

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

J.G., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Pittsburgh, PA, Employer**

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**Docket No. 12-894
Issued: October 2, 2012**

Appearances:

*Robert A. Lebovitz, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 9, 2012 appellant, through his attorney, timely appealed the September 14, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied his traumatic injury claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 claimed lumbar condition is causally related to the accepted January 24, 2009 employment incident.

FACTUAL HISTORY

On January 26, 2009 appellant, then a 50-year-old housekeeping aide, filed a claim (Form CA-1) for a lower back injury that occurred on January 24, 2009 when he lifted a trash can to

¹ 5 U.S.C. § 8101 *et seq.*

empty it.² He felt a pull in his back, but continued to work until the pain worsened. Appellant stopped work and was treated in the employee health unit. An employing establishment physician, Dr. Phani B. Das, treated appellant for an on-duty injury. He advised that appellant should not perform any lifting until further evaluation. The January 24, 2009 emergency treatment report of Dr. Das did not provide a specific diagnosis.³ A January 24, 2009 lumbar x-ray revealed mild degenerative changes, but otherwise no acute process. Appellant was advised to rest and report back to the employee health unit in a couple days. When he returned on January 26, 2009 a nurse practitioner diagnosed lumbar strain with right thoracolumbar spasm. Appellant was advised to remain off work and to follow up with employee health on January 28, 2009. His work restriction was subsequently extended through February 2, 2009.

At the time of the January 24, 2009 employment incident, appellant was undergoing treatment for non-Hodgkin's lymphoma, which was first diagnosed in November 2008. In February 2009, he was incarcerated due to a reported parole violation. Appellant remained in custody until September 2010.⁴ During his incarceration, he continued to receive treatment for his cancer, as well as various other conditions, including ongoing low back complaints. The correctional institution treatment records included several references to a January 2009 employment injury and diagnoses of lumbar strain, degenerative disc disease and chronic lower back pain. Much of the treatment appellant received while incarcerated was provided by nurses and physicians' assistants. OWCP advised him that certain healthcare providers, such as physicians' assistants, nurse practitioners, physical therapists and social workers, are not physicians as defined under FECA.⁵ Consequently, their medical findings and/or opinions would not suffice for purposes of establishing entitlement under FECA.⁶

A March 9, 2009 lumbar spine x-ray was reported as normal. However, an April 1, 2009 lumbar computerized tomography scan revealed degenerative changes with diffuse disc bulges and superimposed disc herniations suspected at L3-4 and L4-5.

Following his September 20, 2010 release from custody, appellant came under the care of Dr. Brian L. Henry, a Board-certified internist. In an October 6, 2010 report (Form CA-20), Dr. Henry diagnosed lumbar disc herniation which he attributed to the January 24, 2009 incident when appellant hurt his back lifting a heavy trash can. He noted that appellant's magnetic resonance imaging (MRI) scan revealed bulging discs at L3, L4 and L5 which might require surgery.

² Appellant previously sustained an employment-related back injury on April 4, 1984. He received wage-loss compensation through December 8, 1996, at which time OWCP terminated compensation on the basis that he no longer had residuals of his injury. The Board affirmed OWCP's termination of wage-loss compensation. Docket No. 00-508 (issued March 19, 2002).

³ Dr. Das is a Board-certified thoracic surgeon.

⁴ Effective March 13, 2009, the employing establishment terminated appellant for cause unrelated to any claimed injury.

⁵ 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

⁶ *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

In a report dated October 21, 2010 (Form CA-20), Dr. Joonyung Lee, a Board-certified orthopedic surgeon, diagnosed discogenic back pain. He attributed appellant's condition to the January 2009 trash can lifting incident. Dr. Lee recommended physical therapy.

In a December 1, 2010 follow-up report, Dr. Henry reviewed the results of a recent lumbar MRI scan that revealed diffuse disc bulges at L3-4, L4-5 and L5-S1, neural foramina narrowing and mild central canal stenosis.⁷ He advised that appellant was currently disabled due to his back pain.

Dr. Eugene A. Bonaroti, a Board-certified neurosurgeon, examined appellant on December 6, 2011. He diagnosed right far lateral herniated nucleus pulposus at L4-5 and referred appellant to pain management. In a December 7, 2011 report (Form CA-20), Dr. Bonaroti attributed the diagnosed lumbar condition to emptying trash on January 24, 2009.

