

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

R.R., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
U.S. BORDER PATROL, Yuma, AZ, Employer**

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**Docket No. 13-188
Issued: March 29, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 1 2012 appellant filed a timely appeal from a May 18, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for a recurrence of disability commencing February 24, 2003. 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 the case.

ISSUE

The issue is whether appellant established that he sustained a recurrence of a medical condition commencing February 7, 2011 causally related to an accepted September 23, 2005 low back strain.

On appeal, appellant asserts that the accepted September 23, 2005 injury worsened over time, causing degenerative disc disease and lumbar arthrosis.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 23, 2005 appellant, then a 37-year-old border patrol agent, sustained a low back injury when he bent forward during medical scenario training. Dr. John G. Ridgeway, an attending osteopathic physician specializing in family practice, submitted September 24, 2005 reports diagnosing a lumbar strain due to bending at work the prior day. He released appellant to light duty, then to full duty on September 28, 2005 with no restrictions and no further treatment needed. OWCP accepted the claim as a lumbar sprain, resolved with no time lost as of September 28, 2005.

On February 14, 2011 appellant filed a recurrence claim (Form CA-2a) seeking medical treatment as of February 7, 2011. He explained that he “threw his back out” on February 7, 2011 when lifting his grandson, then again on February 8, 2011 while tying his shoes. Appellant did not stop work. On February 9, 2011 he saw Dr. Gregory Peare, an attending Board-certified orthopedic surgeon, who obtained x-rays showing worsening degenerative arthritis. Appellant noted that in March 2010, an attending physician obtained lumbar x-rays showing arthritis which he attributed to the September 23, 2005 lumbar sprain.

In a February 8, 2011 report, Dr. Peare related appellant’s account of a five-year history of back pain which started during special weapons and tactics (SWAT) team training. Appellant noted running with a 50-pound rucksack while in training. A 2005 occupational back injury resolved, when “running and training for a marathon ... exacerbated his back again in 2008/09.” Dr. Peare stated that x-rays showed lumbar and sacral osteoarthritis. He diagnosed neuritis or radiculitis due to a displaced lumbar disc.

A February 15, 2011 lumbar magnetic resonance imaging (MRI) scan showed degenerative disc disease from L3 to S1, bilateral L5-S1 facet arthritis, and intervertebral disc narrowing at L3-4 and L4-5. In a February 23, 2011 report, Dr. Peare opined that the February 15, 2011 MRI scan showed “no major findings” and released appellant to full duty “as tolerated.” He submitted progress notes through March 24, 2011.

In a June 1, 2011 letter, OWCP advised appellant of the additional evidence needed to establish his claim including a factual statement regarding the circumstances of the recurrence, and medical evidence addressing the causal relationship between the accepted September 23, 2005 injury and appellant’s condition on and after February 7, 2011. Appellant was afforded 30 days in which to submit such evidence.

Appellant submitted a factual statement asserting that the accepted September 23, 2005 injury caused his back condition commencing February 7, 2011 due to rigorous physical training during 2004, carrying heavy equipment from 2001 to the present and multiple recurrences of lumbar pain since the 2005 lumbar sprain. He asserted that he sustained no other injuries after September 23, 2005. A supervisor noted that appellant had no occupational injuries after September 23, 2005.

In an April 6, 2011 report, Dr. Shawn Hermenau, an attending Board-certified orthopedic surgeon, noted a history of gradual onset back pain over the past several years. He diagnosed lumbosacral degenerative disc disease and lumbosacral spondylosis. Dr. Hermenau recommended a lumbar fusion.

By decision dated October 21, 2011, OWCP denied appellant's claim finding that the factual and medical evidence did not establish causal relationship. It found that Dr. Peare noted a history of a gradual onset back pain and not an acute onset after the September 23, 2005 injury. Also, Dr. Peare noted that appellant experienced back pain after running and training for a marathon in 2008 and 2009.

In a November 18, 2011 letter, appellant requested a review of the written record. He submitted November 17, 2011 reports from Dr. Hermenau stating that appellant had persistent, progressive L4-5 discogenic back pain since the September 23, 2005 injury that "appear[ed] to be work related." In a November 18, 2011 note, Dr. Peare stated that appellant's L4-5 degenerative disc disease and lumbosacral spondylosis were "progression of earlier injury 2005." In a January 16, 2012 letter, he related that appellant developed low back symptoms from "using heavy packs, running and climbing in rugged terrain" at work. Dr. Peare opined that degenerative disc disease at L4-5 and lumbar arthrosis were a progression of the September 23, 2005 injury.

By decision dated and finalized on May 18, 2012, an OWCP hearing representative affirmed the October 21, 2011 decision, finding that appellant had failed to establish that he sustained a recurrence of his medical condition commencing February 7, 2011. The hearing representative found that appellant submitted insufficient rationalized medical evidence to establish that the September 23, 2005 low back strain caused or contributed to appellant's condition after September 28, 2005. The hearing representative noted that a recurrence of disability was defined as a "spontaneous material change" in an accepted condition. However, two intervening causes were implicated when lifting his grandson on February 7, 2011 and tying his shoes on February 8, 2011, precipitating his treatment by Dr. Peare.

