

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

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G.E., Appellant

and

SMALL BUSINESS ADMINISTRATION,  
Herndon, VA, Employer

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**Docket No. 12-1802  
Issued: March 20, 2013**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 29, 2012 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) merit decision dated March 20, 2012.<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant is entitled to wage-loss compensation for temporary total disability beginning January 8, 2009 due to kidney stones.

**FACTUAL HISTORY**

On February 4, 2009 appellant, then a 54-year-old field inspector, filed an occupational disease claim alleging that continual exposure to heat and humidity caused mild heat exhaustion

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<sup>1</sup> By decision dated April 20, 2012, OWCP terminated appellant's wage-loss and medical benefits effective April 20, 2012. Appellant has not appealed this decision.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

and severe dehydration which contributed to renal stones. He first became aware of his disease or illness on August 13, 2008 while on duty in Harlingen, TX. Appellant was deployed almost continuously from August 5, 2008 through January 7, 2009. He stopped work on January 8, 2009. In a separate statement, appellant indicated that he had been free of kidney stones since 1999 due to major changes in his lifestyle and diet. However, during the performance of his duties in 2008, he had two bouts with mild heat exhaustion due to dehydration and was diagnosed with a kidney stone on his left side on August 13, 2008. Appellant had to have a stent surgically implanted and he was unable to pursue any further treatment until he was released to active/nonpay status on January 7, 2009. He stated that surgery was required to remove the stone as it did not pass. OWCP accepted the claim for heat exhaustion.

On April 19, 2010 appellant filed CA-7 forms claiming compensation for total disability beginning January 8, 2009. Medical evidence submitted in support of the claim revealed that he had kidney stones that appeared after the alleged dehydration. In several medical reports from 2009 to 2010, Dr. Louise Lamarre, a specialist in emergency medicine and in pain management, reported that appellant was unable to perform his normal duties beginning January 8, 2009 and continuing due to his frequent bouts of kidney stones and urinary tract infections. She reported that his heat exhaustion with secondary urolithiasis (kidney stone) was chronic and was triggered by the work-related exposure and dehydration. Dr. Lamarre noted appellant's condition was preexisting and aggravated by the work-related exposure. She diagnosed recurrence of urolithiasis with secondary infection and heat exhaustion, resolved. In letters dated May 18, June 25 and July 8, 2010, OWCP requested medical evidence that established disability for work during the claimed period.

In a June 11, 2010 report, an OWCP medical adviser reviewed a May 14, 2010 statement of accepted facts and appellant's medical record to determine whether his kidney stones should be accepted as work related as a result of the work-related heat exhaustion. The medical adviser noted that the presence of renal stones as of August 13, 2008 was too early to have been caused by an episode of "heat exhaustion" of the same date. The medical adviser opined that kidney stones should not be accepted based on the current medical evidence.

Due to the medical conflict between Dr. Lamarre and OWCP's medical adviser, OWCP referred appellant to Dr. Linda S. Miller, a Board-certified internist, for an impartial medical evaluation. In a July 27, 2010 report, Dr. Miller reviewed the statement of accepted facts, the medical record and provided examination findings. She diagnosed multiple bilateral renal calculi, occasional left hydronephrosis and renal colic. Dr. Miller noted that renal colic was a symptom related to renal calculi and hydronephrosis, which was apparent on multiple computerized tomography (CT) scans since August 2008. She found no evidence to establish a diagnosis of heat exhaustion/stroke, dehydration or acute renal failure. Dr. Miller opined that the multiple bilateral renal calculi (kidney stones), occasional left hydronephrosis, and renal colic were not related to appellant's employment either by direct cause, aggravation, precipitation or acceleration. She noted that appellant had a preexisting history of kidney stones causing obstruction, necessitating nephrostomy tube and lithotripsy. Dr. Miller explained that he had risk factors for developing kidney stones and there was no documentation to support that he was dehydrated at any point since August 13, 2008. She stated that when appellant was seen on August 13, 2008 (and on other emergency room and clinic visits) there were no symptoms of dizziness, thirst, dry mouth, headache or confusion which are usually associated with

dehydration. Dr. Miller noted that his lab work from August 13, 2008 was essentially normal and none of the emergency room physicians stated that he was dehydrated or had heat exhaustion on emergency room visits on August 13, September 17 or 22, 2008. While appellant was given intravenous fluids, this was because of his presumed and later confirmed kidney stone since increased fluids usually help the stone pass. There was also no indication that he had any signs or symptoms of acute renal failure. Dr. Miller opined that, even if appellant had become dehydrated on his first day of work on August 5, 2009, it was doubtful he would have formed a seven millimeter kidney stone in seven days. She noted that he has a previous history of kidney stones and he continued to develop more kidney stones as seen on later CT scans without any further work history of being outdoors in the heat or history of dehydration. Dr. Miller thus opined that appellant's renal stones were not related to any type of employment injury.

