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

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| **M.K., Appellant** | ) | |
| **and** | ) | **Docket No. 17-1259** |
| | ) | **Issued: July 16, 2018** |
| **TENNESSEE VALLEY AUTHORITY, DIVISION OF NUCLEAR POWER, Soddy Daisy, TN, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant[1]
*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 May 19, 2017 appellant, through counsel, filed a timely appeal from a March 3, 2017 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 the case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The record provided to the Board includes evidence received after OWCP issued its March 3, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

## ***ISSUE***

The issue is whether appellant has met his burden of proof to establish a lumbar injury causally related to the accepted March 22, 2016 employment incident.

## ***FACTUAL HISTORY***

On April 21, 2016 appellant, then a 43-year-old craftsman, filed a traumatic injury claim (Form CA-1) alleging that on March 22, 2016 he experienced a back strain during the performance of his federal employment duties, which then worsened over a period of three weeks. He related that on March 22, 2016 he was one of three craftsmen who removed four wash screens for divers, each screen weighed between 350 to 400 pounds. While removing the second screen, one of the other craftsmen lost control of the screen and he experienced a low back strain while trying to hold the screen. Appellant stopped work April 21, 2016.

On the Form CA-1 the employing establishment acknowledged that appellant was engaged in moving screens on March 22, 2016 and that a screen had shifted or slipped and came to rest on the grating below. However, it disputed that the entire weight of the basket was placed on appellant. The employing establishment advised that a 14-foot screen weighed 338 pounds and a 10-foot screen weighed 242 pounds. It further related that appellant did not mention any back injury in an e-mail he sent that day and he did not lose time from work until the second week of April 2016.

An undated work release from Erlanger North Emergency Department noted that appellant could return to work without restriction on April 18, 2016.

In an April 7, 2016 report, Dr. Mark G. Freeman, a Board-certified orthopedic surgeon, evaluated appellant for right hip complaints. Appellant indicated that he had an S1 joint injection six to seven months prior at the chiropractor's office and that the pain went away. However, the pain returned three weeks ago. Appellant denied having any accidents or injuries. Dr. Freeman provided an impression of right hip impingement syndrome. He opined that he did not believe that appellant's hip was the cause of his complaints and recommended an evaluation of appellant's spine. Other medical history was significant for lumbar spine fusion, femoral acetabular impingement, and obesity.

An April 13, 2016 lumbar spine computerized tomography (CT) scan indicated that appellant was status post spinal fusion from L2 through S1. The scan revealed L3 on L4 and LI on L2 retrolisthesis with intervertebral disc space narrowing and vacuum disc phenomenon and severe L3-4 spinal stenosis secondary to disc bulging and ligamentum flavum hypertrophy hyperfrophy and osteophytes. No acute compression fracture was seen. An impression was provided of multilevel lumbar spondylosis with severe L3-4 spinal stenosis.

In an April 18, 2016 note, Gary Elledge, a certified family nurse practitioner, noted appellant's history that he hurt his lower back approximately three weeks prior while moving some heavy screens. He also noted that appellant had undergone lumbar spinal fusion in 1998. Nurse Elledge noted that appellant's April 13, 2015 CT scan showed multilevel spondylosis, severe L4-5 spinal stenosis, and status post L2-S1 transpedicular spinal fusion.

An April 21, 2016 lumbar spine magnetic resonance imaging (MRI) scan revealed severe L3 spinal stenosis secondary to large disc bulging and retrolisthesis, status post L2-S1 transpedicular spinal fusion, and mild L1-2 spinal stenosis.

In an April 21, 2016 report, Eric A. Henderson, a physician assistant, noted appellant's history of L2 thru S1 posterior fusion in 1999 and cervical fusion in 2014. He reported that appellant presented with a three-week history of progressive back pain after carrying a 400-pound object overhead, which a coworker dropped, and he was forced to catch in an awkward motion. Appellant noted that he felt a pop in his low back. An assessment of L4-3 stenosis with radiculopathy, right L4, L5, S1 parathesias, and history of L2 through S1 posterior fusion by Dr. Broadstone in 1999 was provided.

In an April 22, 2016 return to work note, Mr. Henderson indicated that appellant had back and lower extremity pain and would remain off work until surgical evaluation on May 16, 2016. He also noted that appellant had missed work for the above problems since April 11, 2016.

In a May 2, 2016 report, Dr. Daniel Kueter, a Board-certified neurosurgeon, indicated that appellant underwent a successful cervical decompression and fusion in 2014. Appellant reported that his right leg went numb in March 2016, which he thought was caused by 400 pounds of equipment and weight imposed on his back. Dr. Kueter indicated that appellant was disabled and unable to work due to this condition. He diagnosed previous anterior cervical decompression and fusion with revision, L2 through S1 posterior spinal decompression and fusion, new onset severe right lumbar radiculopathy after a workers' compensation incident, lumbar disc rupture L3-4 right, and lumbar stenosis L5-S1 right. Dr. Kueter recommended an expedited lumbar laminotomy and discectomy at L2-4 on the right and a lumbar laminectomy with partial facetectomy at L5-S1 on the right. He noted that spinal fusion would have to be explored. In an accompanying May 2, 2016 note, Dr. Kueter indicated that appellant was evaluated for severe low back, hip, and right leg pain. He noted that appellant was to remain off work for the month of May.

