



## **FACTUAL HISTORY**

This case was previously before the Board.<sup>1</sup> By decisions dated July 11, 2008 and July 6, 2009, the Board found an unresolved conflict in medical opinion, set aside August 30, 2007 and October 7, 2008 Office decisions. The Board remanded the case for further development of the medical evidence. The facts of this case as set forth in the Board's prior decisions are incorporated herein by reference.

On September 17, 2009 the Office referred appellant, together with the case file, an amended statement of accepted facts (SOAF)<sup>2</sup> and a list of questions, to Dr. Lance N. Brigham, a Board-certified orthopedic surgeon selected as an impartial medical specialist, for an examination and opinion as to whether his bilateral knee and low back conditions were causally related to his job requirements.

In an October 5, 2009 report, Dr. Brigham reviewed the medical history and provided findings on physical examination. He noted that appellant provided a work history of cleaning bilges and booms between 2003 and 2006 which required lots of kneeling and climbing. Based on appellant's statement that he worked in general maintenance from 2003 to 2006, Dr. Brigham opined that his back condition and bilateral knee conditions were the natural progression of degenerative changes. He noted that studies of twins showed that degenerative disc disease was more likely related to genetics and family history, with obesity and smoking being additional risk factors. Dr. Brigham stated that appellant's job did not cause or aggravate his degenerative knee condition or back condition. There would be flare-ups from work and daily activities that would cause pain in his back and knees but this would not accelerate the natural progression of either condition. Dr. Brigham opined that there was no job-related injury to appellant's back or knees based on the job history "as documented by [appellant]."

By decision dated October 29, 2009, the Office denied appellant's claim on the grounds that the weight of the medical evidence, represented by the impartial medical specialist's opinion of Dr. Brigham, established that his knee and back conditions were not causally related to factors of his employment.

Appellant requested reconsideration. He contended that Dr. Brigham's report was not based on an accurate factual background or explain his opinion on causal relationship.

By decision dated January 21, 2010, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted did not warrant further merit review.

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<sup>1</sup> See Docket No. 09-93 (issued July 6, 2009); Docket No. 08-348 (issued July 11, 2008). On February 1, 2006 appellant, a maintenance worker, filed an occupational disease claim alleging a loss of cartilage in both knees and an aggravation of his lower back condition as a result of his employment activities, working on asphalt and steel surfaces for 8 to 12 hours a day, climbing ladders, working on his hands and knees, cleaning small spaces and bumping his knees on hatches and piping.

<sup>2</sup> In its July 6, 2009 decision, the Board instructed that the SOAF clearly states appellant's employment factors.

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

When the Office refers an employee to a referee examiner for the purpose of resolving a conflict in medical opinion pursuant to 5 U.S.C. § 8123(a), it has the responsibility to secure a medical report that properly resolves the conflict.<sup>3</sup> When the referee examiner's opinion requires clarification or elaboration, the Office must secure a supplemental report from the physician to correct the deficiency in his original report.<sup>4</sup>

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

The Board finds that this case is not in posture for a decision. The conflict in the medical opinion evidence has not been resolved as Dr. Brigham did not provide a fully rationalized medical opinion.

The Board remanded the case for further development of the medical evidence in its July 6, 2009 decision. On remand, the Office referred appellant to Dr. Brigham for an independent medical examination.

Dr. Brigham noted that appellant provided a work history of cleaning bilges and booms between 2003 and 2006 which required lots of kneeling and climbing. He opined that appellant's job duties did not cause or aggravate his back or knee conditions based on the work history "as documented by [appellant]." It does not appear that Dr. Brigham based his opinion as to causal relationship on the factual background provided in the SOAF. He did not mention the job duties and physical requirements as set forth in the SOAF which included: working in maintenance shops, dry docks, piers, ships, submarines, barges and other facilities and involved working in cramped spaces on hands and knees on hard surfaces such as steel and asphalt. Appellant was required to lift and carry up to 60 pounds, sometimes more; turn, bend, pull, push, stand, crouch, kneel, stoop, climb ladders and reach. He sometimes struck his knees against hard surfaces while performing his job. Dr. Brigham's report mentions almost none of the job duties and physical requirements as described in the SOAF. He based his opinion, that appellant's back condition and bilateral knee conditions were the natural progression of degenerative changes and not his job, on the history given by appellant not the SOAF. Dr. Brigham's report did not discuss appellant's employment duties or that he reviewed any description of the duties. His report did not incorporate any of appellant's accepted employment duties into his opinion on causal relationship. His report is insufficient because it was not based on a proper factual background.

As the Board pointed out in its prior decision, the issue to be resolved is whether appellant's back and knee conditions were caused or aggravated by factors of his employment, which included working on his hands and knees and striking his knees against hard surfaces. Dr. Brigham's report did not fully or adequately address this issue. He did not explain why appellant's job duties, as set forth in the SOAF, such as working on his hands and knees and striking his knees against hard surfaces over a period of time, could not cause or aggravate his

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<sup>3</sup> See *Thomas Graves*, 38 ECAB 409 (1987).

<sup>4</sup> See *Talmadge Miller*, 47 ECAB 673 (1996).

back and knee conditions. Accordingly, the Office has not resolved the conflict in the medical evidence. The case must again be remanded to resolve the conflict.

On remand, the Office should further develop the medical evidence and obtain a supplemental report from Dr. Brigham to address the issue of whether appellant's work duties, as set forth in the SOAF, caused or aggravated his diagnosed back and knee conditions. Following this and any other further development as deemed necessary, it shall issue an appropriate merit decision on appellant's occupational disease claim.

In light of the Board's disposition of the first issue, it is unnecessary to consider the second issue in this appeal.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 21, 2010 and October 29, 2009 are set aside and the case is remanded for further action consistent with this opinion.

Issued: November 23, 2010  
Washington, DC

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

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

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