

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

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**J.V., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Pittsburgh, PA, Employer**

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**Docket No. 11-764  
Issued: January 24, 2012**

*Appearances:*  
*Appellant, pro se*  
*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 February 8, 2011 appellant filed a timely appeal from the January 18, 2011 merit decision of the Office of Workers' Compensation Programs' (OWCP) decision which denied his claim for a recurrence of disability. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues on appeal are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability beginning November 2, 2007, causally related to his accepted 2005 employment injury; and (2) whether appellant's cervical or lumbar disc herniations are causally related to his accepted employment injury.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On September 23, 2005 appellant, then a 61-year-old manager of customer service operations, injured his back and neck when his work vehicle was rear-ended. On April 10, 2006 OWCP accepted that he sustained sprain/strain of the neck and both shoulders. It subsequently accepted right knee medial meniscus tear for which appellant had surgery on January 3, 2007. Appellant stopped work on December 26, 2006. He returned to limited duty four hours a day on May 7, 2007. Appellant stopped work again on October 12, 2007 and returned on October 22, 2007 for four hours a day. He stopped work on November 2, 2007. Appellant received wage-loss compensation for intermittent periods of disability through August 31, 2007.<sup>2</sup> On June 1, 2008 he retired from the employing establishment.

On October 3, 2005 Dr. Jerry Murphy, an attending physician specializing in emergency medicine, noted examining appellant on September 27, 2005 for a September 23, 2005 work injury. Appellant had neck pain, bilateral shoulder pain, worse on the left, with tingling into his arm, along with mid and lower back pain and bilateral hip pain. Dr. Murphy noted a 1995 motor vehicle accident that caused a low back injury and a 2000 motor vehicle accident from which appellant completely recovered. He diagnosed post-traumatic spinal strain and sprain with spasm, left shoulder sprain with possible internal derangement and bilateral trapezii myofascitis. On September 10, 2007 Dr. Murphy diagnosed of persistent cervical strain and sprain with disc herniation and persistent right knee sprain with internal derangement. He submitted reports noting that appellant was totally or partially disabled.

In a May 9, 2008 report, Dr. Murphy diagnosed persistent but improved post-traumatic spinal strain and sprain; persistent but improving bilateral shoulder girdle sprain with left shoulder sprain with bursitis; status post arthroscopic right knee surgery; multilevel post-traumatic lumbar disc herniations; and multilevel post-traumatic cervical disc herniations. He opined that there was a direct causal relationship between appellant's need for continuing medical treatment and the accepted injuries of September 23, 2005 and the additional diagnoses. Dr. Murphy opined that appellant was "totally disabled and unable to work in his preinjury job capacity because of his inability to sit, stand or drive for prolonged periods of time, reach, lift, carry, especially with his left upper extremity, kneel or climb stairs."

On May 9, 2008 appellant filed a claim for a recurrence of disability beginning November 2, 2007. He performed limited duty after his January 3, 2007 right knee surgery. Appellant worked at mostly sedentary administrative duties for four hours a day, five days a week. He continued to have pain and swelling in the right knee, left shoulder, neck and back. From May 7 to November 2, 2007, the pain from the original injury became "acute" and appellant could no longer perform his modified duties. The employing establishment controverted the claim noting a lack of supporting medical documentation. It noted that "appellant left work as normal prior to [November 6, 2007] and did not provide any notice of recurrence." The employing establishment stated that appellant only asked for sick leave until March 26, 2008 and, thereafter, requested leave without pay.

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<sup>2</sup> The record reflects that appellant was in nonwork-related motor vehicle accidents in 1995 and 2000. Appellant received a schedule award for 10 percent to the right lower extremity on January 12, 2009.

By letter dated July 11, 2008, OWCP informed appellant that the evidence was insufficient to support his claim for a recurrence on November 2, 2007. On September 19, 2008 it referred him for a second opinion examination to Dr. Steven J. Valentino, a Board-certified orthopedic surgeon, to determine the nature and extent of his September 23, 2005 injury.

