



## **FACTUAL HISTORY**

On February 26, 2015 appellant, then a 63-year-old librarian, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries in the performance of duty on February 17, 2015.<sup>3</sup> On the claim form she alleged that she was removing 40 books from high shelves and placing them on a cart, and while pushing the cart, she injured her back. Appellant described the injury as a fracture of the upper and lower back. According to the claim form, she stopped work on February 18, 2015 and returned to work on February 23, 2015. The record also contains claims for compensation (Form CA-7) for April 13 to 24, 2015, and April 27 to May 8, 2015.

Appellant submitted a report dated February 18, 2015 from Dr. David Walker, an employing establishment physician, who provided a history that she complained of a back strain while lifting books from a high shelf. Dr. Walker also indicated that she reported performing heavy pushing activity over the past month at work, which had aggravated her back pain. He diagnosed back strain. An x-ray of the thoracic spine dated February 18, 2015 showed diffuse osteopenia, according to Dr. Darin J. Hildoer, a radiologist.

On February 19, 2015 appellant was treated by Dr. Ashley Pullen, a Board-certified family practitioner. In a report of that date, Dr. Pullen reported that appellant had a history of osteoporosis of the spine and pain worsened in the mid and lower back after moving a heavy cart at work. She provided results on examination and diagnosed back pain, osteoporosis, urinary tract infection and pleurisy. Dr. Pullen indicated that a magnetic resonance imaging (MRI) scan was recommended to rule out possible vertebral fractures.

In a thoracic spine MRI scan report dated February 24, 2015, Dr. Hildoer, a diagnostic radiologist, reported acute to subacute mild to moderate fracture of the T5 vertebral body, and acute mild compression fracture of the T6 vertebral body.

In a report dated March 13, 2015, Dr. Joseph Traina, a Board-certified neurosurgeon, provided a history that appellant had an injury on January 20, 2015 and a second injury while lifting many heavy books on February 17, 2015. He provided results on examination and diagnosed closed thoracic fracture. Dr. Traina indicated that appellant should be off work until April 13, 2015.

Dr. Traina submitted a note dated April 27, 2015, indicating that when he saw appellant on March 13, 2015 she reported suffering a muscle strain at work on January 20, 2015. He reported that she had recuperated from that injury, and then on February 17, 2015 she was moving heavy books and felt a sharp pain. Dr. Traina noted that the MRI scan of February 24, 2015 reported an acute fracture.

By decision dated May 22, 2015, OWCP denied appellant's claim for compensation. It accepted that the February 17, 2015 employment incident occurred as alleged, but found that the

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<sup>3</sup> Appellant also filed an occupational disease claim (Form CA-2) on February 26, 2015. (OWCP File No. xxxxxx648). The claim form described work activity on January 20, 2015, such as opening heavy boxes and moving mail containers. Appellant reported on the claim form she injured her lower and upper back. This claim is not before the Board on this appeal.

medical evidence of record was insufficient to establish an injury causally related to the February 17, 2015 employment incident.

Appellant requested a review of the written record before an OWCP hearing representative on June 15, 2015. She submitted a June 15, 2015 report from Dr. Pullen. Dr. Pullen noted that appellant had a history of osteoporosis, and was seen on February 19, 2015 “after moving heavy books in the library.” She reported that appellant had been diagnosed with pleurisy a day earlier. Dr. Pullen wrote, “Due to [appellant’s] history of osteoporosis, I recommended a[n] MRI [scan] of the spine to rule out compression fractures as the heavy lifting could have resulted in a compression fractures of the spine. [Appellant] had MRI [scans] of the spine that did confirm acute compression fractures of the spine. She has been referred to and followed by specialists since the diagnosis of vertebral compression fractures.”

By decision dated November 2, 2015, the hearing representative affirmed the May 22, 2015 OWCP decision. The hearing representative found that the medical evidence was not rationalized with respect to causal relationship between a thoracic fracture and the February 17, 2015 employment activity.

On November 30, 2015 appellant requested reconsideration of her claim. She indicated that she had mailed a CD with her MRI scan results to the hearing representative and would like a medical expert to review the results. Appellant noted that the MRI scan results showed an acute fracture, which physicians use to describe a recent injury. She submitted a physical therapy note and an undated note referring to a chest x-ray.

By decision dated December 15, 2015, OWCP denied merit review of the claim. It found that appellant had not submitted pertinent and relevant new evidence with respect to the medical issue presented.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA has the burden of proof to establish that he or she sustained an injury while in the performance of duty.<sup>4</sup>

In order to determine whether an employee actually sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether “fact of injury” has been established. Generally, “fact of injury” consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the employment incident caused a personal injury, and generally this can be established only by medical evidence.<sup>5</sup>

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty, and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the

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<sup>4</sup> *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

<sup>5</sup> *See John J. Carlone*, 41 ECAB 354, 357 (1989).

specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>6</sup>

### ANALYSIS -- ISSUE 1

In the present case, the claim filed was for an injury from removing books from a high shelf and pushing a cart on February 17, 2015.<sup>7</sup> OWCP has accepted the factual element of this claim. The issue is whether the medical evidence of record establishes a diagnosed condition causally related to the identified February 17, 2015 incidents.

