

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

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**J.E., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Toledo, OH, Employer**

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**Docket No. 11-711  
Issued: December 1, 2011**

*Appearances:*  
*Gordon Reiselt, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On January 25, 2011 appellant, through his attorney, filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) merit decision dated October 26, 2010. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant sustained a low back injury on July 25, 2001 in the performance of duty; (2) whether appellant sustained a consequential urinary incontinence condition; and (3) whether OWCP abused its discretion by denying appellant authorization for an August 2002 laminectomy procedure.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This is the fourth appeal before the Board. Appellant, a 31-year-old clerk, filed a claim for benefits, alleging that he sustained an injury to his lower back on August 19, 1987. OWCP accepted the claim for lower back strain. By decision dated March 9, 1990, it reduced appellant's compensation based on his wage-earning capacity as a personnel worker. An OWCP hearing representative affirmed the March 9, 1990 decision by decision dated January 2, 1992. In a March 23, 1994 decision, the Board reversed OWCP's decisions and reinstated appellant's compensation.<sup>2</sup> OWCP subsequently accepted the conditions of chronic pain syndrome and aggravation of degenerative disc disease at L5-S1. Appellant returned to light duty in July 1999.

On July 30, 2001 appellant filed a claim for benefits based on traumatic injury, alleging that he sustained an injury to his lower back while pushing a heavy mail cart on July 25, 2001. Appellant submitted several reports from Dr. William D. Richardson, Board-certified in internal medicine, who stated that appellant was unable to work due to an acute flare up of chronic back pain which resulted from the July 25, 2001 work incident. He opined that appellant's increased pain and disability were due to acute strain, inflammation and muscle spasms of the muscles and that the July 25, 2001 incident aggravated the lumbar condition and caused his urinary incontinence. OWCP referred appellant for a second opinion examination with Dr. Edwin S. Carter, a Board-certified orthopedic surgeon, who opined that appellant did not sustain any injury or condition due to the July 25, 2001 injury and that back surgery was not necessitated by the July 2001 injury. By decision dated June 25, 2002, OWCP denied appellant's claim for benefits based on traumatic injury, finding that he failed to submit sufficient medical evidence in support of his claim.<sup>3</sup> Appellant submitted additional reports from Dr. Richardson in which he expounded on his previously-stated findings and noted that appellant underwent an L5-S1 laminectomy procedure in August 2002 to ameliorate his low back pain. By decision dated November 12, 2003, an OWCP hearing representative affirmed the June 25 and December 19, 2002 OWCP decisions and denied authorization for the August 2002 back surgery. By decision dated March 11, 2004, OWCP denied appellant's request for reconsideration.

In a November 10, 2005 decision,<sup>4</sup> the Board set aside OWCP's November 12, 2003 decision. The Board found that there was a conflict in the medical evidence between Dr. Richardson, the attending physician, and Dr. Carter, the referral physician, regarding whether appellant's alleged lumbar sprain was causally related to the July 25, 2001 work incident, whether he sustained a consequential urinary incontinence condition and whether his August 2002 L5-S1 laminectomy was necessitated by this alleged injury. The Board therefore remanded the case to OWCP for referral to an impartial medical examiner to resolve the conflict. Dr. R. Peter Mirkin, a Board-certified orthopedic surgeon and OWCP's impartial specialist, opined that appellant's lumbar symptomatology would have been the same whether or not the July 25, 2001 incident had occurred, that his urinary continence condition was not work related and that his August 2002 back surgery was performed for a condition which preexisted the

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<sup>2</sup> Docket No. 93-799 (issued March 23, 1994).

<sup>3</sup> OWCP also denied the recurrence of disability claim by decision dated December 19, 2002.

<sup>4</sup> Docket No. 04-1268 (issued November 10, 2005).

July 25, 2001 injury. In a May 12, 2008 decision, OWCP denied appellant's claim, finding that Dr. Mirkin's report represented the weight of the medical evidence.

