

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

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**MICHAEL P. WACKER, Appellant**

**and**

**OCCUPATIONAL SAFETY & HEALTH  
ADMINISTRATION, Madison, WI, Employer**

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**Docket No. 04-1749  
Issued: December 14, 2004**

*Appearances:*  
*Michael P. Wacker, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On June 30, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated July 22, 2003 wherein the Office denied appellant's claim for compensation because the medical evidence failed to establish that he sustained an injury in the performance of duty causally related to factors of his federal employment. Appellant also appeals the October 20, 2003 decision denying merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of the case.

**ISSUES**

The issues are: (1) whether appellant established that he sustained an injury causally related to factors of his federal employment; and (2) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

## **FACTUAL HISTORY**

On October 1, 2002 appellant, then a 34-year-old industrial hygienist, filed an occupational disease claim alleging that he sustained degenerative disc disease as a result of his federal employment. By letter dated October 7, 2002, the Office requested that appellant submit further evidence in support of his claim.

By letter dated November 4, 2002, appellant responded by indicating that he had a posterior discectomy L5-S1 on November 17, 2000, that he returned to full-duty work two months later and that since then he has pain and discomfort radiating from his lower back down his legs. Appellant claimed that his work activities aggravated his back pain. Appellant alleged that his back pain was the result of his carrying approximately 23 plus pounds of inspection equipment up and down ladders and on uneven surfaces and continuously carrying approximately 50 plus pounds of inspection and sampling equipment during inspections. In further support of his claim, appellant submitted records from Dean Medical Center and St. Mary's Hospital Medical Center. These records indicated that appellant received medical treatment on October 7, 2002 and that he was scheduled for surgery on October 23, 2002.

By decision dated November 8, 2002, the Office denied appellant's claim on the grounds that he did not sustain an injury in the performance of duty. The Office found that, although the initial evidence supported that appellant actually experienced the claimed employment factor, the evidence did not establish that a condition was diagnosed in connection with this.

By letter dated January 27, 2003, appellant filed a request for reconsideration. In support thereof, appellant submitted a November 11, 2002 medical report wherein Dr. Kahle indicated that he first saw appellant in November 2000 when he treated appellant for a large ruptured disc at L5-S1 associated with low back pain and right leg pain. He noted that this came upon appellant spontaneously and it was his "impression that the disc herniations resulted from his strenuous work activities." Dr. Kahle noted that after his discectomy on November 17, 2000 appellant initially did well, but that after returning to work appellant found that he would become more symptomatic. Dr. Kahle noted that, when he saw appellant for reevaluation in September 2002, he opined that appellant's "bilateral intermittent sciatica-type symptoms associated with low back pain were due to a severely degenerative dis[c] at L5-S1 and that this was still related to his work injury that had led to his discectomy at this same level." He indicated that appellant underwent an anterior discectomy at L5-S1 on October 23, 2002. He noted that he was concerned that appellant was at significant risk for having recurrent back problems if he returns to his usual employment and recommended restrictions.

By letter dated January 28, 2003, the Office requested that appellant submit further evidence including a detailed statement addressing any nonwork-related back injuries and medical records with regard to previous treatment for his back. This evidence was not received in a timely fashion.

By decision dated March 5, 2003, the Office found that appellant had not provided sufficient evidence to warrant modification of the previous decision.

By letter dated April 23, 2003, appellant requested that the Office reconsider his claim. In support thereof, appellant submitted records with regard to his previous treatment in November 2000. Appellant also submitted the results of various diagnostic tests.

Appellant also submitted numerous other medical reports. In a November 29, 2001 report, Dr. Cynthia M. Bender, a Board-certified physiatrist, indicated that appellant was having pain off and on since his surgery of November 17, 2000, but that he got worse after visiting the World Trade Center to do air quality testing for his job with the employing establishment. In a progress note dated September 11, 2002, Dr. David L. Hahn, a Board-certified family practitioner, indicated that appellant had “persistent back pain following surgery, clearly related to activity.” In a medical report dated September 24, 2002, Dr. Kahle indicated that appellant had intermittent recurrent low back pain and right sciatica. He concluded, “I would have to say that this was not a work-related injury, but now that he has degenerative dis[c] disease at L5-S1 and has had a discectomy at that level his strenuous job activities clearly exacerbated his pain.” Appellant underwent an anterior discectomy with spine fusion on October 23, 2002. Appellant submitted a duty status report dated April 24, 2003 wherein Dr. Kahle indicated that appellant had a 10 percent “percentage of permanent disability.”

