

Appellant filed a claim for a recurrence of disability on September 12, 2006 alleging that her disability commenced approximately two months prior. By decision dated November 2, 2006, OWCP denied the claim for a recurrence of disability. By decision dated February 26, 2007, its hearing representative set aside the November 2, 2006 decision and remanded the case for further development of the medical evidence. OWCP was directed to refer appellant for a second opinion medical examination to determine whether she sustained a recurrence of her accepted lower back condition as of July 2006 and whether her surgery in October 2006 was necessitated by the 1985 work injury.

OWCP referred appellant for a second opinion examination with Dr. Thomas J. Sabourin, Board-certified in orthopedic surgery, who stated that the 1985 injury and subsequent surgery resulted in no substantial change in the typical progression of the underlying degenerative process. Dr. Sabourin opined that appellant's current L4-5 disc condition was the natural progression of the degeneration, which had occurred over time, and not related to the original August 1985 employment injury in which she herniated the L5-S1 disc. 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.

By decision dated July 24, 2007, OWCP denied appellant's claim for a recurrence of disability. It found that Dr. Sabourin's referral opinion represented the weight of the medical evidence. By decisions dated February 29 and September 18, 2008, OWCP 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 1985 injury also contributed to the deterioration at the L4-5 as well as the L3-4 level. 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 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. Dr. Levine 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. He 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, OWCP denied appellant's application for review on the grounds that it did not raise any substantive legal questions or include new and relevant evidence sufficient further merit review. It found that appellant had submitted any new or relevant medical evidence; but did not address Dr. Levine's December 17, 2008 report.

In a June 7, 2010 decision,² the Board affirmed OWCP's July 24, 2007, February 29 and September 18, 2008 merit decisions, finding that appellant failed to submit evidence to show that she sustained a worsening of her lower back condition as of July 2006. The Board set aside the June 11, 2009 decision, finding that OWCP abused its discretion by failing to consider Dr. Levine's December 17, 2008 report. The complete facts of this case are set forth in the Board's June 7, 2010 decision and herein incorporated by reference.

By decision dated August 19, 2010, OWCP denied modification of its previous decisions, finding that appellant did not establish a recurrence of disability as of July 15, 2006.

LEGAL PRECEDENT

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury, and who supports that conclusion with sound medical reasoning.³ A recurrence of disability is defined as the inability to work caused by a spontaneous change in a medical condition which results from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. The Board notes that any contribution of employment factors is sufficient to establish the element of causal relation.⁴

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁵

ANALYSIS

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

OWCP denied appellant's claim for recurrence of disability commencing July 15, 2006 based upon the report of the second opinion physician, Dr. Sabourin, who found that her L4-5 disc condition, for which appellant underwent surgery in 2006, was the natural progression of the underlying degenerative disease and not related to the accepted August 1985 employment injury in which she herniated the L5-S1 disc.

The December 17, 2008 report from Dr. Levine found that appellant's current lumbar condition was to a degree, causally related to the 1985 work injury, for which she underwent a lumbar laminectomy in 1985 and disc excision at L5-S1. Dr. Levine explained the cause of appellant's recurrence by noting that she initially achieved a good result from her 1986 surgery; but her subsequent employment contributed to the deterioration found at the L4-5 and L3-4

² Docket No. 09-1905 (issued June 7, 2010).

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

⁴ See *L.R., claiming as widow of E.R.*, 58 ECAB 369 (2007).

⁵ 5 U.S.C. § 8123(a).

levels, together with the normal progression of the degenerative disease. He advised that the 1985 employment injury would result in some stress at the level above the surgery, as did her subsequent employment and the progression of the degenerative process. Dr. Levine 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.

The Board finds that Dr. Levine's opinion on causal relationship is in conflict with that of Dr. Sabourine. Dr. Levine supported causal relationship to the accepted 1985 accepted injury, while Dr. Sabourine ruled out such causal relationship. The case will be remanded to OWCP for referral to an impartial medical specialist.

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant sustained a recurrence of disability commencing July 15, 2006 causally related to her accepted L5-S1 herniated disc condition.

ORDER

IT IS HEREBY ORDERED THAT the August 19, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded to OWCP for further development of the medical evidence in conformance with this decision.

Issued: October 6, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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