In an October 28, 2008 report, Dr. Valentino noted that appellant's history of injury and treatment and opined that the accepted soft tissue conditions of the neck and bilateral shoulders strains and sprains had resolved. He stated that the 1995 motor vehicle accident caused a low back and disc injury and that appellant had similar complaints from 2000 motor vehicle accident. Dr. Valentino examined appellant and noted that he walked normally and had full range of motion in the cervical, thoracic and lumbar regions. He determined that range of motion of the right knee was 0 to 120 degrees with no evidence of decreased strength, atrophy, ankylosis or sensory changes. Dr. Valentino opined that the accepted soft tissue conditions of the neck and bilateral shoulder strains and sprains had resolved and that appellant did not have any ongoing residuals of the employment injury. He explained that there was no evidence that the work-related conditions were active or causing objective findings. Furthermore, appellant was able to perform the duties of his position as a manager of customer service operations. He opined that the periods of total disability beginning January 2, 2007 were due to the accepted work-related injury but that appellant could return to preinjury position on a full-time basis when he returned to work on April 3, 2007 at which time he would have been at maximum medical improvement.

By decision dated December 12, 2008, OWCP denied appellant's claim for a recurrence of disability beginning November 2, 2007.

On January 10, 2009 appellant requested a hearing, which was held on April 22, 2009. After the hearing, he submitted a May 11, 2009 report from Dr. Murphy who noted his history. Regarding appellant's current condition, Dr. Murphy opined that appellant's "transition from part-time work to total disability was an exacerbation and recurrence of his underlying accepted injuries of neck, bilateral shoulder, upper, lower and middle back as well as right knee, since September 23, 2005, at which time he injured these areas and this was consistent with [appellant] having already been on partial disability, working five days per week, four hours per day." He noted that appellant had "significant neck, bilateral shoulder, entire back and right knee pain, swelling and spasm and continued to have a ... spinal strain and sprain with spasm, underlying disc pathology with radiculopathy and bilateral myofascitis, all acute and post-traumatic in nature, bilateral right knee sprain status post arthroscopic surgery, which was post-traumatic in nature as well." Dr. Murphy opined that appellant's prognosis was guarded. He added that the diagnoses and the recurrence of the injury were directly related to his job injuries of September 23, 2005.

In a June 16, 2009 decision, OWCP's hearing representative found that a medical conflict existed between Dr. Murphy and Dr. Valentino as to whether the disc herniations of the cervical and lumbar spines or the recurrence of November 2, 2007 were causally related to the work injury. The case was remanded for referral to an impartial medical examiner.

On July 16, 2009 OWCP referred appellant to Dr. William H. Simon, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In an August 7, 2009 report, Dr. Simon reviewed appellant's history which included a nonwork-related motor vehicle accident in 1995 that caused a low back and disc injury with similar complaints from a nonwork motor vehicle accident in 2000. He advised that appellant's history included discogenic changes in the lumbar spine related to persistent trauma and degeneration. A July 2006 magnetic resonance imaging (MRI) scan showed degenerative disc disease in the lumbar spine. Dr. Simon stated that appellant had cervical pain prior to the work injury noting that his record review noted a C5-6 disc herniation shown in a 2002 cervical spine MRI scan. He opined that none of these diagnoses could be related to the September 23, 2005 injury, as "[a]ny soft tissue injury such as sprains or strains would have healed in a matter of weeks to perhaps several months and the documentation including the objective testing shows that [appellant] had preexisting problems in his neck and back which were totally unrelated to the trauma sustained on September 23, 2005." Dr. Simon opined that appellant had no objective residuals from the trauma of September 23, 2005 "as far as his history can be determined."

