



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the prior decision are incorporated herein by reference. The relevant facts follow.

On December 11, 2013 appellant, then a 31-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she pulled up to a house, got out of her truck, and fell while in the performance of duty. She indicated that she injured her lower back and had pain shooting down the right leg. Appellant stopped work on that date.

By decision dated February 10, 2014, OWCP denied the claim, finding that appellant had established that the December 11, 2013 employment incident occurred in the performance of duty as alleged. However, the evidence of record was insufficient to establish that appellant's diagnosed conditions were causally related to the accepted incident.

Appellant subsequently requested a hearing and submitted additional medical evidence.

A February 19, 2014 magnetic resonance imaging (MRI) scan, read by Dr. Fraser H. Brown, a Board-certified diagnostic radiologist and neuroradiologist, revealed severe degenerative disc disease at L5-S1, with disc extrusion, herniated disc material contacting the traversing S1 nerve roots, and moderate right foraminal narrowing with displacement of the exiting L5 nerve root.

In a June 25, 2014 report, Dr. Menachem M. Meller, a Board-certified orthopedic surgeon, noted that he had seen appellant on February 11 and 25, March 13, and April 1, 2014. He advised that during her treatment she presented primarily with axial back pain at the belt line and at the posterior superior iliac spine. Dr. Meller read the results of the February 19, 2014 MRI scan and advised that it revealed severe degenerative disc disease at L5-S1 with disc extrusion, herniated disc material contacting the traversing S1 nerve roots, and moderate right foraminal narrowing with displacement of the exiting L5 nerve root. He noted that appellant had physical therapy on January 6, 2014 and was being released for full-time work with permanent restrictions. Dr. Meller summarized that she had a slip and fall on ice landing on her back and was found to have a significant amount of preexisting degeneration as well as a herniated disc at L5-S1 that was contacting or abutting on the traversing S1 nerve root and displacing the exiting L5 nerve root. He determined that appellant had not reached maximum medical improvement and referred her to neurology as he believed that she might benefit from surgical decompression and possibly a fusion.

Following a June 9, 2014 hearing, OWCP's hearing representative issued a decision on July 28, 2014, affirming OWCP's hearing representative affirmed the February 10, 2014 decision. The hearing representative found that the medical evidence of record was insufficient to establish causal relationship.

On February 24, 2015 appellant, through counsel, requested reconsideration of the merits of her claim and submitted additional evidence.

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<sup>3</sup> Docket No. 16-0126 (issued May 18, 2016).

In a February 17, 2015 report, Dr. Steven Valentino, an osteopath and Board-certified orthopedic surgeon, noted that appellant presented with low back pain localized from L3 through S1 with radiation into both legs with numbness. He indicated that her symptoms were apportioned to the work injury, which occurred on December 11, 2013. Dr. Valentino noted that appellant slipped on ice while at work as a letter carrier. He also indicated that lumbar decompression surgery was recommended, but had been denied. Dr. Valentino explained that appellant had a prior work-related injury in 2001 which occurred while working as a ramp agent for an airline. He noted that she sustained an L5-S1 disc herniation, which was treated with chiropractic care and she improved such that she was able to return to full-time full duty. Dr. Valentino noted that his review of the February 19, 2014 MRI scan revealed severe degenerative disc at L5-S1 with disc extrusion, with herniated disc material contacting the traversing S1 nerve roots. He opined that “[c]learly this accident caused an aggravation of her prior L5-S1 disc herniation along with aggravation of underlying degenerative disc disease and sciatica.” Dr. Valentino noted that his opinion was made within a reasonable degree of medical certainty and based upon positive objective findings on physical examination, positive MRI scan, and the fact that she had recovered from her prior 2001 work injury and had returned to work full-time full duty and was working without any symptomatology or impairment until the claimed December 11, 2013 employment incident.

By decision dated May 21, 2015, OWCP denied modification of its prior decision, finding that she had not met her burden of proof to establish her claim.

Appellant subsequently appealed to the Board. By decision dated May 18, 2016, the Board affirmed the May 21, 2015 decision. The Board found that the medical evidence of record did not sufficiently address how the December 11, 2013 activities at work caused or aggravated a low back condition and was, therefore, insufficient to establish her claim.

