



## ISSUE

The issue is whether appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include lumbar spondylosis with grade 1 anterolisthesis of L3-4 and right lower extremity radiculitis, as causally related to the accepted June 30, 2017 employment injury.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 3, 2017 appellant, then a 68-year-old sales store checker, filed a traumatic injury claim (Form CA-1) alleging that on June 30, 2017 he sustained injuries to his right knee, elbow, forearm, and low back when he tripped and fell while in the performance of duty. He stopped work on July 1, 2017. OWCP accepted the claim for right knee laceration, right knee sprain, right elbow laceration, right elbow abrasion, and right elbow fracture. Appellant returned to a modified-duty assignment for two days, on July 14 and 15, 2017, but stopped work thereafter.<sup>4</sup> OWCP paid him wage-loss compensation on the supplemental rolls from August 17 to November 18, 2017. On November 20, 2017 appellant returned to full-time, light-duty work.

On November 17, 2017 appellant, through counsel, requested that OWCP expand the acceptance of the claim to include aggravation of lumbar spondylosis with grade 1 anterolisthesis of L3 on L4 with right lower extremity radiculitis as causally related to the accepted June 30, 2017 employment injury.

Dr. Laura Ross, an osteopathic physician Board-certified in orthopedic surgery, in October 19 and 30, 2017 reports, indicated that appellant's lumbar spine, right elbow, right knee, and right shoulder were injured in the June 30, 2017 employment incident. She related his history related to his June 30, 2017 fall at work. Based on her review of a September 8, 2017 lumbar spine magnetic resonance imaging (MRI) scan, Dr. Ross diagnosed an exacerbation of lumbar spondylosis with grade 1 anterolisthesis of L3 on L4 with right lower extremity radiculitis. She opined that the grade 1 anterolisthesis of L3 on L4 was directly caused by the employment incident. Dr. Ross also opined that the employment incident caused an exacerbation of underlying spondylosis, because appellant had no symptoms prior to the employment incident.

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<sup>3</sup> Docket No. 21-0003 (issued January 21, 2022).

<sup>4</sup> On September 22, 2017 appellant filed a notice of recurrence (Form CA-2a), claiming disability from work commencing July 18, 2017. OWCP created a new occupational disease claim (Form CA-2) under OWCP File No. xxxxxx152 alleging July 14 and 15, 2017 employment exposure. By decision dated September 4, 2019, the Board set aside OWCP's July 16, 2018 decision and remanded the case for further development and issuance of a *de novo* decision. The Board found that appellant's notice of recurrence and subsequent claims for wage-loss compensation within 90 days of his return to work following his employment injury should have been developed as a claim for recurrence under OWCP File No. xxxxxx417. Docket No. 19-0493 (issued September 4, 2019).

In a December 11, 2017 report from Dr. Munir Ahmed, a Board-certified orthopedic surgeon, appellant's diagnoses were noted as post-traumatic lumbar strain and sprain, lumbar radiculitis, and femoral neuropathy of the right leg.

By decision dated January 29, 2018, OWCP denied expansion of the acceptance of the claim to include aggravation of lumbar spondylosis with grade 1 anterolisthesis of L3 on L4. It found that the medical evidence of record was insufficient to establish causal relationship between the additional diagnosed condition(s) and the accepted employment injury.

On February 5, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

On March 28, 2018 OWCP referred appellant, along with a March 20, 2018 statement of accepted facts (SOAF) and the medical record, to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion examination as to whether the acceptance of the claim should be expanded to include additional conditions causally related to the June 30, 2017 employment injury. In an April 13, 2018 report, Dr. Askin noted the factual and medical history of appellant's claim and his review of the medical records, including MRI scan evidence of lumbar degenerative disc disease. He related appellant's physical examination findings and opined that the accepted conditions had resolved. Dr. Askin further opined that the claim should not be expanded to include additional medical conditions as causally related to the June 30, 2017 employment injury. He noted that the imperfections in appellant's low back were likely baseline and are incidentally found in persons of appellant's age.

