

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

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C.L., Appellant )

and )

**DEPARTMENT OF VETERANS AFFAIRS,**  
**VETERANS ADMINISTRATION MEDICAL**  
**CENTER, San Diego, CA, Employer** )

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**Docket No. 09-1905**  
**Issued: June 7, 2010**

*Appearances:*

*Sally LaMacchia, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 21, 2009 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated September 18, 2008 and June 11, 2009. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant sustained a recurrence of disability as of July 15, 2006; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for further review on the merits under 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

Appellant, a 47-year-old nurse, injured her lower back on August 18, 1985 while moving a patient from a bed into a chair. She filed a claim for benefits on August 21, 1985, which the

Office accepted for herniated disc at L5-S1.<sup>1</sup> The Office authorized surgery for a lumbar laminectomy on October 18, 1985. Appellant retired from the employing establishment in January 1987.

In a Form CA-2a received by the Office on September 12, 2006, appellant alleged that she sustained a recurrence of disability.<sup>2</sup> She stated on the form that the recurrence of disability had commenced about two months previously.

By decision dated November 2, 2006, 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.

On November 1, 2006 appellant requested a review of the written record.

In a report dated October 6, 2006, received by the Office on November 13, 2006, Dr. Janet Dunlap, Board-certified in orthopedic surgery, noted that appellant had injured her lower back in 1985 and had undergone surgery to repair a herniated disc at L5-S1. She stated that appellant had been mostly asymptomatic, with the exception of occasional back pain, until recently. Dr. Dunlap advised that appellant had developed moderate to severe low back pain and numbness with radiation to the left lower extremity at the L5 level; she noted on examination that appellant had left L5 radiculopathy. Appellant underwent x-rays which showed Grade 2 spondylolisthesis at L4-5 but with stability on flexion and extension views, spondylosis, severe disc degeneration at L5-S1 and a mild degenerative scoliosis. Dr. Dunlap also administered a magnetic resonance imaging (MRI) scan which indicated left L5-S1 defects with mild postsurgical fibrosis, severe disc degeneration at L5-S1 and L4-5 and anterolisthesis at L4-5 with neuroforaminal stenosis. She scheduled appellant for left-sided L4-5/L5-S1 decompression fusion surgery.

Dr. Dunlap opined that appellant's current condition was related, both directly and indirectly, to her previous condition. She asserted that appellant's 1985 left L5 laminectomy surgery resulted in surgical changes noted on the MRI scan. Dr. Dunlap also stated that appellant had developed adjacent, segmented degeneration with instability, greatest at L4-5, second at L5-S1, manifested as significant facet osteoarthropathy and disc degeneration. She advised that the changes at L5-S1 were related to the original injury and surgery; she further opined that the changes at L4-5 were related to both the natural aging process/degenerative changes in addition to an aggravation caused by undergoing the L5 hemilaminectomy.

Dr. Dunlap asserted that, based on the history appellant related, she never fully recovered from the original disability, despite returning to her usual job for a short period. She stated that appellant had experienced persistent numbness in the left lower extremity in addition to intermittent low back pain; she also noted that appellant had sustained no subsequent injuries and

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<sup>1</sup> The original claim for a traumatic injury is not contained in the instant record. The information regarding the filing of appellant's claim in August 1985 is included in the statement of accepted facts.

<sup>2</sup> The Board notes that, although the Form CA-2a is dated February 17, 2002, it was not received by the Office until September 12, 2006.

had displayed no other factors which would have caused her recurrence. Dr. Dunlap summarized that appellant had two overlapping problems: (a) progressive, degenerative changes at the L5-S1 level related to her previous injury and the surgical treatment for it; and (b) the development of adjacent segment degeneration, which was due to the natural aging or degenerative process together with some aggravation due to the previous decompressive surgery. She stated:

“[Appellant] has had persistent, but tolerable, symptoms following her L5-S1 surgery to gradually progress, superimposed upon the additional newer symptoms related to the L4-5 pathology. Rather than representing a ‘recurrence,’ this represents the natural progression of these degenerative processes.”

In a November 7, 2006 statement, received by the Office on November 13, 2006, appellant advised that she underwent a second surgical procedure on her lower back on October 30, 2006. She stated that she had been experiencing extreme pain and numbness from her left hip to her toes.