In a September 24, 2009 decision,<sup>5</sup> the Board set aside OWCP's May 12, 2008 decision, finding that Dr. Mirkin did not provide adequate medical rationale in support of his conclusions and that his February 22, 2006 report was not sufficient to meet the standard for an impartial medical specialist. The Board remanded the case to OWCP for referral to a new medical specialist, to resolve the outstanding conflict in the medical evidence regarding whether appellant sustained an injury on July 25, 2001, whether his urinary incontinence condition was sustained as a consequence of his accepted lumbar conditions and whether his August 2002 back surgery was necessitated by an employment-related condition. The complete facts of this case are set forth in the Board's November 10, 2005 and September 24, 2009 decisions and are herein incorporated by reference.<sup>6</sup>

In order to resolve the conflict in the medical evidence, OWCP referred the case to Dr. Marvin R. Mishkin, a Board-certified orthopedic surgeon. In a January 5, 2010 report, he stated findings on examination, thoroughly reviewed the medical history and the statement of accepted facts and asserted that appellant had diffuse and various subjective complaints of back and lower extremity pain which did not correlate with a lack of objective findings. Dr. Mishkin advised that he had negative straight leg raising on the lower extremities, no evidence of motor weakness, no muscle atrophy and excellent range of motion in his back. Appellant had no significant objective findings of radiculopathy, sciatica or neurological deficit and his clinical findings were not consistent with his diffuse persistent subjective complaints, including back and lower extremity pain.

Dr. Mishkin noted that when appellant underwent surgery in August 2002 there was a bulging of the annulus, but no extrusion of the disc into the spinal canal and no nerve root being compressed by a pathological disc. He opined that this indicated very minimal clinical findings to correlate with magnetic resonance imaging (MRI) scan results in the record and represented a bulging or protruded disc without herniation and definitive compression of the nerve root. Dr. Mishkin concluded, based on a reasonable degree of medical certainty, that there was no injury resulting from the July 25, 2001 incident that necessitated or resulted in the subsequent surgery and his current complaints of pain and discomfort. In addition, he was unable to explain or determine the cause of the urinary incontinence appellant sustained based on the clinical findings and the MRI scan results as noted in the medical records. Dr. Mishkin opined that any urinary problems he had were unrelated to the surgery of August 22, 2002 and the August 19, 1987 and July 25, 2001 work injuries.

Dr. Mishkin further opined, with reasonable medical certainty, that he would not have recommended the back surgery appellant underwent on August 22, 2002, based on his review of the medical records. He reiterated his opinion that the MRI scan findings, subjective complaints

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<sup>5</sup> Docket No. 08-2097 (issued September 24, 2009).

<sup>6</sup> The Board noted that appellant had filed a separate claim for recurrence of disability stemming from the July 25, 2001 work incident, which it considered separately in its decision. The Board denied a claim based on a recurrence of disability as of July 25, 2001.

and the lack of objective findings were not consistent with appellant's subjective complaints. Dr. Mishkin concluded that appellant's August 22, 2002 back surgery was not a result of, related to or caused by or necessitated by the August 19, 1987 and July 25, 2001 employment injuries.

By decision dated January 29, 2010, OWCP determined that appellant did not sustain a low back injury in the performance of duty on July 25, 2001, that his claimed urological condition was not causally related to an accepted condition and denied authorization for his August 2002 surgery. It found that Dr. Mishkin's referee opinion represented the weight of the medical evidence.

On February 26, 2010 appellant requested an oral hearing, which was held on August 3, 2010.

In a June 2, 2010 report, Dr. Harry O. Cole, Board-certified in neurosurgery, reviewed appellant's medical history and diagnostic tests and stated that an April 30, 2010 MRI scan showed degenerative changes without evidence of a disc herniation. He advised that appellant's pattern of symptoms was consistent with a residual pain syndrome, probably chronic radicular compression which was no longer present. Dr. Cole recommended that appellant undergo a lumbar myelography and computerized axial tomography (CT) scanning.

