

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

C.P., Appellant	)	
	)	
and	)	<b>Docket No. 18-0665</b>
	)	<b>Issued: November 8, 2018</b>
<b>DEPARTMENT OF THE ARMY,</b>	)	
<b>INSTALLATION MANAGEMENT</b>	)	
<b>COMMAND, LAWSON ARMY AIRFIELD,</b>	)	
<b>Fort Benning, GA, Employer</b>	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*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 February 8, 2018 appellant filed a timely appeal from an August 23, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The record on appeal includes evidence received after OWCP issued its August 23, 2017 decision. The Board's jurisdiction is limited to the evidence in the case record 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 condition causally related to the accepted September 10, 2013 employment incident.

## FACTUAL HISTORY

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

On September 11, 2013 appellant, then a 32-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging that, on September 10, 2013, he injured his back while pulling a hose load of 1.75" attack line of fire apparatus in the performance of duty. He stopped work on September 10, 2013.

By decision dated November 25, 2013, OWCP denied the claim, finding that appellant had not established a medical diagnosis in connection with the claimed work incident. It further noted that the medical evidence of record did not contain a well-rationalized opinion based on objective findings on whether and how any diagnosed condition was attributable to identified work activities.

On November 7, 2014 appellant requested reconsideration.

By decision dated December 3, 2014, OWCP modified the prior decision to reflect that fact of injury had been established, but the claim remained denied as causal relationship had not been established.

On January 26, 2015 appellant, through counsel, appealed to the Board. By decision dated June 2, 2015, the Board affirmed OWCP's December 3, 2014 decision, finding that the medical evidence of record was insufficient to establish that appellant's diagnosed back conditions were caused or aggravated by the accepted September 10, 2013 employment incident.<sup>4</sup>

On February 8, 2016 OWCP received appellant's February 3, 2016 request for reconsideration.

In a January 27, 2016 report, Dr. Gary Dawson, a Board-certified neurologist, noted that appellant developed pain in the lower back from preexisting pathology in the lumbar spine that was not painful until his injury. He indicated that appellant's magnetic resonance imaging (MRI) scan revealed degenerative disc disease and spondylosis. Dr. Dawson concluded that appellant's pain was causally related to the accepted employment incident.

By decision dated February 17, 2016, OWCP denied appellant's request for reconsideration of the merits of his claim, finding that Dr. Dawson's January 27, 2016 report was

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<sup>3</sup> Docket No. 15-600 (issued June 2, 2015).

<sup>4</sup> *Id.*

cumulative and substantially similar to medical evidence already of record. It found that Dr. Dawson offered a medical conclusion about causal relationship, but failed to explain with medical rationale how the specific work incident on September 10, 2013 caused or contributed to the diagnosed condition.

On March 17, 2016 appellant requested reconsideration. He provided a duplicate copy of Dr. Dawson's January 27, 2016 report.

OWCP also received medical reports from Dr. Glenn E. Fussell, a Board-certified family practitioner, dated from February 24, 2013 through April 1, 2016. In his April 1, 2016 report, Dr. Fussell noted a chronology of events related to appellant's lumbar conditions. On February 9, 2013, as appellant pushed a sliding bay door open, the door jammed and jolted his back causing back pain. On February 22, 2013, as appellant was opening a hangar door, the weather stripping on the door caught, the door jammed, and as appellant tried to pull the door open, he experienced back pain and tingling down to his hips. Dr. Fussell saw appellant on February 22, 2013 and his lumbar x-ray evidenced a loss of lordosis, which suggested an injury and spasm. During an office visit in July 2013, appellant reported that he was pulling a hose load of 1.75" attack line of the fire apparatus and injured his back. On October 21, 2013, while on light duty, he turned a door knob in the sleeping quarters and experienced a back spasm that caused him to fall. Dr. Fussell further noted that appellant reported having back pain, worse in the morning during a November 15, 2013 visit. He noted that a November 2015 MRI scan revealed multilevel degenerative changes with some abutment of the nerve roots and multilevel neural foraminal stenosis at L4-5 and L5-S1. The MRI scan also revealed a broad-based posterior disc osteophyte complex with bilateral facet arthropathy causing abutment of the L5 and S1 nerve roots. Dr. Fussell indicated that the MRI scan report did not reveal that appellant had spondylosis or spinal stenosis.

Dr. Fussell opined that appellant had nerve root impingement from posterior disc osteophytes. He noted that the cause of the impingement was the osteophyte complexes. Dr. Fussell indicated that the work injury did not cause the osteophytes to occur, but could have aggravated the compression with some soft tissue swelling, which should have been temporary and resolved with his light-duty time at work.

By decision dated June 9, 2016, OWCP reviewed appellant's case on the merits, but denied modification of its prior decisions. It found that the medical evidence of record did not include a rationalized medical opinion based on objective medical evidence which established causal relationship between the diagnosed conditions and the September 10, 2013 employment incident.

On June 8, 2017 appellant requested reconsideration. In a June 8, 2017 letter, counsel presented several arguments. He also requested that the new medical evidence from Dr. Fussell dated July 6, 2016 be reviewed.