In a January 15, 2011 report (Form CA-20), Dr. Minhduc T. Tran, a Board-certified family practitioner, diagnosed lumbar disc herniation, which she attributed to lifting a trash can on January 24, 2009. She noted that appellant was currently receiving physical therapy and had been referred to a pain clinic.

By decision dated February 18, 2011, OWCP denied appellant's traumatic injury claim. While appellant established that the January 24, 2009 employment incident occurred as alleged, it found that he failed to establish that his diagnosed lumbar condition was causally related to the January 24, 2009 employment incident. OWCP noted that the initial diagnosis of lumbar strain was provided by a nonphysician. With respect to the subsequent diagnosis of lumbar disc herniations, it found the medical evidence insufficient because the various physicians failed to explain how the herniations were caused by the January 24, 2009 employment incident.

Appellant requested an oral hearing and submitted additional evidence.

In a March 9, 2011 report, Dr. Henry explained that appellant injured his back on January 24, 2009 when he picked up a trash can. Since then, appellant experienced significant back pain that limited his ability to work. Dr. Henry further stated that an October 1, 2010 lumbar MRI scan showed a diffuse bulge at L3-4, L4-5 and L5-S1. He opined that the January 24, 2009 injury was the cause of appellant's current lower back symptoms. Dr. Henry also noted that pharmacological therapies and physical therapy had not resulted in significant improvement and that appellant was scheduled for a surgical consultation in April 2011.

In a July 22, 2011 report, Dr. Henry elaborated on the causal relationship between appellant's lumbar disc herniations and the January 24, 2009 employment incident. He stated that heavy lifting was a well-documented risk factor for creating bulging discs, such as those evident on appellant's October 1, 2010 lumbar MRI scan. Dr. Henry further explained that he accepted appellant's report of back pain from lifting the trash can and that no other event was responsible. Appellant also reported that the pain was not present prior to lifting the trash can on January 24, 2009 and it had not since resolved. Based on these factors, Dr. Henry opined that appellant's current symptoms were caused by the diffuse disc bulge and lumbar stenosis. He also noted that there was no alternative explanation for appellant's lower back pain.

⁷ This appears to be the same MRI scan Dr. Henry referenced in his October 6, 2010 report.

OWCP also received a May 6, 1997 lumbar x-ray which revealed a normal lumbosacral spine.

In a September 14, 2011 decision, the hearing representative affirmed OWCP's February 18, 2011 decision. He concluded that the medical evidence failed to prove that appellant had a compensable low back condition causally related to the January 24, 2009 work incident.

LEGAL PRECEDENT

A claimant seeking benefits under FECA has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.⁸

To determine if an employee sustained a traumatic 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 that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred.⁹ The second component is whether the employment incident caused a personal injury.¹⁰ An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.¹¹

ANALYSIS

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

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden to establish entitlement to compensation; however, OWCP shares responsibility in the development of the evidence to see that justice is done.¹² Although much of the medical care appellant received for his low back condition was provided by nonphysicians, he immediately sought treatment following the January 24, 2009 incident. There

⁸ 20 C.F.R. § 10.115(e), (f); see *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁹ *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question which generally requires rationalized medical opinion evidence to resolve the issue. See *Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

¹¹ *Shirley A. Temple*, 48 ECAB 404, 407 (1997). The fact that the etiology of a disease or condition is unknown or obscure does not relieve an employee of the burden of establishing a causal relationship by the weight of the medical evidence nor does it shift the burden of proof to OWCP to disprove an employment relationship. *Judith J. Montage*, 48 ECAB 292, 294-95 (1997).

¹² *William J. Cantrell*, 34 ECAB 1223 (1983).

is a documented history of ongoing lumbar complaints since that time. Following appellant's release from custody in September 2010, Dr. Henry diagnosed lumbar disc herniations which he attributed to the January 24, 2009 employment incident. While his various reports are insufficient to discharge appellant's burden of proof that to establish the lumbar herniated discs are causally related to the January 24, 2009 employment incident, the evidence is sufficient to require further development of the case record by OWCP.¹³

On remand, OWCP should refer appellant to an appropriate specialist, together with the case record and a statement of accepted facts. The specialist should be requested to address the medical evidence of record and whether the accepted evidence caused an injury. If so, he or she should address the nature and extent of any employment-related residuals and disability. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2011 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: October 2, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹³ See *John J. Carlone*, *supra* note 10; *Horace Langhorne*, 29 ECAB 820 (1978).