Examination revealed limited range of cervical motion in all directions and normal lumbar range of motion. Appellant had no leg length discrepancy or atrophy of the thigh or calf; straight leg raises and Lasegue signs were negative in the sitting root positions; augmented straight leg raise signs were negative; deep tendon reflexes and ankles were hyporeactive but symmetrical; extensor hallucis longus motor power was normal bilaterally and sensation was intact in the lower extremities. Knee examination was normal with full range of motion, no swelling or tenderness and healed arthroscopic incisions medially and laterally about the right knee.

On neurological examination, appellant had decreased sensation in the medial calf on the right. There was no obvious atrophy of the upper arm or forearm. Right shoulder examination was normal although appellant lifted his left arm to 90 degrees and complained of pain. Despite these findings, his internal and external rotation was normal and he had full range of motion of the elbows, wrists and hands. Deep tendon reflexes which were normal and sensation was intact in the upper extremities. The cervical spine showed some tenderness to light to medium palpation at C7 with no involuntary paravertebral muscle spasm.

Dr. Simon diagnosed cervical degenerative disc disease with disc herniation at C5-6; cervical radiculopathy on the left side; lumbar degenerative disc disease with a small herniation at L4-5; lumbar radiculitis, left side, based on electromyography scan; and status post right knee partial medial and lateral meniscectomy. He explained that these diagnoses were "unrelated to any trauma sustained on September 23, 2005." Dr. Simon opined that the only current finding "that could be possibly related to September 23, 2005 would be the arthroscopic incisions on his right knee." He explained that the right knee condition had resolved as the torn meniscus was removed in January 2007 and "could not be a cause of continuing symptomatology." Dr. Simon opined that the soft tissue conditions of neck and bilateral shoulder strain had resolved. He explained that the cervical and lumbar conditions were not work related. Dr. Simon further noted that appellant no longer had residuals of the employment injury, as any such injuries would have healed in a matter of a few weeks to several months.

Dr. Simon advised that appellant would have healed by early 2006 and he noted that appellant worked for some time after the incident. He opined that there was no evidence that the work-related condition sustained on September 23, 2005, namely soft tissue injuries of the neck

and back were causing any present objective findings. Dr. Simon further advised that the periods of disability beginning November 2, 2007 were not due to the work injury. He explained that “In my opinion [appellant] would have been retired because of progressive degenerative changes in his neck and back which would be unrelated to (the work injury), preexistent and which would occur whether or not he had sustained any injuries at all on September 23, 2005. Dr. Simon noted that appellant had work restrictions but indicated that these were due to his preexisting degenerative conditions.

By decision dated October 19, 2009, OWCP denied appellant’s claim for a recurrence of disability. It also found that the disc herniations in the cervical and lumbar spines were not causally related to the effects of the work injury.

On October 12, 2010 appellant requested reconsideration.<sup>3</sup> He noted that he never returned to full duty from May 7, 2007 until he retired on June 1, 2008. Appellant indicated that he was informed that he must claim a recurrence of disability. He explained that his physicians instructed him to stop work on November 2, 2007 due to his accepted injuries. Appellant noted that, before November 2, 2007, he was working four hours a day, five days a week and received compensation for four hours daily. He noted that he used sick leave from November 6, 2007 until March 26, 2008 and then requested compensation for eight hours a day from March 26 to May 30, 2008, when his physicians placed him off work. Appellant advised that he exhausted all of his sick leave and was forced to retire on June 1, 2008 because he was “not getting paid.” He noted that on December 4, 2009 he was told to resubmit a claim for compensation for four hours a day instead of eight hours a day five days a week, which was submitted on December 7, 2009 based on Dr. Simon’s report which supported that appellant’s accepted injuries were permanent and partially disabling. Appellant alleged that he was given “misleading information” from “Local and OWCP offices” which precluded an appeal to the Board “because of time limitations.” He requested compensation from March 26 to May 30, 2008.

By decision dated January 18, 2011, OWCP denied modification of the prior OWCP decision.

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

Section 10.5(x) of OWCP’s regulations provide that 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.<sup>4</sup>

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantive evidence, a recurrence of total

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<sup>3</sup> On December 9, 2009 appellant requested a hearing but, in a January 13, 2010 decision, OWCP denied the request as it was not timely made within 30 days.

