

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

J.B., Appellant

and

**DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION, Billings, MT,
Employer**

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**Docket No. 13-1320
Issued: November 19, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 15, 2013 appellant filed a timely appeal from December 4, 2012 and February 27, 2013 merit decisions of the Office of Workers' Compensation Programs (OWCP) which denied his traumatic injury claim and an April 15, 2013 nonmerit decision denying his request for 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 case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that his back condition was causally related to the May 14, 2012 employment incident; and (2) whether OWCP properly denied appellant's March 7, 2013 request for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 15, 2012 appellant, then a 66-year-old laborer, filed a traumatic injury claim alleging that on May 14, 2012 he felt a snap in his lower back and experienced sharp pain when he turned to come up the stairs while using a backpack vacuum.² He stated that the injury progressed to constant and sharp pain in his lower back and legs that had not subsided.

In an August 18, 2011 magnetic resonance imaging (MRI) scan report of the lumbar spine, Dr. Jeffrey Weissmann, a Board-certified diagnostic radiologist, related appellant's history of back pain and left leg pain. He observed negative alignment and vertebral marrow signal. Dr. Weissmann also noted cystic dilation of the nerve root sleeve on the left and facet hypertrophy and thickening of ligament flavum at L2-3. He diagnosed moderately severe spinal stenosis at the L4-5 level which was also associated with impingement of the exiting left L4 nerve root from a lateralizing disc bulge which had additional, extruding fragments extending behind the L4 vertebral body.

In a May 22, 2012 report, Dr. E. Jeffrey Donner, a Board-certified orthopedic surgeon, related appellant's complaints of low back with bilateral buttock and leg pain. He explained that about one week ago appellant developed recurrent back, bilateral buttock and leg pain with numbness and weakness. Dr. Donner reviewed his history and conducted an examination. He observed mild local tenderness and pain to the mid-lumbar spine around L4-5 and intense sharp pain in appellant's lower back with attempts at lumbar extension past neutral. Dr. Donner noted difficulty ambulating because appellant's legs became weak and numb and decreased sensation in the left anterior thigh. He reported that three views of the lumbar spine showed well-maintained disc spaces with no gross instability. Dr. Donner noted that an August 2011 MRI scan showed a congenitally narrowed spinal canal with marked facet arthropathy, primarily at L3-4 and L4-5, causing significant global stenosis and a left-sided disc herniation with a free fragment behind the left L4 vertebral body. He diagnosed lumbar disc degeneration and lumbar spinal stenosis. Dr. Donner concluded that appellant had progressive severe back pain and spinal stenosis.

In a May 24, 2012 report, Dr. Donner stated that appellant returned with continued pain in his buttock area that radiated down the legs with movement and noted active problems of lumbosacral disc degeneration and lumbar spinal stenosis. He reported that appellant could barely stand upright and that any attempts at extension past neutral markedly increased his buttock and bilateral posterior leg pain. Dr. Donner noted that he reviewed his lumbar MRI scan and observed significant spinal stenosis at L5-S1 with facet cyst on the left side. He diagnosed severe lumbar spinal stenosis with neurological deficits.

In a May 24, 2012 MRI scan report, Dr. Willis Chung, a Board-certified diagnostic radiologist, noted appellant's complaints of low back pain and observed normal lumbosacral vertebral body alignment and normal vertebral body marrow signal.

² The record reveals that appellant filed two previous traumatic injury claims for a November 4, 2010 incident (File No. xxxxxx321) and an October 12, 2011 incident (File No. xxxxxx733).

In a June 11, 2012 operative report, Dr. Donner stated that appellant underwent a lumbar laminectomy and nerve root decompression on appellant. He noted that appellant's diagnosis of severe lumbar spinal stenosis and also observed prominent congenital narrowing of the spinal canal from L1 through L5.

In a June 20, 2012 duty status report, Dr. Donner noted that on May 14, 2012 appellant experienced sharp pain in his lower back and legs after turning to come up the stairs. He diagnosed lumbar stenosis and advised appellant to return to work on June 25, 2012 with restrictions.

In an undated return to work slip, Deborah J. Browne, a physician's assistant authorized appellant to return to work on June 25, 2012 with no restrictions.

By letter dated October 31, 2012, OWCP advised appellant that his claim was initially accepted for a minor injury but now his claim was being reopened for consideration on the merits. It advised him that the evidence submitted was insufficient to establish his claim and requested additional evidence to demonstrate that he sustained a diagnosed condition as a result of the May 14, 2012 employment incident.

In a November 11, 2012 handwritten statement, appellant noted that he had been vacuuming on May 14, 2012 with a backpack weighing about 25 to 30 pounds for about one to one and a half hours. When he turned to start vacuuming the stairs, he felt a sharp pain in his lower back that went down both his legs. Appellant reported the incident to his supervisor and was advised to see a doctor. He made an appointment with Dr. Donner. Appellant stated that on May 15, 2011 he had the same problem during his vacuuming and was treated with steroid shots. He noted that he did not have any other injuries on or off duty between the date of injury and the date that he first reported it. Appellant also submitted a description of his duties as a laborer at the employing establishment.

In a November 13, 2012 report, Dr. Donner stated that he initially examined appellant on May 22, 2012 for a work injury that occurred on May 14, 2012 when appellant turned to go down some stairs while wearing a backpack vacuum and felt a sharp pain in his lower back. Appellant related that the injury was a recurrence of a previous 2011 work injury. Dr. Donner reported that a lumbar MRI scan revealed significant spinal stenosis on the left side where appellant had a facet cyst compressing the nerves as well as global stenosis at L4-5 and L3-4. He related that appellant underwent surgical decompression, which was performed on June 11, 2012, and was able to return to work without restrictions on June 25, 2012. Dr. Donner opined that appellant had sustained a recurrent work injury on May 14, 2012 and had undergone successful surgical treatment for his condition.

