

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

P.W., Appellant

and

**DEPARTMENT OF THE NAVY, MARE
ISLAND SHIPYARD, Vallejo, CA, Employer**

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) **Docket Nos. 10-266 & 10-1023**
) **Issued: February 7, 2011**
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Appearances:
Douglas Sughrue, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 9, 2009 appellant, through counsel, filed a timely appeal of the August 18, 2009 merit decision of the Office of Workers' Compensation Programs which denied his claims for recurrence of total disability and compensation for partial disability and request for surgery in Office File No. xxxxxx147. Appellant also filed a timely appeal of the Office's November 18, 2008 merit decision denying his claim for a traumatic injury and an August 14, 2009 nonmerit decision denying his request for reconsideration in Office File No. xxxxxx165. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of these cases.

ISSUES -- OFFICE FILE NO. xxxxxx147

The issues are: (1) whether appellant sustained a recurrence of total disability commencing December 15, 2006 and partial disability commencing August 16, 2007 causally related to his June 2, 1988 employment injuries; and (2) whether the Office properly denied his request for back surgery.

FACTUAL HISTORY -- OFFICE FILE NO. xxxxxx147

The Office accepted that on June 2, 1988 appellant, then a 34-year-old painter, sustained degenerative disc disease, a herniated disc of the lumbar spine, and thoracic and lumbar neuritis or radiculitis while painting at the employing establishment.¹ It authorized thermo modulation back surgery which he underwent on May 19 and June 30, 1999. On May 1, 2006 appellant underwent a bilateral laminectomy at L3-5. The Office paid temporary total disability compensation from May 1 to November 30, 2006. On December 1, 2006 appellant returned to full-time modified work.

On August 16, 2007 appellant filed a claim (Form CA-2a) alleging that he sustained a recurrence of disability commencing December 15, 2006 due to his June 2, 1988 employment injuries. He noted that, after his return to light-duty work on December 1, 2006, his back started to hurt and his pain progressively worsened. Appellant was scheduled to begin working four hours a day on August 16, 2007 based on an attending physician's instructions. He filed a claim (Form CA-7) claiming wage-loss compensation benefits commencing that date.

By letter dated October 3, 2007, the Office requested that appellant submit additional factual and medical evidence.

In an October 10, 2007 medical report, Dr. Andrew Cash, an attending Board-certified orthopedic surgeon, addressed a treatment plan for appellant's decreased range of motion of the lumbar spine with paraspinal muscle spasm and tenderness. He also provided his physical restrictions.

In an October 12, 2007 statement, an employing establishment supervisor related that appellant complained about difficulty performing his regular work duties on a weekly basis since his return to work in December 2006. The supervisor stated that accommodations were made for appellant's restrictions.

On October 16, 2007 appellant described his work duties upon his return to work on December 1, 2006 and history of his prior injuries and medical treatment. He also provided a history of his civilian employment and the development of his back pain commencing December 15, 2006.

By decision dated November 23, 2007, the Office denied appellant's claim for a recurrence of disability commencing December 15, 2006 and compensation for partial disability as of August 16, 2007, finding the medical evidence insufficient to establish that his disability was due to his accepted June 2, 1988 employment injuries.

On December 20, 2007 appellant requested an oral hearing before an Office hearing representative. Dr. Cash's reports dated November 14, 2007 to May 15, 2008 addressed his back problems, disability for work and physical restrictions. He requested authorization for appellant to undergo epidural steroid injections and decompressive laminectomies and foraminotomies to

¹ The Board notes that in 1995 appellant started work at the Department of the Air Force, Nellis Air Force Base, in Las Vegas, Nevada, where he sustained his alleged back injury on January 2, 2008 in File No. xxxxxx165.

treat his lumbar radiculopathy, radiculitis, multilevel disc bulges, stenosis, neuroforaminal stenosis and neurogenic claudication.² Dr. Cash recommended physical therapy, pain management and diagnostic testing. On March 14, 2007 he listed findings on physical examination and advised that appellant had postlaminectomy syndrome. Dr. Cash had lumbar stenosis, spondylosis and retrolisthesis based on a magnetic resonance imaging (MRI) scan. He recommended that appellant modify his eight-hour workday schedule to four hours a day.

In a June 26, 2008 decision, an Office hearing representative set aside the November 23, 2007 decision and remanded for further development. She instructed the Office to refer appellant to an appropriate specialist for a medical examination to determine whether his June 2, 1988 employment injuries worsened as of August 16, 2007 resulting in a reduction of his work schedule to four hours per day.