Additional medical reports were received by OWCP. This included reports from Dr. Joan F. O'Shea, a Board-certified neurosurgeon and orthopedic spine specialist. Dr. O'Shea evaluated appellant on May 15, 2018, and performed a follow-up visit on June 26, 2018. She considered lumbosacral x-rays that were performed on May 21, 2018. Dr. O'Shea's diagnostic assessment, after evaluation, included lower back pain secondary to preexisting degenerative disc disease, herniated disc at L4-5 and L5-S1 with biforaminal stenosis at L4-5 and L5-S1; and questionable L3-4 spondylosis. In a July 2, 2018 letter, she noted a history of the employment injury and described examination and diagnostic findings. Dr. O'Shea suggested that lumbar x-rays be performed in extension and flexion views to check for instability given the possibility of spondylolisthesis at L3-4.

A hearing was held on May 23, 2018. By decision dated July 13, 2018, OWCP's hearing representative set aside the January 29, 2018 decision, finding that Dr. Askin had not provided sufficient rationale for his opinion regarding causal relationship of appellant's low back conditions. On remand, the hearing representative directed OWCP to administratively combine the instant claim, OWCP File No. xxxxxx417, with OWCP File No. xxxxxx152, prepare a new SOAF covering both claims, and request that Dr. Askin provide a supplemental opinion.<sup>5</sup>

On July 25, 2018 OWCP provided an updated SOAF to Dr. Askin, and requested a supplemental opinion. In a July 30, 2018 response, Dr. Askin noted that appellant was 68 years

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<sup>5</sup> OWCP has administratively combined OWCP File Nos. xxxxxx152 and xxxxxx417, with the latter serving as the master file.

of age and had numerous foci of age-related degeneration, as well as consequences of gout and possible consequences of an old motorcycle accident. He opined that appellant had fully recovered from the accepted employment injuries and may resume his full duties. Dr. Askin also opined that the anterolisthesis, the radiculitis, and the degenerative osteoarthritis reported by Dr. Ross were age-related imperfections of appellant's age, and were not directly caused, aggravated, precipitated, or accelerated by the accepted employment injury. He explained that there were no continuing or lingering effects of trauma demonstrated in appellant's records or by clinical examination.

By decision dated August 16, 2018, OWCP denied the expansion of the acceptance of appellant's claim to include additional diagnoses of exacerbation of lumbar spondylosis with grade 1 anterolisthesis of L3-4 with right lower extremity radiculitis. It found that the weight of the medical evidence rested with the opinion of Dr. Askin, the second opinion examiner.

On August 21, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding the denial of the expansion. A hearing was held on January 14, 2019.

Medical reports from Dr. Ross dated January 22, February 19, and March 15, 2019 were received by OWCP. In her March 15, 2019 report, Dr. Ross addressed Dr. Askin's report. She noted that appellant had reported back pain from the onset of injury. Dr. Ross pointed out that the arthritic and degenerative conditions, which Dr. Askin attributed solely to age, were not problematic for appellant prior to the employment injury. She maintained that the employment incident exacerbated those conditions to a level where appellant was symptomatic most of the time.

By decision dated March 25, 2019, OWCP's hearing representative vacated OWCP's August 16, 2018 decision regarding appellant's request for expansion of the acceptance of his claim. She found that a conflict in medical opinion existed between Dr. Ross, who opined that the June 30, 2017 employment injury adversely affected the diagnosed low back and right shoulder conditions, and Dr. Askin, who maintained that those conditions were solely due to the aging process. The hearing representative remanded the case to OWCP for an updated SOAF and referral for an impartial medical examination to determine whether the diagnosed back conditions were causally related to the June 30, 2017 employment injury.

OWCP referred appellant along with an updated SOAF dated April 18, 2019, and list of questions to Dr. Ian Blair Fries, a Board-certified orthopedic surgeon, serving as an impartial medical examiner (IME).

