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

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| **L.H., Appellant** | ) | |
| **and** | ) | |
| **DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS, CIVILLIAN PERSONNEL ADVISORY CENTER, Walla Walla, WA, Employer** | ) | **Docket No. 09-1848**<br>**Issued: June 28, 2010** |

*Appearances:*
*Alan J. Shapiro, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

### ***JURISDICTION***

On July 13, 2009 appellant filed a timely appeal from a June 12, 2009 merit decision of the Office of Workers' Compensation Programs denying modification of an April 2, 2009 merit decision. The Board also has jurisdiction over the Office's March 11, 2009 merit decision that denied his claim.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether appellant established that he sustained an injury on January 22, 2009 in the performance of duty causally related to his employment.

[1] 20 C.F.R. § 501.3(e).

## ***FACTUAL HISTORY***

On February 2, 2009 appellant, a 46-year-old electrician, filed an occupational disease claim (Form CA-2) for a numb left arm and leg as well as a sore neck.[2] He alleges these conditions arose on January 22, 2009 when, while driving down the road, a "car crossed the line" and when he lifted his left hand to the steering wheel, he felt pain in his neck and his left side arm and leg went numb.

Appellant submitted a January 21, 2009 report in which Dr. Joe Gendreau, orthopedist and radiologist, reported that a magnetic resonance imaging (MRI) scan of appellant's cervical spine revealed multiple levels of cord deformity and central narrowing. He submitted a January 22, 2009 report in which Dr. Richard Rhee, radiologist, reported that an MRI scan of appellant's spine revealed mild generalized disc osteophyte complexes at the C3-4 and C4-5 levels as well as postsurgical changes.

In a note dated January 22, 2009, from Kennewick General Hospital's, Emergency Department, Dr. Jose Loera, Board-certified in family medicine, excused appellant from work. An emergency room flow sheet also dated January 22, 2009 noted that appellant had been having left hand and leg numbness for months, but that it was worse now and that he had just had an MRI scan of his neck the day before, January 21, 2009.[3] Additional emergency room notes recorded that he had felt a "pop" on the right side of his neck on January 22, 2009.

In a note dated February 3, 2009, Dr. Mark Palit, orthopedic surgeon, excused appellant from work from January 26 through February 6, 2009 because of a neck injury sustained on January 22, 2009. Appellant submitted a report, dated February 9, 2009, in which Dr. Palit diagnosed cervical disc degeneration "with possible stenosis."

In a February 11, 2009 report, Dr. Chris Glenn, a Board-certified diagnostic radiologist, reported that a computerized tomography scan of appellant's cervical spine revealed significant spinal stenosis and neural foraminal stenosis. In a February 13, 2009 note, Dr. Palit released appellant from work from January 26 through March 20, 2009 for "injury recovery." In a subsequent report, dated February 17, 2009, Dr. Palit diagnosed cervical disc degenerative stenosis at the C4 through C7 levels.

Appellant submitted a March 5, 2009 report in which Dr. T. Thomas Wilkinson, a neurological surgeon, reported findings on examination and reviewed appellant's medical history. Dr. Wilkinson noted that appellant had a long and complicated history after developing a left hemiparesis in 1996. He noted that at that time appellant had undergone C5-6 anterior cervical discectomy and fusion, following which he noted improvement. After a change in jobs appellant's condition worsened and he had gradually been getting worse over the past several

[2] The Board notes that the Office issued a Form CA-16. A properly executed Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay the cost of the examination or treatment regardless of the action taken on the claim. *See Elaine M. Kreymborg*, 41 ECAB 256, 259 (1989). The CA-16 form issued to appellant did not authorize either examination or treatment and was therefore not properly executed.

[3] Appellant noted, in a February 15, 2009 statement, that he had an MRI scan the day before the incident "for follow up on the nerve problems found in my right arm after my carpal tunnel surgery."

years. Regarding the incident of January 22, 2009, Dr. Wilkinson reported: "Then he states on January 22, 2009, he was driving a truck had to avoid an accident and did a sudden evasive maneuver jerking himself around and then had the sudden onset of left hemiplegia. He did not have any pain at that time except in his cervical spine. Gradually, over time he started developing paresthesias in his left arm and leg and regained his movement."

In a March 6, 2009 report, (Form CA-20) Dr. Palit reviewed appellant's history of injury, reported findings on examination and diagnosed cervical root lesion with "possible radiculopathy."

Appellant submitted a March 9, 2009 report in which Dr. Wilkinson stated, "I think [appellant] has symptomatic spinal stenosis at the C4-5, C5-6 and C6-7 [levels]."

By decision dated March 11, 2009, the Office denied the claim. Although it accepted that the January 22, 2009 incident occurred as alleged, it denied the claim because the evidence of record did not demonstrate that the accepted incident caused a medically diagnosed condition.

On March 19, 2009 appellant requested reconsideration.

The employing establishment controverted the claim, noting that appellant had an MRI scan the day before the incident. By decision dated April 2, 2009, the Office, affirming its March 11, 2009 decision, denied modification because the evidence of record did not demonstrate the accepted employment incident caused a medically diagnosed condition.

Appellant filed an application for reconsideration and submitted an April 13, 2009 postoperative report following C4 through partial C7 decompressive laminectomies and C4-5 lateral mass fusions done on March 31, 2009 in which Dr. Wilkinson opined:

> "Some question has been raised regarding the cause of his need for surgery. In my opinion, the incident of January 22, 2009 when he made a sudden jerking maneuver to avoid an accident while driving caused his most recent symptoms that required decompression surgery and fusion."