By decision dated February 26, 2007, an Office hearing representative set aside the November 2, 2006 decision and remanded for further development of the medical evidence. She instructed the Office to refer appellant to a second opinion medical specialist to determine whether appellant had sustained a recurrence of her accepted lower back condition as of July 2006 and whether the October 2006 surgery was necessitated by the 1985 work injury.

The Office referred appellant for a second opinion examination with Dr. Thomas J. Sabourin, Board-certified in orthopedic surgery. In a report dated July 10, 2007, he indicated, as did Dr. Dunlap, that appellant had two separate problems. The first one involved her residual symptomatology and narrowing of the disc space at L5-S1; the second problem was the development of a substantial spondylolisthesis at the L4-5 level, as described by Dr. Dunlap. Dr. Sabourin noted that appellant had surgery in October 2006 which resulted in a remarkable recovery, though he noted that the record he received contained no operative reports or subsequent progress reports. He did state, however, that appellant brought x-rays to the examination, taken recently and subsequent to the surgery, which showed that she had attained a successful fusion from L3 through S1 with pedicle screws at S1, L5, L4 and L3. Dr. Sabourin stated that based on these x-rays appellant appeared to have undergone bilateral lateral fusion; he stated that the surgery had rendered some reduction of the spondylolisthesis at L4-5. He noted that the fusion appeared to be taking fairly well on the right side and stated that appellant showed no motor deficit, remarkable range of motion given the nature of the extent of the fusion. Dr. Sabourin stated that there were no medical reports in the record documenting the October 30, 2006 surgery. He therefore stated that appellant’s second low back problem was a separate episode and occurred at a different level than the original episode.

Dr. Sabourin concluded that the 1985 injury and subsequent surgery resulted in no substantial change other than the typical progression of degenerative changes but had not caused any change in her ability to work. Regarding the L4-5 disc problem, he advised that this was the natural progression of the degeneration, which had occurred over time, but was not related to the original August 1985 employment injury in which she herniated the disc at L5-S1. Dr. Sabourin stated that appellant’s October 2006 surgery was medically necessitated by her problem at the L4-5 disc level, which did not exist and was not aggravated by the 1985 work injury. He further

stated that, although appellant did receive treatment for her L4-5 lesion, she would not have needed the October 2006 surgery if she had only experienced residuals from the 1985 work-related injury at L5-S1. Dr. Sabourin indicated that appellant's injury and subsequent surgery had resulted in some mild, minimal micro instability which would have caused recurring back injuries had she returned to her work.

By decision dated July 24, 2007, the Office denied appellant's claim for a recurrence of disability. It found that Dr. Sabourin's referral opinion that her alleged recurrence of disability as of July 2006 was not related to the original 1985 employment injury represented the weight of the medical evidence.

By December 3, 2007 letter, appellant, through her representative, requested reconsideration. Accompanying the reconsideration request was a November 6, 2007 report from Dr. Dunlap in which she expressed her disagreement with Dr. Sabourin's opinion that appellant's current Grade 2 spondylolisthesis/instability at L4-5 was not related to the 1985 work injury. She stated that appellant's 1985 surgery, which was authorized by the Office and necessitated by the accepted 1985 L5-S1 herniated disc condition, resulted in the subsequent degeneration at both the L5-S1 and L4-5 levels, appellant's subsequent degeneration at both levels, including the Grade 2 spondylolisthesis/instability at L4-5. In other words, Dr. Dunlap stated, appellant's original work-related injury of August 1985 resulted in spinal surgery which progressed and ultimately led to her recurrent, progressive symptomatology and the need for the October 2006 surgery; the 1985 surgery resulted in a precipitation and aggravation of the underlying condition with eventual instability at L4-5 and progressive disc degeneration at both L4-5 and L5-S1, necessitating further surgery. She advised that this marked the natural progression with appellant having undergone such surgery as was done in 1985, in which she had a significant discectomy and laminectomy performed at both levels.

