



## **FACTUAL HISTORY**

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

On August 14, 2014 appellant, a 55-year-old truck driver, filed a traumatic injury claim (Form CA-1) alleging that, on July 1, 2014, he experienced severe low back pain putting a chock block under the rear tire of his vehicle. He stopped work on the date of injury.

On July 29, 2014 Dr. William P. Docken, Board-certified in internal medicine, opined that appellant remained disabled due to lower back pain.

Dr. Bahige Asaker, an attending osteopath, evaluated appellant on September 9, 2014 for low back pain. He obtained a history of appellant experiencing severe pain in his back on July 1, 2014 putting a chock block under the wheel of his truck at work and noted that he had not worked since that date. Dr. Asaker indicated that he had a "history of low back pain dating back to 2012." He advised that an August 6, 2014 magnetic resonance imaging (MRI) scan revealed a disc protrusion at L5-S1, spondylosis at T-11 and T-12 with some neural impingement, mild disc bulging with congenital spinal narrowing at L2-3, and mild stenosis at L3-4. He further found that the MRI scan showed moderate-to-marked central spinal stenosis and moderate right L3 neural stenosis, right L3 neural impingement, a moderate asymmetric disc bulge at L4-5, bilateral L4 neural impingement, a nerve root sheath arising from the thecal sac at L5-S1, bilateral mild L5 neural foraminal stenosis, and L11 and L12 spondylosis with a mild disc bulge. Dr. Asaker indicated that x-rays obtained July 3, 2014 showed degenerative joint disease and old trauma. He opined that appellant was disabled from work as he was unable to perform the lifting, continuous sitting, and standing required by his work duties.

By decision dated September 26, 2014, OWCP denied appellant's claim finding that the medical evidence of record was insufficient to establish a diagnosed condition causally related to the accepted employment incident. On October 24, 2014 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. On February 17, 2015 counsel requested a review of the written record in lieu of an oral hearing.

In a report dated July 10, 2014, received by OWCP on February 17, 2015, Dr. Asaker noted that appellant initially sustained a back injury at work in May 2012, but had experienced another injury to his back a week earlier. He diagnosed back strain, L3-4 disc spurring, and degenerative disc disease. Dr. Asaker found that appellant should remain off work pending evaluation by a specialist, noting that appellant's 2012 injury periodically flared up and that he was worried that if he returned to work and no light duty was available he might permanently injure his back.

Dr. Docken, in a report dated November 4, 2014, advised that appellant continued to experience low back pain which increased with bending, stooping, and lifting. He noted that his symptoms began early in July 2014 when he experienced acute pain in his low back after he put

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<sup>3</sup> Docket No. 16-0887 (issued November 4, 2016).

a block under the wheel of his truck. Dr. Docken diagnosed low back pain with underlying lumbar degenerative disease and possible myofascial pain. He also diagnosed lumbar spinal stenosis, which he found was “of degenerative origin, and probably not related to [the] 2012 injury.”

In a November 24, 2014 report, Dr. Christopher M. Bono, a Board-certified orthopedic surgeon, advised that appellant initially felt low back pain in 2012. He reinjured his back in 2014 when he experienced the onset of severe low back pain on the left side placing a stop behind a tire. Dr. Bono advised that appellant’s pain increased when he transitioned from sitting to standing and with extensive sitting and standing.

On January 29, 2015 Dr. Docken found that, as set forth in his July 23, 2014 office note, appellant “incurred acute low back pain on July 1, 2014, specifically related to placing a chock block under his truck while at work. Since then, there has been persisting back pain, as has also been documented....”

By decision dated April 28, 2015, OWCP’s hearing representative affirmed the September 26, 2014 decision, as modified. It found that the reports of Drs. Docken, Asaker, and Bono were sufficient to establish that appellant sustained diagnosed medical conditions, but the claim remained denied as the medical evidence of record was insufficient to establish causal relationship between the diagnosed conditions and the July 1, 2014 employment incident.