On June 26, 2008 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion medical examination.

In a June 16, 2008 report, Dr. Swartz reviewed a history of appellant's June 2, 1988 employment injury and medical treatment. He reviewed the medical record and listed his findings on physical examination. Dr. Swartz advised that appellant had chronic lumbar spinal stenosis and multilevel degenerative disc disease. He was postoperative multiple lumbar procedures, many of which did not help him. Dr. Swartz stated that the January 2, 1988 employment injuries temporarily aggravated appellant's age-related degenerative disease and spinal stenosis. Appellant had no employment-related disability. His employment-related conditions had resolved as of June 17, 1991, the date of a lumbar MRI scan which showed nothing but age-related degenerative changes. Dr. Swartz advised that the proposed back surgery was not warranted as the prior surgeries had failed. He stated that appellant could work eight hours per day as his physical restrictions were based on his nonwork-related conditions. Dr. Swartz opined that the reduction of appellant's work hours as of August 16, 2007 was not related to his employment-related conditions.

The Office found a conflict in the medical opinion evidence between Dr. Cash and Dr. Swartz as to whether appellant had any employment-related disability causally related to his January 2, 1988 employment injuries and whether the proposed surgery was warranted. By letter dated August 19, 2008, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Joseph S. Gimbel, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a September 16, 2008 report, Dr. Gimbel obtained a history of appellant's June 2, 1988 employment injuries and medical treatment. On physical examination, he reported that appellant had deep tendon reflexes in both knees and ankles were 2+ and equal. Sensation and motor function of both lower extremities was normal. There was a negative Babinski and no vibratory sensation in the left great toe. There was diminished vibratory sensation in the left and right lateral malleolar region, right great toe and over both patellae. The left thigh measured 2 centimeters smaller than the right above the suprapatellar region and 13 centimeters proximal to

² On January 22, 2008 the Office authorized Dr. Cash's request to perform epidural steroid injections.

the patella. Full range of motion of the hip was present. Range of motion of both hips caused appellant to complain about back pain. There was tenderness in both the sacroiliac joint and at the L5-S1 interspace. Range of motion was limited in all directions but appellant was able to bend forward and place his hands on the examining table in front of him. He was also able to bend forward and pick up his shoe and place it on his foot. Dr. Gimbel reported negative Romberg and neurological findings.

Dr. Gimbel advised that a December 2006 electromyogram (EMG)/nerve conduction study (NCS) provided normal results.³ He stated that a diagnosis of peripheral neuropathy was not previously considered based on appellant's history of diabetes, a complaint mainly of left leg pain that burned worse at night and back pain that was relieved with lying flat although it did not change his leg pain. Dr. Gimbel opined that he had permanent chronic low back pain causally related to his January 2, 1988 employment injuries and subsequent nonbeneficial surgeries. Appellant's symptoms of neuropathy and burning and tingling in the left lower extremity more so than the right, were not due to his accepted employment injuries. They were probably related to his diabetes. Dr. Gimbel advised that the proposed surgical intervention was not warranted. He recommended that appellant undergo EMG/NCS testing to evaluate the lack of vibratory sensation in his lower extremities. Dr. Gimbel also recommended that appellant take Lyrica or Neurontin. He stated that his back pain should continue to be treated conservatively with trigger point injections at L5-S1 and the sacroiliac joints, physical therapy, strengthening, back strengthening and the use of a TENS unit. Dr. Gimbel stated that appellant did not have any preexisting disability or conditions. He had limited range of motion. Dr. Gimbel advised that appellant could not perform his regular work duties, but could work eight hours per day with restrictions as set forth in an accompanying work capacity evaluation (Form OWCP-5c).⁴ He further advised that appellant continued to suffer from residuals of his June 2, 1988 employment injuries and subsequent back surgeries which consisted of limited range of motion and back pain with radicular components. Although it was difficult to determine how much of his leg pain was related to his back condition or to his diabetic neuropathy, Dr. Gimbel stated that some of his leg pain resulted from his back problems.

