



October 14, 2010 his back condition progressively worsened. His job duties required that he stoop over his desk to work on certified and registered letters, parcels, delivery confirmations and express mail. In addition, appellant worked the general delivery window.

Appellant submitted several reports from Dr. Arthur G. Nahas, an osteopathic physician Board-certified in family practice and sports medicine. On May 13, 2011 Dr. Nahas related that appellant had ongoing low back spasms and pain into his legs. He stated that a previous nerve conduction study showed L5-S1 radiculopathy on the left of a moderate degree and mild L5 radiculopathy on the right. Dr. Nahas concluded that appellant could not return to work. On May 31, 2011 he related that appellant's work activities of bending over a desk to write up certified letters and bending to pick up trays of mail aggravated his back condition and exacerbated his symptoms.

In a report dated July 8, 2011, Dr. Nahas advised that appellant stopped work on October 14, 2010 due to a low back condition which was aggravated by work factors. He noted that appellant was involved in activities requiring prolonged bending, sitting and working with a registered cart which had heavy and oversized items on the bottom. Appellant also had to carry delivery confirmation packages and parcels; further, his morbid obesity placed additional stress on his low back. Dr. Nahas opined that appellant was currently totally disabled due to his low back condition.

On September 15, 2011 OWCP advised appellant that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits. It asked him to submit a comprehensive report from his treating physician describing his symptoms and the medical reasons for his condition with an opinion as to whether his low back condition was causally related to his federal employment. OWCP requested that appellant submit this evidence within 30 days.

OWCP thereafter received an October 7, 2011 supplemental statement from appellant who described the frequency of his various employment duties.

Dr. Nahas submitted reports dated September 29 and October 20, 2011. He stated findings on examination and reiterated his previous findings and conclusions. Dr. Nahas opined that appellant's neck, upper and lower extremity radicular and low back complaints were directly and solely the result of working at the employing establishment.

By decision dated October 17, 2011, OWCP denied appellant's claim, finding that he failed to establish fact of injury. It found the evidence insufficient to establish the work events or factors, as alleged.

By letter dated October 25, 2011, appellant, through his attorney, requested a hearing.

By decision dated January 9, 2012, an OWCP hearing representative set aside the October 17, 2011 decision. The case was remanded for further development of the factual evidence regarding appellant's work duties.

By decision dated May 9, 2012, OWCP denied appellant's claim. It accepted that he performed duties as a mail clerk that required stooping and bending. OWCP found, however,

that he failed to submit sufficient medical evidence to establish that his low back condition was causally related to his work duties.

By letter dated May 14, 2012, counsel requested a hearing.

By decision dated August 14, 2012, an OWCP hearing representative set aside the May 9, 2012 decision. She directed that the current case, OWCP file number xxxxxx031, be combined with a previously accepted claim for a lumbar strain under file number xxxxxx462, which appellant sustained on July 29, 2008. The hearing representative remanded the case for review by Dr. Lawrence Barr, an osteopath and second opinion examiner, to address whether appellant's claimed low back condition was caused by his work duties, as described by the employing establishment.<sup>2</sup>

In a December 28, 2012 report, Dr. Barr stated that appellant did have a low back strain on July 29, 2008 but did not sustain a worsening of his underlying degenerative disc disease. He advised that appellant had an exacerbation, a temporary increase in his symptomatology. Dr. Barr stated that when he examined appellant on June 4, 2012, he complained of tenderness in the lumbar paraspinals radiating into the buttocks. He showed full motion and good strength, reflexes and sensation. Appellant's current complaints appeared to be related to his degenerative disc disease and that he had underlying medical conditions such as diabetes, atrial fibrillation and morbid obesity, which by themselves affected a person's ability to work.

