

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

DAVID G. PERRY, Appellant

and

**DEPARTMENT OF TRANSPORTATION, Salt
Lake City, UT, Employer**

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**Docket No. 03-1236
Issued: February 3, 2004**

Appearances:
David G. Perry, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On April 14, 2003 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated February 3, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained a back condition causally related to factors of his federal employment.

FACTUAL HISTORY

On July 9, 2002 appellant, then a 55-year-old aviation safety inspector, filed a claim for a traumatic injury occurring on February 28, 2002 in the performance of duty.¹ Appellant stopped work on March 5, 2002 and returned to work on June 25, 2002. In a statement accompanying his

¹ It appears that pages 1-236 of the case record as assembled refer to a different Office File Number, A16-0227725 and a different appellant, David W. Perry.

claim, appellant related that he experienced “[t]raumatic stress and strain of [the] lower back culminating in vertebrae fusion surgery,” which he attributed to three weeks of training for four hours per day in a “full-motion flight simulator.” He related that on February 28, 2002 he finished “training and a type-rating check” on an airplane. Appellant related that he experienced low back pain extending into his right leg on March 2, 2003, which worsened over the next several days. Appellant stated that on April 18, 2002 he underwent a surgical fusion at L4-5.

In a form report dated July 26, 2002, Dr. Donald W. Bryan, a Board-certified orthopedic surgeon, described appellant’s history of injury as no prior back problems “until after he was in the simulator at work.” Dr. Bryan diagnosed a herniated disc with desiccation and radiculopathy of the right L5 nerve. Regarding the question on the form of whether appellant’s condition was caused or aggravated by an employment activity, Dr. Bryan stated that it was “a possibility” but that it was “not clear in this situation.” He opined that appellant was totally disabled from April 18 until June 2002.

By letter dated January 2, 2003, the Office provided appellant 30 days, within which to submit additional factual and medical information in support of his claim. Appellant did not respond within the time allotted.

In a decision dated February 3, 2003, the Office denied appellant’s claim on the grounds that he did not establish “a medical condition causally related to factors or events of your federal employment for February 28, 2002.” The Office found that appellant experienced the employment factors identified as causing his condition but did not establish a medical condition arising from the described employment factors.

LEGAL PRECEDENT

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 the 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.²

ANALYSIS

Initially, the Board notes that, although appellant filed a traumatic injury claim (Form CA-1), in the statement accompanying his claim, he attributed his condition to three weeks of training for four hours per day in a flight simulator. As appellant clearly implicated

² *Solomon Polen*, 51 ECAB 341 (2000); *see also Victor J. Woodhams*, 41 ECAB 345 (1989).

incidents occurring on more than one workday, his claim is properly adjudicated as a claim for an occupational disease.³

The Office accepted that appellant was exposed to the employment factors, to which he attributed his condition. The issue, therefore, is whether appellant has submitted rationalized medical evidence sufficient to show that he sustained a medical condition causally related to the identified employment factors. Appellant submitted a form report dated July 26, 2002 from Dr. Bryan, who diagnosed a herniated disc with desiccation and radiculopathy at L5. Dr. Bryan noted that appellant had no history of back problems prior to his work in the flight simulator and opined that it was unclear whether appellant's condition was caused or aggravated by employment activities though it was a "possibility." The Board finds that Dr. Bryan's opinion that it was possible that appellant's work in a flight simulator caused his herniated disc is speculative in nature and thus of diminished probative value. While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, neither can such opinion be speculative or equivocal.⁴

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.⁵ As appellant failed to submit a rationalized medical report supporting that he sustained a back condition causally related to his employment, the Office properly denied his claim for compensation.

On appeal appellant contends that the additional information he submitted subsequent to the Office's February 3, 2003 decision should be considered. However, the Board has no jurisdiction to review this evidence for the first time on appeal.⁶ Appellant, however, can submit this evidence to the Office with a request for reconsideration under 5 U.S.C. § 8128.

CONCLUSION

The Board finds that appellant has not established that he sustained a back condition causally related to factors of his federal employment.

³ A traumatic injury is a condition caused by incidents occurring within a single workday or shift; an occupational disease or illness is a condition produced by the work environment over a period longer than a single workday. See 20 C.F.R. §§ 10.5(q) and (ee).

⁴ *Judith J. Montage*, 48 ECAB 292 (1997).

⁵ See *Michael E. Smith*, 50 ECAB 313 (1999).

⁶ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 3, 2003 is affirmed.

Issued: February 3, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member