

FACTUAL HISTORY

On September 18, 2006 appellant, then a 43-year-old federal air marshal, filed a traumatic injury alleging on September 17, 2006 he injured his lower back arising from his seat following a flight. He stated, "I began to get out of my seat something popped in my back and my left leg went numb and lost weight bearing ability causing me to fall back into seat."

Appellant sought treatment from a physician's assistant on September 18, 2006.¹ He underwent a magnetic resonance imaging (MRI) scan on September 25, 2006, which demonstrated post-surgical changes at L2-3 and L4-5. Level L3-4 exhibited a disc bulge and broad disc herniation with compromise of the L4 nerve roots. Dr. M. Darryl Antonacci, a Board-certified orthopedic surgeon, completed a report on October 24, 2006 and noted appellant's history of injury on an airplane as "getting out of a seat and as he began to stand, he heard a pop with intense pain along with left leg pain and numbness." He noted that appellant had previous surgery for a microdiscectomy at L3-4 and L4-5 in 2001. On physical examination Dr. Antonacci found that appellant exhibited muscle spasm in the low back and left hip. He diagnosed probable L3-4 disc herniation and recommended an epidural steroid injection. Dr. Antonacci found appellant totally disabled.

In a letter dated November 13, 2006, the Office requested additional factual and medical evidence from appellant. It allowed 30 days for a response.

Dr. Sanjay Bakshi, a Board-certified anesthesiologist, completed a report on October 30, 2006 and noted appellant's history of injury. He diagnosed lumbar disc herniation at L3-4 and recommended an additional MRI scan, which was performed on November 13, 2006. It demonstrated a left para-midline disc herniation at L3-4. On November 20, 2006 Dr. Bakshi recommended epidural injections at L3-4 bilaterally. On December 11, 2006 he stated, "It is my opinion that [appellant's] injury is related to his accident on September 17, 2006 and he is unable to work at this time." Appellant also submitted the surgical reports from his January 18, 2000 anterior cervical decompression and fusion at C4-7 and his August 7, 2001 bilateral microdiscectomies at L2-3 and L4-5. Dr. Bakshi completed an additional report on December 14, 2006. He stated, "[Appellant's] current symptomatology began on September 17, 2006 while working as a federal air marshal. At this time the patient states that he arose from a seated position on an aircraft when he stumbled and fell back into his seat." Dr. Bakshi stated that the finding of herniated disc at L3-4 on MRI scan directly correlated with appellant's low back pain and radiculopathy as well as the findings of physical examination of positive straight leg raising and weakness. He concluded, "[I]t is my professional opinion that [appellant's] current symptomatology is causally related to the accident he sustained on September 17, 2006 while working as a federal air marshal."

¹ Registered nurses, licensed practical nurses and physician's assistants are not "physicians" as defined under the Federal Employees' Compensation Act. Their opinions are of no probative value. *Roy L. Humphrey*, 57 ECAB 238, 242 (2005); 5 U.S.C. § 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologist, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law."

By decision dated December 22, 2006, the Office denied appellant's claim. It found that the September 17, 2006 incident occurred, but that the medical evidence did not provide a diagnosis which could be attributed to the incident.

Appellant requested reconsideration on January 9, 2007 and resubmitted Dr. Bakshi's December 14, 2006 report. On January 15, 2007 Dr. Bakshi opined that appellant's current low back pain began on September 17, 2006 when he arose from a seated position on an aircraft, stumbled and fell back into his seat. He stated that appellant experienced a pop with intense pain as well as left leg pain and numbness. Dr. Bakshi diagnosed left para-midline disc herniation at L3-4. He noted that disc herniation could occur when undue stress was placed on the disc. Dr. Bakshi stated, "Certainly, the shearing force associated with the history described by [appellant], of rising up out of an airline seat with its associated twisting motion, then stumbling and falling back can cause a disc to herniate." He concluded that appellant's employment incident resulted in his current symptoms.

By decision dated April 10, 2007, the Office denied modification of the December 22, 2006 decision, findings that his description of the employment incident did not agree with that provided by Dr. Bakshi. Specifically, it found that appellant did not describe standing with a twisting motion or falling back into his seat and that as Dr. Bakshi's opinion on causal relationship was not based on an accurate history. The Office also found that Dr. Bakshi's opinion regarding causal relationship was couched in speculative terms and failed to explain a "shearing force."

