



## **FACTUAL HISTORY**

On May 31, 2011 appellant, then a 61-year-old sales and distribution associate, filed a traumatic injury claim alleging that on May 23, 2011 she sustained a lower back injury when she tried to move a wire cage but something around the wheel prevented it from moving. She stopped work on May 27, 2011.<sup>2</sup>

By letter dated May 31, 2011, the employing establishment controverted appellant's claim alleging that she did not meet her burden of proof to establish that the alleged injury was a result of her occupation.

In a May 31, 2011 attending physician's report, a physician with an illegible signature stated that appellant was having back pain and diagnosed back pain with radiculopathy.

In an unsigned duty status report, an unknown provider noted that appellant sustained an injury on May 23, 2011 and worked as a sales, service and distribution associate. It was indicated that she was not able to work at all.

On June 3, 2011 OWCP advised appellant that the evidence submitted was insufficient to establish her claim and requested additional medical evidence to establish that she sustained a diagnosed condition as a result of the May 23, 2011 employment incident.

In a May 27, 2011 diagnostic imaging report, Dr. Rashmi Hooda, a Board-certified internist, noted appellant's complaints of back pain. The examination revealed five nonrib, lumbar-type vertebral bodies, narrowing in the facet joints throughout the lumbar spine and severe disc space narrowing at the L4-5 level. Dr. Hooda also observed mild rotary dextroscoliosis of the lumbar spine which appeared degenerative. She diagnosed degenerative changes of the lumbar spine and recommended further evaluation with a magnetic resonance imaging (MRI) scan examination.

In a June 13, 2011 MRI scan report, Dr. William Willoughby, a Board-certified diagnostic radiologist, noted appellant's history of back pain, radiculopathy and stenosis. He observed dextroscoliosis and facet arthropathy at multiple levels. Appellant's vertebral body heights were well maintained with no abnormal motion on the flexion or extension views. Dr. Willoughby diagnosed degenerative disc disease and grade 1 spondylolisthesis at L3-4.

In a June 13, 2011 report, Dr. George S. Stefanis, a Board-certified neurological surgeon, noted appellant's complaints of some axial back, left buttock and cheek pain going down into the thigh and calf since a May 23, 2011 work incident. He related that she was pulling and pushing a metal cage loaded with heavy magazines on a mail truck when she experienced pain in her back. Dr. Stefanis reviewed appellant's history and reported that the MRI scan revealed degenerative changes of the lumbar spine with canal narrowing at L2-3, 3-4 and 4-5. He also stated that there may be a small disc that was protruding to the left at L4-5 that might account for her symptoms. Upon examination of appellant's back, Dr. Stefanis observed some tenderness between L3 and the sacrum and mild paravertebral spasms. Forward bending caused pain at 45

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<sup>2</sup> On June 28, 2011 appellant filed a claim for disability compensation for the period July 7 to 26, 2011.

degrees and lateral bending and tilt caused pain in both directions. Straight leg raise testing demonstrated mild discomfort at 45 degrees on the left and at 60 degrees on the right. Clonus and Babinski tests were negative. Dr. Stefanis recommended an electromyogram (EMG) nerve conduction of the left lower extremity and reported that appellant was not able to work.

In a June 28, 2011 neurology report, Dr. Frederick W. Jennart, a Board-certified psychiatrist and neurologist, conducted nerve conduction and EMG studies for appellant's complaints of left leg and low back pain. Nerve conduction studies revealed normal findings and the EMG examination showed no signs of denervation of the left lower extremity. Motor units also appeared normal and interference patterns were full.

Appellant also submitted a handwritten June 30, 2011 physical therapist report.

In a decision dated July 18, 2011, OWCP denied appellant's claim finding insufficient medical evidence to establish that she sustained any medical condition as a result of the May 23, 2011 employment incident.

On July 28, 2011 appellant submitted a request for a review of the written record.<sup>3</sup> She resubmitted Dr. Stefanis' and Dr. Willoughby's June 13, 2011 reports and Dr. Jennart's June 28, 2011 report. Appellant also submitted handwritten physical therapy records dated June 30 to July 11, 2011 by an unknown provider.

In a June 6, 2011 MRI scan report, Dr. John H. Penuel, a Board-certified diagnostic radiologist, observed slight anterolisthesis of L3 on L4 and severe narrowing of the disc space at L4-5. Severe bilateral neural foraminal narrowing and a left-sided disc bulge were also noted. The examination further revealed extensive endplate signal changes at L4-5 which were predominantly decreased on T1, increased on T2, suggesting Type 1 degenerative process. No fluid signal was seen within the disc space and conus appeared normal. Dr. Penuel diagnosed multilevel degenerative changes.