<sup>4</sup> 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements.<sup>5</sup>

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence.<sup>6</sup> This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.<sup>7</sup> The physician's opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>8</sup>

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.<sup>9</sup>

FECA<sup>10</sup> provides that, if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>11</sup> In cases where OWCP 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.<sup>12</sup>

### ANALYSIS -- ISSUE 1

Appellant's claim was accepted for sprain/strain of the neck and shoulders and right knee medial meniscus tear. He had periods of total and partial disability before he claimed a recurrence of total disability beginning November 2, 2007.

OWCP determined that a conflict of medical opinion existed between Dr. Murphy, for appellant, who opined that the recurrence and non accepted diagnoses were causally related to the September 23, 2005 injury and Dr. Valentino, the second opinion physician, who opined that the recurrence and additional conditions were not causally related to the accepted injury.

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<sup>5</sup> *Richard E. Konnen*, 47 ECAB 388 (1996); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>6</sup> *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

<sup>7</sup> *Duane B. Harris*, 49 ECAB 170, 173 (1997).

<sup>8</sup> *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

<sup>9</sup> *Walter D. Morehead*, 31 ECAB 188 (1986).

<sup>10</sup> 5 U.S.C. §§ 8101-8193, 8123(a).

<sup>11</sup> 5 U.S.C. § 8123(a); *Shirley. Steib*, 46 ECAB 309, 317 (1994).

<sup>12</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

Therefore, it properly referred appellant to Dr. Simon, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

With regard to the claimed recurrent disability, Dr. Simon's August 7, 2009 report noted appellant's history and explained that he had preexisting degenerative low back and cervical spine conditions. He determined that there was no evidence of disabling residuals of the accepted neck and shoulder sprains or from the right knee condition that had been surgically repaired. Dr. Simon noted findings and diagnosed degenerative disc disease in the cervical spine with disc herniation at C5-6; cervical radiculopathy on the left side; lumbar degenerative disc disease with small disc herniation at L4-5, lumbar radiculitis, left side, established by electromyography scan and status post partial medial and lateral meniscectomy, right knee. He explained that appellant's accepted soft tissue sprains would have healed in a matter of weeks to several months and noted that records of objective testing documented that he had preexisting problems in his neck and back that "were totally unrelated to the trauma sustained on September 23, 2005." Dr. Simon concluded that appellant had no objective residuals from the September 23, 2005 trauma. He noted that the only finding that could be possibly related to the September 23, 2005 injury would be the arthroscopic incisions on his right knee but advised that the incisions were healed and that current knee examination was normal. Dr. Simon concluded that the soft tissue injuries resolved by early 2006 and he noted that appellant worked for some time after the injury. He opined that appellant had no work restrictions that could be attributed to the accepted conditions and indicated that continuing restrictions were due to his preexisting degenerative conditions. Dr. Simon specifically found that periods of disability beginning November 2, 2007 were not due to the September 23, 2005 injury. He explained that appellant "retired because of progressive degenerative changes in his neck and back which would be unrelated to (the work injury), preexistent and which would occur whether or not he had sustained any injuries at all on September 23, 2005."

The Board finds that Dr. Simon's opinion is entitled to special weight as his report is sufficiently well rationalized and based upon a proper factual background. OWCP properly relied upon his reports in finding that appellant did not sustain recurrence of total or partial disability beginning November 2, 2007, causally related to his September 23, 2005 work injury. Dr. Simon examined appellant, exhaustively reviewed his medical records and reported accurate medical and employment histories. He found no basis on which to attribute the claimed disability to the accepted injury.

While appellant requested reconsideration and submitted arguments regarding his belief that his disability was work related, he did not submit additional medical evidence to overcome the weight of Dr. Simon's report. Consequently, he did not meet his burden of proof to establish a recurrence of disability for the claimed period.

