

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

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<b>J.G., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 24-0754</b>
	)	<b>Issued: August 20, 2024</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>EMPORIA VA CLINIC, Emporia, VA, Employer</b>	)	
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*Appearances:*

*Aaron B. Aumiller, Esq., for the appellant<sup>1</sup>*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On July 25, 2022 appellant, through counsel, filed a timely appeal from a March 29, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish a medical condition causally related to the accepted April 1, 2019 employment incident.

## FACTUAL HISTORY

On April 4, 2019 appellant, then a 59-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on April 1, 2019, he sustained pain and numbness of the legs, hips, left foot, neck, and shoulders when he attempted to prevent a patient from falling and felt a “pop” in his back while in the performance of duty. He stopped work on April 6, 2019.

In a development letter dated April 15, 2019, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and afforded him 30 days to respond.

On April 10, 2019 Dr. Richard Garri, Board-certified in emergency medicine, examined appellant for complaints of back, neck, and shoulder pain radiating down the legs with numbness and tingling in the left toes and hip. On physical examination, he observed tenderness of the lumbar area with pain. Dr. Garri diagnosed left-sided sciatica.

In a report dated April 25, 2019, Dr. Keith Tucci, a Board-certified neurosurgeon, related that appellant was seen for complaints of back pain, numbness of the left leg and toes, and right leg pain. He noted that appellant had undergone a bilateral L4-5 lateral recess decompression procedure in 2016. On physical examination, Dr. Tucci observed an antalgic gait, full motor control, no spasticity or rigidity, full range of motion of the extremities, and a negative straight leg raise test. He stated an impression of recurrence of back and bilateral leg discomfort.

By decision dated May 22, 2019, OWCP denied appellant’s claim, finding that the medical evidence of record was insufficient to establish a condition diagnosed in connection with the accepted incident of April 1, 2019. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On May 29, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review.

In a report dated August 21, 2019, Dr. Aaron Danison, an osteopathic Board-certified neurosurgeon, recounted that appellant was seen for complaints of back pain. He noted that appellant had previously undergone bilateral laminectomies at L4-5 on April 21, 2015. On physical examination, Dr. Danison observed an antalgic gait. He reviewed a magnetic resonance imaging (MRI) scan of the lumbar spine and x-rays of the lumbar spine, noting grade 1 spinal listhesis; spinal instability with hypermobility at L4-5 and flexion that reduced in extension; and severe central and lateral recess stenosis at L4-5, exacerbated with forward flexion. Dr. Danison diagnosed grade one L4-5 spondylolisthesis resulting in lumbar radiculopathy.

In a note dated September 5, 2019, Dr. Tucci explained that appellant lifted a patient on April 1, 2019 when he felt an immediate “pop” in his back and experienced pain, burning, and numbness of the left leg, followed by the same symptoms of the right leg. Appellant later

developed a right foot drop. Dr. Tucci diagnosed bilateral lumbar radiculopathy and spondylolisthesis. He noted that appellant had previously undergone back surgery in 2015 and was asymptomatic until the incident of April 1, 2019. Dr. Tucci opined that the force generated in the April 1, 2019 event was sufficient to aggravate appellant's preexisting spondylolisthesis, resulting in his symptoms and requiring further spinal surgery.

A hearing was held before a representative of OWCP's Branch of Hearings and Review on September 11, 2019.

By decision dated November 7, 2019, OWCP's hearing representative modified the May 22, 2019 decision finding that the evidence established a diagnosed condition that could be related to the claimed employment incident. However, the claim remained denied as the medical evidence of record was insufficiently rationalized to establish causal relationship between the diagnosed condition and the accepted April 1, 2019 employment incident.<sup>3</sup>

Appellant submitted progress notes from a physician assistant dated April 30, 2020.

On August 10, 2020 appellant underwent an L4-5 posterior interbody fusion procedure performed by Dr. Russell Margraf, a Board-certified neurosurgeon for treatment of L4-5 spondylolisthesis and stenosis.

On November 5, 2020 appellant, through then-counsel, requested reconsideration.

By decision dated November 19, 2020, OWCP denied appellant's request for reconsideration.

On January 28, 2021 appellant, through then-counsel, again requested reconsideration indicating that the submitted evidence met the criteria for a merit review.

By decision dated February 12, 2021, OWCP denied modification of its November 7, 2019 decision.

