



sudden sharp pain in his back and legs which caused his knees to buckle and he fell to the floor. Appellant was taken by ambulance to the hospital, where he remained until September 18, 2003. Appellant has not returned to work.<sup>1</sup>

Appellant's claim was accompanied by statements from JoAnn Coon, John Bambe, Rick Bond and Byron Carlisle, attesting to the injury, together with a September 16, 2003 magnetic resonance imaging (MRI) scan, showing a central-right disc protrusion at L5-S1; and a September 19, 2003 medical report signed by Dr. Robert Thomas, an orthopedic surgeon, indicating a left shoulder injury.

By letter dated October 7, 2003, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office further advised appellant as to the type of factual and medical evidence needed to establish his claim.

In a September 23, 2003 statement, appellant related that he had experienced pain in both of his legs since driving on a work trip to Lakeview, Oregon, on July 29, 2003. He missed three days of work due to pain in August 2003 and that driving aggravated his condition. On September 15, 2003 appellant drove to work and he experienced pain in both legs. He indicated that, when he was at the copier, severe pain shot up and down his spine and leg, and his right leg buckled. Appellant stated that he did not fall but caught himself on the mail counter. He went back to his desk to do some work, but again experienced pain when he later stood up and, while in the process of trying to sit back down, his chair rolled away. Appellant fell backwards, landing first on his left shoulder and then the rest of his body. He related that he was claiming injury to his back, left shoulder, ribs and hips. A copy of the ambulance report was provided, together with physical therapy notes from September 25 through November 12, 2003, assessing a lumbar strain with bilateral lower extremity symptoms.

In a September 15, 2003 report, Dr. Brad A. Ward, a Board-certified neurological surgeon, noted that he had followed appellant for over a year. He stated that appellant had a very long history of back problems, had multiple MRI scans that showed degenerative changes, and had previous complaints of his right leg buckling. The history of the current injury was noted with an impression of chronic back pain.

In a September 15, 2003 report, Dr. Hans G. Russell, a Board-certified family practitioner, noted the history of injury and provided an impression of intractable low back pain with the possibility of some radiculopathy.

A September 16, 2003 MRI scan provided an impression of central-right disc protrusion at L5-S1 with an associated annular fissure and mild distortion of the lateral recess. Findings were noted to be similar to those seen on a February 27, 2002 MRI scan.

On September 17, 2003 appellant underwent a lumbar epidural steroid injection at L3-4.

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<sup>1</sup> The record indicates that appellant has multiple prior back claims before the Office, which were combined into one file. These prior claims are not at issue in the present appeal.

In a September 19, 2003 report, Dr. Thomas noted the history of injury and that appellant was being followed by Dr. Ward for low back problems. An assessment of left neck and shoulder pain following a fall was provided along with evidence of preexisting acromioclavicular arthrosis, of the left shoulder.

On October 9, 2003 appellant was hospitalized. In reports of the same date, Dr. Bryce J. Yerman noted that a pulmonary computerized tomography scan showed a right lower lobe clot. Dr. Alan Hilles diagnosed a pulmonary emboli, probably secondary to right upper extremity thrombophlebitis, and also diagnosed degenerative disc disease lumbosacral spine since 1979.<sup>2</sup> Dr. Keith Harless, a Board-certified internist, provided an impression of right upper extremity thrombosis secondary to previous intravenous (IV) associated with acute pulmonary embolus. An impression of chronic back pain was also provided.

On November 14, 2003 Dr. Ward advised that appellant was unable to return to work until January 9, 2004.

By decision dated December 2, 2003, the Office found that the medical evidence of record failed to establish that appellant sustained an injury due to the September 15, 2003 incident. The Office found that the evidence submitted failed to establish a causal relationship between appellant's claimed medical conditions and the accepted work-related incident.

In a letter dated January 15, 2004, appellant requested reconsideration. He related that he has had previous work-related injuries to his back and stated that his drive the previous July was the start of his legs buckling under him. Appellant indicated that Dr. Ward had told him on January 9, 2004 that he might have an injury higher up that was causing his legs to buckle. On December 18, 2003 appellant stated that, during his hospitalization and treatment for the September 15, 2003 injury, he developed a blood clot for the IV needle in his right arm and had to be hospitalized for the blood clot. He stated that he has to use a walker as he did not trust his legs to stay under him. Appellant advised that he did not have left shoulder pain prior to the fall, but did thereafter.

In a November 10, 2003 report, Dr. Thomas noted that appellant had an MRI scan of the left shoulder which demonstrated a full-thickness tear of the left supraspinatus with evidence of inflammation in and around the biceps tendon within the intracapsular region, consistent with a longitudinal tear. A left rotator cuff tear and left shoulder tendinosis, possible biceps tendon tear was assessed.

In a January 9, 2004 work release note, Dr. Ward advised that appellant was unable to return to work pending a functional study.

By decision dated January 29, 2004, the Office denied appellant's reconsideration request on the grounds that the evidence was irrelevant and appellant failed to show that the Office erred in its December 2, 2003 decision.

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<sup>2</sup> The credentials of Drs. Yerman and Hilles are not of record.