OWCP received reports dated April 1, 2014 from Dr. Meller. Dr. Meller diagnosed low back pain.

By letter dated August 25, 2016, appellant, through counsel, requested reconsideration of the merits of his claim and submitted an August 10, 2016 report from Dr. Valentino. Counsel argued that the new report from Dr. Valentino supported that appellant aggravated her preexisting degenerative low back condition. He also argued that Dr. Valentino’s report provided sufficient medical reasoning to establish causal relationship.

In an August 10, 2016 report, Dr. Valentino provided additional details and noted that appellant presented with low back pain with radiation into both legs with numbness in her feet and calves. He also found that her back symptoms exceeded her leg complaints, and graded her symptoms as an 8-9 out of 10 on a visual analog scale. Dr. Valentino related that appellant “very clearly apportions her symptoms to a work injury which occurred on [December 11, 2013].” He indicated that she slipped and fell on ice while at work as a letter carrier. Dr. Valentino also noted that appellant described a direct blow as well as a torsional mechanism of injury sufficient to aggravate the degenerative changes as well as a disc herniation. He further explained that appellant sustained a prior injury in 2001 wherein she sustained an L5-S1 disc herniation. Dr. Valentino indicated that, after three years of conservative care, she noted improvement and was able to return

to work full-time, full duty. He also noted that there were no records of any ongoing, low back or radicular symptoms from that point up until the work-related injury of December 11, 2013.

Dr. Valentino indicated that he had reviewed the report of Dr. Meller and opined that the report “clearly apportions the onset of her symptoms to the work-related injury of December 11, 2013 and indicates that she will have permanent restrictions. Likewise, he also discusses the role of lumbar decompression plus or minus fusion in the future in which she could considerably gain additional functional benefit.” Dr. Valentino explained that he had reviewed the Board’s decision and order and advised that the “mechanism of injury was a torsional force as well as a direct blow to the back,” which was sustained on December 11, 2013. He explained that this mechanism of injury is sufficient to aggravate preexisting degenerative changes at L5-S1 along with disc herniation. As noted above, appellant’s back was in a weakened state prior to the work-related injury of December 11, 2013. Dr. Valentino opined that it was “reasonable therefore that the torsional and direct blow force, which she sustained on December 11, 2013 did aggravate her preexistent degenerative changes along with disc herniation which in the MRI scan are noted to be severe.” He reiterated that his statements were made within a reasonable degree of medical certainty.

In a letter dated September 19, 2016, counsel advised OWCP that he was following up on the request for reconsideration.

By decision dated November 17, 2016, OWCP denied modification.<sup>4</sup> It found that Dr. Valentino’s August 25, 2016 report was very similar to his February 17 2015 report. In particular, OWCP found that Dr. Valentino’s report was inconsistent, as he indicated that appellant was able to return to work full-time, full-duty employment without any ongoing low back or radicular symptoms until the work-related injury of December 11, 2013. It explained that Dr. Valentino then noted that her back was in a weakened state prior to the work-related injury of December 11, 2013 and opined that it was reasonable that the torsional and direct blow force which she sustained on December 11, 2013 did aggravate her preexisting degenerative changes along with disc herniation which in the MRI scan was noted to be severe. OWCP explained that returning to full duty and having no records of any ongoing low back or radicular symptoms there years after the 2001 injury was “contraindicated” by the statement that appellant was in a weakened state prior to the work injury of December 11, 2013. It further found that no additional objective findings were provided by Dr. Valentino explaining how he arrived at his conclusion and he still did not explain how the February 19, 2014 MRI scan findings were supportive of a new injury, the key elements in the Board’s prior decision.

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<sup>4</sup> OWCP’s November 17, 2016 decision denied modification of the Board’s May 18, 2016 decision. OWCP, however, is not authorized to review Board decisions. Although the May 18, 2016 Board decision was the last merit decision of record, its May 21, 2015 decision is the appropriate subject of possible modification by OWCP. See 20 C.F.R. § 501.6(d).

