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

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| **S.S., Appellant** | ) | |
| **and** | ) | **Docket No. 11-134** |
| | ) | **Issued: September 13, 2011** |
| **DEPARTMENT OF VETERANS AFFAIRS, OFFICE OF INFORMATION & TECHNOLOGY, Washington, DC, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On October 22, 2010 appellant filed a timely appeal from a September 22, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 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 his claim should be accepted for right shoulder, right leg and right lower back conditions due to his accepted February 10, 2010 employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

On February 16, 2010 appellant, then a 38-year-old information technology specialist, filed a traumatic injury claim (Form CA-1) alleging that on February 10, 2010 he sustained a right shoulder strain when he slipped on black ice while getting out of his car. He sought treatment on February 11, 2010 and notified his supervisor on February 16, 2010. The employing establishment controverted the claim stating that appellant was injured in the parking garage prior to reporting for duty and was not in the performance of his duties when hurt.

By letter dated February 22, 2010, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the medical and factual evidence needed and was directed to submit it within 30 days. In a letter of the same date, OWCP also requested additional factual information from the employing establishment.

In a February 11, 2010 report, appellant's chiropractor, reported that appellant had segmental dysfunction at the C5, C6, C7 and T1 levels. The history of injury states that appellant nearly slipped in the parking garage at the employing establishment and noted complaints of right shoulder and neck pain.[2]

In a February 18, 2010 medical report, Dr. Robert Jones, Board-certified in internal medicine, stated that appellant was walking in an icy parking lot when he fell and grabbed the car door with his right arm, suffering an abduction and external rotation injury. He noted appellant's chief complaint as right shoulder pain. Appellant reported that a few nights before the appointment while sleeping, he felt a "pop" in his shoulder and felt sudden pain. Upon examination, Dr. Jones reported that appellant had tenderness at the tuberosity, positive impingement sign and 4/5 external rotation strength secondary to pain. X-rays of the right shoulder were read to reveal a type II acromion and fractures or bony avulsions. Dr. Jones diagnosed pain in joint shoulder region, recommended a magnetic resonance imaging (MRI) scan and excused appellant from work.

By decision dated March 30, 2010, OWCP denied appellant's claim finding that the evidence did not demonstrate that the injury occurred in the performance of duty.

In an April 27, 2010 narrative statement, appellant explained his fall and argued that he was in the performance of duty because his shift had started five minutes prior to the incident. He further stated that his first medical examination for his right shoulder was on February 11, 2010 and that he was informed he had a bad strain. On February 14, 2010 Impact Orthopedics conducted x-rays and recommended an MRI scan of his right shoulder. After developing headaches and neck stiffness, appellant visited Dr. Saleeby who diagnosed irritation of his shoulder and neck nerves and recommended treatment.

By letter also dated April 27, 2010, the employing establishment responded to OWCP by stating that the parking garage where appellant had parked was owned by the Veteran's Administration and that appellant had parked on a level reserved for employees.

[2] The signature on this report is illegible although the letterhead identifies the office.

On August 8, 2010 appellant requested reconsideration of OWCP's decision and submitted the following information in support of his request.

In a February 10, 2010 medical report, Dr. Jeannette F. Stein, Board-certified in internal medicine, reported that appellant had parked on the sixth level of the parking garage when he stepped out onto black ice he had to grab his car to keep from falling completely to the ground. This caused appellant to pull and scrape his right knee. Dr. Stein further noted that appellant had a history of right shoulder injury while in the military. She diagnosed abrasion of the right knee and reported that appellant could return to regular duty.

In prescription notes dated March 23 to 26, 2010, Dr. Stephen Saleeby, a chiropractor, reported that appellant was seen in his office for appointments.

In a March 23, 2010 medical report, Dr. Saleeby noted that appellant slipped on ice in the parking garage at work on February 10, 2010. He reported that he took a compliance measurement to determine the degree of vertebral fixation (subluxation) and segmental mobility. The test revealed a decrease of function of 70 to 80 percent in the cervicothoracic spine. A motion x-ray study revealed a loss of function of 70 to 80 percent at the C1 and C5 vertebral segments in forward flexion and 60 percent at the C7 vertebral segment in extension. Dr. Saleeby also noted significant ligament instability at the C5 and C6 vertebral segments. He diagnosed a cervicothoracic spine sprain resulting in right-sided brachial neuritis. Chiropractic treatment consisted of a manual manipulation of the cervical and thoracic spine, electrical stimulation and myofascial release to the cervicothoracic paraspinal musculature spine.

