

FACTUAL HISTORY

This case has previously been before the Board on appeal on multiple occasions. On January 24, 2004 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim alleging that a dog bit him in the performance of duty that day injuring his right arm. The medical records indicated that he was treated for a large complete laceration of the right forearm. Appellant returned to light-duty work on February 26, 2004. In a signed note dated March 2, 2004, Dr. Gordon noted appellant's arm condition and suggested physical therapy. Appellant preferred to see his chiropractor. He sought chiropractic treatment on March 3, 2004 for cervical and thoracic strain, cervical radiculitis and lumbar segmental dysfunction. Appellant increased his work hours to six hours a day on March 30, 2004. He returned to work for eight hours per day on April 16, 2004. By decision dated May 4, 2004, OWCP accepted appellant's claim for right forearm laceration and right hand and wrist contusion.

Appellant filed a recurrence of disability claim on December 27, 2004 and alleged that he worked with pain in his wrist and lower back. He stopped work on October 9, 2004. OWCP requested additional factual and medical evidence in support of appellant's claim on January 28, 2005. It denied his claimed recurrence on September 22, 2005 noting that he did not submit the requested information.

Appellant filed a claim for an occupational disease on September 9, 2005 alleging that he developed a low back condition with pain into his legs due to lifting and carrying mail, twisting and bending at the waist, walking long distances and stooping and bending. In a report dated September 12, 2005, Bruce R. Rosenblum, MD, noted that appellant had low back pain which predated his January 2004 dog bite. He stated that the magnetic resonance imaging (MRI) scan was consistent with central L3-4 disc herniation and left lateralizing L2-3 disc herniation. On physical examination, Dr. Rosenblum found no deep tendon reflexes in the left lower extremity and lumbar paravertebral spasm. He diagnosed lumbar radiculopathy exacerbated by a traumatic injury.

On June 14, 2005 Dr. Evander Duck, a Board-certified neurologist, examined appellant and diagnosed intractable low back pain and narcotic dependency. He indicated that appellant was totally disabled from June 14 through July 28, 2005 due to lumbar disc herniation on July 28, 2005.

On October 3, 2005 appellant requested an oral hearing before an OWCP hearing representative regarding his claimed recurrence of disability.

Appellant underwent a left L2-3, L3-4 and L4-5 hemilaminectomy with medial facetectomy and foraminotomy on October 14, 2005.

By decision dated January 25, 2006, OWCP denied appellant's occupational disease claim on the grounds that the medical evidence did not establish a causal relationship between his diagnosed condition and his implicated employment duties. Appellant requested an oral hearing before an OWCP hearing representative on January 30, 2006.

Dr. Rosenblum completed a report on January 8, 2006 and noted appellant's January 24, 2004 dog bite. He stated that the dog jumped on the front of appellant's body and knocked him onto the ground on his back. Dr. Rosenblum noted that appellant had low back pain with radiation down the left leg prior to this incident and two months after the incident he believed that this condition worsened. He noted appellant's back surgery and stated, "Within a reasonable degree of medical certainty I therefore believe that this patient had an exacerbation of a preexisting lumbar sacral spine syndrome as the result of his January 2004 work-related injury. I therefore believe that the subsequent testing and treatment with relevance to the lumbar sacral spine including the need for the lumbar sacral decompression ... is causally related to this accident."

In a report dated February 27, 2006, Dr. Robert Dennis, a Board-certified orthopedic surgeon, noted appellant's history of a dog bite on January 24, 2004. Appellant stated that he experienced an exacerbation of his preexisting chronic low back pain with radiation into his left leg. Dr. Dennis noted that appellant had a history of degenerative disc disease of the cervical and lumbar spine, scoliosis and herniated discs at L3-4 and L4-5. He reviewed the medical records and diagnosed lumbar radiculopathy exacerbated by traumatic injury as well as aggravation and acceleration of previously diagnosed herniated discs, lumbar spine.

Appellant's attorney appeared at the recurrence oral hearing withdrawing the request for an oral hearing and requesting that OWCP include appellant's back condition as a result of the dog bite incident. By decision dated March 20, 2006, the hearing representative granted the withdrawal.

In a decision dated June 2, 2006, OWCP declined to include appellant's back condition as an accepted injury in his traumatic injury claim. It noted that the initial evidence supporting his claim did not include a history of fall to the ground. The claims examiner found that the history given by Dr. Rosenblum was contradictory and that appellant had not submitted medical evidence of a back condition predating his dog bite. Counsel requested an oral hearing regarding this decision on June 6, 2006. By decision dated August 4, 2006, the hearing representative found that the case was not in posture for a hearing as OWCP had not properly developed appellant's back claim. The hearing representative noted appellant's occupational disease claim and stated that both claims should be reviewed prior to issuing a decision.

By decision dated July 21, 2006, the hearing representative affirmed OWCP's January 26, 2006 decision denying the occupational disease claim.

In a letter dated August 17, 2006, OWCP requested additional factual and medical evidence in support of appellant's claim that a back injury resulted from his January 24, 2004 dog bite.