In a July 15, 2011 report, Dr. Stefanis noted appellant's complaints of continued discomfort in her lower back into her left leg. Appellant related that physical therapy helped temporarily but she continued to experience pain with lateral bending and tilt. Dr. Stefanis reported that the physical examination was essentially unchanged and noted that the EMG and nerve conduction studies showed no nerve damage. He recommended interlaminar injections at L3-4 and L4-5 and stated that appellant was unable to work.

In an August 1, 2011 report, Dr. Stefanis related that on May 23, 2011 appellant was pushing and pulling a metal cage loaded with heavy magazines at work and that she denied any prior history of trauma or injury except for an occasional back strain. He noted that x-rays revealed a grade 1 spondylolisthesis at L3 and L4 and an MRI scan revealed canal narrowing at

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<sup>3</sup> On August 4, 2011 appellant, through her representative, submitted a request for a telephone hearing. OWCP assigned the request as a review of the written record and sent her employer a letter informing them that a review of the written record was requested. No response was received. By letter dated September 6, 2011, counsel objected to the review of the written record and requested an oral hearing instead. He stated that since he was the representative he was the one who made those decisions and alleged that a denial of the oral hearing would violate appellant's due process rights. The Board notes, however, that appellant has not challenged this decision on appeal.

L3-4 with subluxation. Dr. Stefanis felt that appellant did have a problem but stated that regarding whether this was an accepted claim or not, it was a decision that OWCP would have to make. He explained that appellant worked every day for a number of years until this injury occurred and that this was the only traumatic event of which he was aware.

By decision dated November 10, 2011, OWCP's hearing representative affirmed the July 18, 2011 denial decision. He determined that appellant sustained a back condition but found insufficient medical evidence to demonstrate that her back condition was causally related to the May 23, 2011 employment incident.

In a letter dated November 28, 2011, counsel requested reconsideration. In an October 24, 2011 report, Dr. Stefanis related that on May 23, 2011 appellant was pulling and pushing a metal cage loaded with heavy magazines at work when she felt something happen to her back. He explained that any type of activity where she bent forward, pulled or pushed could cause an aggravation of an underlying problem. Dr. Stefanis reviewed appellant's x-rays and observed that she appeared to have spondylolisthesis, grade 1, at L3 and L4 and there may be a small disc protrusion at L4-5. He noted that she definitely had degenerative changes. Dr. Stefanis opined that the findings on the x-ray predated the problems on appellant's MRI scan, but stated that this type of injury could aggravate an underlying problem. He reported that he could not tell how long her back problems were there and that the MRI scan did not give information of what caused these problems. Dr. Stefanis concluded that based on appellant's history she did not have this type of problem until after the May 23, 2011 employment incident.<sup>4</sup>

In a decision dated December 16, 2011, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review under 5 U.S.C. § 8128(a). It determined that the materials were cumulative to the evidence previously submitted.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>5</sup> has the burden of proof to establish the essential elements of her claim by the weight of the reliable, probative and substantial evidence<sup>6</sup> including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.<sup>7</sup>

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<sup>4</sup> The Board notes that Dr. Stefanis' October 24, 2011 report was on the record at the time that OWCP's hearing representative issued the November 10, 2011 decision, but the hearing representative did not address this report.

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

<sup>7</sup> *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether “fact of injury” has been established.<sup>8</sup> 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.<sup>9</sup> Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.<sup>10</sup> An employee may establish that the employment incident occurred as alleged but fail to show that his or her disability or condition relates to the employment incident.<sup>11</sup>

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence providing a diagnosis or opinion as to causal relationship.<sup>12</sup> Rationalized medical 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 specified employment factors or incident.<sup>13</sup> 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.<sup>14</sup> The weight of the 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.<sup>15</sup>

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

OWCP accepted that on May 23, 2011 appellant sustained a back injury when she tried to move a wire cage filled with heavy magazines in the performance of duty but denied her claim finding insufficient medical evidence to establish that her back condition was causally related to the accepted incident. The Board finds that she did not meet her burden of proof to establish that she sustained a back injury in the performance of duty.

Appellant submitted various reports by Dr. Stefanis, who noted her complaints of lower back and left lower extremity pain following a May 23, 2011 incident at work when she attempted to move a metal cage loaded with heavy magazines on a mail track. Dr. Stefanis

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<sup>8</sup> *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

<sup>9</sup> *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

<sup>10</sup> *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>11</sup> *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

<sup>12</sup> *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

<sup>13</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>14</sup> *B.B.*, 59 ECAB 234 (2007); *D.S.*, Docket No. 09-860 (issued November 2, 2009).

