

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

J.E., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Morrisville, NC, Employer**

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**Docket No. 12-1154
Issued: January 4, 2013**

Appearances:
Florence A. Bowens, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 2, 2012 appellant, through his attorney, filed a timely appeal from a November 8, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim and a December 14, 2011 nonmerit decision denying reconsideration. 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 claim.

ISSUES

The issues are: (1) whether appellant has established that he sustained an injury in the performance of duty on August 15, 2011 as alleged; and (2) whether OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 15, 2011 appellant, then a 57-year-old supervisor transportation security officer (screener), filed a traumatic injury claim (Form CA-1) alleging that on that day he fell on his back during a shift briefing. He claimed injuries to his neck and lower back. A witness statement from Joshua Smith on the CA-1 form stated "Supervisor Julius was giving a quick briefing when he lost his balance and fell over. Quickly he was aided back onto his feet by fellow Officers Martin and Joel." Appellant's supervisor, Rodney Godwin, indicated that the incident was a "first aid injury."

In an August 17, 2011 report, Dr. Balwinder Sidhu, a Board-certified internist, provided work restrictions and, in an August 23, 2011 work note, indicated that appellant had an appointment that day.

September 1 and 6, 2010 work restrictions from Dr. Peter M. Grossi, a neurosurgeon, were received. In a September 1, 2011 report, Dr. Grossi indicated that appellant was seen on August 11, 2011 for low back pain and bilateral leg pain, numbness, claudication and gait disturbance. He indicated that appellant has had worsening back and bilateral leg pain since February and that his left leg gave out on him and he fell at work two weeks earlier after which he filed a workman's compensation claim. Dr. Grossi noted that appellant worked as a supervisor at the employing establishment. Examination findings were presented and a diagnosis of severe lumbar and cervical degenerative disease, stenosis and neurogenic claudication and cervical myelopathy was provided. After questioning appellant, Dr. Grossi stated that it sounded as if appellant injured his back in 2005 and since had progressive back pain, bilateral lower extremity pain, weakness and numbness. He recommended surgery. Copies of Dr. Grossi's August 11, 2011 medical report, noting a history of intermittent back pain over the last five years and three episodes at work which had resolved, was provided along with copies of an August 24, 2011 magnetic resonance imaging (MRI) scan study of the thoracic and cervical spine; September 30, 2011 MRI scan studies of the lumbar, thoracic and cervical spine and several requests for authorization for surgery.

In an October 4, 2011 letter, OWCP noted that, when appellant's claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work and, because the employing establishment did not controvert continuation of pay (COP) or challenge the merits of the case, payment of a limited amount of medical expenses were administratively approved. However, the merits of appellant's claim were reopened for consideration given the requests for surgery authorization. OWCP informed appellant of the type of factual and medical evidence needed to establish his claim. Appellant was accorded 30 days to submit additional evidence, including a narrative report from his attending physician which contained a rationalized medical opinion as to how the reported work incident caused or aggravated his claimed injury.

Appellant filed a claim for disability from September 25 to October 8, 2011, from October 23 to November 5, 2011. Also submitted was a May 22, 2008 cervical spine MRI scan report.

In a November 1, 2011 report, Dr. Grossi noted that he last saw appellant on September 1, 2011. He noted that appellant worked as a supervisor for the employer for many

years. Dr. Grossi indicated that appellant had problems with his back for many years but was currently in severe pain with significant neurologic impairment and inability to work due to a fall on August 15, 2011. He referenced his September 1, 2011 report for details of his examination and review of the films. The history of injury related by appellant was: “on August 15, 2011 he was working at a check point in his normal position at Raleigh Durham International Airport. He felt a sudden onset of back spasm and pain and weakness. He was forced to stand by the side of the wall. In doing, his left leg then gave out on him and he fell down landing on his buttock and back area.” Dr. Grossi reported that, since that time, appellant had increasing back pain and bilateral lower extremity pain, weakness and numbness and has essentially been unable to walk. He advised that appellant had severe degenerative disease of his entire cervical spine to his mid-thoracic spine and severe degeneration and stenosis and throughout his lumbar spine. Dr. Grossi stated that, although appellant’s condition was the result of a long-standing degenerative disease, the fall of August 15, 2011 exacerbated his condition. Based on his conversations with an examination of appellant, he stated that it sounded like he was functioning fine and doing well prior to the August 15, 2011 fall. Dr. Grossi reiterated that surgery was imperative.

