



## **ISSUES**

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability on September 21, 2009 causally related to his November 27, 2007 employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant alleged that OWCP failed to properly develop his initial claim to include all his back conditions due to the accepted employment injury.

## **FACTUAL HISTORY**

On December 3, 2007 appellant, then a 50-year-old letter carrier, filed a traumatic injury alleging that on November 27, 2007 he injured his back when he attempted to catch a coworker who had tripped. OWCP accepted his claim for a sprain of back in the lumbar region on December 14, 2007.

Appellant filed a recurrence of disability on January 9, 2008 and alleged that he developed a recurrence of disability on January 4, 2008. He stopped work on that date as his back pain became too great. Appellant noted that he had preexisting degenerative disc disease. On March 7, 2008 OWCP informed him that his claim was open for medical treatment. Appellant filed a second claim for recurrence on May 19, 2008 and stopped work on May 10, 2008 due to severe back and hip pain. He underwent a lumbar magnetic resonance imaging (MRI) scan on April 15, 2008 which demonstrated advanced degenerative disc disease at L5-S1 with osteophytes and mild to moderate degenerative facet hypertrophy. Appellant's MRI scan also found small central disc protrusions at L3-4 and L4-5. OWCP accepted his January 5, 2008 claim for recurrence of disability on September 9, 2008. On August 11, 2009 it accepted appellant's May 10, 2008 recurrence of disability claim.

On July 28, 2009 appellant requested a schedule award. He submitted a November 30, 2001 MRI scan which demonstrated a herniated disc at L5-S1.

On October 6, 2009 appellant filed a recurrence of disability claim alleging on September 21, 2009 he stopped work due to pain in both legs and hips as well as his testicles. He filed an additional claim on October 15, 2009 alleging a recurrence on October 5, 2009. In a note dated October 7, 2009, Dr. Martin Hall, an orthopedic surgeon, stated that appellant had low back pain with weakness and testicular discomfort. He found no spasm on examination and no radicular symptoms. Dr. Hall noted that appellant had L5-S1 degenerative disc based on x-rays. He diagnosed lumbar degenerative disc. Dr. Lawrence Okafor, an internist, completed a note on October 8, 2009 and stated that appellant experienced intermittent lumbar pain from February 28 through March 12, 2009; from September 21 through 29, 2009 and on October 5 to 12, 2009 and that appellant's "mail job aggravates it."

Dr. Suneela Harsoor, a Board-certified anesthesiologist, examined appellant on November 23, 2009 and diagnosed lumbar discogenic pain secondary to disc protrusion and lumbar facet arthropathy. She reviewed his April 15, 2008 MRI scan. Dr. Harsoor stated that appellant had slightly reduced range of motion in the lumbar spine and mild paraspinal muscle

tenderness with trigger points in the gluteal muscles. Dr. Prentiss Taylor, a Board-certified pulmonologist, examined appellant on April 30, 2010 and reviewed his history of injury. He diagnosed pain in the right shoulder joint, pulmonary obstructive disorders, osteoarthritis, lower back sprain, spinal stenosis and adult sleep apnea. On May 6, 2010 Dr. Taylor diagnosed lower back sprain and recommended that appellant lose weight and exercise.

In a letter dated June 11, 2010, OWCP referred appellant for a second opinion evaluation with Dr. Julie M. Wehner, a Board-certified orthopedic surgeon. On July 20, 2010 Dr. Wehner noted his history of injury on November 27, 2007. She reviewed appellant's medical history and diagnosed a lumbar strain as resulting from the employment injury. Dr. Wehner reviewed his present symptoms for testicular pain and pain radiating down the inside of both legs and stated that this pain did not follow a radicular pattern and was not solely related to low back problems. She stated that appellant's present clinical examination was benign. Dr. Wehner stated, "[Appellant] has intermittent exacerbations of his pain which are consistent with his preexisting problem. He should have reached maximum medical improvement from the lumbar strain within three months from the date of injury of November 27, 2007. Ongoing pain complaints are no longer related to a lumbar strain. They are due to [appellant's] underlying and preexisting disc degeneration and disc herniation." Dr. Wehner opined that appellant could perform full duty except when he had intermittent exacerbation of his pain due to the degenerative disc at L5-S1 which was related to his prior disc herniation. She concluded, "However, continued exacerbations are no longer attributable to a work-related lumbar strain from a temporary exacerbation from November 27, 2007. They are due to the chronic problem [appellant] had prior to this injury."

In a letter dated August 19, 2010, OWCP requested that Dr. Taylor describe appellant's permanent impairment for schedule award purposes.

By decision dated August 20, 2010, OWCP denied appellant's claim for recurrence of disability beginning September 21, 2009. It found that the medical evidence did not establish that the claimed recurrence resulted from the accepted work injury.

Appellant requested reconsideration of the August 20, 2010 decision on September 17, 2010. He submitted the appeal request form by placing a checkmark alongside the reconsideration option. Appellant resubmitted the MRI scan report dated November 30, 2001, which demonstrated a herniated disc at L5-S1.

By decision dated October 1, 2010, OWCP declined to reopen appellant's claim for consideration of the merits on the grounds that he failed to submit any new evidence or legal argument with his reconsideration request.

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

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his

or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>3</sup> Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his recurrence of disability commencing September 21, 2009 and his November 27, 2007 employment injury.<sup>4</sup> This burden includes the necessity of 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 employment factors and supports that conclusion with sound medical reasoning.<sup>5</sup>

### ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for injury on November 27, 2007 as resulting in a sprain of back in the lumbar region. In support of his claim for a recurrence of disability on September 21, 2009, appellant submitted medical reports from several different physicians. Dr. Hall completed a note of October 7, 2009 and diagnosed low back pain with weakness and testicular discomfort. He also found an L5-S1 degenerative disc based on x-rays. Dr. Hall did not opine that appellant's diagnosed conditions were due to his accepted employment injury and did not distinguish between his employment-related and preexisting conditions. Due to these deficiencies his report is not sufficiently detailed to establish that appellant's recurrence of disability on or after September 21, 2009 was due to his accepted back sprain.