In a report dated June 9, 2010, Dr. Cole reviewed the results of the myelogram and CT scan appellant underwent that day and found that there was no indication of disc herniation or nerve root entrapment. He advised that there was no direct surgical management for appellant's current complaints, although he could be a candidate for a dorsal column stimulator.

In a June 23, 2010 report, Dr. Richardson stated that appellant continued to have low back pain stemming from the 1987 work injury. He stated that an implantation of a dorsal column stimulator had been recommended in an attempt to relieve the pain.

In a July 6, 2010 report, Dr. Richard S. Gahn, Board-certified in pain medicine and anesthesiology, stated that the myelogram and CT scan appellant underwent on June 9, 2010 was notable for multi-level degenerative changes as well as a disc protrusion at T1-12. He also advised that appellant had spondylitic changes at L5-S1. Dr. Gahn administered a lumbar MRI scan and advised that the results of this test showed moderate disc degeneration at L3-4, L4-5 and L5-S1, with evidence of moderate degenerative spurring at L3-4, L4-5 and L5-S1. He stated that the April 30, 2010 MRI scan of the lumbar spine revealed degenerative changes from L3-4 through L5-S1, postsurgical changes at L4 and L5 and mild neuroforaminal stenosis at L5-S1 bilaterally.

Dr. Gahn asserted that appellant had chronic radicular low back symptoms which appeared to be neuropathic in origin. He advised that appellant was not a surgical candidate and had exhausted nearly all forms of conservative management, including physical therapy, medications, behavioral modalities and injections. Dr. Gahn noted that he discussed with appellant the possibility of trying a spinal cord stimulator.

By decision dated October 26, 2010, an OWCP hearing representative affirmed the January 29, 2010 decision.

## LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA<sup>7</sup> has the burden of establishing that 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 FECA, that the claim was timely filed within the applicable time limitation period of FECA, 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.<sup>8</sup> 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.<sup>9</sup>

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. 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.<sup>10</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>11</sup> 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 the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>12</sup>

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.<sup>13</sup>

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant’s condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.<sup>14</sup>

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<sup>7</sup> 5 U.S.C. § 8101-8193.

<sup>8</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>9</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>10</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>11</sup> *Id.* For a definition of the term “injury,” see 20 C.F.R. § 10.5(a)(14).

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

<sup>13</sup> *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

<sup>14</sup> *Id.*

## ANALYSIS -- ISSUE 1

Dr. Mishkin, the new impartial medical specialist, stated in his January 5, 2010 report that appellant had no significant objective findings of radiculopathy, sciatica or neurological deficit. He explained that a review of medical records concurrent with the July 25, 2001 injury and leading up to the August 2002 surgery revealed that appellant's clinical findings and subjective complaints of back and lower extremity pain did not correlate with the lack of objective findings. Dr. Mishkin advised that appellant had negative straight leg raising on the lower extremities, no evidence of motor weakness, no muscle atrophy and excellent range of motion in his back. He opined that the MRI scan results from 2002 showed a bulging or protruded disc without herniation and definitive compression of the nerve root. Dr. Mishkin concluded, based on a reasonable degree of medical certainty, that there was no injury resulting from the July 25, 2001 incident that necessitated or resulted in the subsequent surgery and his current complaints of pain and discomfort. OWCP relied on his opinion in its January 29, 2010 decision, finding that appellant had no condition or disability causally related to the July 25, 2001 work incident and was therefore not entitled to compensation or medical benefits.

The Board finds that Dr. Mishkin's referee opinion negated a causal relationship between appellant's condition and disability and constituted medical evidence sufficient to establish that his low back condition was not causally related to the July 25, 2001 work incident. His opinion is sufficiently probative, rationalized and based upon a proper factual background. Therefore, OWCP properly accorded Dr. Mishkin's opinion the special weight of an impartial medical examiner,<sup>15</sup> and found in its January 29, 2010 decision that appellant did not sustain an injury in the performance of duty on July 25, 2001.