Appellant, through his attorney, requested reconsideration on November 21, 2007. He submitted a statement that on September 17, 2006 he twisted to arise from his assigned seat on a 50 passenger aircraft to clear the low ceiling and that "during this motion and continuing into up righting myself the pop in my back occurred." Appellant stated that pain then caused him to stumble and collapse back into the seat. He also submitted a statement from a coworker, Michael Wenk, describing the employment incident. Mr. Wenk stated that appellant attempted to leave his seat at the completion of the flight by turning his body in a twisting motion. He stated that appellant then fell back into his seat and was unable to rise. According to Mr. Wenk, appellant was sweaty, pale and stated that he was experiencing extreme back pain.

Appellant submitted a May 9, 2007 report from Dr. Jose Fontanez, a Board-certified internist, diagnosing chronic low back syndrome secondary to herniated disc. He also resubmitted evidence from the physician's assistant.

In a report dated October 11, 2007, Dr. Jack McNutty, a Board-certified neurosurgeon, noted appellant's history of injury as back pain beginning when he attempted to rise from his seat on an airplane on September 17, 2006. He stated that appellant had no problem with his back until this incident and that his current back condition was causally related to the September 17, 2006 employment injury. Dr. McNutty performed additional back surgery on appellant on April 30, 2007 with a good outcome.

Dr. Bakshi completed a report on October 1, 2007 and described appellant's September 17, 2006 employment incident as occurring as he began to stand on an aircraft. He stated that appellant's left leg became numb and he lost weight bearing ability causing him to fall

back into his seat. Dr. Bakshi repeated his prior statements regarding the causal relationship between appellant's employment incident and his herniated disc. He further stated that appellant described no other incident or history to account for his symptoms on September 17, 2006 and opined that his symptomatology was causally related to this incident.

By decision dated February 5, 2008, the Office declined to reopen appellant's claim for consideration of the merits finding that Dr. Bakshi's October 1, 2007 report was repetitious. It stated that a limited review of its prior decision was undertaken and the decision was not found to be in error.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act² 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 timely filed within the applicable time limitation period of the Act, that an injury was sustained 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. The employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged. An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by the preponderance of the reliable, probative and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that the employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. An employee has not met his burden of proof where there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁴

The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. The medical evidence required to establish causal relationship is usually rationalized medical 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

² 5 U.S.C. §§ 8101-8193.

³ *Jussara L. Arcanjo*, 55 ECAB 281, 283 (2004).

⁴ *Id.*

the relationship between the diagnosed condition and the specific employment activity identified by the claimant.⁵

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an employment incident on September 17, 2006, which occurred when he was arising from his seat on an airplane felt a pop and due to the loss of sensation in his left leg fell back into his seat. It initially denied appellant's claim on the grounds that he failed to submit evidence of a diagnosed condition on December 22, 2006. He requested reconsideration and submitted additional medical evidence including the diagnosis of left para-midline disc herniation at L3-4. The Office then denied appellant's claim on April 10, 2007 on the grounds that the medical opinion evidence regarding the causal relationship between his diagnosed condition and his employment incident was not based on an accurate factual background and was couched in speculative terms.

Dr. Bakshi, a Board-certified anesthesiologist, submitted medical reports in support of appellant's claim for a herniated disc arising on September 17, 2006. In a report dated October 30, 2006, he provided a history of injury consistent with appellant's statement on the claim form diagnosed lumbar disc herniation at L3-4. This report is not sufficient to meet appellant's burden of proof as Dr. Bakshi did not provide his opinion that the accepted September 17, 2006 employment incident caused or contributed to the diagnosed condition of herniated disc.

On December 11, 2006 Dr. Bakshi opined that appellant's L3-4 disc herniation was due to the September 17, 2006 employment incident. This report lacks the necessary medical rationale explaining how the employment incident of arising from a seat on an airplane caused the disc herniation. Without medical explanation, this report is not sufficient to meet appellant's burden of proof.

In a report dated December 14, 2006, Dr. Bakshi opined that appellant's current symptoms began as a result of his attempt to arise from an airplane seat with a subsequent stumble and fall back into his seat. He again diagnosed herniated disc and offered the opinion that appellant's condition was related to this incident. In the December 14, 2006 report, Dr. Bakshi's statement of the facts began to deviate from the explanation of the employment incident offered by appellant. He appeared to view the stumble and fall by appellant as occurring prior to the back injury, while appellant clearly indicated that the stumble and fall were the result of the pop in his back and the resulting weakness in his left leg. This factual deviation by Dr. Bakshi lessens the probative value of his December 14, 2006 report as the report is not based on a complete and accurate factual and medical background. This report also fails to provide the necessary medical reasoning explaining how and why Dr. Bakshi believed that the actual employment incident resulted in appellant's herniated disc.