## LEGAL PRECEDENT -- ISSUE 1

In order to determine whether an employee sustained an injury in the performance of duty, the Office begins with an analysis of whether “fact of injury” has been established. Generally “fact of injury” consists of two components which must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.<sup>3</sup> This includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.<sup>4</sup> Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>5</sup>

## ANALYSIS -- ISSUE 1

In this case it is undisputed that appellant fell at work on September 15, 2003. The Office found however that the medical evidence did not establish that a medical condition was caused by the September 15, 2003 employment incident.

Dr. Ward noted that appellant had a very long history of back problems with degenerative changes and had previous complaints of right leg buckling, but he did not provide an opinion on causal relationship and provided only an impression of chronic back pain. Dr. Russell assessed intractable low back pain with the possibility of some radiculopathy, but did not provide an opinion on causal relationship. Although Dr. Thomas provided an assessment of neck and shoulder pain following a fall, he failed to diagnose a condition associated with the accepted fall. As neither physician discussed the cause of appellant’s condition, their reports are of diminished probative value.<sup>6</sup> Although appellant has also submitted evidence indicating that he developed a pulmonary emboli secondary to right upper extremity thrombophlebitis, the emergency room physicians did not attribute such condition to the September 15, 2003 employment incident.

Consequently, appellant has not met his burden of proof in establishing his claim as there is no reasoned opinion by a physician addressing how the September 15, 2003 incident caused or aggravated a particular medical condition.

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<sup>3</sup> *Barbara Johnsen (James C. Johnsen)*, 54 ECAB \_\_\_\_ (Docket No. 03-1738, issued September 30, 2003); *Tracey P. Spillane*, 54 ECAB \_\_\_\_ (Docket No. 02-2190, issued June 12, 2003); *Michelle Salazar*, 54 ECAB \_\_\_\_ (Docket No. 03-623, issued April 11, 2003); *Charles E. Colquitt*, 54 ECAB \_\_\_\_ (Docket No. 02-1009, issued February 5, 2003); *Deborah L. Beatty*, 54 ECAB \_\_\_\_ (Docket No. 02-2294, issued January 15, 2003).

<sup>4</sup> *John D. Jackson*, 55 ECAB \_\_\_\_ (Docket No. 03-2281, issued April 8, 2004).

<sup>5</sup> *Nicolette R. Kelstrom*, 54 ECAB \_\_\_\_ (Docket No. 03-275, issued May 14, 2003); *Jamel A. White*, 54 ECAB \_\_\_\_ (Docket No. 02-1559, issued December 10, 2002).

<sup>6</sup> *Linda I. Sprague*, 48 ECAB 386 (1997) (medical evidence that does not offer any opinion regarding the cause of an employee’s condition is of diminished probative value on the issue of causal relationship).

## LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.<sup>7</sup> Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

## ANALYSIS -- ISSUE 2

In support of his reconsideration request, appellant argued that he did not have left shoulder pain prior to the fall, but he did now. He further indicated that his drive the previous July<sup>9</sup> was the start of his legs buckling under him and that Dr. Ward told him that he might have an injury higher up. However, the underlying issue, causal relationship between the September 15, 2003 incident and any resulting medical condition and disability, is medical in nature. Thus, appellant's lay assertions regarding the cause of his medical condition do not show that the Office erroneously applied or interpreted a point of law or advanced a point of law or fact not previously considered by the Office.<sup>10</sup> Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

The Board finds that the evidence submitted on reconsideration is not relevant to the issue in this case of whether there is a causal relationship between appellant's medical conditions and the accepted employment incident. In a November 10, 2003 report, Dr. Thomas diagnosed a left rotator cuff tear and left shoulder tendinosis; however, the physician failed to address whether appellant's diagnosed conditions were caused by the employment incident of September 15, 2003.<sup>11</sup> Therefore it is not relevant to the issue in this case. Similarly, Dr. Ward's December 30, 2003 and January 9, 2004 notes pertaining to disability and advising that he had no further recommendations for appellant's claim do not provide any support for causal relationship and are not relevant to the issue in this case. Dr. Ward's December 30, 2003 report specifically declined to address causal relationship. Accordingly, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2) as the evidence submitted, although new, was not relevant.

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<sup>7</sup> 20 C.F.R. § 10.606(b)(2) (1999).

<sup>8</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>9</sup> To the extent that appellant is claiming that a July 2003 work trip caused an injury, the Board notes that the record does not contain a claim regarding any such claim for a new injury. The claim before the Board pertains to whether the September 15, 2003 employment incident caused an injury.

<sup>10</sup> See *Gloria J. McPherson*, 51 ECAB 441 (2000) (lay individuals are not competent to render a medical opinion).

<sup>11</sup> See *John D. Jackson*, *supra* note 4.

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied appellant's January 15, 2004 request for reconsideration.<sup>12</sup>

**CONCLUSION**

The Board finds that appellant has failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty on September 15, 2003. The Board further finds that the Office properly denied appellant's reconsideration request without conducting a merit review.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decisions dated January 29, 2004 and December 2, 2003 are affirmed.

Issued: August 20, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>12</sup> Subsequent to the Office's January 29, 2004 decision, the Office received additional evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence and any legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 10.606(b) (1999).