By letter dated October 1, 2008, the Office advised Dr. Gimbel that a diagnosis of pain was generally considered a subjective symptom. It requested that he provide a diagnosis based on supportive objective findings. Dr. Gimbel was also requested to provide rationale in support of his opinion that the proposed surgery was not warranted. The Office asked him to clarify whether the recommended EMG/NCS was causally related to appellant's January 2, 1988 employment injuries or a nonindustrial condition. Dr. Gimbel was further asked to clarify his opinion that appellant could work 8 hours per day, noting that the restrictions set forth in his Form OWCP-5c related to a 7-hour and 30-minute workday.

³ It appears that Dr. Gimbel inadvertently stated that the normal EMG/NCS study was performed in December 2006 as the only normal EMG/NCS study of record was performed on January 18, 2006.

⁴ Dr. Gimbel's September 22, 2008 Form OWCP-5c advised that appellant could sit 6 hours with a break, walk, reach above the shoulder, push and pull up to 10 pounds and lift up to 15 pounds 30 minutes and stand 1 hour. He was restricted from bending, stooping, squatting, kneeling, climbing and driving at work. Dr. Gimbel recommended two 10-minute breaks.

In an October 23, 2008 supplemental report, Dr. Gimbel advised that appellant had degenerative joint disease and was postoperative laminectomy and discectomy. He also had spinal and neuroforaminal stenosis based on a 2008 MRI scan. Dr. Gimbel stated that the proposed surgery was not warranted because appellant had already undergone multiple surgical procedures without any benefit, noting that his recent laminectomy and discectomy provided no relief. In addition, he had no current neurological problems. Although the 2008 MRI scan suggested spinal stenosis and neuroforaminal stenosis, Dr. Gimbel found that appellant's complaints and neurological examination findings did not support further surgical intervention. He recommended repeat EMG/NCS testing to evaluate appellant's nonindustrial condition and not his employment-related conditions. In an accompanying Form OWCP-5c dated October 20, 2008, Dr. Gimbel reiterated that appellant could sit for 6 hours, walk for 30 minutes and stand for 1 hour. He recommended that appellant take two 15-minute breaks per day.

By decision dated October 24, 2008, the Office denied appellant's claim for a recurrence of disability commencing December 15, 2006, compensation for partial disability as of August 16, 2007 and request for authorization for surgery. It found that Dr. Gimbel's medical opinion was entitled to special weight accorded an impartial medical specialist and established that appellant's total and partial disability during the claimed periods and proposed surgery were not causally related to his June 2, 1988 employment injuries.

On March 3, 2009 appellant, through his attorney, requested reconsideration of the October 24, 2008 decision. In reports dated August 27, 2008 to July 23, 2009, Dr. Cash addressed appellant's back symptoms and his proposed treatment plan. In an August 27, 2008 report, he listed a history of appellant's back pain from April 11, 2007 to August 1, 2008 and medical treatment. Based on physical examination, appellant sustained a work-related back injury. Dr. Cash stated that his lumbar stenosis and internal disc disruption and stenosis required at least one more surgical procedure. He concluded that appellant sustained an exacerbation of his June 2, 1988 employment injuries.

In a decision dated August 18, 2009, the Office denied modification of the October 24, 2008 decision.⁵

LEGAL PRECEDENT -- ISSUE 1 -- OFFICE FILE NO. xxxxxx147

The Act pays compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁶ Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁷

⁵ Following the issuance of the Office's August 18, 2009 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office with formal written request reconsideration. 5 U.S.C. § 8128(a); 20 C.F.R. § 10.606.

⁶ 5 U.S.C. § 8102(a).

⁷ 20 C.F.R. § 10.5(f).

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.⁸ 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 (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁹

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.¹⁰

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.¹¹

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 (known as a referee physician or impartial medical specialist) who shall make an examination.¹² In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³

ANALYSIS -- ISSUE 1 -- OFFICE FILE NO. xxxxxx147

Dr. Cash opined that appellant could only work four hours a day with restrictions and requested authorization for him to undergo decompressive laminectomies and foraminotomies. Dr. Swartz, an Office referral physician, found that appellant's employment-related conditions had resolved as of June 17, 1991, that he could work eight hours per day with nonemployment-related restrictions and the proposed surgery was not warranted. The Office found a conflict of

⁸ *Id.* at § 10.5(x).

⁹ *Id.*

¹⁰ *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

¹¹ *James H. Botts*, 50 ECAB 265 (1999).

¹² 5 U.S.C. § 8123(a); *see S.T.*, 60 ECAB ____ (Docket No. 08-1675, issued May 4, 2009).