Following this decision, appellant requested reconsideration and submitted reports from Drs. Cole, Richardson and Gahn. In the June 2, 2010 report, Dr. Cole advised that appellant's pattern of symptoms was consistent with residual pain syndrome, most likely chronic radicular compression which was no longer present. He stated that an April 30, 2010 MRI scan showed degenerative changes without evidence of a disc herniation. In his June 9, 2010 report, Dr. Cole opined that the June 6, 2010 myelogram and CT scan results showed no evidence of disc herniation or nerve root entrapment. Dr. Richardson opined in his June 23, 2010 report that appellant continued to have low back pain stemming from the 1987 work injury and noted that an implantation of a dorsal column stimulator had been recommended to alleviate his back pain. Dr. Gahn stated in the July 6, 2010 report that the CT scan/myelogram appellant underwent on June 9, 2010 was notable for multi-level degenerative changes as well as a disc protrusion at T1-12. He also advised that he had spondylitic changes at L5-S1. Dr. Gahn asserted that the July 6, 2010 lumbar MRI scan revealed moderate disc degeneration at L3-4, L4-5 and L5-S1 moderate degenerative spurring at L3-4, L4-5 and L5-S1. He stated that the April 30, 2010 lumbar MRI scan indicated degenerative changes from L3-4 through L5-S1, postsurgical changes at L4 and L5 and mild neuroforaminal stenosis at L5-S1 bilaterally. Dr. Gahn advised that appellant had chronic radicular low back symptoms which appeared to be neuropathic in origin.

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<sup>15</sup> Gary R. Seiber, 46 ECAB 215 (1994).

The reports appellant submitted subsequent to the January 29, 2010 decision are not sufficient to overcome OWCP's finding that Dr. Mishkin's impartial opinion represented the weight of the medical evidence. The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.<sup>16</sup> While Drs. Cole and Gahn noted complaints of continuing low back pain and indicated that appellant had findings of moderate abnormalities based on various myelogram, CT scan and MRI scan tests, neither of these physicians provided a medical rationale explaining how appellant's diagnosed low back conditions in 2010 were causally related to the July 25, 2001 work incident. Dr. Richardson's June 23, 2010 report merely contained a restatement of prior findings and his previously stated opinion that appellant's injuries and resulting conditions and disability were causally related to the July 25, 2001 work incident. Dr. Richardson's opinion is lacking in probative value because it is merely a restatement of one side of the conflict in the medical evidence which was resolved by Dr. Mishkin's referee opinion.<sup>17</sup> Thus an OWCP hearing representative properly found in his October 26, 2010 decision that appellant had submitted no evidence sufficient to undermine OWCP's finding, in its January 29, 2010 decision, that the opinion of Dr. Mishkin represented the weight of the medical evidence.

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

While the initial employment injury must arise out of and in the course of claimant's federal employment, later nonindustrial injuries may also be compensable.<sup>18</sup> If a member weakened by an employment injury contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury, if the further medical complication flows from the compensable injury, so long as it is clear that the real operative factor is the progression of the compensable injury, with an exertion that would not be unreasonable in the circumstances.<sup>19</sup>

A claimant bears the burden of proof to establish a claim for a consequential injury.<sup>20</sup> As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is evidence, which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.<sup>21</sup>

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<sup>16</sup> See *Anna C. Leanza*, 48 ECAB 115 (1996).

<sup>17</sup> *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

<sup>18</sup> See *S.M.*, 58 ECAB 166 (2006).

<sup>19</sup> *S.A.*, Docket No. 09-2339 (issued July 22, 2010); see also *Larson, The Law of Workers' Compensation* § 10.01 at p. 10-2 (2004).