In an August 9, 2019 report, Dr. Fries noted his review of the April 18, 2019 SOAF and appellant's medical record and his complaints. He reported his physical examination findings of July 31, 2019. Dr. Fries diagnosed right acromioclavicular and glenohumeral joint degeneration, degenerative full-thickness supraspinatus tear, and likely adhesive capsulitis; right elbow nondisplaced supracondylar fracture, right olecranon bone tenderness; chronic low back pain, multilevel lumbar spine degeneration; bilateral total knee replacements; and left hallux metatarsophalangeal joint gout. Regarding appellant's low back condition, Dr. Fries related that he must accept Dr. Ross' documentation and conclude that any injuries sustained to his back or lower extremity had fully resolved. He related that any subsequent complaints in these areas were

due to conditions unrelated to appellant accepted trauma. Dr. Fries concluded that “certainly preexisting age-related lumbar degenerative disc disease could become symptomatic spontaneously or due to sequent trauma.” He, however, opined that appellant’s lumbar spine pathology was not related to the June 30, 2017 employment injury, and he did not have symptomatic lumbar radiculopathy. Dr. Fries indicated his agreement with Dr. O’Shea and the other physicians of record that appellant reached maximum benefits from treatment of his lumbar pathology, noting that Dr. Ross had changed her opinion earlier this year. He noted that appellant currently had disability due to appellant’s right shoulder, possibly his low back and bilateral total knee replacements.

By decision dated September 5, 2019, an OWCP hearing representative affirmed OWCP’s January 28, 2019 termination decision. The hearing representative found that Dr. Askin’s opinion represented the weight of the medical evidence that the accepted medical conditions had resolved without residuals.

In a letter dated September 20, 2019, OWCP requested that Dr. Fries clarify his August 9, 2019 opinion, and provide a well-reasoned medical opinion as to whether the acceptance of appellant’s claim should be expanded to include lumbar conditions. In an October 16, 2019 addendum report, Dr. Fries quoted from his August 9, 2019 report that appellant’s lumbar spine pathology was not related to the June 30, 2017 employment injury, and that he did not have symptomatic lumbar radiculopathy. He indicated that he was unaware of any new condition affecting appellant, and that appellant had reached maximum medical benefit from care for any injuries he sustained on June 30, 2017 when presented for examination on July 31, 2019.

On November 21, 2019 OWCP requested that Dr. Fries clarify his July 31 and October 16, 2019 opinions regarding whether appellant’s claim should be expanded for acceptance of a right shoulder condition.

OWCP subsequently received an October 29, 2019 report, wherein Dr. Ross noted that appellant’s back examination was unchanged.

In a November 22, 2019 report, Dr. Fries again discussed appellant’s right shoulder condition.

By decision dated December 6, 2019, OWCP accepted the additional conditions of temporary aggravation of preexisting right shoulder degeneration (resolved as of August 9, 2019) based on the reports from Dr. Fries.

By separate decision also dated December 6, 2019, OWCP denied the expansion of the acceptance of the claim to include an additional diagnosis of exacerbation of lumbar spondylosis with grade 1 anterolisthesis of L3-4 right lower extremity radiculitis. The special weight of the medical evidence was accorded to the reports of Dr. Fries.

On December 16, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review with regard to both December 6, 2019 OWCP decisions.

A hearing was held on April 1, 2020. By decision dated May 13, 2020, the hearing representative affirmed both December 6, 2019 OWCP decisions.

On October 2, 2020 appellant, through counsel, appealed to the Board. By decision dated January 21, 2022, the Board affirmed in part and set aside in part OWCP's May 13, 2020 decision.<sup>6</sup> The Board affirmed that the accepted temporary aggravation of a preexisting right shoulder degeneration had resolved as of August 9, 2019, but set aside OWCP's denial of the expansion of the claim to include additional medical conditions of lumbar spondylosis with grade 1 anterolisthesis of L3-4 and right lower extremity radiculitis causally related to his accepted employment injury and the case remanded for further proceedings. The Board instructed OWCP to obtain another supplemental opinion from Dr. Fries as to whether the diagnosed lumbar conditions were caused or aggravated by the accepted employment injury.