As noted, appellant received treatment from Dr. Walker on February 18, 2015. He provides a brief history of lifting books from a high shelf, but did not provide an opinion as to causal relationship between a diagnosed condition and the employment activity. Dr. Pullen treated appellant on February 19, 2015 noting a history of osteoporosis. A February 24, 2015 MRI scan showed acute compression fractures at T5 and T6.

Dr. Pullen also did not provide a rationalized medical opinion on causal relationship between diagnosed compression fractures and the February 17, 2015 employment activity. Her June 15, 2015 report provides only a brief history of moving heavy books without further explanation. Dr. Pullen subsequently reports that an MRI scan was ordered as heavy lifting could have caused compression fractures. The MRI scan, once completed, confirmed acute compression fractures. However, this is not a rationalized medical opinion as it is speculative and lacking any medical explanation as to how the specific incidents on February 17, 2015 caused compression fractures.<sup>8</sup> It is not enough for the MRI scan to show acute compression fractures. There must be a clear explanation as to why the physician believes that the findings on the February 24, 2015 MRI scan were the result of the identified employment activity on February 17, 2015. This is particularly important in this case because, as noted above, appellant had alleged other recent incidents of lifting and pushing items.

The February 24, 2015 MRI scan report of Dr. Hildoer provided no opinion on causal relationship. As such, it is of limited probative value.<sup>9</sup>

Dr. Traina treated appellant on March 13, 2015, but did not provide an opinion on causal relationship between a diagnosed condition and the February 17, 2015 employment incidents. In an April 27, 2015 note, he referred to MRI scan results, without further explanation.

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<sup>6</sup> *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

<sup>7</sup> Appellant has also filed an occupational disease claim, for an injury occurring over more than on workday. With respect to the occupational disease claim, she identified a January 20, 2015 incident. The Board also notes that the history provided to Dr. Walker in the February 18, 2015 treatment note referred to heavy pushing activity for a month. To the extent that appellant is claiming an injury from such activity commencing on January 20, 2015 and continuing, she may pursue that issue with respect to the occupational claim which is not presently before the Board.

<sup>8</sup> Medical opinions using terms such as the condition is "probably" related, "most likely" related or "could be" related are speculative and diminish the probative value of the medical opinion evidence. *Kathy A. Kelley*, 55 ECAB 206, 211 (2004).

<sup>9</sup> See *J.D.*, Docket No. 16-0064 (issued June 1, 2016); *Michael E. Smith*, 50 ECAB 313 (1999).

The Board finds that the medical evidence of record does not include a medical report that has a complete factual and medical background and a rationalized medical opinion on the issue of causal relationship. It is appellant's burden of proof to establish the claim, and the Board finds that she did not meet her burden in this case.

On appeal, appellant reiterates her argument that a medical expert should review a CD of diagnostic testing. She included a copy of a CD and medical evidence of record. As noted, it is appellant's burden of proof to establish her claim. The Board has reviewed the medical evidence of record that was before OWCP as of November 2, 2015. For the reasons discussed above, appellant did not meet her burden in this case.

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.

### **LEGAL PRECEDENT -- ISSUE 2**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>10</sup> OWCP's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent evidence not previously considered by OWCP."<sup>11</sup> 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

In the present case, appellant submitted a reconsideration request dated November 30, 2015. However, she did not show that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by OWCP. Appellant argued that the medical evidence of record showed an acute fracture and this should require further development of the evidence and review by a medical expert. As discussed above, it is appellant's burden of proof to submit probative evidence and the medical evidence showing acute thoracic fractures did not establish the claim. The reopening of a case is not required where the legal contention has no reasonable color of validity.<sup>13</sup>

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<sup>10</sup> 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

<sup>11</sup> 20 C.F.R. § 10.606(b)(3).

<sup>12</sup> *Id.* at § 10.608(b); *see also* *Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>13</sup> *Elaine M. Borghini*, 57 ECAB 549 (2006); *Annette Louis*, 54 ECAB 783 (2003).

The underlying merit issue presented was a medical issue, and appellant did not submit any pertinent and relevant new evidence on the issue of causal relationship between a diagnosed condition and the February 17, 2015 employment activity.

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered by OWCP. Accordingly, she did not meet the requirements of 20 C.F.R. § 10.606(b)(3) and OWCP properly declined to review the merits of the claim.

### **CONCLUSION**

The Board finds that appellant did not establish an injury causally related to a February 17, 2015 employment incident. The Board further finds that OWCP properly denied the reconsideration request without merit review of the claim under 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated December 15 and November 2, 2015 are affirmed.

Issued: July 8, 2016  
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