

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

<b>D.C., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 14-772</b>
	)	<b>Issued: July 25, 2014</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>New Orleans, LA, Employer</b>	)	
	)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Alan J. Shapiro, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

**DECISION AND ORDER**

Before:  
PATRICIA HOWARD FITZGERALD, Acting Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 17, 2014 appellant, through counsel, filed a timely appeal from a January 15, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for compensation. 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.

**ISSUE**

The issue is whether appellant established that he sustained a traumatic injury in the performance of duty on May 26, 2011, as alleged.

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

## **FACTUAL HISTORY**

This case was previously before the Board. On December 30, 2013 the Board issued an Order Dismissing Appeal based on appellant's request.<sup>2</sup> The relevant facts are as follows. On June 21, 2011 appellant, then a 45-year-old city carrier, filed an occupational disease claim for low back pain he alleged arose from his federal duties. He indicated that he first realized his condition and that it was caused or aggravated by his employment on May 26, 2011. Appellant first received medical care for his condition on June 1, 2011. The employing establishment challenged the claim, asserting that on June 1, 2011 he was receiving an investigative interview for street performance, which could lead to disciplinary action, when he stated that he needed a CA-17 because his back hurt. Appellant indicated that he injured his back on May 26, 2011, six days prior to the interview. On June 28, 2011 he filed a traumatic injury claim alleging that on May 26, 2011 he experienced lower back pain while picking up heavy boxes on route. Appellant first received medical care for his condition on June 1, 2011. No other documentation was submitted.

By letter dated July 7, 2011, OWCP advised appellant of the deficiencies in his claim. He was asked to submit additional factual and medical evidence, including medical evidence which contained a physician's well-rationalized medical opinion to support that his condition was causally related to the injury or event. Appellant was provided 30 days to submit the requested information.

OWCP received an August 5, 2011 statement from appellant describing his duties as well as delivering heavy boxes on a daily basis without a back brace. It also received a June 28, 2011 physical therapy order and authorization request; a July 27, 2011 initial physical therapy evaluation report; a July 29, 2011 physical therapy report; a June 1, 2011 diagnostic test of L-spine series; a June 10, 2011 magnetic resonance imaging (MRI) scan of the lumbar spine without contrast; and a return to work slip from Dr. Louis V. Montelaro, a family practitioner, which indicated that appellant had been under his care from June 7 to 14, 2011 and should not work for one week.

A June 28, 2011 duty status report, progress notes and letter from Dr. Kevin P. McCarthy, a Board-certified orthopedic surgeon, were also received. In his June 28, 2011 progress notes, Dr. McCarthy noted that appellant reported a one-month history of low back pain and that he works as a mail carrier. He reported examination findings as well as his review of the June 10, 2011 MRI scan of the lumbar spine. An impression of lumbar degenerative disc disease and lumbar spondylosis was provided. Conservative treatment was recommended. In his June 28, 2011 letter, Dr. McCarthy indicated that appellant was evaluated for low back pain. He stated that it appears his symptoms are related to lumbar degenerative disc disease and lumbar spondylosis and recommended conservative treatment, such as physical therapy.

By decision dated August 11, 2011, OWCP denied the claim as the medical evidence did not establish a diagnosed condition or injury as a result of employment. It stated that appellant had failed to provide medical evidence explaining an injury as a result of lifting a heavy box on his route.

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<sup>2</sup> Docket No. 13-1982 (issued December 30, 2013).

On September 7, 2011 appellant requested that an OWCP hearing representative perform a review of the written record.

In an August 23, 2011 progress note, Dr. McCarthy continued to provide an impression of lumbar degenerative disc disease and lumbar spondylosis. He indicated that he reviewed appellant's statement regarding his injury which occurred while at work as well as his check-in paperwork on his initial visit and opined that it did appear that his present symptoms were consistent with the above-stated injury. In a June 28, 2011 addendum, Dr. McCarthy indicated that appellant's paperwork at check-in indicated that his symptoms started after an injury at work which occurred on May 26, 2011, which was mistakenly left out of the subjective portion of the dictation.

