

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT MITCHELL and DEPARTMENT OF THE NAVY,
NAVAL MEDICAL CENTER, RESPIRATORY CARE DIVISION,
Portsmouth, VA

*Docket No. 99-2271; Submitted on the Record;
Issued October 23, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant has established that he sustained a low back condition in the performance of duty.

On May 27, 1998 appellant, then a 44-year-old respiratory therapist, filed a notice of occupational disease (Form CA-2) alleging that "excessive standing and walking" during 12-hour work shifts caused a spondylolisthesis "of L5 over S1 ... with right L5 or S1 radiculopathy," requiring surgery on April 22, 1998. The employing establishment terminated appellant's employment effective February 27, 1998.¹ Appellant first sought treatment with Dr. James Garrison, a family practitioner, in September 1997, who referred appellant to Dr. Nasrollah Fatehi, a neurosurgeon, in March 1998.

In a November 16, 1997 slip, Dr. Garrison held appellant off work from November 13 to 16, 1997 for an unspecified cause.² A January 13, 1998 lumbar magnetic resonance imaging (MRI) scan showed "L5-S1 bilateral spondylolysis with spondylolisthesis and resulting bilateral neural foraminal narrowing, L4-5 central disc bulging and partial annular tear."

¹ Appellant's appointment was career conditional, with a one-year probationary period. In a June 30, 1998 statement, P.A. Klimczynski, appellant's supervisor, recalled that some weeks, after beginning work in August 1997, appellant reported to work with a cane, but did not complain of back pain until he began pulling a chair "behind him to go from bed to bed" when there were chairs at each bedside. P.A. Klimczynski noted that appellant had been removed from neonatal intensive care unit (NICU) assignments as he was unable to "remain in the area when needed," did not attend to patient "needs in a timely fashion" and "exhibited a flippant attitude when nurses or physicians pointed out dangerous and flagrant mistakes."

² Unsigned chart notes from Dr. Garrison's office show that appellant presented on November 12, 1997, January 8 and March 14, 1998 complaining of back pain with radiation into the right leg, with suspected disc disease on the right.

In a March 23, 1998 report, Dr. Fatehi related appellant's account of being terminated "since he could not perform his duties satisfactorily, because of pain." He noted findings on neurologic examination and diagnosed "[c]hronic right L5 and/or S1 radiculopathy, secondary to grade I spondylolisthesis of L5 over S1 vertebra."³ Dr. Fatehi recommended L5 decompression, stabilization and fusion performed on April 22, 1998.⁴ He submitted periodic progress reports through May 1998.⁵

In a May 5, 1998 form report, Dr. Garrison noted that he "deferred" expressing an opinion regarding whether the diagnosed spondylolisthesis "was caused or aggravated by employment activity" to Dr. Fatehi. He checked a box "no" indicating that appellant had no history "of concurrent or preexisting injury or disease or physical impairment."

In a May 22, 1998 attending physician's form report (Form CA-20), Dr. Fatehi diagnosed "chronic right L5 and/or S1 radiculopathy secondary to grade I spondylolisthesis of L5 over S1 vertebra." In response to question 8, "Do you believe the condition found was caused or aggravated by an employment activity? (Please explain answer)," Dr. Fatehi did not check either the "yes" or "no" boxes, but wrote "it is possible." In a second May 22, 1998 form report, Dr. Fatehi found appellant totally disabled for work for an indefinite period.

In an October 8, 1998 letter, appellant, through his authorized representative,⁶ noted that Dr. Fatehi indicated that appellant had no evidence or history of back problems.

In a January 19, 1999 letter, the Office described the type of medical and factual evidence needed to establish appellant's claim. The Office explained that the medical evidence received was insufficient as "the physician failed to discuss the medical connection between the condition diagnosed and the factors of [appellant's] employment." The Office noted that it was appellant's "responsibility ... to provide or ensure the provision of all evidence needed to decide [his] claim...." Appellant was afforded 30 days in which to submit additional evidence.⁷

By decision dated February 20, 1999, the Office denied appellant's claim on the grounds that causal relationship was not established. The Office found that appellant had not submitted sufficient medical evidence discussing "the medical connection between the condition diagnosed

³ Dr. Fatehi also diagnosed bipolar disorder by history of treatment.

⁴ Dr. Fatehi performed a "[d]ecompressive L5 laminectomy, bilateral L5-S1 facetectomy, foraminotomy and internal stabilization with pedicle screws and rods ... lateral mass and transverse process fusion from L4 through S1 with Dynagraft, autograft and allograft bone."

⁵ These reports do not discuss causal relationship.

⁶ In an April 4, 1998 letter, appellant appointed his father, P.M. Mitchell, to act as his representative regarding his compensation claim.

⁷ The record indicates that appellant did not submit additional evidence prior to issuance of the February 20, 1999 decision.

and the factors of [his] employment.” Following issuance of the February 20, 1999 decision, appellant submitted additional evidence.⁸

An excerpt from an undated position description states that appellant’s position required “constant standing and/or walking.”

In a September 15, 1998 statement, P.A. Klimczynski, appellant’s supervisor, stated that appellant’s termination “was based solely on his performance ... his back problems were not a factor....”