In an April 29, 2010 medical report, Dr. Saleeby reported that appellant complained of pain in the lower back radiating into the right hip. He related this pain to appellant's work injury on February 10, 2010. A radiographic examination showed misalignments (subluxations) at the L4 and L5 vertebral segments and the right sacrum. Dr. Saleeby also reported that a postural examination showed a moderate high ilium and leg deficiency on the right side. He performed a manipulation of the cervicothoracic, lumbar and sacral spine.

By decision dated September 22, 2010, OWCP modified its March 30, 2010 decision and informed appellant that his claim was accepted for a right knee abrasion and cervical subluxations at C1, C5 and C7. It noted that the new evidence showed that he had been injured in the performance of duty and that a chiropractor had diagnosed cervical subluxations related to the February 10, 2010 injury.

OWCP declined to accept a right shoulder condition, noting that the medical evidence did not provide a sufficient diagnosis or explain how the injury caused the shoulder condition. It

also declined to accept an injury to appellant's low back because the medical evidence did not establish a causal relationship between the condition and the incident.[3]

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA 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 FECA; 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 or specific condition for which compensation is claimed are causally related to the employment injury.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.[5]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP 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 to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[6] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[7] 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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[8]

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[3] The Board notes that appellant submitted additional evidence after OWCP rendered its September 22, 2010 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision and therefore, this additional evidence cannot be considered on appeal. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

[4] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[5] *Michael E. Smith*, 50 ECAB 313 (1999).

[6] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[7] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[8] *James Mack*, 43 ECAB 321 (1991).

The term physician is defined under section 8101(2), as follows: "physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law."[9] The term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulations by the Secretary.[10]

## ***ANALYSIS***

The Board finds that appellant has not established that he sustained a right shoulder, right lower leg or right lower back condition because the medical evidence of record does not contain a reasoned medical opinion establishing causal relationship between these conditions for the accepted injury. OWCP accepted that on February 10, 2010 appellant sustained a right knee abrasion and cervical subluxations at C1, C5 and C7 while in the performance of duty. Appellant contends that OWCP should accept a right shoulder, right lower leg and right lower back condition.

In a February 18, 2010 medical report, Dr. Jones reported that appellant was walking in an icy parking lot when he fell and grabbed the car door with his right arm, suffering an abduction and external rotation injury. He noted that appellant's chief complaint was pain in his right shoulder and that, while sleeping, he felt a "pop" in his shoulder and experienced sudden pain. Upon physical examination, Dr. Jones reported that appellant had tenderness at the tuberosity, positive impingement sign and 4/5 external rotation strength secondary to pain. X-rays of the right shoulder revealed a type II acromion as well as fractures or bony avulsions.[11] Dr. Jones diagnosed pain in joint shoulder region, recommended an MRI scan and excused him from work.

Dr. Jones' diagnosis of pain in the joint shoulder region is a description of a symptom rather than a clear diagnosis of the medical condition.[12] He made other observations of a type II acromion, which is an anatomical description rather than a diagnosis, and fractures or bony avulsions. The later two comments might imply a diagnosis but, standing alone are too cryptic to describe a clear, medical diagnosis. It becomes almost impossible to establish causal connection in appellant's claim because the physician has not identified a medical condition that causes his pain.

[9] 5 U.S.C. § 8101(2).

[10] *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[11] Beyond this single x-ray finding, the record in this case contains no other significant reference to boney trauma. Based upon the available information, the Board does not accept this observation as sufficient to establish a diagnosis.

[12] The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis. *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[13] The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[14] Thus, Dr. Jones' medical report is insufficient to establish appellant's burden of proof.

In a February 10, 2010 medical report, Dr. Stein's history supported that appellant had slipped on ice in a parking garage and had grabbed his car to keep from falling to the ground, pulling his right shoulder and scraping his knee. She further noted that appellant had a history of a right shoulder injury from the military. Dr. Stein diagnosed abrasion of the right knee and informed appellant that he could return to regular duty.