In his July 6, 2016 report, Dr. Fussell essentially reiterated the contents of his April 1, 2016 report. He reiterated the chronology and details of the events relating to appellant's back conditions. Dr. Fussell opined "Therefore, it can be said that he has nerve root impingement from the posterior disc osteophytes. The cause of the impingement is the osteophyte complexes. The work injury did not cause the osteophytes to occur, but could have aggravated the compression

with some soft tissue swelling, which should have been temporary, and should have resolved with his light[-]duty time at work.”

By decision dated August 23, 2017, OWCP denied modification of its prior decision. It found that appellant had not provided rationalized medical evidence explaining how the accepted employment incident of September 10, 2013 had caused or aggravated his back condition.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> 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 timely filed within the applicable time limitation period of FECA, that an injury was sustained 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 upon a traumatic injury or an occupational disease.<sup>7</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged.<sup>8</sup> Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>9</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable 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.<sup>10</sup>

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

<sup>6</sup> *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>7</sup> *J.O.*, Docket No. 17-0789 (issued May 15, 2018); *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989). A traumatic injury refers to injury caused by a specific event or incident or series of events or incidents occurring within a single workday or work shift, whereas an occupational disease refers to an injury produced by employment factors which occur or are present over a period longer than a single workday or work shift. 20 C.F.R. § 10.5(q), (ee); *Brady L. Fowler*, 44 ECAB 343, 351 (1992).

<sup>8</sup> *See J.O., id.*; *Julie B. Hawkins*, 38 ECAB 393 (1987).

<sup>9</sup> *See J.O., supra* note 7; *John J. Carlone*, 41 ECAB 354 (1989).

<sup>10</sup> *See J.O., supra* note 7; *see also I.J.*, 59 ECAB 408 (2008); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

## ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a lumbar condition causally related to the accepted September 10, 2013 employment incident.

In its prior decision dated June 2, 2015, the Board determined that the medical evidence of record was insufficient to establish that appellant's diagnosed back conditions were caused or aggravated by his September 10, 2013 employment incident. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>11</sup> The Board will, therefore, not review the evidence addressed in the prior appeal.

Appellant subsequently requested reconsideration and submitted additional medical evidence.

In his January 27, 2016 report, Dr. Dawson noted that appellant developed pain in the lower back from preexisting pathology in the lumbar spine that was not painful until his injury. He indicated that appellant's MRI scan revealed degenerative disc disease and spondylosis. Dr. Dawson concluded that there was a causal relationship between appellant's pain and the work-related injury. He, however, offered only a general conclusion on causal relationship. Dr. Dawson did not offer a rationalized medical explanation regarding causal relationship between the diagnosed conditions and the September 10, 2013 employment incident. A mere conclusion without necessary rationale explaining why the physician believes that a claimant's accepted employment incident resulted in the diagnosed condition is insufficient.<sup>12</sup>

While Dr. Fussell noted the September 10, 2013 work incident in his April 1 and July 6, 2016 reports, he also noted that appellant had several other work-related incidents which caused injury to his back: on February 9, 2013, while pushing a bay door open; on February 22, 2013, while opening a hangar door; on July 26, 2013, when pulling on a hose line; and on October 21, 2013 when appellant fell at work due to a back spasm. He failed to provide sufficient rationale based on objective medical findings to support that the diagnosed conditions were the result of the September 10, 2013 work incident and not related to the other work incidents he noted. Without explaining how, physiologically, the employment incident caused or contributed to the diagnosed conditions, Dr. Fussell's reports are insufficiently rationalized and of limited probative value.<sup>13</sup> An explanation as to how, physiologically, the September 10, 2013 incident would have caused the diagnosed conditions is especially important given the number of other incidents appellant experienced in 2013, allegedly causing back injury. Furthermore, Dr. Fussell offered a speculative opinion on causal relationship as he concluded that the "work injury could have aggravated the compression with some soft tissue swelling, which should have been temporary and should have resolved with his light duty time at work." As such his April 1 and July 6, 2016 reports are insufficient to meet appellant's burden of proof.

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<sup>11</sup> See *H.G.*, Docket No. 16-1191 (issued November 25, 2016).

<sup>12</sup> *D.O.*, Docket No. 18-0086 (issued March 28, 2018).

<sup>13</sup> *M.B.*, Docket No. 17-1647 (issued April 2, 2018); *D.J.*, Docket No. 17-0364 (issued April 13, 2018).

An award of compensation may not be based on surmise, conjecture, or speculation. Neither the fact that appellant's condition became apparent during a period of employment, nor the belief that his condition was caused, precipitated, or aggravated by his employment, is sufficient to establish causal relationship.<sup>14</sup> Causal relationship must be established by rationalized medical opinion evidence. The Board finds that the medical evidence of record is insufficient to establish a lumbar condition causally related to the September 10, 2013 employment incident. Consequently, appellant has not met his burden of proof.

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 met his burden of proof to establish a lumbar condition causally related to the accepted September 10, 2013 employment incident.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 23, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 8, 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

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<sup>14</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).