<sup>15</sup> *James Mack*, 43 ECAB 321 (1991).

reported that an MRI scan revealed degenerative changes and canal narrowing at L3-4 with subluxation. Upon examination, he observed some tenderness between L3 and the sacrum and a small disc that may be protruding to the left at L4-5. Straight leg raise testing was positive for mild discomfort. Dr. Stefanis concluded that appellant had a problem but explained that OWCP would have to decide whether this was an accepted claim or not. The Board finds that, while he provided an accurate history of injury and a diagnosis, he was unable to provide a rationalized medical opinion regarding whether appellant's back condition resulted from the accepted May 23, 2011 employment incident. Dr. Stefanis found that appellant had a back condition but failed to provide an opinion on the cause of this condition. The Board has held that 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.<sup>16</sup> Likewise, the diagnostic and neurological reports of Drs. Hooda, Willoughby, Jennart and Penuel are insufficient to establish causal relationship as they also do not provide any opinion regarding the cause of appellant's back condition. Thus, these reports are insufficient to establish appellant's claim.

Appellant also submitted a May 31, 2011 attending physician's report with an illegible physician's signature and an unsigned duty status report that noted her complaints of back pain following a May 23, 2011 employment incident. The Board has previously held, however, that unsigned reports or ones that bear illegible signatures cannot be considered as probative medical evidence because they lack proper identification.<sup>17</sup> Similarly, the physical therapy records also fail to establish causal relationship as physicians' assistants are not considered "physicians" as defined by FECA.<sup>18</sup> Because appellant has not provided probative medical evidence in this case, the Board finds that she did not meet her burden of proof to establish her claim.

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

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.<sup>19</sup> OWCP's regulations provide that OWCP may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise her right through a request to the district OWCP.<sup>20</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by

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<sup>16</sup> *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

<sup>17</sup> *Thomas L. Agee*, 56 ECAB 465 (2005); *Richard F. Williams*, 55 ECAB 343 (2004).

<sup>18</sup> Section 8102(2) provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); *see also Roy L. Humphrey*, 57 ECAB 238 (2005).

<sup>19</sup> 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

<sup>20</sup> 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>21</sup>

A request for reconsideration must also be submitted within one year of the date of the OWCP decision for which review is sought.<sup>22</sup> A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>23</sup> If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>24</sup>

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

By decisions dated July 18 and November 10, 2011, OWCP denied appellant's traumatic injury claim. On November 28, 2011 appellant, through counsel, submitted a request for reconsideration. In a decision dated December 16, 2011, OWCP denied her request for reconsideration. The Board finds that OWCP improperly denied appellant's request for reconsideration.

In support of her request for reconsideration, appellant submitted an October 24, 2011 report from Dr. Stefanis. The Board concurs with OWCP's finding that, while this report was initially received by OWCP on November 7, 2011, days prior to the hearing representative's November 10, 2011 decision, this report was not reviewed by the hearing representative. The Board also finds that this report is sufficient to warrant further merit review. In his prior report of record dated June 13, 2011, Dr. Stefanis related appellant's history of injury and diagnostic findings, but offered no medical opinion regarding the cause of her condition. In his August 1, 2011 report, he again deferred to OWCP to determine the cause of appellant's diagnosed conditions. Pursuant to a request from counsel, Dr. Stefanis prepared his October 24, 2011 report to address the relationship between appellant's May 23, 2011 employment event and her diagnostic findings. The third regulatory requirement for reopening a claim for merit review does not include the requirement that a claimant submit all evidence necessary to discharge his or her burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.<sup>25</sup> The October 24, 2011 report from Dr. Stefanis was clearly relevant, pertinent and not previously considered, therefore this case will be remanded to OWCP for merit review.

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<sup>21</sup> *Id.* at § 10.606(b); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>22</sup> *Id.* at § 10.607(a).

<sup>23</sup> *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

<sup>24</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>25</sup> *Billy B. Scoles*, 57 ECAB 258 (2005).

The Board accordingly finds that appellant did meet a requirements of 20 C.F.R. § 10.606(b). Pursuant to 20 C.F.R. § 10.608, OWCP improperly denied merit review.

**CONCLUSION**

The Board finds that this case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated November 10 and July 18, 2011 are affirmed and the December 16, 2011 decision is set aside and the case is remanded for an appropriate decision.

Issued: July 25, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board