In a decision dated July 22, 2003, the Office denied modification of its earlier decisions. The Office found that the record was devoid of a well-rationalized medical opinion which explained how appellant’s employment duties caused or contributed to a material worsening of his degenerative disc condition with postoperative changes.

By letter dated September 8, 2003, appellant again requested reconsideration. In support thereof, appellant submitted the April 24, 2003 report by Dr. Kahle that was already in the record.

By decision dated October 20, 2003, the Office found that the evidence submitted by appellant on reconsideration was insufficient to warrant a merit review of the decision dated July 22, 2003.

### **LEGAL PRECEDENT – ISSUE 1**

An employee seeking benefits under the Federal Employees’ Compensation Act<sup>1</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 the Act; 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>2</sup> These are the essential

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>3</sup>

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;<sup>4</sup> (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;<sup>5</sup> and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>6</sup>

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

In the instant case, the evidence establishes that appellant experienced the employment factor as alleged. However, the Board finds that appellant has not submitted sufficient evidence to show that a condition has been diagnosed in connection with the accepted employment factors. There has been no condition diagnosed in connection with the alleged aggravation of appellant's previous condition. Although Dr. Kahle indicated that appellant's strenuous work activities clearly exacerbated his pain, pain is considered a symptom, not a diagnosis and does not constitute a basis for payment of compensation in the absence of objective factors of disability.<sup>8</sup> Furthermore, the mere fact that later symptoms mirrored those following the employment injury, without more, is insufficient to establish a causal relationship, as the work activities may produce symptoms which are revelatory of an underlying condition.<sup>9</sup> Dr. Hahn

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<sup>3</sup> See *Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 2.

<sup>4</sup> *Solomon Polen*, 51 ECAB 341 (2000).

<sup>5</sup> *Marlon Vera*, 54 ECAB \_\_\_\_ (Docket No. 03-907, issued September 29, 2003); *Janet L. Terry*, 53 ECAB \_\_\_\_ (Docket No. 00-1673, issued June 5, 2002); *Roger Williams*, 52 ECAB 468 (2001).

<sup>6</sup> *Ernest St. Pierre*, 51 ECAB 623 (2000).

<sup>7</sup> *Gloria J. McPherson*, 51 ECAB 441 (2000).

<sup>8</sup> See *John I. Clark*, 32 ECAB 1618 (1981).

<sup>9</sup> *Gary R. Fullbright*, 40 ECAB 737 (1989); *Dominic M. DeScala*, 37 ECAB 369 (1986).

also indicated that appellant's pain was "definitely exacerbated by his work." However, Dr. Hahn never indicates that he has an understanding as to what appellant's work involves. Without relating specifics as to what in appellant's work caused the symptoms, Dr. Hahn's report cannot show causal relationship. Although Dr. Bender indicates that appellant's pain got worse after visiting the World Trade Center for his job, she also did not link appellant's condition to specific factors of his federal employment. Accordingly, the Board finds that appellant failed to establish his claim for compensation as the medical evidence was insufficient to establish fact of injury.

### **LEGAL PRECEDENT -- ISSUE 2**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>10</sup> the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

In support of his claim for reconsideration, appellant submitted a copy of Dr. Kahle's April 24, 2003 report. As this report was already in the record and reviewed by the Office, it is insufficient to warrant further merit review.<sup>12</sup> Furthermore, appellant has not raised any substantive legal questions nor included any pertinent new and relevant evidence not previously considered and, therefore, appellant's request did not constitute a basis for reopening a case.<sup>13</sup>

### **CONCLUSION**

As appellant failed to establish that he sustained an injury causally related to factors of his federal employment, the Office properly denied appellant's claim for benefits. Furthermore, the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

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<sup>10</sup> 5 U.S.C. § 8128(a).

<sup>11</sup> 20 C.F.R. § 10.606(b)(2)(i-iii).

<sup>12</sup> *Id.*

<sup>13</sup> See *James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta DeGuzman*, 35 ECAB 309 (1983), *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 20 and July 22, 2003 are hereby affirmed.

Issued: December 14, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member