By decision dated August 24, 2010, OWCP denied appellant's claim for wage-loss compensation for disability commencing January 8, 2009. The weight of the medical evidence was afforded to Dr. Miller's impartial medical opinion.

On September 21, 2010 appellant requested a review of the written record. In a September 20, 2010 letter, he asserted that OWCP's decision and the handling of his case was fraught with "multiple inaccuracies, omissions and blatant manipulation of the facts." He asserted his claim was filed for kidney stones, not heat exhaustion. Appellant described his heat stress/exhaustion and dehydration upon his arrival in Harlingen, TX, on August 5, 2008 and what he did to self-treat his symptoms. He stated his date of injury should be changed to August 5 through 12, 2008 for his multiple episodes of heat stress and the date of injury for his kidney stones should be August 13, 2008 and continuing. Appellant argued that the statement of accepted facts contained an incorrect date of injury and did not include medical evidence that was a part of his case record. He contended that the opinions of the medical adviser and Dr. Miller should be disallowed as the statement of accepted facts was inaccurate, Dr. Miller was not provided with the complete case file and she was not an appropriate specialist for his condition.

Medical evidence submitted included a March 8, 2010 hospital report, nurse notes and pathology reports for treatment of recurrent urolithiasis (kidney stone) with secondary infection. On July 21, 2010 Dr. Lamarre diagnosed recurrence of urolithiasis with secondary exhaustion and heat exhaustion, resolved. On September 1, 2010 she diagnosed renal calculi secondary to dehydration from heat exhaustion at work. She opined that appellant's preexisting condition was aggravated on August 13, 2008 during a severe heat exhaustion episode that triggered the formation of a large kidney stone. A September 29, 2010 statement from appellant to the employing establishment was also provided.

By decision dated March 10, 2011, an OWCP hearing representative affirmed the August 24, 2010 OWCP decision. She found that appellant failed to provide a reasoned medical opinion to challenge or counter Dr. Miller's impartial medical opinion or to substantiate his claims.

On July 1, 2011 appellant requested reconsideration. In his July 1, 2011 letter, appellant reargued points previously made. In a May 2, 2011 report, Dr. Michael T. Smith, a Board-certified neuropathologist, noted the history of injury and appellant's subsequent medical treatment. An assessment of nephrolithiasis was provided. Dr. Smith opined that the events of August 2008 "seem" to have caused heat exhaustion and significant volume depletion. The

volume depletion “could have” changed the urinary chemistry such that either a new renal stone was formed or a previously insignificant stone was enlarged enough to cause symptoms and obstruction. Since appellant was asymptomatic for nearly 10 years between episodes of clinically symptomatic stones, Dr. Smith opined that appellant was attempting to limit stone forming risk factors as best he could until he encountered the extreme environmental situation in South Texas. He opined that appellant’s heat exhaustion and volume depletion he experienced in August 2008 could plausibly have led to an exacerbation of renal stones. No clinically significant renal stones were noted. Also submitted was a May 2, 2011 lab result report and medical notes from Baylor All Saints Medical Center dated March 6 to 8, 2010.

In April 13 and June 1, 2011 reports, Dr. Lamarre opined that appellant suffered from heat exhaustion a few days prior to the August 13, 2010 kidney stone incident and this provoked the kidney stone. Based on a detailed evaluation of evidence of environmental conditions and exposure and interviews with appellant, Dr. Lamarre stated that appellant’s symptoms indicated that it was very likely that appellant had incident of heat cramps and at least one incident of heat exhaustion August 9, 10, 11 and 12, 2008. When appellant was diagnosed with kidney stone in the emergency room on August 13, 2008, he received 2.5 liters of saline to treat moderate dehydration. During the week prior to this emergency room visit, it was likely that he had multiple incidents of heat exhaustion but did not have heat exhaustion on August 13, 2010 it was a kidney stone. Dr. Lamarre noted Dr. Smith’s opinion that the volume depletion could have changed his urinary chemistry such that the new renal stone could have formed or enlarged a previously clinically insignificant stone and concluded that the urolithiasis suffered on August 13, 2008 was a direct result of exposure to excessive heat for several days prior to the incident and therefore was work related. She indicated that appellant could return to work but he was not completely released as he would need a ureteral resection.

