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<b>M.M., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 13-929</b>
	)	<b>Issued: July 25, 2013</b>
<b>DEPARTMENT OF THE NAVY, MARINE</b>	)	
<b>CORPS AIR STATION MIRAMAR,</b>	)	
<b>San Diego, CA, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

On February 27, 2013 appellant filed a timely appeal from an August 31, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether appellant sustained an injury on April 29, 2010 in the performance of duty.

On May 28, 2010 appellant, then a 38-year-old police officer, filed a traumatic injury claim alleging that on April 29, 2010 he strained his low back in the performance of duty. He

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

related, "I witnessed a 90[-]year[-]old man trip and fall and my reaction was to try to keep him from falling by catching him."

By letter dated June 3, 2010, OWCP requested that appellant submit additional factual and medical information in support of his claim. Specifically, a detailed report from his attending physician addressing the causal relationship between any diagnosed condition and the April 2010 work incident. It noted that appellant sustained a herniated disc on February 19, 2010, following which he resumed work on April 27, 2010.

In a report dated May 10, 2010, Dr. William L. Tontz, Jr., a Board-certified orthopedic surgeon, discussed appellant's complaints of leg pain. On examination, he found a positive straight leg raise. Dr. Tontz noted that appellant would see another doctor "if this is, in fact, work related." He recommended an epidural injection to treat his disc herniation.

In a work status report dated May 12, 2010, Dr. George Colson, Board-certified in emergency medicine, diagnosed low back pain and a herniated disc at L4-5. He found that appellant could work as of that date with restrictions.

On June 9, 2010 Dr. Tontz advised that appellant underwent a lumbar laminectomy on June 5, 2010 and was totally disabled for eight weeks.

On July 2, 2010 the employing establishment noted that appellant had two separate claims and was released to limited duty on June 30, 2010.

By decision dated July 6, 2010, OWCP denied appellant's traumatic injury claim. It found that the medical evidence was insufficient to establish that he sustained a back condition causally related to the April 29, 2010 work incident.

In a note dated July 9, 2010, Dr. L. David Rutberg, a Board-certified neurosurgeon, related that appellant injured his lower back while at work on February 19, 2010. In another note of the same date, he found that appellant could perform sedentary employment and returned to his usual work on August 5, 2010.

In an employing establishment clinic note dated July 28, 2010, Dr. Juan C. Fals, Board-certified in preventive medicine, stated that appellant sustained a back injury on February 19, 2010 and underwent an L4-5 discectomy and laminectomy on June 5, 2010. He was off work pending recovery from surgery.

In a report dated February 20, 2011, Dr. Rutberg related that he had treated appellant for a long history of sciatica of the left leg and pain in the low back. On February 19, 2010 he pulled a low back muscle. A magnetic resonance imaging (MRI) scan study on April 14, 2010 revealed no significant abnormalities and he returned to work on April 28, 2010. Dr. Rutberg stated, "[Appellant] suffered great increase in low back pain with right sciatica April 29, 2010 when attempting to help a driver who tripped on a barrier (Hedge hog) at [the] entrance to base." A repeat MRI scan study showed a large herniated disc at L4-5 on the right and appellant underwent surgery. Dr. Rutberg stated, "A large disc fragment was removed, thus, arguing for

the acuity of the herniation. Furthermore, it must be noted that the prior surgery was performed on the left side and at L5-S1, a different level.” Dr. Rutberg related:

“There is no question in my mind as a [B]oard[-]certified neurosurgeon that the incident of [April 29, 2010] caused the HNP [herniated nucleus pulposus] on the right at L4-5. There is no connection to the preexisting condition which more probably than not was a sprain as proven by the subsequent above noted MRI [scan study] of [April 14, 2010] which demonstrated at the L4-5 level ‘only’ [m]ild facet hypertrophy, no central or neural foraminal stenosis. Therefore, per that preincident MRI [scan] there was no disc pathology noted at L4-5 and the findings at the surgery of [June 5, 2010] were such as to indicate the acuity of the herniation relating it to the [April 29, 2010] incident.”

On March 17, 2011 appellant requested reconsideration. In a decision dated June 23, 2011, OWCP denied modification of its July 6, 2010 decision. It found that Dr. Rutberg’s opinion was not sufficiently rationalized to establish that the April 29, 2010 employment incident caused the herniated disc.

By letter dated June 20, 2012, appellant requested reconsideration. He asserted that the employing establishment had not challenged his claim. Appellant submitted the June 5, 2010 surgical report from Dr. Tontz and MRI scan studies of his spine.