While the appeal was pending before the Board, OWCP received a May 4, 2020 report, wherein Dr. Ross contended Dr. Fries, in his August 9, 2019 report, had not reviewed any physical studies pertaining to appellant's back, including the diagnostic testing of the lumbar spine.

In a letter dated March 29, 2022, OWCP requested that Dr. Fries clarify his August 9, 2019 opinion regarding the causal relationship of the diagnosed lumbar spine conditions.

In a November 18, 2022 report, Dr. Fries opined that appellant does not have objective or measurable evidence of lumbar spine trauma. He explained that the September 8, 2017 lumbar spine MRI scan, which was taken slightly more than two months after the June 2017 work-related incident did not confirm trauma. Rather, it showed multilevel degenerative findings including disc bulges, ligament, and facet hypertrophies, foraminal narrowing, and a minimal L3-4 anterolisthesis, which was common in patients of appellant's age. Dr. Fries also explained that when he examined appellant on July 31, 2019 appellant had subjective low back complaints, but no objective findings. On examination, appellant had normal range of back motion as he voluntarily reached his feet with his hands from an erect standing position, he had normal gait and was able to walk on his toes and heels, had negative seated and supine straight leg raising, symmetrical reflexes, no motor deficits, no measurable thigh atrophy, and no dermatome sensory losses. Thus, he concluded, at the time of his July 31, 2019 examination of appellant, that there was no ongoing lumbar spine condition or radiculopathy, nor was there a causal relationship to his June 30, 2017 work injury. Dr. Fries further indicated that his opinion is further supported by the majority of appellant's medical records. This included Dr. Ross' reports of November 16, 2017, February 19<sup>7</sup> and November 15, 2018; Dr. Ahmed's December 11, 2017 report; Dr. Askin's April 13 and July 30, 2018 reports; and Dr. O'Shea's June 26, 2018 report. Dr. Fries concluded that the physicians who evaluated appellant uniformly agreed that he had reached maximum medical improvement (MMI), there were no objective physical examination findings to support radiculopathy, and there was no objective evidence of lumbar spine trauma. He additionally stated that "it may be reasonably held the accident temporarily aggravated underlying preexisting age-related degenerative lumbar spine. This would be based predominantly upon complaints and

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<sup>6</sup> *Supra* note 3.

<sup>7</sup> This is a typographical error as Dr. Ross' report was dated February 19, 2019, not February 19, 2018.

subjective findings. However, there was no objective evidence that appellant had sustained spinal injury or that he has measurable spinal or physical examination evidence of radicular residuals.”

By decision dated November 30, 2022, OWCP denied expansion of the acceptance of the claim to include an additional diagnosis of exacerbation of lumbar spondylosis with grade 1 anterolisthesis of L3-4 right lower extremity radiculitis. The special weight of the medical evidence was accorded to the opinion of Dr. Fries.

On December 7, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review.

A hearing was held on May 11, 2023. By decision dated July 25, 2023, OWCP’s hearing representative affirmed OWCP’s November 30, 2022 decision.

### **LEGAL PRECEDENT**

When an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>8</sup>

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.<sup>9</sup> A physician’s opinion on whether there is causal relationship between the diagnosed condition and an accepted injury must be based on a complete factual and medical background.<sup>10</sup> Additionally, the physician’s opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale which, explains the nature of the relationship between the diagnosed condition and the accepted employment injury.<sup>11</sup>

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant’s own intentional misconduct.<sup>12</sup> The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.<sup>13</sup>

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<sup>8</sup> *M.B.*, Docket No. 19-0485 (issued August 22, 2019); *R.J.*, Docket No. 17-1365 (issued May 8, 2019); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>9</sup> *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>10</sup> *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>11</sup> *Id.*

<sup>12</sup> *I.S.*, Docket No. 19-1461 (issued April 30, 2020); *A.M.*, Docket No. 18-0685 (issued October 26, 2018); *Mary Poller*, 55 ECAB 483, 487 (2004).