## LEGAL PRECEDENT

A claimant seeking benefits under FECA<sup>5</sup> 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, including that an injury was sustained in the performance of duty as alleged, and that any specific condition or disability claimed is causally related to the employment injury.<sup>6</sup>

To determine if an employee 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 that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.<sup>7</sup> The second component is whether the employment incident caused a personal injury.<sup>8</sup> An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.<sup>9</sup>

Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue.<sup>10</sup> A physician’s opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.<sup>11</sup> Additionally, the physician’s opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant’s specific employment factor(s).<sup>12</sup>

## ANALYSIS

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

Appellant alleged that on December 11, 2013 she sustained an injury to her lower back with pain shooting down her right leg after she fell while exiting her delivery truck in the performance of duty. OWCP accepted that the event occurred as alleged.

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<sup>5</sup> *Supra* note 1.

<sup>6</sup> 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

<sup>7</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>8</sup> *John J. Carlone*, 41 ECAB 354 (1989). .

<sup>9</sup> *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

<sup>10</sup> *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>11</sup> *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>12</sup> *Id.*

OWCP denied appellant's claim for compensation as the medical evidence of record was insufficient to establish that her low back condition was causally related to her accepted employment incident of December 11, 2013.

On reconsideration appellant submitted a new report from Dr. Valentino, dated August 10, 2016. Dr. Valentino provided additional details and noted that he was attempting to provide an explanation and response to the Board regarding the cause of appellant's condition. For example, he indicated that he had reviewed the Board's decision and order and described appellant's activities at work, which included that she described a direct blow as well as a torsional mechanism of injury which was sufficient to aggravate the degenerative changes as well as a disc herniation. Dr. Valentino noted her prior injury in 2001 wherein she sustained an L5-S1 disc herniation and explained that after three years of conservative care, she improved and was able to return to work full-time, full duty until she sustained reinjury on December 11, 2013. He also explained that there were no records of any ongoing, low back or radicular symptoms from that point up until the work-related injury of December 11, 2013. Dr. Valentino reviewed the report from Dr. Meller and explained that his report "clearly apportions the onset of her symptoms to the work-related injury of December 11, 2013 and indicates that she will have permanent restrictions." He explain that the "mechanism of injury was a torsional force as well as a direct blow to the back," which was sustained on December 11, 2013. Dr. Valentino explained that the mechanism of injury was sufficient to aggravate appellant's preexisting degenerative changes at L5-S1 along with disc herniation. He also explained that appellant's back was in a weakened state prior to the work-related injury of December 11, 2013. Dr. Valentino opined that it was "reasonable, therefore, that the torsional and direct blow force, which she sustained on December 11, 2013 did aggravate her preexistent degenerative changes along with disc herniation which in the MRI scan are noted to be severe."

The Board observes that Dr. Valentino reviewed the Board's prior decision and provided rationale as to how he arrived at his opinion by way of a medical explanation to show how the accepted December 11, 2013 employment incident aggravated appellant's preexisting conditions. The Board notes that he provided an opinion that appellant recovered from her prior injury and was able to work full-time full duty, and this opinion is not contraindicated by his statement that appellant's back was in a weakened state prior to the December 11, 2013 incident. The Board finds that his opinion shows that she recovered enough to return to full duty until she sustained a new injury on December 11, 2013. Dr. Valentino explained in his report that her back was weakened, which suggests that it was not as strong as it originally was. The Board finds that, although his report is not sufficiently rationalized to meet appellant's burden of proof in establishing her claim, it stands uncontroverted in the record and is sufficient to require further development of the case.<sup>13</sup>

Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter. While the appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>14</sup>

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<sup>13</sup> *John J. Carlone, supra note 8; Horace Langhorne, 29 ECAB 820 (1978).*

<sup>14</sup> *John W. Butler, 39 ECAB 852 (1988).*

The Board will remand the case to OWCP for referral to an appropriate medical specialist to further develop the medical evidence regarding whether appellant sustained an injury causally related to the accepted December 11, 2013 employment incident. Following this and any other further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 17, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development in accordance with this decision of the Board.

Issued: July 9, 2018  
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