On July 7, 2015 appellant, through counsel, requested reconsideration and submitted additional medical evidence. In a July 2, 2015 report, Dr. Joseph S. Barr, an orthopedic surgeon, related that he evaluated appellant on May 14, 2015. He discussed his history of the onset of acute low back pain on July 1, 2014 when he placed a block wedge under the wheel of his truck. Appellant had a history of a 2012 back injury. He had not worked since July 1, 2014. Dr. Barr reviewed an August 1, 2014 MRI scan which he found revealed degenerative changes throughout the lumbar spine, with moderate-to-marked spinal stenosis at L3-4 and L4-5. He diagnosed “postlumbar sprain related to employment.” Dr. Barr noted that appellant had preexisting lumbar spine problems, with one episode of lumbar problems in 2012 causing him to be out of work. He opined that the July 2014 work incident resulted in a permanent aggravation in the underlying process, as evidenced by the findings on MRI scan of lumbar stenosis.

By decision dated August 12, 2015, OWCP denied modification of the April 28, 2015 decision. On October 21, 2015 appellant, through counsel, again requested reconsideration.

In a September 9, 2015 report, Dr. Barr reviewed OWCP’s decision. He indicated that he did not find appellant’s spinal stenosis arose due to trauma, but instead found that the stenosis and lumbar degeneration were permanently aggravated by the July 1, 2014 work incident. Dr. Barr noted that appellant had a prior low back problem in 2012 which resulted in the appellant being out of work for two and a half months and later recovered. He further noted that appellant was able to perform his work duties until the July 1, 2014 work incident. Dr. Barr opined that the July 1, 2014 work incident of bending and twisting could slightly increase disc swelling and swelling in the lumbar facet joints. He found that appellant sustained a “permanent aggravation of a preexisting condition which renders [him] incapable to doing his former work pushing heavy containers of mail.”

By decision dated February 10, 2016, OWCP denied modification of its prior decision.

Appellant, through counsel, then appealed to the Board. By decision dated November 4, 2016, the Board affirmed a February 10, 2016 OWCP decision finding that appellant had not met his burden of proof to establish an injury to his low back due to an accepted July 1, 2014 work incident. The Board found that appellant had not submitted a sufficiently reasoned medical opinion explaining the mechanism by which the July 1, 2014 work incident resulted in a diagnosed medical condition. The Board noted that Dr. Barr did not explain how slight swelling of the disc and lumbar facet joints permanently aggravated a preexisting condition.

On April 28, 2017 appellant, through counsel, again requested reconsideration. Counsel contended that an April 13, 2017 report from Dr. Barr was sufficient to demonstrate causal relationship. She further noted that, if work duties contributed in any way to a claimant's condition, it was compensable under FECA.

In his April 13, 2017 report, Dr. Barr reviewed the Board's decision. He discussed his September 9, 2015 findings and noted that an August 2014 MRI scan showed that appellant had a developmental or acquired condition of spinal stenosis. Dr. Barr found that such a condition did not mean that appellant had back pain. He related:

“However, the fact that the lumbar spinal canal was decreased in size would cause, contribute to, accelerate, or precipitate compression/injury to the lumbar nerve roots from an injury such as [appellant] sustained on July 1, 2014. Mechanical pressure on the nerves creates an inflammatory response that adds to the nerve pain. Thus, pressure and inflammation are additive to nerve roots in an already stenotic environment. These opinions are stated to a reasonable degree of certainty.”

Dr. Barr found that appellant had age-related degenerative spinal changes, including facet joint thickening and ligamentum flavum bulging with some disc collapse. He advised:

“The injury of July 1, 2014 suffered by [appellant] came about as he had to bend over and twist to put the block wedge under the wheel of his truck. This type of twisting stress on the lumbar spine was enough to compromise the area available for the lumbar nerves. The lumbar spine and the discs and nerve roots were aggravated by the injury. The term ‘aggravation’ is used to denote a permanent increase of symptoms in a previously abnormal, but asymptomatic area such as the lumbar spine.”

Dr. Barr reviewed the definition of “probative” and opined that he had provided probative evidence that the July 1, 2014 work incident caused “lasting damage and symptoms in [appellant's] lumbar spine.”