In a November 29, 2011 report, Dr. McCarthy indicated that appellant first came to his clinic on June 28, 2011 following a lifting injury which occurred at his employment on May 27, 2011. At that time, he was diagnosed with lumbar degenerative disc disease and lumbar spondylosis. Dr. McCarthy opined that the basis for both of those diagnoses are in part due to repetitive back traumas most likely received throughout his military service and his employment at the employing establishment. He further opined that the lifting injury reported on May 27, 2011 acutely exacerbated his overall condition. Dr. McCarthy indicated appellant has responded favorably to his current treatment plan along with the work restrictions and that he was presently at a workable baseline.

By decision dated December 20, 2011, an OWCP hearing representative affirmed the denial of appellant's claim. The hearing representative indicated that OWCP accepted that the May 26, 2011 work event occurred but found that the medical evidence, specifically Dr. McCarthy's reports, failed to provide any medical rationale that appellant sustained, developed or further aggravated a lumbar condition as a result of the accepted May 26, 2011 work event.

On April 6, 2012 appellant requested reconsideration. New evidence was submitted in support of his request.

In a February 28, 2012 medical report, Dr. Eric K. Oberlander, a neurologist, noted that appellant was a postal worker who has complaints of lower back pain following a work-related injury on May 27, 2011, when he reportedly carried six heavy boxes and noted a sharp lower back pain onset followed by severe right lower extremity pain. Appellant reported that prior to May 27, 2011 he did not have any significant problems with back or lower extremity pain. Dr. Oberlander noted that appellant was a disabled veteran secondary to an ankle fracture, elbow fracture and high blood pressure. He presented examination findings and reviewed appellant's diagnostic studies. Dr. Oberlander opined that appellant's back pain was probably coming from the disc herniation at L5-S1 and the annular tear at that level. He also has some advanced degenerative changes, including facet arthropathy at several levels. Dr. Oberlander indicated the issue that could be acute as the disc herniation and annular tear at L5-S1 were probably from his work-related injury. These issues did not appear to have been there indefinitely and were probably not related to his military issues. Dr. Oberlander recommended conservative therapy and a discogram.

By decision dated June 29, 2012, OWCP denied modification of its prior decision. It found that Dr. Oberlander did not provide a well-reasoned medical opinion causally relating his diagnosis to the work-related injury.

On June 12, 2013 appellant, through his attorney, requested reconsideration. New evidence provided in support of his claim included a note from the employing establishment's health unit which included hearing tests; a charge of discrimination arising on or about May 26, 2011 against the employing establishment by the National Labor Relations Board; congressional inquiries and statements by appellant.

In a June 6, 2013 report, Dr. Oberlander advised that appellant was seen for lower back pain on February 28, 2012. Appellant presented with complaints of back pain following a work-related injury that occurred on May 26, 2011. Dr. Oberlander indicated that appellant was a postal worker who, while carrying six heavy boxes, noticed a sharp lower back pain followed by the onset of severe right lower extremity pain. Appellant denied any previous back or right leg problems. Dr. Oberlander noted that a June 10, 2011 MRI scan of the lumbar spine revealed an L5-S1 disc herniation and annular tear. Appellant's symptoms were felt to be related to the acute disc herniation and annular tear as a result of his work-related injury. Dr. Oberlander indicated that prior to this consultation, appellant was seen and treated by Dr. McCarthy. He recounted the results of appellant's visits. On April 16, 2012 appellant was working modified duty with a limited route and had significant improvement in symptoms. Recommendations were made to continue modified duty at work for six weeks while progressively increasing his normal daily activities outside work. On June 5, 2012 Dr. Oberlander noted that appellant had had a motor vehicle accident in which he ran off the road. Appellant had an acute exacerbation of his symptoms with worsening back and right leg pain. Dr. Oberlander's examination was unchanged and it was recommended that appellant begin physical therapy again. Due to a change in his symptoms, appellant was scheduled for a new MRI scan of the lumbar spine. He continued to work. The June 19, 2012 MRI scan of the lumbar spine showed moderate findings of an L5-S1 disc bulge and annular tear with some degenerative changes and bilateral neuroforaminal narrowing. Dr. Oberlander stated that appellant had continued back pain but improvement of his leg symptoms. On September 18, 2012 appellant had increasing back pain. It was noted that he was working a new route and was walking over eight hours a day. Appellant was out of work for a few days because of his symptoms. Recommendations were given to remain out of work for two more days with return to limited duty with a shorter route with no more than seven hours on the street working. On November 13, 2012 appellant presented with continued worsening back pain and subjective leg weakness despite his work restrictions. He had to leave work over a weekend due to the severity of his symptoms. Appellant was not ready for surgery and he was given a release to return to work on work assignment only. On February 18, 2013 appellant had continued back pain. It was noted that he had retired because of his back problems and was trying to lose weight, but began having knee problems. Symptoms had improved since appellant was not working. On April 23, 2013 test results were discussed. Discogram revealed concordant pain in the L3-4 and L4-5 levels with extravasation of contrast dye at the L5-S1 level consistent with an annular tear. Dr. Oberlander's recommendation that appellant avoid surgery as long as possible was seconded by a Dr. Greg Fautheree. Appellant was referred to pain management. Dr. Oberlander concluded that appellant sustained a work-related injury while lifting boxes on May 26, 2011. Appellant had imaging that revealed an L5-S1 disc herniation with an annular tear. He had no prior back complaints before that injury, even

