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

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| **C.F., Appellant** | ) | |
| **and** | ) | **Docket No. 13-1070** |
| | ) | **Issued: September 19, 2013** |
| **DEPARTMENT OF THE STATE, BUREAU OF DIPLOMATIC SECURITY, Washington, DC, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On March 28, 2013 appellant filed an appeal from a February 11, 2013[1] merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In this case, appellant informed OWCP in his February 16, 2012 reconsideration request that he had a new mailing address in Florida and included the address in his request. He explained that he was currently assigned to the American Embassy in Jakarta, Indonesia and that his mail was forwarded there monthly. The record reveals, however, that the August 2, 2012 OWCP decision was mailed to his old address in Chantilly, Virginia. Appellant submitted evidence demonstrating that OWCP did not mail the August 2, 2012 decision to his new Florida mailing address until February 11, 2013, when he requested that future correspondence is directed to his new address. The Board notes that OWCP's August 2, 2012 decision was not properly issued until February 11, 2013.

[2] 5 U.S.C. § 8101 *et seq.*

## ***ISSUE***

The issue is whether appellant met his burden of proof to establish that he sustained a back condition causally related to the November 2, 2010 employment incident.

## ***FACTUAL HISTORY***

On November 22, 2010 appellant, then a 40-year-old special agent, filed a traumatic injury claim alleging that on November 2, 2010 he sustained a back injury when he provided security for a team traveling in rough seas in Nicaragua. He explained that the pounding of the water against the boat for an hour on the trip aggravated a previous work-related back injury.

On July 15, 2011 OWCP advised appellant that no evidence was received to establish his claim and requested additional evidence.

In a decision dated August 25, 2011, OWCP denied appellant's claim. It accepted that the November 2, 2010 employment incident occurred as alleged but denied the claim, finding insufficient medical evidence to establish that he sustained a back diagnosed condition as a result of the accepted incident.

In a letter dated February 16, 2012, appellant submitted a request for reconsideration. He stated that he did provide documentation such as medical records and statements and would include the documents again. Appellant explained that he used a mailing address in Florida, but was currently assigned to Indonesia for work. He noted that the August 25, 2011 decision was sent to his former address in Virginia, then forwarded to Florida and then forwarded to Indonesia.

Appellant had previously submitted a traumatic injury claim form dated September 25, 2006, in which he described a July 28, 2006 back injury. He explained that, while he had been in a training class for defensive tactics, he was thrown onto his back and landed on a handcuff case. The claim was accepted and is currently open for medical expense.

In a handwritten July 19, 2005 employee health record, a nurse practitioner noted appellant's complaints of worsening hip pain and disc disease. Appellant was diagnosed with L5-S1 disc herniation and canal stenosis.

In a January 18, 2008 magnetic resonance imaging (MRI) scan report of the lumbar spine, Dr. Grazie Christie, a Board-certified diagnostic radiologist, observed intervertebral disc space narrowing at L5-S1 with end plate reactive changes and disc desiccation. No compression fractures were identified. Dr. Christie diagnosed broad-based disc herniation at L5-S1 that caused central canal stenosis and neural foraminal narrowing.

In an October 25, 2010 report, Dr. John K. Phillips, a Board-certified family practitioner, stated that appellant had back pain related to an L5-S1 disc herniation with central canal stenosis and bilateral S1 nerve root compression. He authorized appellant to work light duty with restrictions of no carrying more than 15 pounds and no physical activity to include running, pushups and sit-ups.

In a handwritten November 11, 2010 employee health record, a nurse practitioner related that appellant had back pain after being in high seas on a boat. The examination revealed tenderness and low back pain.

In a December 16, 2010 MRI scan report, Dr. Jeffrey Troy, a Board-certified diagnostic radiologist, related appellant's complaints of back pain and concern for L5-S1 herniated disc. He observed degenerative end plate marrow changes at L5-S1 and minimal anterior disc osteophyte disease at L2-3, L3-4 and L5-S1. Osseous alignment appeared normal and vertebral body heights were well preserved. Dr. Troy diagnosed multilevel degenerative changes, most conspicuous at L5-S1.