By decision dated August 2, 2011, OWCP denied modification of its prior decision.

On February 1, 2012 appellant requested reconsideration and reiterated previous arguments. In a January 18, 2012 report, Dr. Lamarre diagnosed resolved heat exhaustion and ongoing kidney stones. She reported that appellant’s kidney stones developed because he was extremely dehydrated in the course of his work in the field for the Federal Government. Dr. Lamarre noted that the dehydration started on August 5, 2008 as appellant was outside every day until August 12, 2008 in a heat index over 100 degrees every day. She opined that he was completely disabled because of his recurrence of kidney stone, infection, severe pain, frequent visit to the emergency room, frequent procedures from a urologist from the time of the injury through June 1, 2011, where his findings stabilized. Dr. Lamarre noted that appellant still had residual stones on the left side but he could be treated conservatively and was being followed regularly by a urologist. She opined that he may resume work June 1, 2011.

By decision dated March 20, 2012, OWCP denied modification of its prior decision.

### **LEGAL PRECEDENT**

Section 8102(a) of FECA<sup>3</sup> sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: The United States shall pay compensation as

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<sup>3</sup> 5 U.S.C. § 8102(a).

specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.... In general the term disability under FECA means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.<sup>4</sup> This meaning, for brevity, is expressed as disability for work.<sup>5</sup> For each period of disability claimed, the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.<sup>6</sup> Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative and substantial medical evidence.<sup>7</sup>

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under FECA.<sup>8</sup> The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>9</sup>

Once an employee establishes that he or she sustained an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, for which he or she claims compensation, is causally related to the accepted injury.<sup>10</sup> For conditions not accepted by OWCP as employment related, appellant has the burden of proof to establish causal relationship.<sup>11</sup>

### ANALYSIS

OWCP accepted that appellant sustained heat exhaustion on August 13, 2008. On his claim form, appellant alleged that his kidney stones developed as a result of his work-related heat exposure and dehydration. He also filed a request for wage-loss compensation for total disability for the period commencing January 8, 2009 as a result of his kidney stones. OWCP has not accepted appellant's claim for kidney stones. Where a claimant claims that a condition not accepted or approved by OWCP was due to his or her employment injury, he or she bears the

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<sup>4</sup> 20 C.F.R. § 10.5(f). See also *William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

<sup>5</sup> See *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>6</sup> See *William A. Archer*, 55 ECAB 674 (2004).

<sup>7</sup> See *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

<sup>8</sup> See *Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>9</sup> See *Fereidoon Kharabi*, *supra* note 7.

<sup>10</sup> *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

<sup>11</sup> See *Jaja K. Asaramo*, 55 ECAB 104 (2004).

burden of proof to establish that the condition is causally related to the injury through the submission of rationalized medical evidence.<sup>12</sup>

Dr. Lamarre, appellant's attending physician, reported that appellant was unable to perform his normal duties beginning January 9, 2009 due to recurrent kidney stones and urinary tract infections. She also opined that his kidney stone was triggered by the work-related heat exposure and dehydration. OWCP's medical adviser concluded that the kidney stones were not causally related to the accepted work-related heat exposure and dehydration. OWCP properly found a conflict between Dr. Lamarre and OWCP's medical adviser regarding whether appellant's kidney stones should be accepted as work related *via* the accepted heat exhaustion.

