

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICHARD A. PIERCE and DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE, San Francisco, Calif.

*Docket No. 97-1095; Submitted on the Record;  
Issued December 17, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury on November 7, 1994 while engaged in a mandatory physical training program.

On November 9, 1994 appellant, then a 41-year-old senior special agent, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging an employment-related injury to his lower back on November 7, 1994. Appellant stated that "[S]ubsequent to performing mandatory physical training program ('sit-up's'), I experience[d] [a] slight discomfort in my lower back. By the following day the slight discomfort had progressed. By the third day, I was barely able to stand/walk." The record shows that appellant stopped work on November 7, 1994 and returned to work on November 14, 1994. In a decision dated April 25, 1995, the Office of Workers' Compensation Programs denied appellant's claim for compensation on the grounds that the evidence of record failed to support the fact of an injury in this case. In an accompanying memorandum, the Office found that the claimed event, incident or exposure occurred at the time, place and in the manner alleged; however, a medical condition resulting from the accepted trauma or exposure was not supported by the medical evidence of file. By letter dated May 5, 1995, appellant requested a hearing before an Office hearing representative. In a decision dated September 13, 1996, the Office hearing representative affirmed the Office's April 25, 1995 decision. By letter dated October 5, 1996, appellant requested reconsideration and submitted a medical report from Dr. James S. Sobiek, practicing in orthopedic surgery, dated September 13, 1996. In a merit decision dated November 5, 1996, the Office denied appellant's request for reconsideration on the grounds that the additional medical evidence provided by

appellant to support his request for reconsideration was insufficient to warrant modification of the prior decisions.<sup>1</sup>

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant failed to meet his burden of proof in establishing that he sustained an injury on November 7, 1994 causally related to his federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing that 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 the Act and that the claim was timely filed within the applicable time limitation period of the Act.<sup>3</sup> An individual seeking disability compensation must also establish that an injury was sustained at the time, place and in the manner alleged,<sup>4</sup> that the injury was sustained while in the performance of duty,<sup>5</sup> and that the disabling condition, for which compensation is claimed was caused or aggravated by the individual's employment.<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 occupational disease.<sup>7</sup>

In the present case, appellant submitted in support of his claim, a radiological consultation report dated May 3, 1994, from Dr. Catherine J. Goring, Board-certified in internal medicine; a radiological consultation report dated February 20, 1994 and an emergency room report dated November 9, 1994 from Dr. Curtis W. Brown, Board-certified in emergency medicine. In the emergency room report dated November 9, 1994, Dr. Brown stated that appellant was being evaluated for complaints of back pain; that appellant had presented the history of injury as "he did his usual workout and on Monday he started having some low back pain radiating to his right hip." Dr. Brown noted that appellant stated:

"He [Appellant] had this pain before and he actually injured it in a car wreck back in February of 1994. He [Appellant] had seen the neurosurgeon, Dr. Fleming [Dr. Hilari L. Fleming, Board-certified in critical care medicine (neurological surgery)] and an MRI [magnetic resonance imaging] showed that he had a

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<sup>1</sup> Appellant's appeal dated January 27, 1997, was filed with the Board on February 3, 1997. As the Office decision dated August 5, 1995, was issued more than one year prior to the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the merits of this decision. The only decisions before the Board at this time are the Office's hearing representative decision issued September 13, 1996 and the Office's merit decision on reconsideration dated November 5, 1996. 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *Robert A. Gregory*, 40 ECAB 478 (1989).

<sup>5</sup> *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>6</sup> *Steven R. Piper*, 39 ECAB 312 (1987).

<sup>7</sup> *David J. Overfield*, 42 ECAB 718 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

bulging disc at L4-5. He did not have any trauma to this and the pain just seems to be getting worse. He [Appellant] was seen by his chiropractor yesterday and they did a manipulation on it, but about 2:00 a.m. the pain got much worse.”

Dr. Brown went on to note that appellant’s physical examination revealed:

“Temperature 98, pulse 100, respirations 16 and blood pressure 103/99. He is awake, alert and oriented x 3, cooperative and friendly. Head is normocephalic and atraumatic. Neck is supple. Lungs are clear to auscultation. His spine is tender in the L4-5 area. Heart has a regular rate and rhythm. NEUROLOGIC: Motor is 5/5 in the upper and lower extremities. Sensory is intact to light touch and the DTRs [deep tendon reflexes] are symmetrical in the upper and lower extremities.”

Dr. Brown also stated that “since this is a recurrent injury with no actual trauma at this period of time we will treat him [appellant] for his pain and let him go home to bed rest.” He diagnosed appellant with having back pain and a history of a bulging L4-5 disc. While Dr. Brown provided some support for causal relationship, he did not describe appellant’s physical training and explain why appellant’s condition was causally related to the activity involved. Moreover, he did not provide a diagnosis of appellant’s condition. Back pain is a symptom not a diagnosis. Therefore, Dr. Brown’s report is of diminished probative value and insufficient to meet appellant’s burden of proof.<sup>8</sup>

Appellant also submitted an attending physician’s report dated November 14, 1994, and medical reports dated June 28, 1994 and April 21, 1995 from Dr. Fleming, Board-certified in critical care medicine, neurological surgery. In the November 14, 1994 attending physician’s report, Dr. Fleming did not present a diagnosis, but indicated that there was a history or evidence of concurrent or preexisting spinal stenosis -- previous asymptomatic. Dr. Fleming checked a “yes” box indicating that appellant’s condition was believed to be caused or aggravated by appellant’s employment activities.