Dr. Dunlap noted that Dr. Sabourin did not have the opportunity to review her October 30, 2006 operative note or diagnostic findings which showed severe postoperative changes at both the L4-5 and L5-S1 levels. She stated that appellant had stenosis, disc degeneration, and facet degeneration at both the L4-5 and L5-S1 levels, with degenerative spondylolisthesis at L4-5. Dr. Dunlap did concur with Dr. Sabourin's opinion that appellant had attained a solid fusion from the October 2006 surgery from L3 to S1. She also stated that appellant's January 1987 retirement from the employing establishment was significant because she was no longer required to perform physical work including bending, twisting and lifting of patients. Dr. Dunlap asserted that appellant's condition continued to progress because of the instability created by her previous disc herniation and its surgical treatment; she also noted that there were no subsequent injuries. Therefore, her retirement was significant in that it highlighted the natural progression of her previous postoperative condition following her 1985 work injury. Dr. Dunlap stated that the recurrence of her work-related disability occurred on approximately July 15, 2006.

By decision dated February 29, 2008, the Office denied modification of the prior decision.

By letter dated May 27, 2008, appellant's attorney requested reconsideration. In support of the request, appellant submitted the October 30, 2006 operative report from Dr. Dunlap.

Appellant also submitted a November 10, 2006 report from Kevin Mochizuki, Ph.D, who indicated that appellant had undergone neurophysiological monitoring tests.

By decision dated September 18, 2008, the Office denied modification of the prior decision.

By letter dated May 27, 2009, appellant's attorney requested reconsideration.

In a December 17, 2008 report, Dr. Sidney H. Levine, Board-certified in orthopedic surgery, stated the history of injury and reiterated the diagnoses of postsurgical degenerative spondylosis L3-4 and Grade 2 degenerative spondylolisthesis at L4-5. He noted that appellant had achieved a relatively good result from her October 2006 surgery. Dr. Levine opined that appellant's current lumbar condition was causally related to the 1985 work injury, for which she underwent her 1985 lumbar laminectomy and disc excision at L5-S1. He noted that appellant's subsequent employment of eight years following her retirement from the employing establishment also contributed to the deterioration at the L4-5 as well as the L3-4 level, together with the normal progression of the degenerative process. Dr. Levine advised that these findings were significantly greater than would normally be anticipated with the degenerative process caused by increased stress at the level above the surgery. He stated that any aggravation that occurred at the L4-5 level has ceased since the patient underwent a successful fusion. Dr. Levine advised that the 1985 employment injury would result in some stress at the level above the surgery, as did the subsequent employment and the normal progression of the degenerative process; he therefore opined that a small percentage of the need for appellant's October 2006 surgery was brought about as a result of the 1985 work injury. He stated that, as a result of the 1985 injury and subsequent surgery, appellant did have work restrictions that precluded her from returning to her former type of work activity. Dr. Levine reiterated that her subsequent employment did cause further disability, resulting in the need for fusion as did the progression of the natural degenerative process.

By decision dated June 11, 2009, 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. It stated that appellant had submitted no new and relevant medical evidence; it did not mention that appellant had submitted Dr. Levine's December 17, 2008 report.

### **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.<sup>3</sup> A recurrence of disability is defined as the inability to work caused by a spontaneous

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

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>4</sup>

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

In the instant case, appellant has failed to submit any medical opinion containing a rationalized, probative report which relates her claimed recurrence of disability for work as of July 2006 to her accepted L5-S1 herniated disc condition. For this reason, she has not discharged her burden of proof to establish her claim that she sustained a recurrence of disability as a result of her accepted employment condition.

In support of her claim, appellant submitted reports from Dr. Dunlap, her treating physician. She stated in her October 6, 2006 report that appellant had remained relatively asymptomatic since her 1985 lower back injury, herniated disc at L5-S1 and subsequent 1985 surgery to repair the disc. Dr. Dunlap stated that appellant had recently developed low back pain and numbness at the L4-5 level; x-rays indicated a Grade 2 spondylolisthesis at L4-5 and a mild degenerative scoliosis, and an MRI scan showed left L5-S1 defects with mild postsurgical fibrosis, severe disc degeneration at L5-S1 and L4-5 and anterolisthesis at L4-5 with neuroforaminal stenosis. She performed left-sided L4-5/L5-S1 decompression fusion surgery on October 30, 2006 and asserted that appellant's current condition was related, both directly and indirectly, to her previous condition. Dr. Dunlap stated that appellant's current condition/disability was attributable to two problems; one of these involved progressive, degenerative changes at the L5-S1 level related to the August 1985 work injury and October 1985 L5 hemilaminectomy she underwent to ameliorate the condition. The other problem was the development of adjacent segment degeneration with instability, greatest at L4-5, second at L5-S1, with significant facet osteoarthropathy and disc degeneration caused by the natural aging or degenerative process, along with aggravation caused by her 1985 surgery. Dr. Dunlap noted that appellant had never really recovered from her 1985 work injury, experiencing persistent, but tolerable, symptoms following her L5-S1 surgery which gradually progressed, superimposed upon the additional newer symptoms related to the L4-5 pathology. She explicitly stated that this did not constitute a recurrence, but represented the natural progression of these degenerative processes. Dr. Dunlap further noted that appellant had sustained no subsequent injuries and had displayed no other factors which would have caused a recurrence.