In a January 5, 1999 slip report, Dr. Fatehi released appellant “to full-time duty with a 40-pound weight restriction for lifting, pushing or pulling objects.”

In a February 8, 1999 letter, appellant’s representative noted that he was unable to obtain an opinion on causal relationship from Dr. Fatehi.⁹ He asserted that appellant’s back condition was causally related to walking and standing at work as he did not have a preexisting back problem, and that Dr. Fatehi indicated in the May 22, 1998 form report that it was “possible” that the back condition was related to employment factors.

In a March 15, 1999 letter, appellant requested a review of the written record by a representative of the Office’s Branch of Hearings and Review. He asserted that, although the medical record did not contain “specific information required to establish causal relationship,” the evidence submitted raised “an inference that employment incidents and/or conditions did in fact exacerbate [his] disease/injury as claimed.”

By decision dated and finalized May 24, 1999, the Office hearing representative affirmed the Office’s February 20, 1999 decision, finding that appellant failed to submit rationalized medical evidence explaining a causal relationship between the claimed back condition and factors of his federal employment. The hearing representative noted that Dr. Fatehi’s May 22, 1998 comment that a causal relationship was “possible” was “speculative and [did] not meet the requirement for rationalized medical evidence based upon a proper factual and medical background explaining how and why [appellant’s] claimed back condition [was] causally related to his employment.”

The Board finds that appellant has not established that he sustained a low back condition in the performance of duty on or before January 14, 1998 as alleged.

⁸ Appellant also submitted a copy of a June 22, 1998 newspaper clipping about a federal prisoner claiming that incarceration had aggravated a preexisting scoliosis. However, the Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and an employee’s federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee. *William C. Bush*, 40 ECAB 1064, 1075 (1989).

⁹ In a January 26, 1999 letter, appellant’s representative requested that Dr. Fatehi provide a rationalized opinion on causal relationship. In a second January 26, 1999 letter, appellant’s representative requested that the Office “parallel [his] current efforts to obtain desired information and ask Dr. Fatehi to respond.”

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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 claimant.¹⁰

As applied to this case, appellant has the burden of proof to submit rationalized medical evidence explaining how and why factors of his federal employment, including prolonged walking and standing, would cause or contribute to the diagnosed L5-S1 spondylolisthesis and radiculopathy. The Board notes that, in its January 19, 1999 letter, the Office described in detail the type of evidence appellant needed in order to establish his claim. However, the Board finds that appellant did not submit sufficient rationalized medical evidence to establish causal relationship in this case.

In a May 5, 1998 form report, Dr. Garrison, an attending family practitioner, declined expressing his opinion on causal relationship, deferring to Dr. Fatehi, an attending neurosurgeon. Dr. Fatehi mentioned appellant's federal employment in a March 23, 1998 report, and repeated appellant's allegation of being terminated due to his back condition. However, he did not explain how and why any of appellant's job duties would cause or contribute to the claimed back condition.

The most direct support of record for causal relationship is Dr. Fatehi's comment in a May 22, 1998 form report that it was "possible" that appellant's back condition was caused or aggravated by factors of his federal employment. However, Dr. Fatehi did not set forth the medical reasoning which led him to conclude that specific factors of appellant's federal employment could "possibly" cause or aggravate his lumbar spine condition by causing objective, specific physiologic changes. Therefore, this opinion on causal relationship is of greatly diminished probative value as it is speculative,¹¹ and lacks supporting medical rationale.¹²

Appellant asserted in October 8, 1998 and February 8, 1999 letters, as well as on appeal, that causal relationship could be inferred from the medical evidence because he did not have a history of back problems prior to September 1997. However, the Board has held that the mere concurrence of a condition with a period of employment does not raise an inference of causal

¹⁰ *Charles E. Burke*, 47 ECAB 185 (1995).

¹¹ See *William S. Wright*, 45 ECAB 498 (1994) (a physician's statement that appellant's medication "could very well have been" the cause of his condition was equivocal and speculative); see *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value).

¹² *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

relationship between the two.¹³ In other words, the fact that appellant did not have a history of back problems prior to beginning work at the employing establishment does not in and of itself establish that his federal employment caused the back condition.

Appellant and his representative also asserted that the medical evidence, as a whole, supported causal relationship. However, neither appellant nor his representative is a physician under the Act for the purposes of this case. Therefore, their opinion or interpretation of the medical evidence of record is of no probative value.¹⁴

Consequently, appellant has failed to establish that he sustained a low back condition in the performance of duty, as he submitted insufficient medical evidence to establish a pathophysiologic causal relationship between specific factors of his federal employment and his claimed condition.

The decision of the Office of Workers' Compensation Programs dated and finalized May 24, 1999 is hereby affirmed.¹⁵

Dated, Washington, DC
October 23, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

¹³ *Charles E. Richardson*, 34 ECAB 1413 (1983).

¹⁴ *See James A. Long*, 40 ECAB 538 (1989); *Susan M. Biles*, 40 ECAB 420 (1988) (where the Board held that the statement of a layperson is not competent evidence on the issue of causal relationship).

¹⁵ Subsequent to the Office's decision dated and finalized May 24, 1999, appellant submitted additional evidence accompanying his request for appeal. The Board has no jurisdiction to consider this new evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).