## LEGAL PRECEDENT -- ISSUE 2

Where appellant claims that a condition not accepted or approved by OWCP was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>13</sup>

To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.<sup>14</sup> Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>15</sup>

## ANALYSIS -- ISSUE 2

As noted, OWCP accepted sprain/strain of the neck and bilateral shoulders and right knee medial meniscus tear. It denied appellant's claim for cervical and lumbar disc herniations. As noted, OWCP determined that a conflict of medical opinion existed regarding whether the disc herniations in the cervical and lumbar spines were causally related to the effects of the September 23, 2005 work injury, based on the opinions of Dr. Murphy, appellant's physician, who opined that the conditions were work related and Dr. Valentino, the second opinion physician, who opined that they were not causally related. Therefore, it properly referred appellant to Dr. Simon, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict on this matter.<sup>16</sup>

As noted, Dr. Simon's August 7, 2009 report provided an extensive history and comprehensive examination findings. Regarding the whether the disc herniations in the cervical and lumbar spines were causally related to the September 23, 2005 work injury, Dr. Simon noted that appellant's prior history included two nonwork-related motor vehicle accidents in 1995 and 2000. He stated that the review of the medical record indicated that the 2005 accident caused low back and disc injury and that appellant had similar complaints after the 2000 motor vehicle accident. Dr. Simon advised that a July 2006 MRI scan showed degenerative disc disease of the lumbar spine and explained that such findings were clearly degenerative and preexistent in nature and not related to the September 2005 work injury. He also explained that the record documented that appellant had a history of discogenic changes in the cervical spine related to persistent trauma and degeneration, which was present since 2002, noting that a review of the medical evidence referenced that a C5-6 disc herniation was shown in a 2002 cervical spine MRI scan.

Based on this, Dr. Simon explained that the cervical and lumbar spine conditions were preexisting and not related to the injury of September 23, 2005. He noted that "any soft tissue

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<sup>13</sup> *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>14</sup> *Jennifer Atkerson*, 55 ECAB 317 (2004).

<sup>15</sup> *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

<sup>16</sup> *See supra* notes 10, 11.



injury such as sprains or strains would have healed in a matter of weeks to perhaps several months and the documentation including the objective testing shows that [appellant] had preexisting problems in his neck and back which were totally unrelated to the trauma sustained on September 23, 2005.” Dr. Simon also noted findings on examination and determined that they provided no basis to attribute a cervical or lumbar disc condition to the September 23, 2005 work injury. He explained that “In my opinion [appellant] would have been retired because of progressive degenerative changes in his neck and back which would be unrelated to (the work injury), preexistent and which would occur whether or not he had sustained any injuries at all on September 23, 2005.”

The Board finds that Dr. Simon’s opinion is entitled to special weight as his report is sufficiently well rationalized and based upon a proper factual background. OWCP properly relied upon his reports in finding that appellant’s disc herniations in the cervical and lumbar spines were not causally related to his September 23, 2005 employment injury. Dr. Simon examined appellant, reviewed his medical records and reported accurate medical and employment histories and explained the reasons for his opinion.

Consequently, appellant has not established that the disc herniations in the cervical and lumbar spines are causally related to the September 23, 2005 work injury.

On appeal, appellant alleged that his claim should have been accepted for back injuries based on the opinions of his physicians. He also alleged that he never returned to full duty and used sick leave from November 2, 2007 until March 26, 2008. Appellant indicated that he was forced to retire. However, as noted above, he has not met his burden of proof to establish his claim. As noted, the opinion of Dr. Murphy created a conflict with that of Dr. Valentino which Dr. Simon, the impartial specialist, resolved.<sup>17</sup>

### **CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish a recurrence of disability beginning November 2, 2007. The Board also finds that he did not meet his burden of proof to establish that the disc herniations in the cervical and lumbar spines were causally related to his accepted employment injury.

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<sup>17</sup> Appellant may submit evidence or argument with a written request for reconsideration 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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 18, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2012  
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