The Office subsequently referred appellant for a second opinion examination with Dr. Sabourin, who agreed with Dr. Dunlap that appellant had two problems, her residual symptomatology and narrowing of the disc space at L5-S1 and the development of a substantial spondylolisthesis at the L4-5 level. Dr. Sabourin stated, however, that appellant's second low back problem was a separate episode and occurred at a different level than the original episode. He advised that the 1985 injury and subsequent surgery resulted in no changes except for the normal progression of degenerative changes; it had not caused any change in her ability to work. With regard to appellant's L4-5 disc problem, Dr. Sabourin stated that this had resulted from the natural progression of her disc degeneration, which was not related to the original August 1985

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<sup>4</sup> See 20 C.F.R. § 10.5(x); *Donald T. Pippin*, 54 ECAB 631 (2003).

L5-S1 disc herniation. He opined that her October 2006 surgery was necessitated by her problem at the L4-5 disc level, which did not exist in 1985 and was not aggravated by the 1985 work injury. Dr. Sabourin further stated that, although appellant did receive treatment for an L4-5 lesion, she would not have needed the October 2006 surgery if she had only experienced residuals from the 1985 work-related injury at L5-S1. He indicated that appellant's injury and subsequent surgery had resulted in some mild, minimal instability.

The Board finds that the Office properly relied on Dr. Sabourin's referral opinion in its July 24, 2007 decision denying appellant compensation based on a recurrence of his work-related carpal tunnel syndrome. 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.<sup>5</sup> Dr. Sabourin'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 disability as of July 2006 was caused by the natural progression of her degenerative disc condition, not the 1985 work injury, and opined that appellant had a new problem at the L4-5 disc level which was not related to the 1985 L5-S1 herniated disc injury and thus did not constitute a recurrence of disability.<sup>6</sup> Dr. Sabourin's opinion outweighs that of Dr. Dunlap, who attributed appellant's current condition to the 1985 work injury and subsequent 1985 surgery but stated that appellant's condition resulted from a natural progression of the original work injury, not a recurrence of her work-related disability. The Board therefore finds that Dr. Sabourin's opinion constituted sufficient medical rationale to support the Office's July 24, 2007 decision denying compensation based on a recurrence of her work-related L5-S1 herniated disc.

Following the July 24, 2007 decision, appellant submitted a November 3, 2007 report from Dr. Dunlap, who expressed her disagreement with Dr. Sabourin's July 10, 2007 report. She noted that Dr. Sabourin did not have a complete and accurate history of appellant's lower back condition because he did not review her October 30, 2006 operative report. Dr. Dunlap stated that the October 30, 2006 operative note and diagnostic test results showed severe postoperative changes at both the L4-5 and L5-S1 levels, including stenosis, disc degeneration, and facet degeneration at both the L4-5 and L5-S1 levels, with degenerative spondylolisthesis at L4-5. She asserted that appellant's 1985 surgery was authorized by the Office and necessitated by her accepted 1985 L5-S1 herniated disc condition, which resulted in the subsequent degeneration at both the L5-S1 and L4-5 levels. Dr. Dunlap opined that the 1985 work injury resulted in the 1985 spinal surgery, which led to residuals which progressed and ultimately led to her recurrent, progressive symptomatology and the need for the October 2006 surgery. She asserted that appellant's condition continued to deteriorate because of the instability created by her previous disc herniation and its surgical treatment; she noted that there were no subsequent injuries. Dr. Dunlap asserted that appellant's 1987 retirement from the employing establishment, after which she was no longer required to do heavy bending, lifting and twisting which could have caused an intervening injury, provided further evidence that her condition and disability as of July 2006 was attributable to the 1985 work injury.