By decision dated November 8, 2011, OWCP denied appellant’s claim on the grounds fact of injury was not established. It found that the evidence was insufficient to establish that the event occurred as alleged as the history of injury given by appellant to Dr. Grossi was inconsistent with the history of injury provided on the CA-1 form.

On December 7, 2011 appellant requested reconsideration. On December 14, 2011 OWCP received a December 5, 2011 letter from appellant indicating that he was submitting medical reports from Dr. Sonia Pasi, a Board-certified neurologist, and a November 18, 2011 report from Dr. Cary S. Idler, a Board-certified orthopedic surgeon, along with witness statements from coworkers who were present during the May 10, 2005, February 14, 2006 and August 15, 2011 injuries. OWCP received on December 14, 2011 new evidence from appellant which included several witness statements from coworkers attesting to the fact that appellant fell on August 15, 2011 during the shift briefing, a February 14, 2006 Form CA-1, several reports from Dr. Pasi and a November 18, 2011 report from Dr. Idler.

By decision dated December 14, 2011, OWCP denied appellant’s request for reconsideration on the grounds no substantive legal questions were raised and there was no new and relevant evidence submitted.

LEGAL PRECEDENT -- ISSUE 1

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 and/or specific condition for which compensation is claimed are causally related to the

employment injury.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.³

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether fact of injury is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁴ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.⁵ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.⁶

An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁷ An employee has not met his or her burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁸ Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise unexplained, cast doubt on an employee's statements in determining whether a *prima facie* case has been established.⁹ However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.¹⁰

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's 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, must be one of reasonable medical certainty and must be supported by medical

² *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

³ See *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁴ *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

⁵ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

⁶ *Id.*

⁷ See *Betty J. Smith*, 54 ECAB 174 (2002).

⁸ See *D.B.*, 58 ECAB 464 (2007); *id.*

⁹ *Linda S. Christian*, 46 ECAB 598 (1995).

¹⁰ See *V.F.*, 58 ECAB 321 (2007); *Gregory J. Reser*, 57 ECAB 277 (2005).

rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹¹

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an injury on August 15, 2011 to his neck and lower back when he fell on his back during a shift briefing. He notified his supervisor and filed a claim for compensation that same day. Appellant also sought medical treatment a few days later on August 17, 2011. The employing establishment did not controvert the claim.

OWCP found that the evidence was not sufficient to establish the occurrence of the August 15, 2011 employment incident. The Board, however, finds that the evidence is sufficient to establish that appellant experienced the August 15, 2011 work incident at the time, place and in the manner alleged. An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.¹² On his CA-1 form appellant stated that he was giving a shift briefing at work when he fell over. Coworker Joshua Smith provided a witness statement on the CA-1 form which verified that appellant was giving a briefing when he lost his balance and fell over. Dr. Grossi indicated in his September 1, 2011 report that appellant has had worsening back and bilateral lower extremity pain since February and that his left leg gave out on him and he fell at work two weeks ago, for which he filed a workers' compensation claim. Appellant subsequently reported a history of injury to Dr. Grossi on November 1, 2011 that he was working at a check point in his normal position when he experienced a sudden onset of back spasm and pain and weakness and, in so doing, his left leg gave out on him and he fell down. While OWCP focused on the fact appellant changed where the event took place (*i.e.*, working at his normal check point as opposed to giving a shift briefing), this does not change the fact that appellant had experienced some event in his back which resulted in him falling on his back. Furthermore, appellant's history of injury as told to Dr. Grossi, approximately three months after the event occurred, would be entitled to less probative value than the account of injury offered by both appellant and his coworker, Mr. Smith on the date of injury. As noted, the employing establishment did not controvert the claim. Under the circumstances of this case, appellant's allegations have not been refuted by strong or persuasive evidence and there are no inconsistencies sufficient to cast serious doubt on his version of the employment incident.¹³ Consequently, appellant has established the occurrence of the August 15, 2011 work incident.

The remaining issue is whether the medical evidence establishes that appellant sustained an injury causally related to the employment incident. The question of whether an employment incident caused an injury is generally established by medical evidence.¹⁴

¹¹ *I.J.*, 59 ECAB 408 (2008).

