



truck. OWCP accepted a claim for lumbosacral sprain under case number xxxxxx309. Appellant stopped work on October 29, 2007 and returned on November 7, 2007. In a January 11, 2008 report, Dr. Brian J. Sullivan, a specialist in neurosurgery, stated that appellant had experienced difficulties with his low back after October 2007 due to some axial low back discomfort with radicular and claudication symptoms, greater on the right side. He opined that appellant's symptoms were consistent with spondylolisthesis and relatively severe spinal canal stenosis as shown by magnetic resonance imaging (MRI) scan.

In a May 23, 2008 report, Dr. Sullivan stated that, based on the May 20, 2008 examination, appellant had significant low back and neurogenic claudication symptoms. He reiterated his January 2008 findings and noted that he had since undergone aggressive nonsurgical treatment. Dr. Sullivan opined that appellant could benefit from surgical intervention. He recommended an L2 to L4-L5 decompressive laminectomy, instrumented posterolateral fusion, reduction of dislocation and interbody fusion. Dr. Sullivan stated that appellant had experienced significant discomfort with his back since October 29, 2007, with a significant flare up of his discomfort on May 5, 2008 which caused him to stop work. He stated that this flare up was "approximately" related to his October 29, 2007 work injury.

In a Form CA-2a dated May 27, 2008, appellant alleged that he sustained a recurrence of disability on May 5, 2008 due to his accepted injury. On June 3, 2008 Dr. Sullivan requested authorization to perform lumbar surgery. On June 5, 2008 OWCP denied authorization to perform lumbar surgery. It relied on the referral opinion of Dr. Robert Allen Smith, a Board-certified surgeon, who disagreed with Dr. Sullivan's opinion that appellant required spinal surgery. In a June 30, 2008 report, Dr. Smith stated that several reports of record diagnosed appellant with spondylolisthesis, degenerative disease of the spine and neurogenic claudication. He opined that these conditions were not accepted as being related to the work incident of October 29, 2007. Dr. Smith stated that appellant did not demonstrate any findings of ongoing back strain and that therefore the accepted condition had resolved, with no need for surgery or additional treatment.

By decision dated July 17, 2008, OWCP denied appellant's claim for a recurrence of disability due to the absence of medical and factual evidence demonstrating how the claimed recurrence was related to the original work-related injury. Based on Dr. Smith's report, appellant did not require any additional treatment for his accepted lumbosacral strain.

On July 28, 2008 appellant filed a Form CA-1 traumatic injury claim under case number xxxxxx389, alleging that he sustained a low back injury in the performance of duty on May 5, 2008 while unloading heavy mail containers off the truck. Appellant's supervisor, Mr. Harris, stated on the form that appellant had previously led him to believe that he sustained a recurrence of his October 2007 disability and claimed not to be aware that appellant had sustained a new injury on May 5, 2008. He indicated that appellant stopped work and sought medical attention on May 5, 2008. In an August 1, 2008 report, Dr. Sullivan reiterated the findings and conclusions of his January 2008 report. He again recommended surgery.

By decision dated November 6, 2008, OWCP found that appellant failed to submit sufficient medical evidence to establish that he sustained a low back injury on May 5, 2008. By decision dated February 20, 2009, an OWCP hearing representative affirmed the July 17, 2008 decision denying compensation for an alleged recurrence of disability, pursuant to case number xxxxxx309. By decision dated May 7, 2009, he affirmed the November 6, 2008 decision

denying appellant's claim for a low back injury on May 5, 2008, under case number xxxxxx389. The hearing representative found that appellant failed to meet his burden to prove fact of injury.

In a May 19, 2010 decision,<sup>2</sup> the Board affirmed the July 17 and November 6, 2008, February 20 and May 7, 2009 OWCP decisions.

Appellant requested reconsideration and submitted a May 14, 2010 report from Dr. Sullivan who reiterated his opinion that appellant had experienced ongoing troubles since his October 29, 2007 work injury and that the May 5, 2008 incident was an exacerbation and continuation of the same symptoms. By decision dated July 22, 2010, OWCP denied modification of its previous decisions. In an August 16, 2011 decision,<sup>3</sup> the Board affirmed the July 22, 2010 decision. The Board found that appellant failed to establish a worsening of his low back condition as of May 5, 2008; did not submit sufficient medical evidence to establish an injury to his low back on May 5, 2008 and OWCP did not abuse its discretion by denying authorization for lumbar laminectomy/spinal fusion surgery. The facts of this case as set forth in the Board's prior decisions are incorporated by reference.