<sup>20</sup> *J.J.*, Docket No. 09-27 (issued February 10, 2009).

<sup>21</sup> *Charles W. Downey*, 54 ECAB 421 (2003).

## **ANALYSIS -- ISSUE 2**

OWCP had accepted that appellant sustained the conditions of lower back strain, chronic pain syndrome and aggravation of degenerative disc disease at L5-S1 as a result of his 1987 employment injury. Appellant subsequently requested compensation for a urinary incontinence claim as a consequence of these conditions. As noted above, there was a conflict in the medical evidence regarding whether this issue, which was referred to Dr. Mishkin, the impartial medical examiner. Following his examination of appellant and a thorough review of his medical history, including clinical findings and MRI scans, Dr. Mishkin stated that he was not able to explain or determine the cause of appellant's urinary incontinence condition. He opined that any urinary problems he had were unrelated to the surgery of August 22, 2002 and the August 19, 1987 and July 25, 2001 work injuries. The Board finds that Dr. Mishkin's opinion that appellant's claimed urinary incontinence condition did not arise as a consequence of his work-related conditions is sufficiently thorough and well rationalized to merit the weight of an impartial medical examiner. OWCP properly found that his January 5, 2010 report represented the weight of the medical evidence with regard to this issue.<sup>22</sup>

## **LEGAL PRECEDENT -- ISSUE 3**

Section 8103 of FECA<sup>23</sup> provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.<sup>24</sup> In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under FECA. OWCP has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>25</sup>

## **ANALYSIS -- ISSUE 3**

OWCP had accepted that appellant sustained the conditions of lower back strain, chronic pain syndrome and aggravation of degenerative disc disease at L5-S1 as a result of his 1987 employment injury. Appellant underwent a laminectomy procedure in August 2002. There was a conflict in the medical evidence between Dr. Richardson, his treating physician, who asserted

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<sup>22</sup> The Board notes that none of the medical reports appellant submitted following the January 29, 2010 OWCP decision mentioned or addressed the issue of whether he sustained a consequential urinary continence condition.

<sup>23</sup> 5 U.S.C. § 8101 *et seq.*

<sup>24</sup> *Id.* at § 8103.

<sup>25</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).



that appellant's August 2002 laminectomy was necessary to alleviate low back pain from the claimed July 25, 2001 work injury and Dr. Carter, the second opinion physician, who opined that appellant did not sustain any injury or condition due to the July 25, 2001 incident and that back surgery was not necessitated by the July 2001 injury.

As noted above, the only restriction on OWCP's authority to authorize medical treatment is one of reasonableness. OWCP has properly determined in this case that the weight of the medical evidence of record, as represented by Dr. Mishkin's impartial opinion, establishes that appellant's August 2002 low back surgery was not necessitated by the July 25, 2001 work incident, which was not work related or by any other accepted condition. In his January 5, 2010 report, he found based on a reasonable degree of medical certainty and his review of the medical records, that there was no injury resulting from the August 19, 1987 work injury or July 25, 2001 work incident that necessitated or resulted in the August 22, 2002 surgery and that he would not have recommended this surgery. The Board finds that Dr. Mishkin's referee opinion is sufficiently probative, rationalized and based upon a proper factual background. Therefore, OWCP properly accorded Dr. Mishkin's opinion the special weight of an impartial medical examiner.<sup>26</sup> There are no grounds to modify OWCP's prior determination denying authorization for appellant's request for laminectomy surgery.

### **CONCLUSION**

The Board finds that appellant failed to establish that he sustained a low back injury on July 25, 2001. The Board finds that appellant failed to establish that he sustained a consequential urinary incontinence condition in the performance of duty. The Board finds that OWCP properly denied appellant authorization for his August 2002 laminectomy procedure.

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<sup>26</sup> Gary R. Seiber, *supra* note 15.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 26, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 1, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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