OWCP, by development letter dated May 18, 2016, advised appellant that it had paid a limited amount of medical expenses as his injury appeared minor and was not controverted. However, it was now formally adjudicating his claim. OWCP requested that appellant submit additional factual and medical information, including a detailed report from his attending physician addressing causal relationship between any diagnosed condition and the identified work incident. Appellant was afforded 30 days in which to provide the requested information.

In a May 23, 2016 statement, appellant explained that another worker had lost his handhold on the screen that they were carrying and that the screen tried to flip away, which put all the weight on him. He indicated that he delayed reporting his injury and in seeking treatment because he did not realize that he was hurt badly when the incident occurred. Appellant reported that he had no back problems between his low back surgery in 1998 and the March 22, 2016 screen handling incident.

In a May 25, 2016 report, Dr. Kueter essentially repeated the contents of his earlier May 2, 2016 report.

On June 2, 2016 Dr. Kueter performed laminectomy, foraminotomy and facetectomy, and microdiscectomy. Treatment was for the diagnoses of acute lumbar strain, lumbar radiculopathy, spinal stenosis, and disc bulge at L5-S1.

In a June 9, 2016 letter, Dr. Brenda K. Sowter, a senior employing establishment physician and osteopathic manipulative therapy specialist, acknowledged that, during the March 22, 2016 incident, that there was a slipping of the equipment during maneuvering, the weight of 350 pounds was distributed amongst three workers. She noted that appellant did not indicate any pain or symptoms at the time of the incident and did not voice any complaints or injury occurring after the incident. It was not until four weeks later (and time away from work) that appellant returned to work and then indicated that he had sustained an injury to his back. Dr. Sowter further noted that he has had extensive surgery previously to his back and that he had indicated through witness statements that "'there was no issue with the disc, but [that] there was some issue with pins from a previous surgery.'" She additionally advised that the treating physician's diagnosis of lumbar stenosis supported a longstanding and slow process to form in the spine and was not sustained as a result of an alleged work injury. Dr. Sowter concluded that, given the circumstances validated by eye witnesses and participants in the work event, the significant delay in reporting the alleged injury and the preexisting diagnosis and prior surgery, the claim should be deemed a nonwork-related injury.

In an undated witness statement, M.S., a coworker, related that he spoke with appellant over the telephone on May 5, 2016. He indicated that appellant stated that he needed surgery and that there was no issue with the disc, "but [that] there was an issue with some pins from a previous surgery." An unsigned, undated account of injury, which supported Dr. Sowter's description of the incident, was also provided.

By decision dated June 22, 2016, OWCP denied appellant's claim. It found that the medical evidence of record contained insufficient rationale to establish that his diagnosed medical condition was causally related to the accepted March 22, 2016 employment incident.

On July 8, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on January 25, 2017. He further described the screen/basket-handling incident from March 22, 2016. Appellant indicated that he had never previously engaged in this particular screen-handling activity. He also confirmed that he returned to work in a light-duty capacity, but had intermittent absences due to pain until he stopped work completely to undergo the December 12, 2015 low back surgery. Appellant indicated that he remained off work.

Additional evidence was received prior to and after the hearing.

In a June 30, 2016 report, Dr. Kueter opined that appellant sustained a workers' compensation injury on March 22, 2016 when a 400-pound wash screen from a frame was being carried and the weight was transferred to appellant. He noted that appellant immediately felt the onset of back pain, which progressively worsened over the next few weeks and worsened to include lumbar radiculopathy. Dr. Kueter summarized his examination of appellant on May 2, 2016 and indicated that he was diagnosed with workers' compensation injury on that date. Immediate surgical intervention was recommended. Appellant underwent surgery on June 2, 2016, with

significant improvement. Dr. Kueter concluded that appellant's clinical symptomatology was consistent with a workers' compensation injury due to heavy lifting performed on March 22, 2016, with significant weight burden transferred to his body and subsequent absorption by his spine.

A copy of the June 5, 2016 operative report and a June 30, 2016 postoperative report from Dr. Kueter were also received.

In a July 7, 2016 note, Dr. Kueter released appellant to light-duty work with restrictions effective July 11, 2016. Appellant returned to work with restrictions effective July 11, 2016.

On December 12, 2016 Dr. Kueter removed indwelling hardware from L2 through S1 followed by a new posterior interbody and L3-4 fusion with instrumented hardware from L3 through L5. In a January 9, 2017 report, Sarah C. Johnson, a physician assistant, reported on appellant's status post hardware removal L2 through S1 with new posterior fusion L3 through L5.

