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

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| **C.P., Appellant** | ) | |
| **and** | ) | **Docket No. 15-1495** |
| | ) | **Issued: November 16, 2015** |
| **DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION, Loretto, PA, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On June 30, 2015 appellant, through counsel, filed a timely appeal from a March 4, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 has established a lumbar disc condition consequential to an accepted lumbosacral sprain.

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

OWCP accepted that on July 23, 2010 appellant, then a 42-year-old corrections officer, sustained a lumbosacral sprain when attempting to forcibly remove an inmate from a cell. Dr. Patrick Lenz, an attending Board-certified family practitioner, submitted July 23 and 26, 2010 reports noting a history of injury. He diagnosed a lumbosacral sprain and prescribed medication. Dr. Lenz released appellant to full duty as of July 26, 2010. Appellant did not seek additional medical care for lumbar symptoms until July 2012.

On July 10, 2012 appellant filed a recurrence of disability (Form CA-2a) claiming that the accepted back injury worsened spontaneously on June 20, 2012. He stopped work on July 2, 2012. Appellant submitted July 2, 2012 reports from Dr. Lenz relating appellant's account that he injured his back at home on June 20, 2012 while doing yard work. Dr. Lenz also noted a history of back pain since 2008 from an unspecified cause. He diagnosed lumbago aggravated by work. Dr. Lenz held appellant off work for four weeks.[2]

In an August 10, 2012 letter, OWCP advised appellant of the additional evidence needed to establish his claim, including his physician's opinion explaining how and why the accepted resolved lumbosacral sprain would disable him for work on and after June 20, 2012.

In response, appellant submitted reports from Dr. Charles J. Harvey, an attending osteopath Board-certified in orthopedic surgery. In a July 24, 2012 report, Dr. Harvey noted a history of lumbar pain since 2009, and that appellant sustained the accepted 2010 lumbar sprain. He related appellant's account that the pain had "been steady since June 23, 2012." Dr. Harvey diagnosed back pain. He obtained a lumbar magnetic resonance imaging (MRI) scan showing a left-sided L5-S1 disc protrusion. Based on the study, Dr. Harvey diagnosed degenerative joint disease of the lumbar spine with a left-sided L5-S1 disc protrusion. On October 10, 2012 Dr. Harvey noted that appellant's June 2012 increase in discomfort was "related to the original low back sprain [in] 2010." He diagnosed left S1 radiculitis secondary to the disc protrusion.

Appellant underwent a series of lumbar epidural steroid injections in October and November 2012, authorized by OWCP. Dr. Harvey discharged appellant from care on November 20, 2012. Appellant underwent additional lumbar injections by Dr. Harvey in February and July 2013, authorized by OWCP.

A November 29, 2013 MRI scan indicated progression of the L5-S1 herniated disc. At the time, appellant was working full duty with no restrictions.[3] Appellant presented to Dr. Harvey in January 2014 with increasing bilateral radiculopathy. He underwent additional lumbar epidural injections in February 2014, authorized by OWCP.[4]

[2] Appellant participated in physical therapy in July 2012.

[3] By decision dated November 4, 2013, OWCP denied authorization for additional epidural injections as the herniated lumbar disc had not been accepted as work related.

[4] February 17, 2014 electromyography (EMG) and nerve conduction velocity (NCV) studies showed no peripheral neuropathy.

Dr. Harvey opined on February 25, 2014 that the increasing left-sided S1 disc herniation was a "continuation of ongoing symptomatology caused by his original work-related injury. That work-related injury with discogenic pain due to a central disc protrusion noted on the MRI [scan] of August 20, 2012." He opined that while "the original diagnosis was a lumbar sprain but truly his symptomatology has always been caused by a deranged disc at L5-S1. Therefore, his present symptomatology … is a work-related diagnosis."

In a March 28, 2014 letter, Dr. Harvey requested that OWCP authorize an L5-S1 discectomy. He explained that appellant's "present left S1 radiculopathy from this large herniated disc is a continuation of his ongoing symptomatology caused by his original work-related injury of August 20, 2012. At that time, [appellant] did sustain discogenic pain with a moderate protrusion," since progressed to a full left-sided herniation. Dr. Harvey opined that although appellant was originally diagnosed with a lumbar sprain, his symptoms were due to disc derangement at L5-S1. Therefore, the recently diagnosed "herniated disc and need for surgery [were] directly related to the work injury of August 20, 2012."

On April 3, 2014 Dr. Harvey performed a left-sided L5-S1 discectomy with decompression of the left S1 nerve root.

By decision dated April 30, 2014, OWCP denied appellant's claim for a consequential lumbar disc condition and related surgery. It found that the medical evidence indicated that appellant sustained a new, nonoccupational injury while doing yard work at home on June 20, 2012.

Appellant disagreed and on May 6, 2014, through counsel, requested a telephone hearing before an OWCP hearing representative. At the hearing, held December 15, 2014, appellant testified that he did not seek medical treatment from July 2010 through June 2012 as over-the-counter pain medication effectively controlled his symptoms, and he believed that he had only sustained a lumbar sprain. Appellant clarified that he experienced lumbar discomfort after raking leaves at home on June 20, 2012, prompting him to seek treatment. He contended, however, that this was not strenuous activity and that he did not sustain a new injury. Counsel asserted that Dr. Harvey's reports were sufficient to establish the claimed causal relationship between the herniated disc and the accepted July 23, 2010 incident. Appellant submitted additional medical evidence.

