United States Department of Labor
Employees' Compensation Appeals Board

J.R.	)	
and	)	**Docket No. 18-0206**
	)	**Issued: October 15, 2018**
DEPARTMENT OF HOMELAND SECURITY, CITIZENSHIP & IMMIGRATION SERVICES, Miami, FL, Employer	)	

Appearances:
Peter S. Schwedock, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 6, 2017 appellant, through counsel, filed a timely appeal from a May 18, 2017 merit decision and an August 21, 2017 nonmerit 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 this 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 Board notes that appellant submitted additional evidence after OWCP rendered its August 21, 2017 decision. The Board's jurisdiction is limited to reviewing 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); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a lumbar condition causally related to the accepted June 28, 2016 employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 28, 2016 appellant, then a 43-year-old immigration analyst, filed a traumatic injury claim (Form CA-1) alleging, that on that same day, when he attempted to sit down in his chair at work, it flipped backwards causing him to fall on the floor and strike his head and back.[4] He reported head, lower back, and leg pain. A fellow employee provided a witness statement attesting to the employment incident. Appellant notified his supervisor and sought immediate medical treatment on the date of injury. He did not indicate on the claim form that he had stopped work.

In a July 11, 2011 report, Dr. Michael Thorpe, a Board-certified diagnostic radiologist, provided findings pertaining to a magnetic resonance imaging (MRI) scan of appellant's lumbar spine. He reported L4-5 disc bulge and posterior central annular tear, small right paracentral disc herniation, mild facet arthrosis and ligamentum flavum hypertrophy, decreased disc signal, no foraminal narrowing, and that the cross-sectional area of the spinal canal was at the lower limits of normal. Dr. Thorpe reported that L5-S1 scanning revealed a broad-based disc herniation and mild facet arthrosis, increased disc signal, no spinal stenosis, and mild bilateral foraminal narrowing. He also noted that a transitional vertebra was suspected at the lumbosacral junction at S1-2.

In a May 16, 2013 diagnostic report, Dr. Manuel Barbeito, Board-certified in anesthesiology and pain management, reported that appellant's lumbar epidural injections revealed contrast flowing along the right and left L4-5 foramina and lateral recess, depicting severe irritation of the nerve roots. He noted that at the L5-S1 segment there was minimal flow of contrast into the epidural space anteriorly, depicting moderate foraminal encroachment although not to the extent of the L4-5 segments.

In an August 9, 2013 medical report, Dr. Juan Raposo, a Board-certified orthopedic surgeon, reported that appellant had some tenderness to palpation of the lower back and diagnosed L3-4 and L4-5 disc herniation related to a June 20, 2011 work injury.[5] He related that appellant's lower back condition had not deteriorated to the point where surgery was an option for him.

In a June 28, 2016 Baptist Medical Plaza emergency room (ER) report, Dr. Lindsay Lewis, Board-certified in family medicine, reported that on that same date appellant attempted to sit in a chair which broke underneath him, causing him to fall backwards and sustain a blow to the head.

[4] The record indicates that appellant had a prior June 20, 2011 traumatic injury claim to his left lower back after he lost his balance while moving a heavy box under OWCP File No. xxxxxx970. By decision dated August 11, 2011, OWCP accepted the claim for sprain of lumbosacral joint. The record before the Board contains medical reports related to the June 20, 2011 traumatic injury claim.

[5] *Id.*

Witnesses reported that appellant lost consciousness for a few seconds. Appellant complained of headache and back pain on the left side radiating down to the leg. He reported prior issues to his back which were treated with epidural injections and that he did not have any issues until this incident. A lumbar spine x-ray revealed no acute bony abnormality and a computerized tomography (CT) scan of the brain revealed no acute intracranial process detected. Dr. Lewis diagnosed minor closed head injury, acute traumatic lumbar back pain sciatica present on the left, and fall from chair. Appellant was discharged from the urgent care.

