

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

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**J.A., Appellant**

**and**

**FEDERAL JUDICIARY, U.S. PROBATION  
SERVICE, Cleveland, OH, Employer**

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**Docket No. 13-690  
Issued: June 24, 2013**

*Appearances:*  
*James J. Osgood, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 4, 2013 appellant, through his attorney, filed a timely appeal from an August 6, 2012 Office of Workers' Compensation Programs' (OWCP) merit decision. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 met his burden of proof to establish an injury in the performance of duty on November 10, 2009, as alleged.

On appeal, counsel contends that the medical evidence of record, from appellant's attending neurosurgeon, is sufficient to establish causal relationship between the November 10, 2009 employment incident and an aggravation of appellant's preexisting cervical condition.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On December 2, 2009 appellant, then a 41-year-old probation officer, filed a traumatic injury (Form CA-1) claim alleging injuries to the right side of his neck, right shoulder and right arm in the performance of duty on November 10, 2009 as a result of throwing a punch at a training dummy during mandatory defensive training.

Appellant submitted a January 23, 2007 computerized tomography (CT) scan of the cervical spine showing bony fusion at C5-6 and C6-7 and neural foraminal narrowing.

In a December 11, 2009 report, Dr. Hugo Benalcazar, a Board-certified neurosurgeon, diagnosed cervical disc displacement, cervical disc degeneration, neck pain and limb pain. He noted that appellant had pain in the bilateral posterior neck, left shoulder and left arm. Appellant had a history of neck pain requiring a previous cervical fusion that intermittently recurred and was experiencing some upper extremity pain on the left side.

On January 20, 2010 Dr. John E. Wilson, an osteopath Board-certified in pain medicine, conducted an electromyogram and nerve conduction studies. He found that there was no electrodiagnostic evidence of median neuropathy, ulnar neuropathy or cervical motor radiculopathy. Dr. Wilson opined, however, that the test did not rule in/out radiculitis.

On January 28, 2010 Dr. Benalcazar diagnosed neuralgia/neuritis and indicated that appellant was training at work on a training dummy and felt severe neck pain in November 2009. He stated that appellant had pain in the bilateral neck, bilateral upper back and radiation of pain to the right arm, which was aggravated by flexion and lying down.

In a February 17, 2010 letter, OWCP informed appellant of the deficiencies in his claim. It afforded him 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted a March 2, 2010 witness statement indicating that he had been in the process of performing striking drills when he grimaced in pain while striking with his right arm. An August 2, 2007 report from Dr. Bruce J. Ammerman, a Board-certified neurosurgeon, noted that appellant sustained symptomatic herniated disc/protrusion at C6-7 superimposed upon prior trauma and underlying degenerative disc disease as a result of a June 8, 2005 motor vehicle accident.

A magnetic resonance imaging (MRI) scan of the cervical spine dated December 13, 2009 revealed anterior cervical fusion at C5-7, degenerative changes at C3-5 and multilevel foraminal stenosis. An x-ray of the cervical spine dated December 15, 2009 revealed status post fusion at C5-7 with intact hardware, no unusual motion with flexion or extension and degenerative changes at C3-5.

By decision dated March 26, 2010, OWCP found that the evidence did not contain a medical diagnosis in connection with the accepted incident. It denied the claim on the basis that appellant failed to establish causal relationship.

On March 21, 2011 appellant, through his attorney, requested reconsideration and submitted reports dated June 10, 2010 through February 22, 2011 from Dr. Benalcazar who

diagnosed cervicalgia and radiculitis. Dr. Benalcazar noted that appellant exacerbated his preexisting conditions at work on November 10, 2009 which caused his pain to become more severe and required a greater amount and more consistent use of medications.

By decision dated June 17, 2011, OWCP denied modification of the March 26, 2010 decision. It found that the medical evidence submitted was insufficient to establish that an exacerbation of appellant's preexisting conditions were causally related to the November 10, 2009 employment incident.

On June 8, 2012 appellant, through his attorney, requested reconsideration. He submitted a March 5, 1997 MRI scan of the cervical spine, which was normal, an August 6, 2002 MRI scan of the cervical spine, which showed minimal right-sided foraminal narrowing at C3-4, a June 14, 2005 MRI scan of the cervical spine, which revealed disc protrusion at C3-4 and C6-7 and an October 11, 2009 MRI scan of the cervical spine, which showed increasing spondylotic changes at C3-4.

