

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

R.J., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, FEDERAL AIR
MARSHAL SERVICE, East Elmhurst, NY,
Employer**

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**Docket No. 20-1571
Issued: April 19, 2021**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 31, 2020 appellant, through counsel, filed a timely appeal from an August 7, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUE

The issue is whether appellant has met his burden of proof to establish lumbar conditions causally related to the accepted April 16, 2019 employment incident.

FACTUAL HISTORY

On April 28, 2019 appellant, then a 48-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that he sustained a back injury and pinched nerve when undergoing a health and fitness assessment while in the performance of duty on April 16, 2019.⁴ He stopped work on May 3, 2019.

In an undated witness statement, J.S., a coworker, described that on April 16, 2019 he was conducting the employing establishment's mandated physical fitness test with appellant. While holding appellant's feet during the sit-up portion of the test, he observed him wince in pain and reach for his lower back. Appellant advised J.S. that he thought he had pulled something in his back and that he was in discomfort. J.S. further indicated that, while observing appellant performing the lateral pull-down portion of the test, he was holding his lower back and complaining of discomfort and severe pain.

In an April 23, 2019 report, Yaw Appau, a physician assistant, diagnosed sciatica and prescribed medication. In a note dated April 23, 2019, Dr. James Joseph, an orthopedic surgeon, diagnosed low back pain and radiculopathy and held appellant off of work through April 27, 2019. Appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine on April 29, 2019, which demonstrated an L5-S1 subarticular disc extrusion/sequestered disc causing severe lateral recess stenosis and compression of the left S1 traversing nerve root. In a letter dated May 2, 2019, Dr. Joseph advised appellant that he had reviewed the MRI scan, which demonstrated a herniated disc that was pressing on a nerve. He recommended that he consult with Dr. Stephen Andrus, an interventional spine specialist, to discuss an epidural steroid injection.

Dr. Manuel Ceja, an internal medicine specialist, in a May 3, 2019 duty status report (Form CA-17), diagnosed a lumbar spine sprain/strain and bulges which occurred when appellant performed a lateral pull down during a fitness test. He recommended that appellant remain out of work until further notice. In an attending physician's report (Form CA-20) of even date, Dr. Ceja

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the August 7, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁴ Appellant amended the date of injury from April 23, 2019 to April 16, 2019 following a May 2, 2019 request from the employing establishment.

checked a box marked “Yes” to indicate his opinion that appellant’s condition was caused or aggravated by his federal employment.

In a report dated June 4, 2019, Dr. Bruce Ross, an orthopedic surgeon, evaluated appellant for complaints of severe back and left leg pain following an incident where he injured his back while working out for the employing establishment. On physical examination he noted pain at L4, L5 and S1 into the left sacroiliac joint, buttock and leg, an absent Achilles’ reflex on the left, and marked weakness in dorsiflexion of the foot and ankle. Dr. Ross diagnosed a herniated disc and partial foot drop. In a Form CA-20 of even date, he noted a diagnosis of lumbar spine herniated nucleus pulposus (HNP) due to participating in training and recommended appellant remain out of work until further notice.

In a June 27, 2019 development letter, OWCP informed appellant that additional evidence was required to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. The questionnaire requested that appellant describe in detail the employment duties, which he believed contributed to his condition and requested that he provide a physician’s opinion, supported by medical rationale, as to how those duties caused or aggravated his medical condition. OWCP afforded him 30 days to submit additional evidence and to respond to its inquiries. In a letter of even date, it informed the employing establishment that, if appellant was treated at its medical facility for the alleged injury, it must provide treatment notes.

Appellant underwent electrodiagnostic studies including nerve conduction velocity and electromyogram (NCV/EMG) testing on May 13, 2019 by Dr. Madhu Boppana, a neurologist, which demonstrated left L5-S1 radiculopathy.

In a July 10, 2019 response to OWCP’s development letter, appellant indicated his injury occurred while he was performing the lateral pull down. He described feeling a pop in his back followed by an immediate onset of pain in the lower back with severe left-sided pain and numbness from his back to his foot. After this occurred, appellant noted that he sat out for the rest of training.