In a July 27, 2016 report, Dr. Steven Lasser, a Board-certified orthopedic surgeon, described the June 28, 2016 employment injury when appellant's office chair collapsed causing him to fall backwards and strike his head and back. He noted significant injury from a car accident one year prior when he was struck by another vehicle. Appellant experienced significant back pain following a 2015 motor vehicle accident and came under the care of pain management, but he did not lose any time from work as a consequence of the motor vehicle accident. While this preexisting condition existed, Dr. Lasser noted that the pain severity with the new onset left sciatica occurred as a result of his fall at work. He discussed the July 22, 2016 lumbar spine MRI scan and reported that appellant had severe incapacitating left sciatica secondary to a large foraminal and extra foraminal disc herniation at L4-5 with severe neural compression and stenosis. Dr. Lasser also noted advanced degenerative changes of the L4-5 disc with possible spondylolysis, and associated herniation of L4-5 with degenerative disc disease. He diagnosed lumbar intervertebral disc degeneration, lumbar intervertebral disc displacement, and lumbar spondylosis. Dr. Lasser opined that surgical intervention was appropriate in view of the severity of his symptoms and neurologic findings. He noted that the surgical plan was secondary to appellant's work.

By development letter dated August 10, 2016, OWCP notified appellant that his claim was initially administratively handled to allow medical payments, as it appeared to involve a minor injury resulting in minimal or no lost time from work. However, the merits of his claim had not been formally considered and his claim had been reopened for adjudication of the merits because he had requested authorization for surgery. OWCP informed appellant that the evidence of record was insufficient to establish his traumatic injury claim. Appellant was advised of the medical and factual evidence needed and afforded 30 days to submit the additional evidence.

In a July 15, 2016 medical report, Dr. Benham Myers, a doctor of osteopathic medicine, described the June 28, 2016 employment incident and documented complaints of lower back and left leg pain. He diagnosed left lumbago with sciatica and lumbosacral disc displacement. Dr. Myers referred appellant for a lumbar MRI scan.

In a July 22, 2016 diagnostic report, Dr. Jonathan Messinger, a Board-certified diagnostic radiologist, reported that the lumbar spine MRI scan revealed L4-5 disc desiccation with a broad disc bulge and superimposed central disc herniation with slight inferior extrusion, mild central canal stenosis, left foraminal disc bulge, and lateral foraminal disc herniation with severe foraminal stenosis. He further noted L3-4 central disc herniation with superior extrusion behind L3 and moderate central canal stenosis and thecal sac compression.

In medical reports dated August 3 through 17, 2016, Dr. Lasser documented treatment for appellant's lower back injury. He diagnosed lumbar intervertebral disc degeneration, lumbar intervertebral disc displacement, lumbar spondylosis, and persistent severe left sciatica with intense lower back pain secondary to the lumbar disc disease with a far lateral disc extrusion at

L4-5. Dr. Lasser noted that appellant had severe left lower extremity symptoms and severe stenosis affecting the left L4 and L5 nerve roots. He explained that surgical intervention was urgently needed and that his symptoms were secondary to the work-related injury. On August 4, 2016 Dr. Lasser performed an unauthorized surgery for left L3-4 and L4-5 laminectomies with L3-5 instrument effusion. In an August 17, 2016 report, he noted that appellant's left leg pain had dramatically improved since his surgery though the pain had not subsided. Dr. Lasser diagnosed status post L3-5 decompression and fusion with flare-up of pain and left sciatica most likely secondary to nerve root irritation from a combination of surgical manipulation and scar formation.

By decision dated September 14, 2016, OWCP denied appellant's claim as the evidence of record was insufficient to establish that he sustained an injury. It found that the June 28, 2016 employment incident occurred as alleged, but, that the evidence failed to provide a firm medical diagnosis which could be reasonably attributed to the accepted employment incident. OWCP noted that appellant's August 4, 2016 surgery was for L3-4 and L4-5 disc herniations which were conditions that appellant had since 2011.

On October 4, 2016 appellant requested an oral hearing before an OWCP hearing representative.

In an August 23, 2016 diagnostic report, Dr. David Frank, a Board-certified radiologist, reported that an x-ray of the lumbar spine revealed hyperlordosis of the lumbosacral spine, pedicle screws and connecting rods in L3-4 and L4-5 bilaterally, and partial sacralization of L5.