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.<sup>13</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>14</sup>

OWCP selected Dr. Miller, a Board-certified internist, to resolve the conflict. In her July 27, 2010 report, Dr. Miller concluded that appellant's multiple bilateral renal calculi, occasional left hydronephrosis, and renal colic were not connected to his employment factors in anyway. She noted that his bilateral renal calculi and occasional left hydronephrosis were apparent on multiple CT scans since August 2008. Dr. Miller further noted that appellant had preexisting history of kidney stones as well as risk factors which made him more prone to kidney stones. She also reported that there was no medical evidence of dehydration at any point since August 2008. Dr. Miller explained that treatment records from August 2008 did not note symptoms usually associated with dehydration and lab work from August 13, 2008 was essentially normal. She opined that appellant's renal stones were not related to any type of employment injury.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>15</sup> The Board finds that Dr. Miller's report is sufficient to constitute the weight of the medical evidence. Dr. Miller reviewed the statement of accepted facts, performed a physical examination and reviewed the medical evidence of record. Her report, therefore, is based on a proper factual background. Dr. Miller also provided medical reasoning supporting why appellant's kidney stones were not causally related to work factors. Due to the detailed findings and medical reasoning supporting Dr. Miller's report, the Board finds that appellant has not met his burden of proof in establishing a kidney condition due to his

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<sup>12</sup> *Id.*, *M.D.*, Docket No. 11-1737 (issued April 3, 2012); *F.H.*, Docket No. 10-1267 (issued March 7, 2011).

<sup>13</sup> 5 U.S.C. § 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

<sup>14</sup> *R.C.*, 58 ECAB 238 (2006).

<sup>15</sup> *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

August 13, 2008 work injury. As appellant's kidney condition is not causally related to his August 13, 2008 work injury, he is not entitled to any disability compensation as a result thereof.

Following Dr. Miller's report, appellant submitted additional medical evidence in support of his claim and resultant total disability. Dr. Lamarre reported that appellant was disabled because of his recurrence of kidney stone, infection, severe pain, frequent visit to the emergency room and procedures from urologist from the time of injury through June 1, 2011. She opined that, when appellant was diagnosed with kidney stone in the emergency room on August 13, 2008, he received 2.5 liters of saline to treat moderate dehydration. During the week prior to this emergency room visit, it was likely that he had multiple incidents of heat exhaustion but did not have heat exhaustion on that day, it was kidney stone. Dr. Lamarre noted Dr. Smith's opinion regarding volume depletion and concluded that the urolithiasis suffered on August 13, 2008 was a direct result of exposure to excessive heat for several days prior to the incident and therefore should be work related. She did not provide sufficient medical findings or explanation in support of her opinion. Moreover, as Dr. Lamarre was on one side of the conflict that Dr. Miller resolved, the additional reports from her are insufficient to overcome the special weight accorded Dr. Miller's report as the impartial medical specialist or to create a new conflict with it.<sup>16</sup>

In a May 2, 2011 report, Dr. Smith opined that appellant's heat exhaustion and volume depletion he experienced in August 2008 could have led to an exacerbation of renal stones. He reasoned that the volume depletion could have changed the urinary chemistry such that either a new renal stone was formed or that a previously clinically insignificant stone was enlarged enough to cause symptoms and obstruction. Dr. Smith noted that appellant was asymptomatic for nearly 10 years between episodes of clinically symptomatic stones and that the extreme environmental situation in South Texas exacerbated his condition. While he concluded that appellant's renal stones were exacerbated by the heat exhaustion and volume depletion he experienced in August 2008, Dr. Smith did not provide adequate medical reasoning to support his stated conclusions. For example, he did not discuss how a change in appellant's urinary chemistry due to volume depletion a few days prior to the accepted August 13, 2008 work-related heat exhaustion would cause the formation of the seven millimeter kidney stone Dr. Miller reported was diagnosed. Also Dr. Miller reported that appellant continued to develop more kidney stones as seen on later CT scans without any further work history of being outdoors in the heat or history of dehydration. Without a clear explanation of how and why Dr. Smith reached his final conclusion, his report is not sufficient to meet appellant's burden of proof in establishing that the kidney stones are due to the August 13, 2008 employment injury.

On appeal, appellant contends that the evidence of record supports the acceptance of his kidney conditions as being causally related to his work factors and, thus, modification of the statement of accepted facts is required. However, as noted above, the medical evidence does not support that appellant's kidney stones were caused or aggravated by the employment injury. Accordingly, modification of the statement of accepted facts is not necessary.

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.

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<sup>16</sup> *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that his kidney stone condition was due to his August 13, 2008 employment injury and, thus, he is not entitled to any wage-loss compensation as a result of that condition.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated March 20, 2012 is affirmed.

Issued: March 20, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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