¹³ *B.P.*, 60 ECAB ____ (Docket No. 08-1457, issued February 2, 2009); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

medical opinion arose as to whether appellant had any continuing employment-related disability causally related to his January 2, 1988 employment-related back conditions and whether the proposed surgery was warranted. It properly referred appellant to Dr. Gimbel, a Board-certified orthopedic surgeon, as an impartial medical examiner. The Board finds that Dr. Gimbel's opinion is entitled to special weight in establishing that appellant was not totally disabled commencing December 15, 2006 or partially disabled commencing August 16, 2007 due to his employment-related injuries.

In a September 16, 2008 report, Dr. Gimbel examined appellant, reviewed the medical evidence of record and found that he had permanent chronic low back pain causally related to his January 2, 1988 employment injuries and could perform modified work eight hours per day. He stated that appellant's symptoms of neuropathy in the lower extremities, more in the left than right, were not due to his accepted employment injuries. Dr. Gimbel further stated that they were probably related to his diabetes. He provided a comprehensive report in which he reviewed the history of medical treatment and diagnostic studies. Dr. Gimbel stated that conservative treatment rather than the proposed back surgery was warranted. He recommended medication, trigger point injections at L5-S1 and the sacroiliac joints, physical therapy, strengthening, back strengthening and the use of a TENS unit to treat appellant's back conditions. Dr. Gimbel stated that a repeat EMG/NCS was necessary to evaluate the lack of vibratory sensation in appellant's lower extremities. His September 22, 2008 Form OWCP-5c advised that appellant could not perform his regular work duties. Although Dr. Gimbel stated that appellant could work eight hours per day, the restrictions he set forth were for a seven and one-half hour workday.

Dr. Gimbel was asked by the Office to clarify his opinions regarding his diagnosis, the necessity of the proposed back surgery and EMG/NCS, and appellant's ability to work full-time modified work. In an October 23, 2008 report, he advised that appellant had degenerative joint disease and was postoperative laminectomy and discectomy. Dr. Gimbel further advised that appellant had spinal and neuroforaminal stenosis based on a 2008 MRI scan. He explained that the proposed back surgery was not warranted because appellant had already undergone multiple surgical procedures including, a recent laminectomy and discectomy, which provided no relief. Dr. Gimbel further explained that appellant had no current neurological problems. He stated that, despite the findings of the 2008 MRI scan, appellant's complaints and his neurological examination findings did not support further surgical intervention. Dr. Gimbel recommended a repeat EMG/NCS to evaluate his nonindustrial condition and not his employment-related conditions. His October 20, 2008 Form OWCP-5c reiterated appellant's restrictions which included two 15-minute breaks for an 8-hour workday.

As noted, a well-reasoned opinion from a referee examiner is entitled to special weight.¹⁴ The Board finds that Dr. Gimbel provided a well-rationalized opinion based on a complete factual and medical background, his review of the accepted facts and the medical record and findings on examination. Dr. Gimbel's opinion that appellant was not totally disabled commencing December 15, 2006 or partially disabled commencing August 16, 2007 due to his

¹⁴ *Id.*

accepted June 2, 1988 employment-related injuries is entitled to special weight and represents the weight of the evidence.¹⁵

LEGAL PRECEDENT -- ISSUE 2 -- OFFICE FILE NO. xxxxxx147

Section 8103(a) of the Act provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician which the Office, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation.¹⁶

In interpreting section 8103, 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 or her injury to the fullest extent possible, in the shortest amount of time. It has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness.¹⁷ In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury by submitting rationalized medical evidence that supports such a connection and demonstrates that the treatment is necessary and reasonable.¹⁸ While the Office is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.¹⁹ The fact that the Office authorized and paid for some medical treatment does not establish that the condition for which appellant received treatment was employment related.²⁰

ANALYSIS -- ISSUE 2 -- OFFICE FILE NO. xxxxxx147

As stated, the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Gimbel, who found that appellant was not totally disabled commencing December 15, 2006 or partially disabled commencing August 16, 2007 due to his accepted employment-related injuries. Dr. Gimbel also found that the need for the proposed decompressive laminectomies and foraminotomies was not warranted as appellant's neuropathy symptoms were probably related to his diabetes. He based his opinion on an examination of appellant and a review of the record, including a review of diagnostic testing. Dr. Gimbel noted that, despite lumbar MRI scan findings of spinal stenosis and neuroforaminal stenosis, appellant's complaints and his normal neurological findings did not support further surgical intervention. He further noted that appellant's prior multiple surgeries, which included a recent laminectomy and discectomy, provided no relief. Dr. Gimbel opined that appellant could work eight hours per day with

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 8103(a).