On February 11, 2022 appellant, through counsel, requested reconsideration. In an attached report dated February 9, 2022, Dr. Robert W. Macht, a general surgeon, stated that he had obtained an evaluation of appellant on February 8, 2022. He reviewed appellant's medical history and diagnosed status post lumbar fusion, following laminectomy in 2015. Dr. Macht noted that appellant was involved in an incident at work on April 1, 2019, and experienced the new onset of symptoms in the legs due to lumbar radiculopathy. He stated that appellant developed a left foot drop, not a right foot drop. Dr. Macht explained that without specific testing prior to the April 1, 2019 incident, it could not be excluded that appellant had a preexisting spondylolisthesis -- but that generally, spondylolistheses are asymptomatic until aggravation. He opined that the incident of April 1, 2019, which involved a rapid torque supporting the weight of a patient with his back

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<sup>3</sup> The hearing representative also noted that appellant had a prior traumatic injury claim, OWCP File No. xxxxxx844, for a May 18, 2013 injury which was accepted for lumbar sprain, neck sprain, and displacement of lumbar intervertebral disc without myelopathy. On April 21, 2015 appellant underwent an L4-5 partial hemilaminectomy and partial foraminotomy. The hearing representative related that OWCP should double the instant case with OWCP File No. xxxxxx844.

muscles along with twisting of the body, caused sudden back pain with muscle and ligament injury and sudden slippage of one vertebral body on another, (spondylolisthesis) which was of a sufficient degree to cause pinching of the L5 nerve root. The pinching of the L5 nerve root resulted in appellant's pain, numbness, and burning symptoms of the legs, and eventually resulted in the left foot drop.

By decision dated March 29, 2022, OWCP denied modification of its February 12, 2021 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> 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,<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. The first component is whether the employee actually experienced the employment incident at the time and place, and in the manner alleged. The second component is whether the employment incident caused an injury.<sup>8</sup>

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.<sup>9</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

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> *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).

<sup>6</sup> *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).

<sup>7</sup> *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).

<sup>8</sup> *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>9</sup> *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

nature of the relationship between the diagnosed condition and specific employment incident identified by the employee.<sup>10</sup>

### ANALYSIS

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

In a report dated February 9, 2022, Dr. Macht stated that he had evaluated appellant on February 8, 2022. He reviewed appellant's medical history and diagnosed status post lumbar fusion. Dr. Macht noted that appellant was involved in an incident at work on April 1, 2019, and experienced the new onset of symptoms in the bilateral legs due to lumbar radiculopathy. Dr. Macht opined that the incident of April 1, 2019, which involved a rapid torque supporting the weight of a patient with his back muscles along with twisting of the body, caused sudden back pain with muscle and ligament injury and sudden slippage of one vertebral body on another, spondylolisthesis, which was of a sufficient degree to cause pinching of the L5 nerve root. The pinching of the L5 nerve root resulted in appellant's pain, numbness, and burning symptoms of the legs, and eventually resulted in the left foot drop.

The Board finds that the February 9, 2022 report from Dr. Macht is sufficient to require further development of the medical evidence. Dr. Macht proffered a pathophysiological explanation as to how the accepted incident of April 1, 2019 resulted in his diagnosed spondylolisthesis, lumbar radiculopathy, pinching of the L5 nerve root, and associated symptoms, and discussed and differentiated appellant's condition from his preexisting symptoms. Accordingly, his medical opinion is sufficient to require further development of appellant's claim.<sup>11</sup>

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 responsibility in the development of the evidence.<sup>12</sup> OWCP has an obligation to see that justice is done.<sup>13</sup>

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.<sup>14</sup> Its referral physician shall provide a well-rationalized opinion as to whether appellant's diagnosed back conditions were causally related to or aggravated by the accepted employment incident of April 1, 2019, or any other factors

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<sup>10</sup> *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>11</sup> *See J.H.*, *supra* note 6; *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).

<sup>12</sup> *See id.* *See also A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

<sup>13</sup> *See B.C.*, Docket No. 15-1853 (issued January 19, 2016); *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *John J. Carlone*, *supra* note 8.

<sup>14</sup> On remand, OWCP shall combine the instant claim with OWCP File No. xxxxxx844.

of his federal employment. If the physician opines that the diagnosed conditions are not causally related, he or she must explain with rationale how or why the opinion differs from that of Dr. Macht. After such further development of the case record as OWCP deems necessary, it 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 March 29, 2022 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: August 20, 2024  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board