By decision dated July 5, 2017, OWCP denied modification of its prior decision.<sup>4</sup> It found that Dr. Barr did not sufficiently describe the objective findings he relied upon in finding that the July 1, 2014 work incident worsened his preexisting back condition.

On appeal counsel asserts that OWCP is requesting medical evidence beyond the scope of reasonableness. She maintains that FECA should be liberally interpreted in favor of the claimant.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> has the burden of establishing 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.<sup>6</sup> 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.<sup>7</sup>

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether fact of injury has been established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence.<sup>8</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.<sup>9</sup> An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.<sup>10</sup>

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation,

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<sup>4</sup> OWCP is not authorized to review Board decisions. Although the November 4, 2016 decision was the last merit decision of record, the February 10, 2016 OWCP decision is the appropriate subject of possible modification by OWCP. See 20 C.F.R. § 501.6(d).

<sup>5</sup> 5 U.S.C. § 8101 *et seq.*

<sup>6</sup> *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

<sup>7</sup> See *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

<sup>8</sup> *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

<sup>9</sup> *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

<sup>10</sup> *Id.*

OWCP shares responsibility to see that justice is done.<sup>11</sup> The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.<sup>12</sup>

### ANALYSIS

Appellant alleged that he sustained a back injury at work on July 1, 2014 putting a chock block under the rear tire of his vehicle. OWCP initially accepted the occurrence of the July 1, 2014 work incident, but denied his claim as the medical evidence was insufficient to establish causal relationship between a diagnosed condition and his placing of a block under a rear tire of his vehicle. The Board, on November 4, 2016, affirmed OWCP's determination, finding that the medical evidence did not contain sufficient rationale to demonstrate that appellant's action on July 1, 2014 aggravated a preexisting low back condition. The Board noted that Dr. Barr did not explain how increased swelling in the disc and lumbar facet joints caused a permanent aggravation of a preexisting condition.

Subsequent to the Board's November 4, 2016 decision, appellant requested reconsideration and submitted an April 13, 2017 report from Dr. Barr. Dr. Barr advised that he had reviewed the Board's decision and noted that an MRI scan showed developmental or acquired spinal stenosis. He asserted that the decrease in the size of appellant's spinal canal contributed or precipitated his compression injury to the lumbar nerve roots on July 1, 2014 as mechanical pressure on the nerve caused an inflammatory response resulting in nerve pain in a stenotic spinal canal. Dr. Barr related that his twisting motion on July 1, 2014 when he bent over to put the block beneath his tire wheel caused a compromise of the lumbar spine area and an aggravation of his condition. By decision dated July 5, 2017, OWCP denied modification of its prior decisions.

The Board finds that this case is not in posture for decision. Dr. Barr, in his April 13, 2017 report, provided some rationale for his finding that the July 1, 2014 work incident aggravated a preexisting low back condition. He evidenced knowledge of the history of injury, referenced the results of diagnostic studies, and explained the mechanical process by which the accepted employment incident caused or aggravated the previously diagnosed condition of post-lumbar sprain and a permanent aggravation of a preexisting condition. The Board finds that Dr. Barr's opinion, while insufficiently rationalized to represent the weight of the evidence, is sufficient, given the absence of any opposing medical evidence, to require further development of the record.<sup>13</sup>

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>14</sup> On remand, OWCP should refer appellant to an appropriate specialist for a rationalized opinion

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<sup>11</sup> See *S.M.*, Docket No. 16-0990 (issued February 8, 2017); *Jimmy A. Hammons*, 51 ECAB 219 (1999).

<sup>12</sup> 20 C.F.R. § 10.121.

<sup>13</sup> See *R.B.*, Docket No. 16-0205 (issued October 11, 2016).

<sup>14</sup> See *W.W.*, Docket No. 15-1130 (issued August 7, 2015); *Phillip L. Barnes*, 55 ECAB 426 (2004).

regarding whether he sustained a diagnosed condition causally related to the accepted July 1, 2014 employment incident.<sup>15</sup> After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 5, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 27, 2018  
Washington, DC

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

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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

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<sup>15</sup> See *M.K.*, Docket No. 17-1140 (issued October 18, 2017).