By decision dated March 3, 2017, an OWCP hearing representative affirmed OWCP's June 22, 2016 decision. The hearing representative found the medical evidence was insufficient to establish "a work-related causation of or contribution to any low back condition" resulting from the March 22, 2016 employment-related lifting incident.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[4] has the burden of proof to establish 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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty, as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[6]

In order to determine whether 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 conjunctively. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident that is alleged to have occurred.[7] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[8]

[4] *Supra* note 2.

[5] *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[7] *Gary J. Watling*, 52 ECAB 278 (2001).

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

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 claimant.[9]

## ***ANALYSIS***

The Board finds that appellant has not established that the accepted March 22, 2016 employment incident caused his diagnosed lumbar condition.

The determination of whether an employment incident caused an injury is generally established by medical evidence.[10]

Dr. Freeman's April 7, 2016 report is insufficient to establish the claim as he did not provide a history of injury[11] or specifically address whether appellant's employment activities had caused or aggravated the diagnosed right hip impingement syndrome.[12]

Appellant submitted several reports from Dr. Kueter. In his May 2 and 25, 2016 reports, Dr. Kueter noted that appellant stated that his right leg went numb in March 2016, which he thought was caused by 400 pounds of equipment and weight imposed on his back. He indicated that it was a workers' compensation injury. Dr. Kueter provided an impression of new onset severe right lumbar radiculopathy, lumbar disc rupture L3-4 right, and lumbar stenosis L5-SI right and recommended an expedited surgery. He also opined that appellant was totally disabled. However, Dr. Kueter did not provide any medical rationale explaining the basis of his conclusory opinion regarding causal relationship between appellant's back condition and the accepted work incident.[13] Therefore, his opinion is insufficient to meet appellant's burden of proof.

In his June 30, 2016 report, Dr. Kueter related that appellant underwent surgical intervention on June 2, 2016. He indicated that appellant sustained a workers' compensation injury on March 22, 2016 when a 400-pound wash screen from a frame was being carried and the

[9] *Solomon Polen*, 51 ECAB 341 (2000).

[10] *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

[11] *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

[12] *A.D.*, 58 ECAB 149 (2006); Docket No. 06-1183 (issued November 14, 2006) (medical evidence which does not offer any opinion regarding the cause of an employee s condition is of limited probative value on the issue of causal relationship).

[13] *See T.M.*, Docket No. 08-0975 (issued February 6, 2009) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

weight was transferred to appellant. Appellant immediately felt the onset of back pain, which progressively worsened over the next few weeks to include radiculopathy. Dr. Kueter concluded that appellant's clinical symptomatology was consistent with a workers' compensation injury due to heavy lifting performed on March 22, 2016, with significant weight burden transferred to his body and subsequent absorption by his spine. The Board finds that Dr. Kueter's opinion is conclusory in nature without any additional explanation as to how appellant's work activities physiologically caused, precipitated, or aggravated the diagnosed lumbar conditions.[14] The Board has held that the fact that a condition manifests itself or worsens during a period of employment or that work activities produce symptoms revelatory of an underlying condition does not raise an inference of causal relationship between a claimed condition and employment factors.[15] Dr. Kueter did not otherwise provide medical rationale explaining how or why appellant's back condition was caused or aggravated by the accepted March 22, 2016 employment incident. A well-rationalized opinion is particularly warranted when there is a history of preexisting condition.[16] For these reasons, Dr. Kueter's report is insufficient to establish appellant's claim.

Appellant submitted evidence from a nurse practitioner and a physician assistant. However, these health care providers are not considered physicians under FECA.[17] Thus, these records are of no probative medical value in establishing appellant's claim.

Appellant also submitted diagnostic test reports. These reports are of limited probative value as they fail to provide an opinion on causal relationship between his accepted employment incident and his diagnosed lumbar conditions. For this reason, this evidence is insufficient to meet appellant's burden of proof.[18]

OWCP also received a report from Dr. Sowter, an employing establishment physician, dated June 9, 2016. Dr. Sowter noted appellant's history of injury, as well as his medical history. She concluded that, given the circumstances validated by an eyewitness to the accepted employment incident, appellant's delay in reporting the alleged injury, and his preexisting lumbar conditions, his current lumbar conditions were not work related.

[14] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[15] *B.B.*, Docket No. 13-0256 (issued August 13, 2013); *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

[16] *See J.D.*, Docket No. 16-0887 (issued November 4, 2016); *L.M.*, Docket No. 16-0143 (issued February 19, 2016).

[17] *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *Sean O Connell*, 56 ECAB 195 (2004) (reports by nurse practitioners and physician assistants are not considered medical evidence as these persons are not considered physicians under FECA). 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

[18] *See A.D., supra* note 12.

As appellant has not submitted medical evidence sufficient to establish that his diagnosed lumbar condition was causally related to the accepted March 22, 2016 employment incident, he has failed to meet his burden of proof.

On appeal, counsel contends that OWCP nitpicked the evidence. However, as explained above, appellant has not submitted sufficient medical evidence to establish his 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.

## ***CONCLUSION***

The Board finds that appellant has failed to meet his burden of proof to establish a lumbar injury causally related to the accepted March 22, 2016 employment incident.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 16, 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