By letters dated February 3 and March 8, 2013, appellant's attorney requested reconsideration and submitted the January 16 and February 10, 2012 reports of Dr. Sullivan, who stated that an MRI scan of May 2011 showed severe changes, most notably at the L4-5 level. There were moderately severe and significant degenerative changes at L3-4 which seem to have progressed since the previous test showing degeneration at L5-S1. Dr. Sullivan stated that there was more facet arthropathy than there was previously, which resulted in significant degenerative changes at the L3-4 and L4-5 levels. He recommended surgery which included an L3 through S1 decompressive laminectomy, with instrumented posterolateral fusion, interbody fusion and reduction of dislocation at the L4-5 level.

Dr. Sullivan also stated that he had been given a copy of appellant's CA-1 form which stated that he experienced low back and leg pain while pushing extremely heavy wire mail cages to the back of a truck. He stated that this was consistent with the significant degenerative changes that he noted on appellant's May 2011 MRI scan. Dr. Sullivan opined that the May 5, 2008 activity provided enough force to cause the severe axial low back discomfort that appellant experienced and his need for ongoing treatment. He advised that not all of appellant's degenerative changes originated on May 5, 2008; however, they became symptomatic on that date.

By decision dated February 28, 2013, OWCP denied modification of its previous decisions in this case.

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

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

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<sup>2</sup> Docket Nos. 09-1545 and 09- 1546 (issued May 19, 2010).

<sup>3</sup> Docket No. 11-99 (issued August 16, 2011).

causally related to the employment injury, and who supports that conclusion with sound medical reasoning.<sup>4</sup> 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 in the work environment that caused the illness.<sup>5</sup>

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

In the instant case, appellant has failed to submit any medical opinion containing a rationalized, probative report which relates his claimed recurrence of disability for work as of May 5, 2008 to his accepted lumbosacral strain condition. For this reason, he has not discharged his burden of proof to establish that he sustained a recurrence of disability as a result of his accepted employment condition.

In reports dated January 16 and February 10, 2012, Dr. Sullivan reiterated his opinion that appellant had experienced ongoing troubles since the October 29, 2007 work injury and, on May 5, 2008, he experienced an exacerbation of the symptoms which began with the October 2007 injury. He advised that a May 2011 MRI scan showed severe changes at the L4-5 level in addition to moderately severe and significant degenerative changes at L3-4 which had progressed since the previous study. Dr. Sullivan stated that the test showed more facet arthropathy. However, he did not adequately explain how the degenerative changes were due to appellant's accepted lumbosacral strain condition. Dr. Sullivan offered no medical rationale to causally relate appellant's condition after May 5, 2008 to his accepted October 2007 injury.

As noted, appellant has the burden of proof to submit rationalized medical evidence establishing the relationship of the claimed recurrence to the original injury. The weight of the medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided the care of analysis manifested and the medical rationale expressed in support of stated conclusions.<sup>6</sup> Appellant has not submitted a physician's reasoned opinion adequately addressing why appellant's current condition is a spontaneous worsening of the accepted October 2007 lumbosacral strain injury. The medical evidence is insufficient to establish a recurrence of a medical condition causally related to the accepted lumbosacral sprain condition. The Board affirms the denial of appellant's claim for a recurrence of disability beginning May 5, 2008.

### **LEGAL PRECEDENT -- ISSUE 2**

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.<sup>7</sup> Second, the employee must

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<sup>4</sup> *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

<sup>5</sup> *See* 20 C.F.R. § 10.5(x); *Donald T. Pippin*, 54 ECAB 631 (2003).

<sup>6</sup> *See Ann C. Leanza*, 48 ECAB 115 (1996).