In a note, dated April 24, 2009, Dr. Wilkinson reported that appellant underwent surgery to treat cervical spinal stenosis and cervical myelopathy on March 31, 2009; conditions which, he opined were caused by the January 22, 2009 incident. He related that appellant's injury occurred on January 26, 2009 while driving a truck. Dr. Wilkinson notes that appellant had to make a sudden evasive maneuver to avoid an accident and, in the process:

> "[Appellant] was jerked around within the cab of his truck and had a sudden onset of left hemiplegia. Although he did have some return of strength, he developed paresthesias and pain on the left side of his body.
>
> "It is the exacerbation of these symptoms of his preexisting [*sic*] spinal stenosis, [*sic*] which occurred on January 22, 2009, [*sic*] which required his recent treatment including his surgery."

Appellant disagreed and on April 27, 2009 requested reconsideration and designated an attorney to represent him in his claim.

On May 11, 2009 the Office received a March 31, 2009 operative note from Dr. Palit who stated that appellant had undergone C4, C5, C6, C7 decompression laminectomy with C4-5 lateral mass fusion.

By decision dated June 12, 2009, the Office, affirming its April 2, 2009 decision, denied the claim because the evidence of record was insufficient to establish that the accepted employment incident caused a medically diagnosed condition.

## ***LEGAL PRECEDENT***

An employee seeking benefits under the Federal Employees' Compensation Act[4] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[5] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[6] As part of his burden, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.[7] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[8]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, 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.[9] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[10]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical

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[4] 5 U.S.C. §§ 8101-8193.

[5] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[6] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] *G.T.*, *supra* note 6; *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

[8] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[9] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

[10] *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.[11]

## ***ANALYSIS***

The Office accepted that the January 22, 2009 incident occurred as alleged. Appellant's burden is to demonstrate the accepted employment incident caused or aggravated his diagnosed conditions. Causal relationship is a medical issue that can only be proven by production of probative rationalized medical evidence.[12] Appellant has not submitted sufficient medical evidence supporting his claim and, consequently, has not established that he sustained an injury in the performance of duty on January 22, 2009 causally related to his employment.

The relevant medical evidence of record consists of reports and notes from Drs. Gendreau, Glenn, Palit, Rhee and Wilkinson.[13] These reports lack a rationalized medical opinion explaining how the accepted employment injury caused a medically diagnosed injury.[14] As noted above, rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between appellant's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.[15]

[11] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[12] Appellant submitted reports signed by a registered nurse. Because healthcare providers such as nurses, acupuncturists, physician's assistants and physical therapists are not considered physicians under the Act, their reports and opinions do not constitute competent medical evidence. 5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB 389 (2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983).

[13] Appellant submitted hospital records concerning treatment for neck pain. These records were illegible and therefore have no evidentiary value. He submitted reports (Form CA-17) dated January 22 and February 6, 2009. These reports were illegible and singed by an individual whose signature was also illegible. Reports that are unsigned or that bear illegible signatures cannot be considered as probative medical evidence, in that they lack proper identification as to whether they were prepared by physicians. *See R.M.*, 59 ECAB __ (Docket No. 08-734, issued September 5, 2008); *Richard Williams*, 55 ECAB 343 (2004).

[14] *See Mary E. Marshall*, 56 ECAB 420 (2005) (medical reports that do not contain rationale on causal relationship have little probative value). *See also*, *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

[15] *Supra* note 11.

The only physician of record who offered an opinion addressing causal relation between appellant's current condition and the incident of January 22, 2009 was Dr. Wilkinson. While Dr. Wilkinson opined that the accepted employment incident caused the conditions requiring appellant to undergo surgery on March 31, 2009, he provided no explanation, supported by medical rationale. He noted that appellant had a long and complicated history regarding his cervical spine. Dr. Wilkinson noted appellant's cervical surgery of 1996 and the worsening of his condition since that time. The Board notes that appellant's medical history indicates that for months prior to January 22, 2009 he had increasing complaints in his extremities and in fact he had undergone an MRI scan examination on January 21, 2009, the day before the incident, due to his worsening complaints. Dr. Wilkinson did not comment on the significance of the MRI scan on January 21 and 22, 2009 in determining the cause of appellant's current condition. Furthermore, the Board notes that while he attempted to correlate the worsening of appellant's condition to the January 22, 2009 incident, the factual discrepancies negate the correlation. According to appellant, the alleged injury occurred while driving a truck on January 22, 2009, "a car crossed the line" and, as he lifted his left hand to the steering wheel, he experienced pain in his neck, left side and arm. Dr. Wilkinson, however, reported that on January 26, 2009 appellant was making an evasive maneuver to avoid an accident and was "jerked around within the cab of his truck." Such a factual discrepancy on both the data and the facts evidences that his April 24, 2009 opinion is not based on an accurate factual history and therefore lacks probative value These deficiencies reduce the probative value of Dr. Wilkinson's opinion such that the reports and notes are insufficient to satisfy appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.[16]

Appellant has not provided sufficient probative rationalized medical evidence supporting his claim and therefore has not established that he sustained an injury in the performance of duty on January 22, 2009 causally related to his employment.

## ***CONCLUSION***

The Board finds that appellant has not established an injury in the performance of duty on January 22, 2009 causally related to his employment.

[16] *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007)*; Ruth R. Price*, 16 ECAB 688, 691 (1965).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the June 12, April 2 and March 11, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 28, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board