In a response of even date to OWCP’s development letter, C.C., an employing establishment supervisor, confirmed that appellant was performing a mandatory fitness assessment at the time of the alleged injury, and the assessment does include lateral pull downs, among other exercises.

Dr. Ross reexamined appellant on July 10, 2019, noting ongoing low back pain radiating into the left buttock and leg, weakness in dorsiflexion of the left foot at the extensor hallucis longus, and a positive bowstring sign at 50 degrees during straight leg raise testing on the left. In an attending physician’s report of even date, he again noted a diagnosis of lumbar spine HNP due to participating in training. Dr. Ross recommended appellant continue to remain out of work until further notice.

By decision dated August 6, 2019, OWCP denied appellant’s claim, finding that the medical evidence of record was insufficient to establish that the lumbar conditions were causally related to the April 16, 2019 employment incident.

OWCP continued to receive medical evidence. In a May 8, 2019 report, Dr. Ceja noted appellant's history that on April 16, 2019, while undergoing a fitness assessment at work, he felt a sharp pain in his lower back while pulling downward during the lateral pull-down test. He conducted a physical examination and recorded complaints of pain in the lower back, which radiated down the left lower extremity with numbness and muscle spasm. Dr. Ceja diagnosed intervertebral disc displacement of the lumbar region and a strain of muscle, fascia, and tendon of the lower back. He opined, within a reasonable degree of medical certainty, that the diagnoses rendered were causally related to the specified work incident.

In a May 13, 2019 report, Dr. Boppana noted a history that appellant was injured while performing a lateral pull down with weight during a work physical. He indicated that appellant related an immediate onset of back pain. Dr. Boppana outlined his physical examination and EMG/NCV results, as noted above, and diagnosed lumbosacral radiculopathy secondary to lumbosacral disc herniation. He stated that, within a reasonable degree of medical certainty, this diagnosis was causally related to the employment incident.

In August 19 and September 1, 2019 reports, Dr. Ross' examination findings were unchanged, and he referred appellant for ongoing physical therapy. In a Form CA-20 dated August 19, 2019, Dr. Ross again noted a diagnosis of lumbar spine HNP due to participating in training and recommended appellant continue to remain out of work until further notice.

On October 21, 2019 appellant requested reconsideration of the August 6, 2019 decision.

In a September 23, 2019 narrative report, Dr. Ross reiterated appellant's history of injuring his lower back while performing a lateral pull-down. Appellant related that the exercise involved developing the latissimus dorsi and lateral back muscles and, on the third pull, he felt a pop in the lower back. Thereafter, he developed weakness on the left side radiating into the left buttock, left leg and toes and violent muscle spasms that caused twitching and cramping of the left lower extremity. Dr. Ross noted that, prior to the incident, appellant had no history of any problems with his spine. After outlining his evaluations and treatment history to date, including his review of the lumbar MRI scan, he diagnosed intervertebral disc displacement, lumbar region. Dr. Ross opined that the applied stress to the lumbar spine caused by the physical fitness test caused the disc herniation. He further concluded that appellant remained totally disabled and that future treatment may include epidural steroid injections, laminectomy, or spinal fusion.

In October 15 and November 19, 2019 follow up visits, Dr. Ross noted ongoing low back pain radiating into the left buttock and leg and referred appellant for ongoing physical therapy.

By decision dated January 16, 2020, OWCP denied modification of its August 6, 2019 decision.

OWCP continued to receive medical evidence. In a January 8, 2020 follow-up note, Dr. Ross noted ongoing low back pain radiating into the left buttock and left leg. He performed a physical examination and diagnosed a herniated disc. Dr. Ross advised appellant that if he developed foot drop, then decompression surgery would be necessary.

On May 17, 2020 appellant again requested reconsideration and submitted an undated narrative report of Dr. Ross with his request. Dr. Ross explained that the herniated disc resulted

from a pull/torque injury and that rotational force had overwhelmed the load-bearing capacity of the spine. This force caused a tear of the vertebral disc, which then altered the mechanics of the spine, causing trauma to the disc. Dr. Ross opined that the nerve then became swollen and inflamed due to compression from the displaced disc, and that this was a material change caused by the rotational forces of the work injury. He further explained that the quantity of loads placed upon the spine caused the tear of the annulus fibrosis, because their duration and intensity were beyond the body's normal capacities.