through the course of his military service. Appellant had documentation of back pain in 2003 that resolved and he remained pain free without treatment for eight years until his work-related injury of May 26, 2011. Due to the onset of appellant's symptoms and imaging to support and correlate them, Dr. Oberlander opined that it was more probable than not that appellant's L5-S1 disc herniation was caused by his work injury.

By decision dated July 12, 2012, OWCP denied modification of the June 29, 2012 decision.

On December 2, 2013 appellant, through his attorney, again requested reconsideration. New evidence included statements from appellant to his Senator and the attorney's statement of December 2, 2013.

In an August 5, 2013 letter, Dr. Oberlander stated that appellant had been followed at the clinic for continued back problems as a result of a work-related injury of May 26, 2011. Appellant had chronic back and leg pain as a result of this injury. He was now unable to work as a result of the injury as the symptoms require medications which cause drowsiness, dizziness and nausea. Dr. Oberlander stated that appellant would always have chronic pain and difficulties sustaining any gainful employment as it was unlikely that a surgery would alleviate all of his symptoms.

In his October 30, 2013 letter, Dr. Oberlander stated that appellant had no previous symptoms of back pain. Appellant had an incident at work on May 26, 2011 in which he lifted and carried six heavy boxes and immediately noticed sharp lower back pain and severe right lower extremity pain. The lumbar MRI scan revealed L5-S1 disc herniation and annular tear. Dr. Oberlander opined that the absence of symptoms preceding this incident, the sudden onset of appellant's symptoms immediately after that incident are pathophysiological for the abnormality seen on imaging and demonstrates the causal relationship between appellant's work injury and the diagnosed condition.

By decision dated January 15, 2014, OWCP denied modification of its prior decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA has the burden of proof to establish 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 FECA, that the claim was filed within the 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.<sup>3</sup> 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.<sup>4</sup>

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<sup>3</sup> C.S., Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

<sup>4</sup> S.P., 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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. A fact of injury determination is based on two elements. 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. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.<sup>5</sup>

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.<sup>6</sup> The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.<sup>7</sup> The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>8</sup> Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>9</sup>

### ANALYSIS

OWCP accepted that on or about May 26, 2011 appellant lifted a heavy box or boxes while in the performance of duty. It denied his claim, however, finding insufficient medical evidence to establish that his back condition was causally related to the May 26, 2011 event of lifting heavy boxes or factors of his federal employment. The Board finds that appellant did not meet his burden of proof to establish that his back condition was caused or aggravated from his employment.

Appellant submitted a return to work slip from Dr. Montelaro, who failed to provide any medical diagnoses or discussion on causal relationship. Therefore, this evidence does not establish appellant's claim.

Appellant submitted several reports from Dr. McCarthy. In his June 28, 2011 medical report and letter, Dr. McCarthy stated that it appeared appellant's symptoms are related to lumbar degenerative disc disease and lumbar spondylosis. He, however, did not provide any discussion of appellant's work duties or provide an opinion on causal relationship. Medical

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<sup>5</sup> See *Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

<sup>6</sup> See *J.Z.*, 58 ECAB 529, 531 (2007); *Paul E. Thams*, 56 ECAB 503, 511 (2005).

<sup>7</sup> *I.J.*, 59 ECAB 408, 415 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>8</sup> *James Mack*, 43 ECAB 321, 329 (1991).