<sup>7</sup> *John J. Carlone*, 41 ECAB 354 (1989).

submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>8</sup>

### ANALYSIS -- ISSUE 2

Dr. Sullivan did not describe or explain the medical process by which the claimed May 5, 2008 work activities were competent to cause a new injury. In this regard, the Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.<sup>9</sup>

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.<sup>10</sup> Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

Dr. Sullivan stated generally in his January 16 and February 10, 2012 reports that appellant experienced ongoing back problems since his accepted October 29, 2007 work injury. He advised that a May 2011 MRI scan showed changes at the L4-5 level with moderately severe and significant degenerative changes at L3-4 which had progressed since a previous study, in addition to more facet arthropathy. Dr. Sullivan stated that the significant degenerative changes demonstrated by the May 2011 MRI scan were not all present as of May 5, 2008, but became symptomatic on that day. While he opined that appellant's activities in moving wire cages on May 5, 2008 caused back symptoms, Dr. Sullivan did not provide sufficient medical rationale that appellant's work activities on that day caused any specific medical condition.

Dr. Sullivan's reports are not probative because they did not contain medical opinion adequately addressing causal relation. His opinion on causal relationship is of limited probative value in that he did not provide adequate medical rationale in support of his conclusions.<sup>11</sup> Dr. Sullivan did not describe appellant's May 5, 2008 work activities in any detail or state how these activities would have been competent to cause the claimed low back condition.

Appellant failed to provide a rationalized, probative medical opinion relating his current condition to any factors of his employment. Accordingly, as he has failed to submit any probative medical evidence establishing that he sustained an injury to his low back in the performance of duty on May 5, 2008, OWCP properly denied modification of its denial of appellant's claim for compensation.

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<sup>8</sup> *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(ee).

<sup>9</sup> See *Joe T. Williams*, 44 ECAB 518, 521 (1993).

<sup>10</sup> *Id.*

<sup>11</sup> *William C. Thomas*, 45 ECAB 591 (1994).

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8103 of FECA<sup>12</sup> provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.<sup>13</sup> In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under FECA. OWCP has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>14</sup>

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.<sup>15</sup>

### **ANALYSIS -- ISSUE 3**

On June 3, 2008 Dr. Sullivan formally requested authorization for lumbar spine fusion/laminectomy surgery; he indicated that the procedure was necessary to ameliorated appellant's accepted low back symptomatology. On June 5, 2008 OWCP found that the need for such surgery was not related to any employment-related incident or activity. In its July 17, 2008 decision, relying on Dr. Smith's opinion, it found that appellant did not require any additional treatment for his accepted lumbosacral sprain condition.

As stated above, the only restriction on OWCP's authority to authorize medical treatment is one of reasonableness. While appellant has submitted Dr. Sullivan's January 16 and February 10, 2012 reports, these reports are not sufficient to vitiate OWCP's reliance on Dr. Smith's opinion, which negated a causal relationship between appellant's condition and the proposed lumbar laminectomy/spinal fusion surgery. Dr. Sullivan reiterated his recommendation that appellant undergo surgery which included an L3 through S1 decompressive laminectomy, with instrumented posterolateral fusion, interbody fusion and reduction of dislocation at the L4-5 level.

OWCP has properly determined, in numerous decisions, that the weight of the medical evidence of record, as represented by Dr. Smith's referral opinion, indicates that appellant's spondylolisthesis, degenerative disease of the spine and neurogenic claudication conditions are

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<sup>12</sup> *Supra* note 1.

<sup>13</sup> 5 U.S.C. § 8103.

<sup>14</sup> *Dale E. Jones*, 48 ECAB 648 (1997); *Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>15</sup> 5 U.S.C. § 8123(a).

not work related. The only accepted condition in this case is lumbosacral sprain. Dr. Sullivan did not render an opinion regarding the necessity of surgery to ameliorate this condition in his January 16 and February 10, 2012 reports. Therefore there are no grounds to modify OWCP's prior determination denying appellant's request for surgery to ameliorate these conditions.

**CONCLUSION**

The Board finds that appellant has not met his burden to establish that he was entitled to compensation for a recurrence of disability as of May 5, 2008 causally related to his accepted low back condition. The Board finds that OWCP properly found that appellant failed to meet his burden of proof to establish that he sustained an injury to his low back in the performance of duty. The Board finds that OWCP did not abuse its discretion to deny appellant authorization for lumbar laminectomy/spinal fusion surgery.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 28, 2013 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: February 19, 2014  
Washington, DC

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

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

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