<sup>13</sup> *J.M.*, Docket No. 19-1926 (issued March 19, 2021); *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139, 141 n.7 (2001).

Section 8123(a) of FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>14</sup> For a conflict to arise the opposing physicians' viewpoints must be of virtually equal weight and rationale.<sup>15</sup> Where OWCP has referred the case to an IME to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.<sup>16</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that the acceptance of his claim should be expanded to include additional conditions of lumbar spondylosis with grade 1 anterolisthesis of L3-4 and right lower extremity radiculitis, as causally related to the accepted June 30, 2017 employment injury.

Following the Board's January 21, 2022 decision which found that Dr. Fries' reports required further clarification as to whether appellant's accepted employment injury caused or aggravated his lumbar spondylosis with grade 1 anterolisthesis at L3-4 and right lower extremity radiculitis, OWCP requested that Dr. Fries provide a supplemental opinion to clarify his opinion.

In his November 18, 2022 report, Dr. Fries reported his physical examination findings of July 31, 2019 along with the findings of other physicians of record which he opined that supported his conclusion that there was no objective evidence of lumbar spine trauma, no objective physical examination findings to support radiculopathy and no causal relationship to appellant's June 30, 2017 work injury, including an aggravation of any preexisting lumbar spine conditions. He explained that the September 8, 2017 lumbar spine MRI scan, which was taken slightly more than two months after the June 2017 work-related incident, did not confirm trauma, but showed multilevel degenerative findings, a common occurrence in patients of appellant's age. Dr. Fries further advised that appellant had subjective low back complaints, but no objective findings on his July 31, 2019 examination. He also explained that his conclusion that there was no objective evidence of lumbar spine trauma was supported by other physicians who evaluated appellant and had uniformly agreed that he had reached MMI with no objective evidence of lumbar spine trauma or physical examination findings to support radiculopathy. Dr. Fries additionally explained that any determination of whether an underlying preexisting age-related degenerative lumbar spine condition had been temporarily aggravated would be based predominately upon complaints and subjective findings, but the evidence of record indicated that there was no objective evidence that appellant had sustained spinal injury, or that he has measurable spinal or physical examination. He addressed his own examination findings and the medical records to reach a well-reasoned

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<sup>14</sup> 5 U.S.C. § 8123(a); see 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

<sup>15</sup> See *A.E.*, Docket No. 23-0756 (issued December 14, 2023); *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>16</sup> *M.E.*, Docket No. 21-0281 (issued June 10, 2022); *Darlene R. Kennedy, id.*; *James P. Roberts, id.*; see also *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

opinion to negate causal relationship.<sup>17</sup> Following a review of his physical examination as well as the opinions of other examining physician of record, Dr. Fries found no basis on which to attribute causal relationship between the additional conditions of lumbar spondylosis with grade 1 anterolisthesis of L3-4 and right lower extremity radiculitis and the accepted June 30, 2017 employment injury, including an aggravation of any preexisting lumbar spine conditions. The Board, therefore, finds that Dr. Fries' opinion constitutes the special weight of the medical evidence.

As Dr. Ross was on one side of the conflict, her subsequent report of May 4, 2020 is insufficient to create a new conflict in medical opinion or to overcome the special weight properly accorded to Dr. Fries.<sup>18</sup>

As the medical evidence of record is insufficient to establish expansion of the acceptance of appellant's claim to include additional conditions of lumbar spondylosis with grade 1 anterolisthesis of L3-4 and right lower extremity radiculitis, 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 the acceptance of his claim should be expanded to include lumbar spondylosis with grade 1 anterolisthesis of L3-4 and right lower extremity radiculitis, as causally related to the accepted June 30, 2017 employment injury.

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<sup>17</sup> *L.J.*, Docket No. 23-0860 (issued January 29, 2023); *K.V.*, Docket No. 18-0947 (issued March 4, 2019); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *Michael S. Mina*, 57 ECAB 379 (2006); *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

<sup>18</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 25, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 2, 2024  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

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