In a January 24, 2013 report, Dr. Barr stated that appellant did not suffer a worsening of his preexisting back condition. He advised that appellant had a low back sprain, preexisting degenerative disc disease and morbid obesity and had experienced chronic pain since a 1991 motor vehicle accident. Dr. Barr opined that most of appellant's back pain was due to his chronic morbid obesity, diabetes, chronic low back pain and degenerative disc disease. He advised that appellant had undergone an electromyogram (EMG) which noted sensory neuropathy consistent with diabetic sensory neuropathy. Dr. Barr concluded that appellant was capable of sedentary work.

By decision dated February 7, 2013, OWCP found that Dr. Barr's referral opinion represented the weight of medical evidence and that based on his opinion appellant's claimed low back condition was not causally related to employment factors.

By letter dated February 12, 2013, counsel requested an oral hearing.

By decision dated May 7, 2013, OWCP's hearing representative set aside the February 7, 2013 decision, finding that there was a conflict in medical opinion between Dr. Barr, the second opinion examiner, and Dr. Nahas, appellant's treating physician, as to whether his

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<sup>2</sup> File number xxxxxx462 pertains to appellant's traumatic injury claim of July 29, 2008, accepted for a lumbar sprain. OWCP referred him to Dr. Barr on May 18, 2012 with a description of his duties as a letter carrier. In a June 4, 2012 report, Dr. Barr noted that appellant was 6'3" and weighed 425 pounds. Diagnostic testing on January 30, 2009 showed mild degenerative disc disease at L5-S1 without neural compression. He found that appellant's accepted back sprain had reached maximum improvement and no further treatment was necessary. Dr. Barr attributed appellant's low back pain to degenerative disc disease and morbid obesity. He stated that appellant was at a sedentary level of work.

low back condition was causally related to employment factors. She remanded the case for appellant to be referred to a referee medical specialist to resolve the conflict in the medical evidence.

OWCP referred appellant to Dr. Ian B. Fries, Board-certified in orthopedic surgery, for a referee medical examination. In a June 29, 2013 report, Dr. Fries listed findings on examination and reviewed the medical history and the statement of accepted facts. He found that appellant's ongoing low back condition was not causally related to his employment factors. He advised that any aggravation, acceleration or precipitation of appellant's lumbar condition was based on subjective complaints and that there was insufficient evidence to consider his duties from August to October 2010 as the cause of his current low back condition. While appellant did have subjective pain complaints consistent with left lower extremity radiculopathy, he did not currently have objective examination findings to confirm lumbar spine pathology or disabling residuals of the 2008 and 2010 work injuries. Dr. Fries further opined that there were no objective physical findings, such as sensory loss in a dermatomal pattern or sciatic symptoms with provocative testing. He reviewed a December 19, 2008 EMG test and concurred with Dr. Barr that it did not evidence radiculopathy; he opined that the diagnostic test was consistent with peripheral radiculopathy which was likely diabetic in origin.

Dr. Fries concluded that appellant was totally disabled from employment but that this was due to his morbid obesity, untreated diabetes requiring insulin, untreated cardiac arrhythmia and untreated probable congestive heart failure, not the 2008 injury or 2010 activities at work.

By decision dated July 16, 2013, OWCP denied appellant's claim, finding that he failed to submit sufficient medical evidence to establish that his low back condition was causally related to his work duties. It found that Dr. Fries' impartial opinion represented the weight of the medical evidence.

On July 23, 2013 counsel requested an oral hearing, which was held on November 8, 2013.

By decision dated January 15, 2014, an OWCP hearing representative affirmed the July 16, 2013 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> has the burden of establishing that 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 limitation period of FECA, that an injury was sustained 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.<sup>4</sup> These are the essential elements of each and every

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>5</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>6</sup>

To establish causal relationship, a claimant must submit a physician's report in which the physician reviewed the employment factors identified as causing the claimed condition and, taking these factors into consideration as well as findings upon examination, states whether the employment injury caused or aggravated the diagnosed condition and presents medical rationale in support of his opinion.<sup>7</sup>

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee the Secretary shall appoint a third physician who shall make an examination.<sup>8</sup> It is well-established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>9</sup>