¹⁷ *Dr. Mira R. Adams*, 48 ECAB 504 (1997).

¹⁸ *See Debra S. King*, 44 ECAB 203 (1992).

¹⁹ *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

²⁰ *Dales E. Jones*, 48 ECAB 648 (1997); *James F. Aue*, 25 ECAB 151 (1974).

restrictions. As an alternative to the proposed surgery, he recommended conservative treatment which included medication, trigger point injections at L5-S1 and the sacroiliac joints, physical therapy, strengthening, back strengthening and the use of a TENS unit.

The Board finds that Dr. Gimbel's medical opinion is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight in establishing that the proposed back surgery was not warranted.²¹ The Board finds, therefore, that the Office did not abuse its discretion in declining to authorize surgery.

ISSUES -- OFFICE FILE NO. xxxxxx165

The issues are: (1) whether appellant established that he sustained left knee and back injuries on January 2, 2008, as alleged; and (2) whether the Office properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY -- OFFICE FILE NO. xxxxxx165

On January 2, 2008 appellant, then a 54-year-old carpenter/locksmith, filed a traumatic injury claim alleging that he sustained left knee and back injuries as he was leaving work on that date. He opened a door and unknowingly stepped out to a 12-inch drop to the ground. Appellant lost his footing and jammed his left knee and spine. On the claim form, the employing establishment indicated that he was in the performance of duty on January 2, 2008.

In an undated authorization for examination and/or treatment (Form CA-16) and a January 8, 2008 report, Dr. John D. Brown, an attending Board-certified family practitioner, obtained a history that appellant stepped off a curb and jammed his back while working at the employing establishment. He advised that appellant had a lumbar spasm.

In a January 9, 2008 report, Dr. Reynold L. Rimoldi, an attending Board-certified orthopedic surgeon, obtained a history that appellant hurt his left leg and back as he was leaving the employing establishment on January 2, 2008. He noted appellant's June 2, 1988 employment-related injuries and 2006 surgery. Dr. Rimoldi listed his normal findings on physical examination and found that appellant had postlaminectomy syndrome based on x-ray examination. He was not certain if he sustained a new injury. Dr. Rimoldi planned to perform additional diagnostic testing to determine whether the June 2, 1988 employment injuries were exacerbated by the January 2, 2008 incident. He stated that it seemed that the exacerbation occurred, based on appellant's complaint of persistent pain in the distribution of his lumbar spine and left thigh.

By letter dated February 5, 2008, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It requested additional medical evidence.

Appellant submitted several reports dated January 30 to February 8, 2008 from his attending physician, Dr. Cash, which advised that his lumbar disc degeneration and radiculopathy were caused or exacerbated by the January 2, 2008 incident. He was unable to

²¹ See cases cited, *supra* note 13.

work from January 3 to March 15, 2008. In a February 25, 2008 report, Dr. Cash stated that he could not determine whether appellant sustained a new injury on January 2, 2008.

On February 11 and 25, 2008 appellant filed claims for compensation (Form CA-7) for the period February 18 to March 14, 2008.

In an undated Form OWCP-5c, Dr. Rimoldi advised that appellant could not perform his regular work duties but could work eight hours per day with physical restrictions.

In an undated disability certificate, Dr. Brown advised that appellant was unable to work on January 14, 2008. Appellant was released to return to work on January 15, 2008.

By decision dated March 26, 2008, the Office denied appellant's claim of injury and his claims for disability from February 18 to March 14, 2008, finding that the medical evidence was insufficient to establish that he sustained an injury causally related to the accepted January 2, 2008 employment incident.

On April 2, 2008 appellant requested an oral hearing before an Office hearing representative regarding the March 26, 2008 decision. He submitted a January 14, 2008 report by Dr. Brown who listed his normal findings on physical examination and diagnosed low back pain with spasm and radicular symptoms.

In a January 22, 2008 report, Dr. Dennis H. Son, a Board-certified radiologist, indicated that appellant underwent an intra-operative fluoroscopy of the coccyx to treat his lumbar symptoms.