Appellant responded to OWCP's request for information in his traumatic injury claim on September 15, 2006. He submitted a statement dated September 12, 2006 and stated that while delivering mail a large dog broke his chain and charged him. Appellant turned to escape and slipped on ice and fell bracing with his right hand and hitting his back and head. The dog attempted to bite his neck and he blocked that attempt with his right arm which the dog bit. Appellant explained that he was in shock at the time of the injury and received pain medication

for his arm. He noted that following the attack he continued to use pain medication for his arm and bed rest. Appellant stated that it was not until he returned to work that the full extent of his back injury became apparent. He submitted a police report describing the dog attack which stated that the dog, a Rottweiler, broke his chain and jumped on top of appellant knocking him to the ground. While on top of appellant, the dog attempted to bite his neck and he blocked that attempt with his right arm resulting in a bite to that area.

OWCP referred appellant's medical records to an OWCP medical adviser who opined that the fall resulting from the dog bite could have been sufficient to aggravate his prior back problems, but did not believe that appellant would not notice the aggravation for three months.

By decision dated October 3, 2006, OWCP denied appellant's claim for a traumatic aggravation of his preexisting back condition. Appellant requested an oral hearing. He testified at the oral hearing on February 6, 2007 and described the incident on January 24, 2004 including his slip and fall on the ice and the dog bite on his right arm. Appellant stated that he was on bed rest for 10 days. He testified that he first injured his back in 1991 at the employing establishment and sustained a second back injury in 1998. Appellant stated that his back pain increased in March when he returned to light duty. He stated that he injured his back on January 24, 2004 and that his back condition worsened once he returned to full duty.

Following the February 6, 2007 oral hearing, appellant submitted a note dated March 2, 2004 from a chiropractor, Dr. Robert H. Beam, noting that appellant described falling on January 24, 2004 while attempting to avoid a dog. Dr. Beam noted appellant's complaints of moderate-to-severe back pain depending on his activity.

By decision dated April 20, 2007, the hearing representative denied appellant's traumatic injury claim for back injury and found that the medical evidence was not sufficiently detailed and well reasoned to establish appellant's claim.

Appellant requested reconsideration of both claims on June 18, 2007 and submitted additional medical evidence. In a report dated May 20, 2007, Dr. Martin Riss, an osteopath, noted appellant's history of work-related back pain beginning in 1991 and a second injury in 1998. He reviewed a lumbar MRI scan from 2001 which demonstrated a herniated disc at L3-4 and L4-5 with diffuse degenerative disc changes and stenosis. Dr. Riss described the January 24, 2004 dog attack including appellant's fall. He stated that appellant returned to work as a carrier which further aggravated his back condition for which he sought treatment on March 26, 2004. Dr. Riss performed a physical examination and diagnosed laceration of the right forearm, thoracic sprain, degenerative disc disease thoracic spine, lumbar radiculopathy, herniated disc at L3-4 and L4-5, spinal stenosis and post-traumatic left lumbosacral radiculopathy. He opined that appellant was totally disabled. Dr. Riss stated, "It is within the bounds of reasonable medical probability that the fall that occurred on the date of the dog bite aggravated [appellant's] back condition and was further aggravated after he returned to work as letter carrier." He attributed appellant's back surgery to both the January 2004 employment incident and appellant's subsequent return to work as a letter carrier.

By decision dated July 23, 2007, OWCP denied appellant's traumatic injury claim for back injury. On August 17, 2007 it denied modification of his occupational disease claim. The

Board issued a decision and order dated March 12, 2008 finding that appellant had not established that his low back condition was causally related to the factors of employment that he identified.²

In a decision dated March 14, 2008, the Board remanded the case for appellant's back claims to be combined and for a new merit decision.³ OWCP stated that it was combining his claims on April 2, 2008. By decision dated April 2, 2008, it denied appellant's claim, finding that Dr. Riss' report was not sufficiently detailed and well reasoned to establish a causal relationship between appellant's accepted employment injury and his back condition. Appellant appealed to the Board and in an *Order Remanding Case* dated April 1, 2009, the Board found that OWCP had not issued an appropriate merit decision, instead issuing a duplicate of the July 23, 2007 decision on April 2, 2008. The Board remanded the case for a *de novo* decision on the merits.⁴

By decision dated May 1, 2009, OWCP denied modification of its prior decisions and stated that the medical evidence was not sufficient to meet appellant's burden of proof. Appellant appealed to the Board and by decision and order dated May 17, 2010 the Board found an unresolved conflict of medical opinion evidence between Dr. Riss and the medical adviser. The Board remanded the case for referral to an impartial medical examiner.⁵

On June 22, 2010 OWCP referred appellant for a second opinion evaluation with Dr. Aldo Iulo, a Board-certified orthopedic surgeon, who completed a report on July 7, 2010 and reviewed appellant's history of injury and medical treatment. Dr. Iulo opined that appellant's preexisting back condition was not aggravated by his January 2004 employment injury but was a preexisting degenerative condition.