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<sup>5</sup> See *Ann C. Leanza*, 48 ECAB 115 (1996).

<sup>6</sup> *Donald T. Pippin*, 54 ECAB 631 (2003).

Dr. Dunlap's opinion on causal relationship is of limited probative value in that she did not provide adequate medical rationale in support of her conclusions.<sup>7</sup> She did not describe appellant's alleged recurrence of disability in any detail or sufficiently explain how appellant's 1985 L5-S1 herniated disc and 1985 surgery could have caused or contributed to the alleged recurrence of disability in July 2006.<sup>8</sup> Moreover, Dr. Dunlap's opinion is of limited probative value for the further reason that it is generalized in nature and equivocal in that she had previously stated in her October 2006 report that appellant did not sustain a recurrence of disability. She, in fact, continued to maintain that appellant's current condition was a natural progression of the degenerative process which began following her 1985 work injury and 1985 surgery. Dr. Dunlap's report did not vitiate the Office's finding that Dr. Sabourin's opinion that appellant did not sustain a recurrence of disability as of July 2006 constituted the weight of the medical evidence.<sup>9</sup> The Board therefore affirms the September 18, 2008 Office decision which denied appellant's request to modify the July 24, 2007 decision denying compensation for an alleged recurrence of disability.

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

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by constituting relevant and pertinent evidence not previously considered by the Office.<sup>10</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>11</sup>

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

In support of her request for reconsideration, appellant submitted additional medical evidence, *i.e.*, Dr. Levine's December 17, 2008 report, which suggests that appellant's current condition is causally related to her 1985 accepted lower back injury. This evidence constitutes new and relevant evidence pertaining to the issue in this case, *i.e.*, whether appellant sustained a recurrence of her work-related 1985 lower back disability as of July 2006, which was not previously considered by the Office. The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence, which may be necessary to

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<sup>7</sup> *William C. Thomas*, 45 ECAB 591 (1994).

<sup>8</sup> The Board rejects Dr. Dunlop's assertion that Dr. Sabourin did not have a complete and accurate depiction of appellant's condition because he did not review the October 30, 2006 operative report. While Dr. Sabourin did not review a copy of the actual October 30, 2006 operative report, he did review Dr. Dunlop's October 6, 2006 findings and the results of current x-ray and MRI scan tests referenced in that report. Moreover, Dr. Dunlop has not established that the October 30, 2006 surgery was causally related to the accepted 1985 L5-S1 herniated disc injury.

<sup>9</sup> The Board notes that the report from Dr. Mochizuki did not constitute medical evidence pursuant to section 8101(2).

<sup>10</sup> 20 C.F.R. § 10.606(b). *See generally* 5 U.S.C. § 8128(a).

<sup>11</sup> *Howard A. Williams*, 45 ECAB 853 (1994).



discharge her burden of proof.<sup>12</sup> The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.<sup>13</sup> If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.<sup>14</sup> In this case, appellant has submitted relevant and pertinent evidence not previously considered by the Office.

Based on the circumstances discussed above, therefore, the case shall be remanded to the Office to consider Dr. Levine's report and the record in its entirety and determine whether appellant had a recurrence of disability as of July 2006 caused or aggravated by her 1985 accepted employment injury. The Board will, therefore, set aside the Office's June 11, 2009 decision. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

### CONCLUSION

The Board finds that appellant has not met her burden to establish that she was entitled to compensation for a recurrence of disability as of July 2006 causally related to her accepted lower back condition. The Board finds that the Office abused its discretion by refusing to reopen appellant's claim for a recurrence of her work-related disability for review of the merits.

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<sup>12</sup> See *Paul Kovash*, 49 ECAB 350 (1998).

<sup>13</sup> See 20 C.F.R. § 10.606(b).

<sup>14</sup> *Paul Kovash*, *supra* note 12.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 18, 2008 Office of Workers' Compensation Programs' decision be affirmed. The June 11, 2009 decision is set aside and remanded, in accordance with this opinion.

Issued: June 7, 2010  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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