Dr. Stein's diagnosis of right knee abrasion was accepted by OWCP in its September 22, 2010 decision. OWCP, however, denied appellant's claim for his other conditions except for cervical subluxations at C1, C5 and C7. Dr. Stein did not provide a diagnosis for a right shoulder, right lower back or right leg condition and did not provide any detail regarding appellant's medical condition. Further, she noted that appellant had a history of right shoulder injury while in the military. Dr. Stein did not identify a medical condition which produced pain in the shoulder, back or leg. Thus, her medical report is not probative medical evidence because it fails to identify a clear diagnosis or adequately explain the medical cause of appellant's injury.[15]

In a March 23, 2010 medical report, Dr. Saleeby diagnosed cervical subluxations at C1, C5 and C7 as demonstrated by x-ray. He also identified post-traumatic sprain of the cervicothoracic spine resulting in brachial neuritis. OWCP accepted cervical subluxations at C1, C5 and C7 in its September 22, 2010 decision.

In an April 29, 2010 medical report, Dr. Saleeby reported that appellant complained of lower back pain radiating into his hip on the right side, related to the injury he sustained at work on February 10, 2010. A radiographic examination showed misalignments (subluxations) at the L4 and L5 vertebral segments and the right sacrum. Upon administration of a postural examination, Dr. Saleeby reported moderate high ilium and leg deficiency on the right side. He administered a manual manipulation in the cervicothoracic, lumbar and sacral spines.

As a chiropractor, Dr. Saleeby is considered a "physician" for purposes of FECA only where he treats a spinal subluxation as demonstrated by x-ray to exist.[16] His April 29, 2010 medical report diagnosed subluxations demonstrated by x-ray at the L4 and L5 vertebral segments and the right sacrum. Thus, Dr. Saleeby's diagnostic opinion is accepted under FECA

[13] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[14] *See Lee R. Haywood*, 48 ECAB 145 (1996).

[15] *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

[16] 5 U.S.C. § 8101(2).

for this particular diagnosis. While he provided a recognized diagnosis of subluxations, he did not offer a rationalized opinion on causal relationship between appellant's diagnosed condition and the February 10, 2010 incident.[17] Dr. Saleeby generally repeated that appellant complained of lower back pain radiating into his right hip which appellant related to the injury he sustained at work. He never explained how the employment incident caused or contributed to the diagnosed low back subluxations. Further, Dr. Saleeby did not diagnose this medical condition in his earlier March 23, 2010 report and failed to explain in his April 29, 2010 report how this condition developed. Medical reports without adequate rationale on causal relationship do not meet an employee's burden of proof.[18] The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the relationship between the diagnosed condition and the established incident or factor of employment.[19] Thus, the report of April 29, 2010 is insufficient to meet appellant's burden of proof.[20]

Appellant's belief that the work incident caused his medical problem is not in question. That belief, however sincerely held, does not constitute the medical evidence necessary to establish causal relationship. The record is devoid of rationalized medical evidence to establish a right shoulder, right leg, or right lower back condition causally related to the accepted February 10, 2010 employment incident. Thus, appellant has failed to establish his burden of proof.

As noted, the Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its decision and evidence submitted by appellant after the final decision cannot be considered.[21] Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

An award of compensation may not be based on surmise, conjecture or speculation.[22] To establish causal relationship, appellant must submit a physician's report in which the physician reviews those factors of employment alleged to have caused his condition and, taking these factors into consideration, as well as findings upon examination and appellant's medical history,

[17] *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

[18] *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

[19] *See Lee R. Haywood*, 48 ECAB 145 (1996).

[20] In his March 23 and April 29, 2010 medical reports, Dr. Saleeby also diagnosed brachial neuritis, right-sided lumbosacral sprain and moderate high ilium and leg deficiency on the right side. As noted, the only diagnosis acceptable by a chiropractor under FECA is subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2); *Thomas R. Horsfall*, 48 ECAB 180 (1996). As these additional diagnosis are not subluxations demonstrated by x-ray, Dr. Saleeby's report on appellant's additional diagnosis cannot be considered as competent medical evidence under FECA. *See Thomas W. Stevens*, 50 ECAB 288 (1999); *see also Susan M. Herman*, 35 ECAB 669 (1984).

[21] 20 C.F.R. § 501.2(c)(1).

[22] *D.D.*, 57 ECAB 734 (2006).

explain how these employment factors caused or aggravated any diagnosed condition, and present medical rationale in support of his opinion.[23] Where a claimant fails to submit such medical evidence, he or she has not established that the injury occurred as alleged.[24]

## ***CONCLUSION***

The Board finds that appellant has not met his burden of proof to establish that his right shoulder, right leg or right lower back conditions were causally related to the accepted employment injuries.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 22, 2010 is affirmed.

Issued: September 13, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[23] *Supra* note 8.

[24] *Tracey P. Spillane*, 54 ECAB 608 (2003); 5 U.S.C. § 8101(5).