By decision dated August 18, 2010, OWCP denied appellant's claim for a back injury resulting from his January 2004 employment injury. Appellant requested an oral hearing. By decision dated March 16, 2011, the hearing representative set aside OWCP's August 18, 2010 decision and remanded the case for an impartial medical examination.

On April 20, 2011 OWCP referred appellant for an impartial medical examination with Dr. Michael Gordon, a Board-certified orthopedic surgeon. In a report dated May 26, 2011, Dr. Gordon reviewed appellant's medical history beginning with his January 2004 dog attack and noted that appellant had back problems beginning in 1990 after lifting at work. He stated that he did not review radiographic studies and "I would appreciate the opportunity to review any pertinent films." Dr. Gordon reviewed the medical reports and statement of accepted facts. He noted, "I do not have records pertaining to pre-accident MRI's but by history, there were herniated discs diagnosed in the lower lumbar area prior to and after this accident. [Appellant's] radicular symptomatology prior to this accident was also to the left lower extremity."

² Docket No. 07-2445 (issued March 12, 2008).

³ Docket No. 07-2444 (issued March 14, 2008).

⁴ Docket No. 08-1846 (issued April 1, 2009).

⁵ Docket No. 09-1768 (issued May 17, 2010).

Dr. Gordon stated, “In all medical probability, there was no aggravation of a prior existing condition as result of the January 24, 2004 incident. As indicated in the body of this report, [appellant] had a long complex history of back pain prior to the accident on January 24, 2004.” He noted that appellant underwent surgery for radiculopathy and not for primary back pain. Dr. Gordon opined that, if radiculopathy was due to the January 24, 2004 incident, then he would have expected to find a record of radicular symptoms shortly after that date. He further noted that appellant did not report radicular symptoms in his initial chiropractic consultation in March 2005.

By decision dated July 13, 2011, OWCP denied his claim for an aggravation of a preexisting back condition as a result of his January 24, 2004 employment injury. Appellant requested an oral hearing. Counsel appeared on October 12, 2011 and requested that OWCP address appellant’s occupational disease claim.

Appellant submitted a report dated October 7, 2011 from Dr. Riss’ opining that appellant’s back condition was aggravated by his return to work in June 2005. He stated, “It is my opinion that the aforementioned complaints, findings and diagnoses are causally related to the accident of January 24, 2004 and to the occupational exposure and are permanent in nature by causation, and by way of aggravation, acceleration and exacerbation.”

By decision dated December 7, 2011, the hearing representative found that Dr. Gordon’s report was entitled to the special weight of the medical evidence and denied appellant’s claim for a back condition arising from his January 2004 employment injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an “employee of the United States” within the meaning of FECA and 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 or specific condition for which compensation is claimed is causally related to the employment injury.⁷ 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.⁸

OWCP defines a traumatic injury as, “[A] condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain which is identifiable as to time and place of occurrence and member or function of the body affected.”⁹ To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Kathryn Haggerty*, 45 ECAB 383, 388 (1994); *Elaine Pendleton*, 41 ECAB 1143 (1989).

⁸ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁹ 20 C.F.R. § 10.5(ee).

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.¹⁰ Second, the employee must submit sufficient evidence, generally only in the form a medical evidence, to establish that the employment incident caused a personal injury.¹¹

ANALYSIS

Appellant has alleged that he developed severe back pain beginning in March 2004. He has filed claims attributing his back pain to both his traumatic injury in January 2004 and his employment duties. The Board has issued several decisions in regard to these claims. On March 12, 2008 the Board reviewed the medical evidence of record through August 17, 2007 and found that appellant had not established his occupational disease claim. On March 14, 2008 the Board found that there was a conflict of medical opinion evidence regarding whether appellant’s January 2004 traumatic injury resulted in an aggravation of his preexisting back condition and remanded the claim for an impartial medical examination addressing this aspect of appellant’s claim.

OWCP ultimately referred appellant to Dr. Gordon to resolve the conflict regarding appellant’s traumatic injury. In his detailed report dated May 26, 2011, Dr. Gordon concluded that, “In all probability, there was no aggravation of a prior existing condition as a result of the January 24, 2004 incident.” Although he provided this opinion, he indicated that there were no radiographic studies produced for his review and indicated an interest to review the relevant diagnostic studies. However, it is unclear whether OWCP provided Dr. Gordon with the records in question. The Board finds that he was potentially not provided with all the medical records in this case and therefore is not in posture for a decision. In order to provide a full and detailed medical opinion, Dr. Gordon should be provided with all available medical records including appellant’s radiographic studies. OWCP did not attempt to address this inquiry from Dr. Gordon and attempt to obtain these studies if indicated and then request a supplement report. On remand, it should secure the requested documents and provide Dr. Gordon with these studies and an opportunity to determine if these records impact or alter his medical opinion. After this and such development as OWCP deems necessary, OWCP should issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision as OWCP did not provide the impartial medical examiner, Dr. Gordon, with requested diagnostic studies needed to offer his medical opinion.

¹⁰ *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *J.Z.*, 58 ECAB 529 (2007).

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2011 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board

Issued: November 27, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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