that the weight of the medical evidence of record, as represented by Dr. Smith's referral opinion, indicates that appellant's spondylolisthesis, degenerative disease of the spine and neurogenic claudication conditions are not work related, the Office did not unreasonably deny appellant's request for surgery to ameliorate this condition. The Office did not abuse its discretion to deny appellant authorization for lumbar laminectomy/spinal fusion surgery.

CONCLUSION

The Board finds that appellant has not met his burden to establish that he was entitled to compensation for a recurrence of disability as of May 5, 2008 causally related to his accepted lower back condition. The Board finds that the Office properly found that appellant failed to meet his burden of proof to establish that he sustained an injury to his lower back in the performance of duty. The Board finds that the Office did not abuse its discretion to deny appellant authorization for lumbar laminectomy/spinal fusion surgery.

ORDER

IT IS HEREBY ORDERED THAT the May 7 and February 20, 2009, and November 6 and July 17, 2008 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: April 23, 2010
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