In reports dated January 16 to April 15, 2008, Dr. Cash listed his findings on physical examination and reviewed the results of an April 1, 2008 MRI scan of appellant's lumbar spine. He reiterated his diagnosis of lumbar degeneration of intervertebral discs and radiculopathy. Dr. Cash also diagnosed spondylolisthesis at multiple levels, stenosis, neuroforaminal stenosis, neurogenic claudication and radiculitis. He noted that appellant has postlaminectomy syndrome. Dr. Cash advised that the diagnosed conditions accounted for his radicular leg symptoms and stenotic neurogenic claudication.

An April 15, 2008 x-ray report of appellant's lumbar spine from Dr. Ashok Gupta, a Board-certified radiologist, found multilevel degenerative changes of the facets and endplates with retrolisthesis of L2 on L3 and L3 on L4 which appeared to be stable with flexion and extension.

On May 6, 2008 appellant requested that Dr. Cash be subpoenaed as he could better address the aggravation of his 1988 employment-related lumbar conditions by the January 2, 2008 employment incident.

By decision dated November 18, 2008, an Office hearing representative affirmed the March 26, 2008 decision, finding that the medical evidence was insufficient to establish that appellant sustained an injury causally related to the January 2, 2008 employment incident. She also denied his request for a subpoena, finding that he failed to establish that Dr. Cash's

testimony was pertinent to the issue in the case and that he could not obtain the information by other means.

On March 3, 2009 appellant, through his attorney, requested reconsideration of the November 18, 2008 decision. Counsel contended that, while Dr. Cash was unable to find that appellant sustained a new employment-related injury on January 2, 2008, his opinion that the January 2, 2008 employment incident aggravated appellant's June 2, 1988 employment injuries was sufficient to establish appellant's claim.

In an August 14, 2009 decision, the Office denied appellant's request for reconsideration, finding that he failed to submit any new evidence or argument and, thus, was not entitled to further merit review of his claim.

LEGAL PRECEDENT -- ISSUE 1 -- OFFICE FILE NO. xxxxxx165

An employee seeking benefits under the Act²² has the burden of establishing 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 filed within applicable time limitation; that an injury was sustained while 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.²³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.²⁴

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident or exposure, which is alleged to have occurred.²⁵ In order to meet his burden of proof to establish the fact that he sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he actually experienced the employment injury or exposure at the time, place and in the manner alleged.²⁶

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.²⁷ The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and

²² 5 U.S.C. §§ 8101-8193.

²³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

²⁴ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 23.

²⁵ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

²⁶ *Linda S. Jackson*, 49 ECAB 486 (1998).

²⁷ *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

medical background, showing a causal relationship between the claimed condition and the identified factors.²⁸ The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.²⁹

ANALYSIS -- ISSUE 1 -- OFFICE FILE NO. xxxxxx165

The Office accepted that appellant lost his footing and injured his left leg and spine as he stepped out of a door with a 12-inch drop while leaving the employing establishment on January 2, 2008. The Board finds that the medical evidence of record is insufficient to establish that his left leg and back conditions were caused or aggravated by the January 2, 2008 employment incident.

Dr. Brown's reports reviewed a history of the January 2, 2008 employment incident and found that appellant had a lumbar spasm and radicular symptoms. He did not provide any medical opinion addressing whether the diagnosed lumbar conditions were causally related to the accepted incident. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value.³⁰ Dr. Brown's disability certificate found that appellant was unable to work on January 14, 2008, but he could return to work on January 15, 2008. He did not provide a diagnosis or discuss how appellant's condition and resultant disability were caused or contributed to by the January 2, 2008 employment-related incident.³¹ The Board finds that Dr. Brown's reports are insufficient to establish that appellant sustained an employment injury causally related to the accepted employment incident.

Dr. Rimoldi's January 9, 2008 report reviewed a history of the January 2, 2008 employment incident. He listed normal findings on physical examination. Dr. Rimoldi recommended additional diagnostic testing to determine whether appellant's June 2, 1988 employment-related injuries were exacerbated by the accepted employment incident or whether he sustained a new injury. He did not provide a firm diagnosis that was caused or contributed to by the January 2, 2008 employment incident. In an undated Form OWCP-5c, Dr. Rimoldi found that appellant could not perform his regular work duties, but could work eight hours per day with physical restrictions. He did not provide a diagnosis or discuss how appellant's condition and resultant physical limitations were caused or contributed to by the accepted employment incident.