<sup>9</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value.<sup>10</sup> Dr. McCarthy subsequently noted that appellant's symptoms started after an injury at work on May 27, 2011 and opined that his symptoms were consistent with lumbar degenerative disc disease and lumbar spondylosis. However, he again failed to provide any discussion with regard to causal relationship. This report is insufficient to establish the claim.<sup>11</sup> In his November 29, 2011 report, Dr. McCarthy opined that the lifting injury of May 27, 2011 acutely exacerbated appellant's overall condition. While he opined that appellant's condition of lumbar degenerative disc disease and lumbar spondylosis was in part due to repetitive back traumas due to his federal employment, Dr. McCarthy failed to provide any medical rationale that appellant sustained, developed or further aggravated a lumbar condition as a result of the accepted May 26, 2011 lifting incident. Thus, this report is insufficient to meet appellant's burden of proof.

Appellant submitted several reports from Dr. Oberlander. In his February 28, 2012 report, Dr. Oberlander noted the history of injury, presented examination findings and reviewed appellant's diagnostic studies. He opined that appellant's back pain was properly coming from the disc herniation at L5-S1 and the annular tear at that level, which are properly from his work-related injury. Although Dr. Oberlander provided some support for causal relationship, his opinion is insufficient to establish that the disc herniation at L5-S1 and the annular tear at that level are causally related to the work incident. He offered equivocal support for causal relationship. Dr. Oberlander qualified his opinion by stating the diagnoses are probably from the work injury.<sup>12</sup> He also provided insufficient medical reasoning to explain how the lifting incident caused or contributed to the diagnosed medical conditions. Therefore, Dr. Oberlander's February 28, 2012 report is insufficient to meet appellant's burden of proof.

Dr. Oberlander's subsequent reports are likewise deficient. In his June 6, 2013 report, he provided a history of appellant's injury and recounted the results of appellant's visits. Dr. Oberlander opined that, due to the onset of his symptoms and imaging to support and correlate them, it was more probable than not that appellant's L5-S1 disc herniation with an annular tear was caused by his work injury. He again provides only speculative support that appellant's diagnoses are causally related to his employment.<sup>13</sup> In his August 5, 2013 report, Dr. Oberlander stated that appellant has chronic back and leg pain as a result of the May 26, 2011 work injury. However, he offered no medical rationale to support causal relationship. In his October 3, 2013 report, Dr. Oberlander opined that the absence of symptoms preceding the work incident, the sudden onset of his symptoms immediately after the incident as well as the abnormality seen on imaging demonstrates the causal relationship between appellant's work injury and the diagnosed condition. However, he provided no medical reasoning explaining how the lifting incident caused or contributed to appellant's diagnosed medical conditions. The fact

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<sup>10</sup> *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>11</sup> *See J.F.*, Docket No. 09-1061 (issued November 17, 2009) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

<sup>12</sup> Medical opinions that are speculative or equivocal in character are of diminished probative value. *D.D.*, 57 ECAB 734 (2006).

<sup>13</sup> *Id.*

that appellant was asymptomatic prior to the injury is not dispositive of whether his medical conditions are causally related to the accepted incident. The Board had held that an opinion that a condition is causally related because the employee was asymptomatic before the incident is sufficient, without supporting rationale to establish causal relation.<sup>14</sup> Dr. Oberlander has not provided a well-reasoned medical opinion based on medical certainty that the diagnosed conditions were definitively caused by the work-related incident of May 26, 2011.

Appellant also submitted notes from physical therapists. Physical therapy notes do not constitute probative medical evidence, as physical therapists are not considered physicians under FECA.<sup>15</sup> The reports of diagnostic studies, MRI scan and x-rays, do not provide any opinion as to the cause of appellant's condition. These are also of diminished probative value and are insufficient to establish his claim.<sup>16</sup>

Appellant has not submitted reasoned medical evidence explaining how and why his diagnosed medical conditions were caused or aggravated by the May 26, 2011 work incident. He has not met his burden of proof.

On appeal appellant's attorney argues OWCP's decision is contrary to fact and law. For the reasons stated above, the Board finds that appellant has not met his burden of proof.

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

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that he sustained a medical condition causally related to the May 26, 2011 employment incident.

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<sup>14</sup> See *John F. Glynn*, 53 ECAB 562 (2002).

<sup>15</sup> Section 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.

<sup>16</sup> See *Mary E. Marshall*, 56 ECAB 420 (2005).



**ORDER**

**IT IS HEREBY ORDERED THAT** the January 15, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 25, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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