In a March 20, 2014 report, Dr. Lenz noted an original 2010 lumbar injury and a reinjury in June 2012. Appellant underwent additional lumbar steroid injections in March 2014.

Dr. Fred Khalouf, an attending osteopath Board-certified in pain medicine, noted on September 3, 2014 that appellant's lumbar radiculopathy resolved after surgery. He administered a lumbar epidural steroid injection on September 8, 2014.[5]

A December 16, 2014 lumbar MRI scan showed a diffuse L5-S1 disc bulge with impingement of the left S1 nerve roots. In a December 17, 2014 report, Dr. Khalouf noted the new onset of left-sided radicular pain.

[5] October 27, 2014 EMG and NCV studies of lower extremities were within normal limits.

On January 5, 2015 Dr. Harvey performed an L5 laminotomy with left-sided L5 discectomy to address a recurrent left-sided L5-S1 disc herniation.[6] Appellant was readmitted on January 12, 2015 with increased left-sided lumbar pain after he sneezed at home. On January 12, 2015 Dr. Harvey performed a repeat L5 laminotomy with left L5-S1 discectomy, medial facetectomy and foraminotomy.

By decision dated March 4, 2015, an OWCP hearing representative affirmed the April 30, 2014 decision, finding that the additional medical evidence submitted did not contain sufficient rationale supporting that the accepted lumbosacral sprain, since resolved, caused or contributed to the claimed lumbar disc condition.

## ***LEGAL PRECEDENT***

The Board has held that if a member weakened by an employment injury contributes to a later injury, the subsequent injury will be compensable as a consequential injury, if the further medical complication flows from the compensable injury, so long as it is clear that the real operative factor is the progression of the compensable injury.[7]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[8] 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.[9]

## ***ANALYSIS***

OWCP accepted that appellant sustained a lumbosacral sprain on July 23, 2010. On July 10, 2012 appellant claimed a consequential lumbar injury occurring on June 20, 2012. In support of his claim, he submitted reports from Dr. Lenz, an attending Board-certified family practitioner, who diagnosed a lumbosacral strain on July 23 and 26, 2010. He did not observe or diagnose an intervertebral disc herniation or other disc-related pathology. In July 2, 2012 and March 20, 2014 reports, Dr. Lenz noted that appellant sustained a new back injury on June 20, 2012 while doing yard work at home. However, he did not opine that the accepted lumbar sprain caused or was pathophysiologically connected to the June 20, 2012 nonoccupational injury.

Dr. Khalouf, an attending osteopath Board-certified in pain medicine, did not address causal relationship in his reports.

[6] In a January 5, 2015 letter, OWCP advised appellant that it could not authorize surgery at that time, pending the outcome of the hearing.

[7] *S.M.*, 58 ECAB 166 (2006); *Raymond A. Nester*, 50 ECAB 173, 175 (1998).

[8] *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

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

Dr. Harvey, an attending osteopath Board-certified in orthopedic surgery, attributed the worsening of appellant's symptoms in June 2012 to the accepted lumbar sprain, but did not provide any rationale to support this conclusion. He posited that appellant was misdiagnosed in 2010, as his symptoms were indicative of a disc protrusion and not a lumbar sprain. However, Dr. Harvey did not explain the objective clinical findings from contemporaneous medical reports that supported that appellant sustained a more significant injury than the lumbosacral sprain diagnosed by Dr. Lenz. The lack of medical rationale significantly diminishes the probative value of Dr. Harvey's opinion.[10]

Additionally, Dr. Harvey opined on March 28, 2014 that appellant's left S1 radiculopathy was "directly related to the work injury of August 20, 2012." However, the accepted lumbar sprain occurred on July 23, 2010, not August 20, 2012. The only other injury demonstrated by the record was the June 20, 2012 nonoccupational yardwork incident. This inaccurate history of injury further reduces the probative quality of Dr. Harvey's opinion.[11]

Appellant also provided reports from April 2014 to January 2015 signed by a physician assistant. However, as physician assistants are not considered physicians under FECA, these reports are not probative medical evidence. Section 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *J.T.*, Docket No. 12-1903 (issued February 15, 2013). *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

As appellant did not submit medical evidence supporting that the accepted June 20, 2012 lumbosacral sprain caused a June 20, 2012 consequential injury, he did not meet his burden of proof. Thus, OWCP properly denied expansion of the claim, including denial of the April 3, 2014, January 5 and 12, 2015 lumbar surgeries. The Board finds that OWCP's March 4, 2015 decision is proper under the law and facts of this case.

On appeal, counsel contends that OWCP's March 4, 2015 decision is "contrary to law and fact." As set forth above, the medical evidence does not support that the accepted lumbar sprain caused a subsequent lumbar disc herniation or predisposed appellant to further 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 a lumbar disc condition consequential to an accepted lumbosacral sprain.

[10] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[11] *Douglas M. McQuaid*, 52 ECAB 382 (2001).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 4, 2015 is affirmed.

Issued: November 16, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board