LEGAL PRECEDENT

OWCP's implementing regulations define a recurrence of medical condition as a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage.² A claimant has the burden to establish by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury. This burden includes the necessity of furnishing evidence from a qualified physician, who on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury. Moreover, sound medical reasoning must support the physician's conclusion.³ An award of compensation may not be based on surmise, conjecture or speculation or on appellant's unsupported belief of causal relation.⁴

² 20 C.F.R. § 10.5(y); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5(b) (January 1995). See *J.F.*, 58 ECAB 124 (2006).

³ *Ricky S. Storms*, 52 ECAB 349 (2001).

⁴ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain on September 23, 2005 while bending during medical training. Appellant was released to full duty as of September 28, 2005. In his claim for a recurrence of his medical condition, he alleged that the September 23, 2005 injury caused the need for medical treatment commencing February 7, 2011. Appellant has the burden of providing rationalized medical evidence to establish the causal relationship asserted.⁵

The Board notes that appellant and Dr. Peare, an attending Board-certified orthopedic surgeon, identified several intervening causes, negating the claimed causal relationship between the September 23, 2005 lumbar sprain and appellant's need for treatment as of February 7, 2011. Appellant attributed his back condition to carrying heavy equipment at work from 2001 onward, including after the 2005 injury. Dr. Peare related appellant's account of back pain when training for a marathon in 2008 and 2009, using heavy packs at work while running and climbing in rugged terrain. On his claim form, appellant described the onset of back pain when lifting his grandson on February 7, 2011 and while tying his shoes on February 8, 2011, two incidents which did not occur in the performance of duty. These additional nonoccupational events broke the chain of causation between the September 23, 2005 injury and appellant's lumbar condition.⁶ The claimed recurrence of medical condition therefore cannot be deemed to have arisen out of his federal employment.

The Board notes that OWCP also denied appellant's claim because the medical evidence did not support that the September 23, 2005 lumbar sprain caused appellant's need for treatment on and after February 7, 2011. Appellant's physicians provided varying histories of injury. He first saw Dr. Peare on February 8, 2011 after experiencing back pain after lifting his grandson and tying his shoes. Dr. Peare related that appellant had a five-year history of back pain that began while in SWAT team training, aggravated by training for a marathon in 2008 and 2009. After OWCP denied appellant's claim, he provided a November 18, 2011 note mentioning progression of a 2005 injury and a January 16, 2012 letter asserting that appellant's degenerative disc disease and lumbar arthrosis were progressions of the September 23, 2005 lumbar sprain. Dr. Peare did not adequately explain his reasons for his opinion on causal relationship. Dr. Hermenau, an attending Board-certified orthopedic surgeon, described a gradual onset back pain in an April 6, 2011 report; but noted on November 17, 2011 that appellant's back pain began on September 23, 2005. These inconsistent histories of injury diminish the probative value of Dr. Peare's and Dr. Hermenau's opinions.⁷ Additionally, neither physician explained how the September 23, 2005 lumbar sprain would have progressed into degenerative disc disease or a lumbar arthrosis. The lack of rationale also lessens the probative quality of their opinions.⁸

⁵ *Ricky S. Storms*, *supra* note 2.

⁶ See *Carlos A. Marrero*, 50 ECAB 117 (1998) (the Board found that the claimant's use of an exercise machine constituted an intervening cause of appellant's disability and thus OWCP properly denied appellant's claim for recurrence of disability); *Clement Jay After Buffalo*, 45 ECAB 707 (1994) (the Board found that the claimant's knee injury sustained while playing basketball broke the legal chain of causation from an accepted knee injury sustained in the performance of his duties as a firefighter).

⁷ *B. M.*, Docket No. 12-783 (issued November 1, 2012); *Willa M. Frazier*, 55 ECAB 379 (2004).

⁸ *Deborah L. Beatty*, 54 ECAB 340 (2003).

However, the dispositive issue in the case is the intervening 2008, 2009, February 7 and 8, 2011 intervening incidents, breaking the chain of causation stemming from the September 23, 2005 lumbar sprain. Therefore, the inconsistent histories and lack of rationale in Dr. Peare's and Dr. Hermenau's reports regarding a medical causal relationship are no longer relevant.

On appeal, appellant asserts that the September 23, 2005 back injury was the "root cause of [his] back problems" and that his physicians believed that the accepted injury caused L4-5 degenerative disc disease and lumbar arthrosis. As stated, appellant and his physicians identified several intervening causes, breaking the chain of causation from the September 23, 2005 injury.

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.

CONCLUSION

The Board finds that appellant has not established that he sustained a recurrence of disability on or after February 7, 2011 causally related to the accepted September 23, 2005 lumbar sprain.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 18, 2012 is affirmed.

Issued: March 29, 2013
Washington, DC

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

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

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