Dr. Bakshi completed a report on January 15, 2007 and described the employment incident as arising with a twisting motion, then stumbling and falling back. He again diagnosed L3-4 disc herniation. Dr. Bakshi stated that disc herniation could occur when undue stress was

⁵ *Id.*

placed on the disc. He stated, “Certainly, the shearing force associated with the history described by [appellant], of rising up out of an airline seat with its associated twisting motion, then stumbling and falling back can cause a disc to herniate.” This report adds additional factual description of appellant’s employment incident not listed on the claim form. Appellant did not specifically describe a twisting motion in arising from his seat. Dr. Bakshi again appears to view the stumble and fall back into appellant’s seat as a cause of the injury rather than a result as described by appellant. These factual deviations lessen the probative value of Dr. Bakshi’s opinion on the causal relationship between the accepted employment incident and appellant’s diagnosed disc herniation. His history of injury suggests that standing or standing with a twisting motion alone would not be sufficient to cause appellant’s disc to herniate and that instead a stumble and fall would be necessary. Finally, as noted by the Office, Dr. Bakshi seems to equivocate on whether appellant’s employment incident did actually cause the herniated disc by using suggestive words such as “can” or “could” rather than offering a definitive opinion. 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. The opinion should be one of reasonable medical certainty.⁶ For these reasons, appellant has failed to meet his burden of proof in establishing that his L3-4 herniated disc resulted from the September 17, 2006 employment incident and the Office properly denied his claim.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁷ the Office’s regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁸ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁹

ANALYSIS -- ISSUE 2

Appellant, through his attorney, requested reconsideration on November 21, 2007. In support of his request he further clarified the September 17, 2006 employment incident, describing the twisting motion necessary to rise from an airplane seat with a low ceiling. Appellant again indicated that the pop in his back occurred as he was arising and that his stumble and fall back into his seat were the result of his sudden pain and weakness rather than a further contributing cause. He also submitted a witness statement which also noted the twisting motion required to arise from a seat on an airplane with the standard lower ceiling heights. The Board finds that this new evidence is relevant to the reason for which the Office denied appellant’s

⁶ *Samuel Senkow*, 50 ECAB 370, 377 (1998).

⁷ 5 U.S.C. §§ 8101-8193, § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ *Id.* at § 10.608(b).

claim, the discrepancy between his description of his employment incident and that of Dr. Bakshi in his January 15, 2007 report addressing the medical reasoning behind his opinion that appellant's herniated disc was due to twisting during the September 17, 2006 employment incident. The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his or her burden of proof. The requirements pertaining to the submission of evidence in support of reconsideration only specify that the evidence be relevant and pertinent and not previously considered by the Office.¹⁰ This factual evidence complies with this requirement.

Appellant also submitted additional new medical evidence in support of his request for reconsideration. In his October 1, 2007 report, Dr. Bakshi's description of appellant's employment incident, including the stumble and fall, corresponded with his most recent statements as well as with the history on his claim form. He also offered additional reasoning for his opinion that appellant's diagnosed condition was due to his employment incident. The Office found that this report was repetitive. The Board finds that the report from Dr. Bakshi offers additional medical opinion evidence on the causal relationship, the reason for which the Office denied appellant's claim on April 10, 2007, therefore, this report is new and relevant and requires the Office to reopen his claim for further consideration of the merits.

Finally, appellant submitted medical reports from two additional physicians, Drs. Fontanez, a Board-certified internist, and McNutty, a Board-certified neurosurgeon. The Office did not describe this evidence in reviewing appellant's claim. The Board notes that Dr. McNutty listed a history of injury, opined that there was a causal relationship between appellant's employment incident and his back surgery and offered some medical reasoning. This report was also sufficient to require the Office to reopen appellant's claim for consideration of the merits.

CONCLUSION

The Board finds that the Office properly found on April 10, 2007 that appellant had not submitted the necessary medical opinion evidence based on a proper factual background to meet his burden of proof in establishing that he sustained a herniated disc on September 17, 2006. The Board further finds that appellant submitted relevant new evidence in support of his November 21, 2007 request for reconsideration which warranted review of the merits of his claim by the Office. On remand, the Office should conduct a merit review of the evidence submitted with appellant's November 21, 2007 request for reconsideration and issue an appropriate decision.

¹⁰ Donald T. Pippin, 54 ECAB 631 (2003).

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2008 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development in accordance with this decision of the Board. The April 10, 2007 decision of the Office is affirmed.

Issued: September 12, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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