In a decision dated December 4, 2012, OWCP denied appellant's claim finding insufficient medical evidence to establish his claim. It accepted that the May 14, 2012 incident occurred as alleged and that a medical condition was diagnosed, but denied the claim finding that the medical evidence failed to demonstrate that his diagnosed back condition was causally related to the accepted incident.

On January 1, 2013 appellant submitted a request for reconsideration.

In a December 21, 2012 report, Dr. Donner stated that appellant was injured at work on May 14, 2012 and that this work event caused and affected his condition. He explained that while working appellant was subjected to significant forces upon his spine, which caused injury. Dr. Donner reported that the force of the backpack vacuum weighing upon appellant's spine while working plus torsional forces from twisting created enough cumulative force to cause injury to his spine. He concluded that based on the above and as evident by the factual and medical history there was a definite causal relationship establishing that appellant's condition was causally related to the work injury.

By decision dated February 27, 2013, OWCP denied modification of the December 4, 2012 denial decision finding that the medical evidence failed to establish that his back condition was causally related to the May 14, 2012 employment incident. It stated that although Dr. Donner concluded that there was a causal relationship between appellant's spinal pain and the May 14, 2012 employment incident, he did not specifically discuss the diagnosis of spinal stenosis and how his underlying back condition was specifically affected or aggravated.

On March 7, 2013 appellant submitted a request for reconsideration.

In a March 6, 2013 report, Dr. Donner stated that appellant had been under his care since a May 14, 2012 work injury. He related that while working appellant was subject to significant forces upon his spine which caused the spine injury. Dr. Donner concluded that based on the above and as evident by the accurate factual and medical history the May 14, 2012 injury was work related.

In a decision dated April 15, 2013, OWCP denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a). It found that the evidence submitted was cumulative and substantially similar to the evidence previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his claim by the weight of the reliable, probative, and substantial evidence⁴ including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether "fact of injury" has been established.⁶ There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at

³ 5 U.S.C. §§ 8101-8193.

⁴ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁵ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

the time, place and in the manner alleged.⁷ Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.⁸ An employee may establish that the employment incident occurred as alleged but fail to show that his disability or condition relates to the employment incident.⁹

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.¹⁰ 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.¹¹ The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.¹²

ANALYSIS -- ISSUE 1

Appellant alleges that on May 14, 2012 he sustained an injury to his lower back when he carried a vacuum backpack and turned to go up the stairs. OWCP accepted that the May 14, 2012 incident occurred as alleged and that appellant has a diagnosed back condition but found that the medical evidence was insufficient to establish that his back condition was causally related to the accepted incident. The Board finds that this case is not in posture for decision as to whether appellant sustained a back condition as a result of the May 14, 2012 employment incident.

As previously stated, an employee who claims benefits under FECA has the burden of establishing the essential elements of his claim by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment.¹³ However, it is well established that proceedings under FECA are not adversarial in nature, and while the employee has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁴

⁷ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

⁸ *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

⁹ *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

¹⁰ *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

¹¹ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

¹² *James Mack*, 43 ECAB 321 (1991).

¹³ *Supra* note 11.

¹⁴ *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

Appellant was treated by Dr. Donner from May 22 to 24, 2012 for complaints of low back with bilateral buttock and leg pain. Dr. Donner stated that appellant had a history of back problems and suffered from lumbar disc degeneration and spinal stenosis. Upon examination, he observed mild local tenderness and pain to the mid-lumbar spine around L4-5 and intense sharp pain in appellant's lower back with attempts at lumbar extension past neutral. Dr. Donner reported that the August 2011 MRI scan showed a congenitally narrowed spinal canal with marked facet arthropathy primarily at L3-4 and L4-5 causing significant global stenosis and a left-sided disc herniation. He diagnosed lumbar disc degeneration and lumbar spinal stenosis. In the November 13, 2012 report, Dr. Donner stated that on May 14, 2012 appellant had sustained an injury to his back when he went down the stairs while wearing a backpack vacuum at work. He related that this was a recurrence of a previous work injury in 2011 and that appellant underwent successful surgical treatment. In a December 21, 2012 report, Dr. Donner opined that based on his findings and factual and medical history there was a definite causal relationship establishing that appellant's back condition was causally related to the work injury. He explained that, while working appellant was subjected to significant forces upon his spine, which caused a spine injury. Dr. Donner stated that the force of the backpack vacuum weighing upon his spine while working plus torsional forces from twisting created enough cumulative force to cause injury to appellant's spine while working.

The Board notes that, while none of Dr. Donner's reports are completely rationalized, they are consistent in indicating that appellant sustained an employment-related injury. While he does not fully describe the mechanism of injury, he provided a consistent opinion based on examination findings and an accurate factual and medical background, that appellant's current back condition was caused or aggravated by the May 14, 2012 employment incident. Dr. Donner accurately described appellant's work activities on that day and discussed how carrying a heavy backpack vacuum would cause appellant's injuries. He provided an accurate medical history and based his findings on diagnostic testing and physical examination. Although these reports are not sufficient to meet appellant's burden of proof to establish his claim they are sufficient to require OWCP to further develop the medical evidence and the case record.¹⁵

On remand, OWCP should prepare a statement of accepted facts which includes a description of appellant's work duties and refer appellant to an appropriate medical specialist for a second opinion as to whether his current condition was causally related or aggravated by the May 14, 2012 work event. Following this and any other further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's claim. Since appellant's case is being remanded, the second issue regarding OWCP's denial of appellant's request of reconsideration is moot.

CONCLUSION

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

¹⁵ See *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2013 and December 4, 2012 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further development consistent with this decision.

Issued: November 19, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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