In an April 3, 2020 follow up report, Dr. Ross noted ongoing, unchanged examination findings and complaints.

By decision dated August 7, 2020, OWCP denied modification of the January 16, 2020 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,⁶ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁷ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁸

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.⁹

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹⁰ The opinion of the physician must be based upon a complete

⁵ *Supra* note 1.

⁶ *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁹ *T.W.*, Docket No. 20-0767 (issued January 13, 2021); *L.D.*, Docket No. 19-1301 (issued January 29, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019).

¹⁰ *I.J.*, Docket No. 19-1343 (issued February 26, 2020); *T.H.*, 59 ECAB 388 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

factual and medical background, 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 incident.¹¹

ANALYSIS

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

In his September 23, 2019 narrative report and his undated report accompanying appellant's May 17, 2020 request for reconsideration, Dr. Ross provided a proper factual and medical history of the injury, noting that, while performing a lateral pull-down, appellant felt a pop in his lower back and experienced an immediate onset of severe pain followed by cramping in the lower back, down the left leg, and into the left foot. He opined within a reasonable degree of medical certainty that the L5-S1 herniated disc resulted from a pull/torque injury, which placed stress on the spine. Dr. Ross explained that the injury was two-fold, namely, that the rotational force overwhelmed the load-bearing capacity of the spine causing a tear of the vertebral disc, which then altered the mechanics of the spine and caused trauma to the disc. He further explained that the tear of the annulus fibrosis appellant sustained was triggered by the trauma of lifting the weight during the lateral pull-down due to the quantity of loads placed on the spine for a duration and intensity beyond the body's normal capacities. Dr. Ross also opined that the nerve then became swollen and inflamed due to compression from the displaced disc, and that this was a material change caused by the rotational forces of the accepted April 16, 2019 employment incident.

The Board finds that the reports from Dr. Ross are sufficient to require further development of the medical evidence in this claim. He exhibited a comprehensive understanding of the medical record and case history. Dr. Ross' reports provide a rationalized explanation as to how appellant's accepted April 16, 2019 employment incident resulted in his diagnosed lumbar conditions including strain of muscle, fascia and tendon of the lower back, a herniated disc at L5-S1 and left-sided L5-S1 radiculopathy. The Board has long held that it is unnecessary that the evidence of record in a case be so conclusive as to suggest a causal connection beyond all possible doubt. Rather, the evidence required is only that which is necessary to convince the adjudicator that the conclusion drawn is rational, sound, and logical.¹² Dr. Ross' medical opinions as set forth in his reports are found to require further development of appellant's claim.¹³

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares

¹¹ *D.C.*, Docket No. 19-1093 (issued June 25, 2020); *see L.B.*, Docket No. 18-0533 (issued August 27, 2018).

¹² *T.F.*, Docket No. 19-1900 (issued October 27, 2020); *W.M.*, Docket No. 17-0144 (issued November 7, 2017); *E.M.*, Docket No. 11-1106 (issued December 28, 2011).

¹³ *See T.F., id.; J.H.*, Docket No. 18-1637 (issued January 29, 2020); *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

responsibility for the development of the evidence.¹⁴ OWCP has an obligation to see that justice is done.¹⁵

On remand OWCP shall refer appellant to a specialist in the appropriate field of medicine, along with the case record and a statement of accepted facts, for an examination and a rationalized medical opinion as to whether the accepted April 16, 2019 employment incident either caused or aggravated his diagnosed conditions.¹⁶ If the second opinion disagrees with the explanations provided by Dr. Ross, he or she must provide a fully-rationalized explanation as to why the accepted employment incident was insufficient to have caused or aggravated appellant's diagnosed conditions of strain of muscle, fascia and tendon of the lower back, L5-S1 herniated disc and left-sided L5-S1 radiculopathy. After this and other such further development of the case record as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 7, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 19, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ See *id.*; see also *A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy Hammons*, 51 ECAB 219, 223 (1999).

¹⁵ See *B.C.*, Docket No. 15-1853 (issued January 19, 2016); *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *C.C.*, Docket No. 19-1631 (issued February 12, 2020).