### ANALYSIS

On appeal, counsel argues that Dr. Fries' impartial medical report was not sufficiently rationalized and presented inaccurate conclusions regarding the work relatedness of appellant's claimed low back condition. He argues that Dr. Nahas provided diagnostic test results which showed that appellant had bilateral neuropathies and that Dr. Fries was provided with misleading questions concerning appellant's work injury. Counsel contends that OWCP erred in asking Dr. Fries if there was any aggravation of the prior lumbar condition as a result of the October 14, 2010 work injury and that Dr. Fries wrongly refers to a 2010 work accident, when the claim is based on an occupational condition, not traumatic injury. He further contends that Dr. Fries' opinion is not well reasoned because he did not significantly discuss the diagnostic tests in the record or the work duties appellant performed from August to October 2010; he specifically questions why Dr. Fries did not explain why EMG testing would show a diabetic

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<sup>5</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>6</sup> *J.S.*, Docket No. 13-2022 (issued July 28, 2014).

<sup>7</sup> *J.M.*, 58 ECAB 303 (2007).

<sup>8</sup> *Regina T. Pellecchia*, 53 ECAB 155 (2001).

<sup>9</sup> *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

neuropathy versus an entrapment neuropathy, which was revealed by the EMG testing. Counsel further contends that Dr. Fries used speculative language and was confusing and contradictory in stating that appellant had chronic low back pain, subjective left sciatica symptoms and a current disability but no low back condition causally related to his claimed low back condition. He therefore contends that Dr. Fries' report is not well reasoned and did not merit the special weight of a referee medical examiner.

In his June 29, 2013 report, Dr. Fries stated that, while appellant did have subjective pain complaints consistent with left lower extremity radiculopathy, he did not have objective examination findings to confirm lumbar spine pathology or disabling residuals of his work incidents. He asserted that any aggravation, acceleration or precipitation of his lumbar condition was based on subjective complaints. There was insufficient evidence to supporting a finding that appellant's work duties from August to October 2010 were the cause of his current low back condition. Dr. Fries opined that there were no subjective physical findings such as sensory loss in a dermatomal pattern or sciatic symptoms with provocative testing. He reviewed a December 19, 2008 EMG test and concurred with Dr. Barr that they did not indicate radiculopathy. Dr. Fries opined that these tests were consistent with peripheral radiculopathy, which was likely diabetic in origin. He concluded that appellant was totally disabled from employment but that this was attributable to morbid obesity, untreated diabetes, untreated cardiac arrhythmia and untreated probable congestive heart failure, not his claimed low back condition. OWCP relied on Dr. Fries' opinion in its July 16, 2013 decision, finding that appellant's claimed low back condition was not causally related to his employment.

The Board finds that Dr. Fries' impartial opinion negates a causal relationship between appellant's claimed condition and his employment. Counsel makes several assertions that Dr. Fries' findings are not accurate or well reasoned. The question of whether appellant sustained a low back condition in the performance of duty is a medical one. Upon review, Dr. Fries' opinion is sufficiently probative, rationalized and based upon a proper factual background. Therefore, OWCP properly accorded his opinion the special weight of an impartial medical examiner.<sup>10</sup> The Board therefore finds that Dr. Fries' opinion constituted the weight of medical opinion and supports the July 16, 2013 OWCP decision finding that appellant did not sustain a low back condition in the performance of duty.

Appellant subsequently requested an oral hearing but did not submit any additional medical evidence. Thus the Board will affirm OWCP's hearing representative's January 16, 2014 decision.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.<sup>11</sup> Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

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<sup>10</sup> *Gary R. Seiber*, 46 ECAB 215 (1994).

<sup>11</sup> *See id.*

Appellant has not met his burden of proof in establishing that his claimed lumbar back condition was causally related to his employment. For this reason, he has not discharged his burden of proof to establish his claim that this condition was sustained in the performance of duty.

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 failed to meet his burden of proof to establish that his claimed low back condition was sustained in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 15, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 22, 2014  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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