In a decision dated August 31, 2012, OWCP denied modification of the June 23, 2011 decision.

On appeal, appellant asserts that the employing establishment did not contest his injury and that he had supplied everything OWCP requested to support his claim.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>2</sup> has the burden of establishing 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 FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>3</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>4</sup>

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether “fact of injury” is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged,

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<sup>2</sup> *Id.* at § 8101 *et seq.*

<sup>3</sup> *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

<sup>4</sup> *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

by a preponderance of the reliable, probative and substantial evidence.<sup>5</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.<sup>6</sup> An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.<sup>7</sup>

### ANALYSIS

Appellant alleged that he sustained an injury to his lower back on April 29, 2010 when he tried to keep an elderly man from falling. OWCP accepted that the April 29, 2010 incident occurred at the time, place and in the manner alleged. The issue is whether the medical evidence establishes that he sustained a back injury as a result of this incident.

The Board finds that appellant has not established that the April 29, 2010 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.<sup>8</sup> In a report dated May 10, 2010, Dr. Tontz diagnosed a disc herniation and indicated that appellant would see another physician if the condition was related to employment. He did not address the cause of the diagnosed condition and thus his report is of diminished probative value.<sup>9</sup>

In a work status report dated May 12, 2010, Dr. Colson diagnosed a herniated L4-5 disc and found that appellant could work with restrictions. On June 9, 2010 Dr. Tontz found that appellant was disabled after a lumbar laminectomy. Neither Dr. Colson nor Dr. Tontz addressed the cause of appellant's herniated disc or need for surgery. Their reports are insufficient to meet his burden of proof.<sup>10</sup>

In a clinic note dated July 28, 2010, Dr. Fals noted that appellant had experienced an employment injury on February 19, 2010 was off work subsequent to back surgery on June 5, 2010. He did not relate any condition or disability to the April 29, 2010 work incident. Dr. Fals' opinion is of diminished probative value as it is not based on an accurate history.

On July 9, 2010 Dr. Rutberg indicated that appellant sustained a back injury at work on February 19, 2010. He found that appellant could return to sedentary employment. Dr. Rutberg did not address the April 29, 2010 work incident; his report is insufficient to meet appellant's

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<sup>5</sup> *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

<sup>6</sup> *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

<sup>7</sup> *Id.*

<sup>8</sup> *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

<sup>9</sup> *See Conard Hightower*, 54 ECAB 796 (2003).

<sup>10</sup> *See A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of little probative value on the issue of causal relationship).

burden of proof. On February 20, 2011 he discussed appellant's history of sciatica and low back pain. Dr. Rutberg noted that an MRI scan study obtained following the February 19, 2010 back injury did not show any substantial abnormalities. Appellant returned to work on April 28, 2010 but on April 29, 2010 experienced a significant increase in back pain after he tried to help a man who tripped on a barrier. A second MRI scan study showed an L4-5 large disc herniation. Dr. Rutberg attributed the disc herniation to the April 29, 2010 work incident rather than the February 19, 2010 employment injury based on the change on MRI scan studies. He did not, however, explain how the April 29, 2010 work incident caused a herniated disc at L4-5. A physician must provide an opinion on whether the employment incident described caused or contributed to the diagnosed medical condition and support that opinion with medical reasoning to demonstrate that the conclusion reached is sound, logical and rationale.<sup>11</sup> Dr. Rutberg did not provide a reasoned opinion describing how the identified April 29, 2010 employment incident resulted in a herniated disc, his opinion is of diminished probative value.

On appeal, appellant asserts that the employing establishment did not challenge his claim and that he had submitted the evidence required to support his claim. As discussed, however, he did not submit rationalized medical evidence sufficient to meet his burden of proof for causal relationship. An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is a causal relationship between his claimed condition and his employment.<sup>12</sup> Appellant must submit a physician's report in which the physician reviews those factors of employment identified by him as causing his condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.<sup>13</sup> He failed to submit such evidence and therefore failed to discharge 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 and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not established that he sustained an injury on April 29, 2010 in the performance of duty.

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<sup>11</sup> See *John W. Montoya*, 54 ECAB 306 (2003).

<sup>12</sup> *D.E.*, 58 ECAB 448 (2007); *George H. Clark*, 56 ECAB 162 (2004); *Patricia J. Glenn*, 53 ECAB 159 (2001).

<sup>13</sup> *D.D.*, 57 ECAB 734 (2006); *Robert Broome*, 55 ECAB 339 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 31, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 25, 2013  
Washington, DC

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board