In the April 21, 1995 report, Dr. Fleming indicated that he had seen appellant on two occasions and diagnosed appellant with severe spinal stenosis as well as severe lumbar spinal stenosis with back and leg pain as well as cervical spondylosis. Dr. Fleming stated that appellant reported that he had injured himself in an automobile accident in mid February 1994; that he was a passenger in a car that was rear ended by a large truck; and that at the time his initial pain was principally in his neck. Dr. Fleming also indicated that appellant had x-rays done of his neck, which showed degenerative disease, which was otherwise unremarkable; that from that time he had significant low back pain, which he felt would go away because he had had intermittent back discomfort related to work over the years; and that his back pain had become progressively more severe. Dr. Fleming went to note that on physical examination:

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<sup>8</sup> *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee’s condition is of limited probative value on the issue of causal relationship); *see also George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

“His [Appellant’s] MRI showed severe spinal stenosis at L4-5. He also has spurring at C5-6 and C6-7 with mild foraminal encroachment. Currently his diagnosis is cervical spondylosis and lumbar spinal stenosis. He is being treated conservatively at this time. This is a problem that is a progressive problem. He is unlikely to ever have complete resolution, and in fact, it is likely to progress. At some point, at least in his lumbar spine, he is likely to require surgery for decompression of the nerves.”

Additionally, appellant submitted a medical report from a practicing orthopedic surgeon, Dr. Sobiek, dated September 13, 1996. In his report, he also presented a history of a herniated disc at the L4-5 level back in mid February 1994, which he indicated that appellant had been quite asymptomatic from, except for episodes of low back pain or severe paraspinal spasm in the lower back with some radiation into the left hip and buttock, requiring some treatment including an emergency room visit. Dr. Sobiek indicated that it was difficult to tell from his history and examination whether these episodes are directly associated with his L4-5 disc, which was diagnosed on an MRI in 1995. He also indicated that there is a fair chance that these symptoms are simply episodes of mechanical low back pain, which are common in the normal population and not associated with a disc. On appellant’s physical examination, there was no lumbar pain or paraspinal spasm; no sciatic notch tenderness and no gluteal tenderness. Dr. Sobiek indicated that appellant had full flexion and extension, lateral bending and rotation of the lumbar spine without any increase in pain or radicular symptoms; that appellant can heel and toe walk quite nicely and his motor strength is 5/5 in all distributions with deficits. He went on to make an assessment of “status post herniated disc at L4-5 with minimal symptomatology and several episodes of what sounds like severe paraspinal spasm and pain in the lower back,” for which no treatment is necessary at the time since appellant appears to be in excellent condition.

Neither Dr. Fleming, nor Dr. Sobiek presented an actual awareness of the accepted November 7, 1994, incident, or provided a clear diagnosis with medical certainty, or explain how and why appellant’s mandatory physical training on the job caused, precipitated or aggravated a specific medical condition. For example, there is no rationalized medical opinion evidence on whether appellant’s condition was caused or affected by any factors of his federal employment. Therefore, the medical reports of Drs. Fleming and Sobiek are of little probative value as they lack a sufficiently rationalized medical opinion evidence on the causal relationship between any injury sustained on November 7, 1994 and his preexisting medical condition.<sup>9</sup> Therefore, these reports are also insufficient to establish appellant’s claim for benefits. Appellant was advised of the deficiencies in his claim, but evidence sufficient to meet his burden of proof has not been submitted.

An award of compensation may not be based on surmise, conjecture or speculation, or appellant’s belief of causal relationship. The mere fact that a disease or condition manifests itself or worsens during a period of employment<sup>10</sup> or that work activities produce symptoms

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<sup>9</sup> *Charles H. Tomaszewski, supra* note 8.

<sup>10</sup> *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

revelatory of an underlying condition<sup>11</sup> does not raise an inference of causal relationship between the condition and the employment factors. 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. Causal relationship must be established by rationalized medical opinion evidence.<sup>12</sup> As appellant has neither submitted rationalized medical evidence explaining how and why appellant's mandatory physical training caused or aggravated a specific medical condition, or provided medical rationalized opinions addressing the causal connection between any medical condition sustained on November 7, 1994 and any preexisting medical conditions, the Office properly denied appellant's claim for compensation.

The decisions of the Office of Workers' Compensation Programs dated November 5 and September 13, 1996 are affirmed.

Dated, Washington, D.C.  
December 17, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>11</sup> *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

<sup>12</sup> *Victor J. Woodhams*, *supra* note 7.