¹² *See Caroline Thomas*, 51 ECAB 451 (2000).

¹³ *See M.H.*, 59 ECAB 461 (2008).

¹⁴ *See John W. Montoya*, 54 ECAB 306 (2003).

In his September 1, 2011 report, Dr. Grossi noted that appellant had a fall at work two weeks ago, but failed to diagnose any condition resulting from the fall or explain how his fall resulted in any diagnosed condition. In his November 1, 2011 report, Dr. Grossi provided more details about how appellant's fall at work occurred, noting that he had a sudden onset of back spasm and pain and weakness and, while standing against a wall, his left leg gave out on him and he fell down. He indicated that appellant has severe degenerative disease of his entire cervical spine down to his mid-thoracic spine and severe degeneration and stenosis and throughout his entire lumbar spine. Dr. Grossi opined that appellant's long-standing degenerative disease condition was exacerbated by his fall on August 15, 2011 as he appeared to function fine and do well prior to the August 15, 2011 fall. The Board notes that a medical opinion relating condition to an employment injury because the employee was asymptomatic before the injury, is insufficient, without supporting rationale, to establish causal relationship.¹⁵ Dr. Grossi did not provide any other medical rationale to support his conclusion on causal relationship. Thus, his reports are of limited probative value.

Other medical reports of record are insufficient to establish that the August 15, 2011 work incident caused or aggravated an injury. These reports either predate the claimed injury or do not specifically explain how the August 15, 2011 incident caused or aggravated a diagnosed medical condition.

OWCP advised appellant in a letter dated October 4, 2011 that it was his responsibility to establish that his condition was due to the employment incident. The Board finds that he did not submit sufficient medical evidence to establish that his claimed medical condition was related to the August 15, 2011 incident.¹⁶ Thus, OWCP's November 8, 2011 decision is affirmed as modified.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128 of FECA,¹⁷ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁸ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁹ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

¹⁵ *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

¹⁶ While appellant's attorney argues on appeal that the evidence should be viewed in its entirety, appellant did not submit sufficient medical evidence to establish causal relationship.

¹⁷ Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

¹⁸ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁹ *Id.* at § 10.607(a).

ANALYSIS -- ISSUE 2

Appellant disagreed with OWCP's November 8, 2011 decision which denied his claim. OWCP denied his request for reconsideration without performing a merit review.

FECA provides that OWCP shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as OWCP considers necessary with respect to the claim.²⁰ Since the Board's jurisdiction of a case is limited to reviewing that evidence which is before OWCP at the time of its final decision,²¹ it is necessary that OWCP review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed,²² it is crucial that all evidence relevant to that subject matter which was properly submitted to OWCP prior to the time of issuance of its final decision be addressed by OWCP.²³ The Board has held that this principal applies with equal force when evidence is received by OWCP the same day that a final decision is issued.²⁴

In the present case, OWCP did not review evidence received on December 14, 2011, the date of issuance of its December 14, 2011 nonmerit decision denying reconsideration. In particular, it did not mention the reports from Dr. Pasi or Dr. Idler or the witness statements. The medical reports are particularly important given the fact the Board has found that the August 15, 2011 incident occurred as alleged but causal relationship was not established. The Board, therefore, must set aside the December 14, 2011 decision of OWCP and remand the case so that OWCP may fully consider the evidence that was properly submitted by appellant prior to the issuance of this decision. Following such further consideration and after such further development as it deems necessary, OWCP shall issue an appropriate decision.

CONCLUSION

OWCP's November 8, 2011 merit decision is modified to reflect that appellant's claim is denied on the basis causal relationship was not established. Its December 14, 2011 nonmerit decision is set aside and the case remanded for further action.

²⁰ 5 U.S.C. § 8124(a)(2).

²¹ See 20 C.F.R. § 501.2(c)(1).

²² *Id.* at § 501.6(d).

²³ *William A. Couch*, 41 ECAB 548, 553 (1990).

²⁴ *Linda Johnson*, 45 ECAB 439 (1994).

ORDER

IT IS HEREBY ORDERED THAT the November 8, 2011 decision of the Office of Workers' Compensation Programs is affirmed as modified and the December 14, 2011 decision is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: January 4, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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