Appellant also submitted a June 4, 2012 report from Dr. Benalcazar who opined that the November 2009 employment incident contributed to appellant's continued and worsening symptoms and need for adjacent level fusion. Dr. Benalcazar stated that adjacent level disc disease was a common occurrence associated with cervical fusion. He explained that the fusion may place additional stress on the adjacent levels which was a normal function and could not be helped, thus, accelerating the deterioration of the adjacent level in question until it caused pain and disability. Once it reached this state and a reasonable amount of conservative treatment had been attempted and shown to have failed, as in appellant's case, surgery became the only reasonable definitive treatment. Dr. Benalcazar opined that it was not reasonable at this point to keep this surgery from appellant.

By decision dated June 25, 2012, OWCP denied appellant's request for reconsideration of the merits finding that he did not submit pertinent new and relevant evidence or show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP. On July 2, 2012 it vacated the June 25, 2012 decision. OWCP notified appellant that it would review the new evidence and issue a decision within 30 days.

By decision dated August 6, 2012, OWCP denied modification of its June 17, 2011 decision finding that the evidence submitted failed to establish causal relationship.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>2</sup> 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 timely filed within the applicable time

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

limitation period of FECA, that an injury<sup>3</sup> was sustained in the performance of duty, as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. A fact of injury determination is based on two elements. 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. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.<sup>5</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. 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>6</sup>

### ANALYSIS

OWCP has accepted that the employment incident of November 10, 2009 occurred at the time, place and in the manner alleged. The issue is whether appellant sustained an injury in the performance of duty on November 10, 2009. The Board finds that the medical evidence submitted is not sufficient to establish a claim for a compensable employment injury.

In his reports, Dr. Benalcazar diagnosed neuralgia/neuritis, cervicgia, radiculitis, cervical disc displacement, cervical disc degeneration, neck pain and limb pain. He indicated that appellant had a history of neck pain requiring a previous cervical fusion that had intermittently recurred. Dr. Benalcazar opined that appellant exacerbated his preexisting conditions at work on November 10, 2009 while training at work on a training dummy, which caused his pain to become more severe. He stated that adjacent level disc disease was a common occurrence associated with cervical fusion. Dr. Benalcazar generally explained that the fusion may place additional stress on the adjacent levels which was a normal function and could not be helped, thus, accelerating the deterioration of the adjacent level in question until it caused pain

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<sup>3</sup> OWCP’s regulations define 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. 20 C.F.R. § 10.5(ee).

<sup>4</sup> See *T.H.*, 59 ECAB 388 (2008). See also *Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> *Id.* See *Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>6</sup> *Id.* See *Gary J. Watling*, 52 ECAB 278 (2001).

and disability. Although he opined that appellant's conditions were related to the employment incident, Dr. Benalcazar did not provide sufficient medical rationale explaining how his conditions were caused or aggravated by throwing a punch at a training dummy on November 10, 2009. Lacking thorough medical rationale on the issue of causal relationship, Dr. Benalcazar's reports are of limited probative value and insufficient to establish that appellant sustained an employment-related injury in the performance of duty on November 10, 2009. Thus, the Board finds that appellant did not meet his burden of proof to establish a causal relationship between a new condition or an aggravation of his preexisting cervical condition and the November 10, 2009 employment injury.

On August 2, 2007 Dr. Ammerman indicated that appellant sustained symptomatic herniated disc/protrusion at C6-7 superimposed upon prior trauma and underlying degenerative disc disease as a result of a June 8, 2005 motor vehicle accident. He attributed appellant's condition to an injury other than the November 10, 2009 employment incident. Thus, Dr. Ammerman's report is of limited probative value and insufficient to meet appellant's burden of proof to establish a claim.

On January 20, 2010 Dr. Wilson found no electrodiagnostic evidence of median neuropathy, ulnar neuropathy or cervical motor radiculopathy and opined, however, that this test did not rule in/out radiculitis. 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>7</sup> Thus, appellant has not met his burden of proof with the submission of this report.

Similarly, the x-ray, MRI and CT scans of the cervical spine are diagnostic in nature and therefore do not address causal relationship. As such, the Board finds that they are insufficient to establish appellant's claim.

As appellant has not submitted any rationalized medical evidence to support his allegation that he sustained an injury causally related to a November 10, 2009 employment incident, he has failed to meet his burden of proof to establish a claim for compensation.

On appeal, counsel contends that the medical evidence of record, particularly the series of reports from Dr. Benalcazar, is sufficient to establish causal relationship between the November 10, 2009 employment injury and an aggravation of appellant's preexisting cervical condition. For the reasons stated above, the Board finds that the argument is not substantiated.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

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<sup>7</sup> See *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty causally related to a November 10, 2009 employment incident, as alleged.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 6, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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