Dr. Cash's reports found that appellant had lumbar degeneration of intervertebral discs and radiculopathy, spondylolisthesis at multiple levels, stenosis, neuroforaminal stenosis and neurogenic claudication. He attributed his radicular leg symptoms and stenotic neurogenic claudication to the diagnosed lumbar conditions. Dr. Cash opined that appellant's lumbar disc degeneration and radiculopathy conditions were caused or exacerbated by the January 2, 2008 employment incident. He further opined that appellant was totally disabled for work from

²⁸ *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

²⁹ *Charles E. Evans*, 48 ECAB 692 (1997).

³⁰ *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

³¹ *Daniel Deparini*, 44 ECAB 657, 659 (1993).

January 3 to March 15, 2008. Dr. Cash did not discuss how the lumbar and leg conditions and resultant disability were caused or aggravated by the accepted employment incident.³² He did not explain how stepping into a 12-inch drop would cause or contribute to the diagnosed lumbar disc degeneration and radiculopathy. Further, Dr. Cash did not provide any medical opinion addressing whether the preexisting lumbar conditions were causally related to the January 2, 2008 employment incident.³³ In a February 25, 2008 report, he stated that he was unable to determine whether appellant sustained a new injury on January 2, 2008. Dr. Cash did not address whether appellant had experienced left leg and back injuries due to the accepted employment incident. The Board finds that his reports are insufficient to establish that appellant sustained lumbar and left leg conditions causally related to the January 2, 2008 employment incident.

Dr. Son's January 22, 2008 report indicated that he performed an intra-operative fluoroscopy of the coccyx on January 22, 2008 to treat appellant's lumbar symptoms. He did not provide a diagnosis or discuss how appellant's condition and resultant medical treatment were caused or contributed to by the January 2, 2008 employment incident. The Board finds that Dr. Son's report is insufficient to establish appellant's claim.

Dr. Gupta's April 15, 2008 x-ray report did not include an opinion addressing whether the diagnosed lumbar conditions were causally related to the January 2, 2008 employment incident. The Board finds that his report is insufficient to establish appellant's claim.

The Board finds that there is insufficient rationalized medical evidence of record to establish that appellant sustained left leg and back injuries causally related to the accepted January 2, 2008 employment incident. Appellant did not meet his burden of proof.

LEGAL PRECEDENT -- ISSUE 2 -- OFFICE FILE NO. xxxxxx165

To require the Office to reopen a case for merit review under section 8128 of the Act,³⁴ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.³⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.³⁶ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

³² See *Willie M. Miller*, 53 ECAB 697 (2002).

³³ See cases cited, *supra* note 30.

³⁴ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

³⁵ 20 C.F.R. § 10.606(b)(1)-(2).

³⁶ *Id.* at § 10.607(a).

ANALYSIS -- ISSUE 2 -- OFFICE FILE NO. xxxxxx165

Appellant's March 3, 2009 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not submit relevant and pertinent new evidence not previously considered by the Office. Consequently, the Board finds that appellant is not entitled to a review of the merits of his claim based on the first and third above-noted requirements under section 10.606(b)(2).

Appellant contended that although Dr. Cash was unable to find that he sustained a new injury causally related to the accepted January 2, 2008 employment incident, his opinion that the accepted employment incident aggravated his June 2, 1988 employment injuries was sufficient to establish his claim. The Office, however, previously addressed Dr. Cash's opinion in its March 26, 2008 decision and found that it was insufficient to establish that appellant sustained a back injury causally related to the accepted January 2, 2008 employment incident. Repetitive evidence does not warrant reopening a case for further merit review.³⁷ Appellant did not submit any other relevant legal argument not previously considered by the Office.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his March 3, 2009 request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's claims for recurrence of total disability commencing December 15, 2006 and compensation for partial disability commencing August 16, 2007 and request for surgery in File No. xxxxxx147. The Board further finds that appellant did not establish that he sustained left leg and back injuries on January 2, 2008, as alleged. Additionally, the Board finds that the Office properly denied his request for further merit review under 5 U.S.C. § 8128(a) in File No. xxxxxx165.

³⁷ See *L.H.*, 59 ECAB 253 (2007); *James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2009 decision of the Office of Workers' Compensation Programs is affirmed in File No. xxxxxx147. The Office's August 14, 2009 and November 18, 2008 decisions in File No. xxxxxx165 are affirmed.

Issued: February 7, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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