Appellant also submitted a note dated October 8, 2009 from Dr. Okafor listing appellant's intermittent lumbar pain from February 28 through March 12, 2009; from September 21 through 29, 2009 and on October 5 to 12, 2009. Dr. Okafor stated that appellant's work aggravated his lumbar pain. The Board has held that the mere diagnosis of "pain" does not constitute the basis for payment of compensation.<sup>6</sup> Furthermore, Dr. Okafor's report did not include a history of injury, detailed findings or medical explanation of how appellant's work aggravated his lumbar pain. As his report does not provide the necessary medical findings or a clear diagnosis, his report is not sufficient to meet appellant's burden of proof in establishing a recurrence of disability.

Dr. Harsoor provided a report dated November 23, 2009 diagnosing lumbar discogenic pain secondary to disc protrusion and lumbar facet arthropathy. She provided her physical findings. Dr. Harsoor did not provide a history of injury including appellant's preexisting lumbar disc herniation or degenerative disc disease. She did not explain whether his current condition was due to his accepted lumbar strain or due to his preexisting condition. Without a complete history and with no medical opinion evidence this report is not sufficient to establish that appellant's current disability is related to his accepted employment injury.

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<sup>3</sup> 20 C.F.R. § 10.5(x).

<sup>4</sup> *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-9 (1982).

<sup>5</sup> *See Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

<sup>6</sup> *Robert Broome*, 55 ECAB 339 (2004).

In a report dated April 30, 2010, Dr. Taylor reviewed appellant's history of injury and provided multiple diagnoses including pain in the right shoulder joint, pulmonary obstructive disorders, osteoarthritis, lower back sprain, spinal stenosis and adult sleep apnea. He completed an additional report on May 6, 2010 again diagnosing lower back sprain. While Dr. Taylor noted appellant's accepted employment injury, he did not provide the history of a herniated disc in 2001. He also failed to offer a clear opinion as to whether he believed that appellant's current lower back sprain was due to the 2007 employment injury. As Dr. Taylor failed to provide a detailed medical history and opinion evidence regarding the relationship of appellant's current back condition to his accepted employment injury, his report is insufficient to establish that appellant's condition on or after September 2009 was due to a recurrence of employment-related disability.

The Board finds that the medical evidence submitted by appellant is insufficient to meet his burden of proof in establishing a recurrence of disability on or after September 21, 2009.

OWCP undertook further development of the medical evidence and referred appellant to Dr. Wehner for evaluation. In her July 20, 2010 report, Dr. Wehner related his history of injury and reviewed his medical history. She diagnosed a lumbar strain as resulting from the employment injury. Dr. Wehner found that appellant's present symptoms did not follow a radicular pattern and therefore were not related to low back problems. She stated that he should have reached maximum medical improvement from the lumbar strain and that ongoing pain complaints are not causally related to the accepted condition. Dr. Wehner instead attributed appellant's pain to his preexisting disc degeneration. The Board finds that OWCP's second opinion physician, Dr. Wehner's report negates rather than supports a causal relationship between his current condition and his accepted employment injury. As Dr. Wehner attributed appellant's current condition to his preexisting disc degenerative, this report does not support his claim for a recurrence of disability on or after September 21, 2009. Based on the medical evidence in the record, the Board finds that appellant has failed to establish his claimed recurrence.

On appeal, appellant alleged that OWCP failed to consider all the aspects of his condition when accepting his claim for lumbar sprain. The Board notes that the record establishes that in 2001 he had a herniated disc. However, there is no evidence before the Board that this diagnosed condition was employment related. The record does not establish that appellant filed a claim or that this condition was due to an earlier employment injury. Furthermore, appellant has not submitted medical evidence that his November 2007 employment injury resulted in more than the accepted lumbar strain. Based on the record as currently constructed, the Board finds that he has not established the claimed recurrence of disability on September 21, 2009.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.605 through 10.607.

## LEGAL PRECEDENT -- ISSUE 2

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.<sup>7</sup> Section 10.606(b) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.<sup>8</sup> Section 10.608 of OWCP's regulations provide that when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.<sup>9</sup>

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>10</sup>

## ANALYSIS -- ISSUE 2

Appellant requested reconsideration of OWCP's August 20, 2010 decision on September 17, 2010 by selecting the option of reconsideration on the appeal request form. In support of his reconsideration request, he resubmitted the MRI scan report dated November 30, 2001. Appellant did not submit any additional evidence or argument in support of his request.

The November 30, 2001 MRI scan report was before OWCP at the time of the August 20, 2010 decision. As this medical evidence is not new it is not sufficient to require OWCP to reopen appellant's claim for consideration of the merits.<sup>11</sup> Appellant did not provide OWCP with any additional evidence of argument and therefore the Board finds that OWCP properly declined to reopen his claim for consideration of the merits.

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<sup>7</sup> 5 U.S.C. §§ 8101-8193, 8128(a).

<sup>8</sup> 20 C.F.R. § 10.606.

<sup>9</sup> *Id.* at § 10.608.

<sup>10</sup> *M.E.* 58 ECAB 694 (2007).

<sup>11</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. See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

**CONCLUSION**

The Board finds that appellant has failed to meet his burden of proof in establishing a recurrence of disability on or after September 21, 2009. The Board further finds that OWCP properly declined to reopen his claim for consideration of the merits on October 1, 2010.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 1 and August 20, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 23, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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