In a February 2, 2012 report, Dr. Stanley H. Bennett, a Board-certified family practitioner, reviewed appellant's medical records from 2006 to 2010 and noted that the January 2008 MRI scan revealed an L5-S1 herniated disc. He related that appellant did not initially seek medical attention for his July 2006 back injury until 2007 when he continued to experience recurring back pain. Dr. Bennett opined that it was within the "realm of reasonable medical probability" that appellant's disc herniation began at the time of his 2006 back injury and that the subsequent 2010 injury exacerbated his preexisting condition. He explained that, because appellant's recurring low back pain began after his work injury, it was arguable that his 2006 injury caused his disc herniation.

By decision dated August 2, 2012, OWCP denied modification of the August 25, 2011 decision. It found the medical evidence insufficient to establish that appellant's back condition was causally related to the November 2, 2010 employment incident.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence[4] including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she 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 or she actually experienced the employment incident at the time, place and in the manner alleged.[7] Second, the employee must submit

[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).

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

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 or her 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***

Appellant alleged that on November 2, 2010 he aggravated a preexisting back condition when traveling on a boat in rough seas while in the performance of duty. OWCP accepted that the November 2, 2010 incident occurred as alleged. It denied appellant's claim finding insufficient medical evidence to establish that his back condition was caused or aggravated by the accepted incident. The Board finds that he did not meet his burden of proof to provide sufficient medical evidence to establish that he aggravated a previous back condition as a result of the November 2, 2010 employment incident.

The record establishes that a week prior to the November 2, 2010 incident appellant was examined by Dr. Phillips for complaints of back pain. Following the incident appellant sought treatment with Dr. Bennett.

Appellant was examined by Dr. Bennett who related in a February 2, 2012 report that appellant had complaints of recurring back pain following a July 2006 injury. Dr. Bennett noted that a January 2008 MRI scan revealed an L5-S1 herniated disc. He opined that it was "within the realm of reasonable medical probability" that appellant's back condition resulted from the 2006 incident and was exacerbated by the subsequent 2010 work incident. While Dr. Bennett opined that it was possible that appellant's back condition was related to the November 2, 2010 employment incident, the Board notes that his opinion is speculative in nature. He did not adequately explain, with citation to objective findings, whether appellant's herniated disc condition was in fact aggravated by the November 2, 2010 back incident. The Board notes that the December 16, 2010 MRI scan report related multilevel degenerative disc disease, Dr. Bennett

[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).

offered no explanation as to how predegenerative disease was exacerbated by the November 2010 incident. Dr. Bennett also offered no explanation as to why appellant sought treatment for back complaints in October 2010, a week prior to the accepted November 2010 incident and whether appellant had experienced any exacerbation of his back condition at that time.

The Board has held that medical opinions that are speculative or equivocal in character are of diminished probative value.[13] An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is causal relationship between his claimed condition and his employment.[14] This report, therefore, is insufficient to establish appellant's claim.

The additional diagnostic reports by Drs. Christie and Troy are insufficient to establish appellant's traumatic injury claim. Although the reports contain diagnoses of disc herniation and central canal stenosis, neither physicians addressed the cause of appellant's back condition nor related his condition to the accepted work incident. 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.[15] Similarly, in Dr. Phillips' October 25, 2010 report, he also notes appellant's diagnosed back condition but does not give an opinion on the cause of his condition.

The record also contains various employee health records by a nurse practitioner. The Board has noted, however, that a nurse practitioner is not a physician as defined under FECA and therefore, these reports are of no probative value.[16]

The issue of causal relationship is a medical question that must be established by probative medical opinion from a physician.[17] Because appellant has not submitted such probative medical evidence in this case, the Board finds that OWCP properly denied his traumatic injury claim.

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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[13] *D.D.*, 57 ECAB 734, 738 (2006); *Kathy A. Kelley*, 55 ECAB 206 (2004).

[14] *Robert A. Boyle*, 54 ECAB 381 (2003); *Patricia J. Glenn*, 53 ECAB 159 (2001).

[15] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

[16] Section 8102(2) provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); *E.H.*, Docket No. 08-1862 (issued July 8, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Roy L. Humphrey*, 57 ECAB 238 (2005).

[17] *W.W.*, Docket No. 09-1619 (June 2, 2010); *David Apgar*, *supra* note 8.

## ***CONCLUSION***

The Board finds that appellant did not meet his burden of proof to establish that his back condition was causally related to the November 2, 2010 employment incident.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 2, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 19, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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