In medical reports dated August 30 through September 28, 2016, Dr. Lasser related appellant's treatment and progress post left L4 hemilaminectomy, medial facetectomy, L4-5 discectomy, and L4-5 transforaminal lumbar interbody fusion. He noted that appellant had a preexisting lumbar degenerative disease with back pain. Following his June 28, 2016 work injury, appellant's back pain was significantly aggravated and the left sciatica became incapacitating. Dr. Lasser reported that more than 50 percent of appellant's spinal condition which led to the surgical procedure on August 4, 2016 was related to his work-related injury. He reported that appellant was totally disabled which was 100 percent related to the June 28, 2016 work injury.

A hearing was held on March 10, 2017 where appellant testified in support of his traumatic injury claim. He explained that his prior motor vehicle accident and accepted June 20, 2011 work injury did not require surgery, however his current injury and subsequent surgery were caused by the employment incident.

By decision dated April 12, 2017, an OWCP hearing representative affirmed the September 14, 2016 decision finding that the evidence of record failed to establish a diagnosed condition causally related to the accepted June 28, 2016 employment incident.

On May 9, 2017 appellant requested reconsideration of OWCP's decision.

In support of his claim, appellant submitted a May 13, 2015 medical report from Dr. Guillermo Pasarin, a Board-certified neurological surgeon, who provided treatment following his "December 2014 motor vehicle accident." Dr. Pasarin noted complaints of paraspinal pain, slightly worse on right. A January 6, 2015 MRI scan of the lumbar spine was submitted. Dr. Pasarin reported that the MRI scan showed age-appropriate degenerative changes with advanced degenerative changes at L3-4 and L4-5 with some disc bulging and bilateral foraminal

compromise most notably at L4-5. He speculated that appellant's myofascial low back pain following his motor vehicle accident may or may not be discogenic in origin. Dr. Pasarin noted that the changes in his MRI scan were predominantly degenerative in nature, but could account for some of the numbness and tingling in his legs, and could possibly be causing some of his back pain. He reported that at this juncture there was no need for neurosurgical indication. However, if appellant's severe pain did not improve in several months, Dr. Pasarin would then consider him as a possible surgical candidate.

In a March 11, 2016 medical report, Dr. Andrew Ellowitz, a Board-certified orthopedic surgeon, reported that appellant's low back pain had increased, radiating to the right leg.

In a March 22, 2017 medical report, Dr. Lasser reported that appellant noted confusion and misunderstanding regarding his prior workers' compensation case, his current work-related injury, and the motor vehicle accident. He explained that in 2011 appellant fell at work and his symptoms improved after minimal treatment. In 2015 appellant was involved in a motor vehicle collision that required evaluation and treatment. Despite these previous injuries, he was able to continue working normally until the June 28, 2016 employment incident when his symptoms subjectively and objectively changed dramatically, thus requiring the need for surgical intervention. Dr. Lasser reported that surgical intervention was not previously necessary based on the images from 2011 and 2015. He noted that the lumbar MRI scans of July 2011, January 2015, and July 2016 showed significant change in the appearance of the L4-5 and L5-S1 lumbar discs. Both the 2011 and 2015 MRI scans showed bulges on the L4-5 and L5-S1 lumbar disc. However, when reviewing the July 2011 and January 2015 images carefully, and comparing them to the July 2016 MRI scan, the relevant T2-weighted images revealed significant increase in the herniation at L4-5 and a herniation with extrusion at L5-S1. Dr. Lasser explained that, although both of these discs revealed some abnormalities before the June 2016 injury, they were not significantly symptomatic. Based on appellant's history and careful review of the actual images from the time periods mentioned, he opined that appellant's pain symptoms, sciatica, and August 2016 surgery was directly related to his fall at work on June 28, 2016.

By decision dated May 18, 2017, OWCP "affirmed" in part and vacated in part the April 12, 2017 decision. It found that the medical evidence of record established a minor closed head injury with ecchymosis on the vertex of the head with loss of consciousness for a few seconds. OWCP denied appellant's claim for a lumbar injury finding that the medical evidence of record failed to establish a low back condition causally related to the accepted June 28, 2016 employment incident.

By separate decision dated May 18, 2017, OWCP accepted the claim for minor closed head injury with ecchymosis on the vertex of the head with loss of consciousness for a few seconds.

On August 1, 2017 appellant requested reconsideration of OWCP's decision. He submitted a narrative statement documenting the differences in the lumbar MRI scans following his 2011 work injury, 2015 motor vehicle accident, and 2016 employment incident. In support of his claim, appellant resubmitted medical evidence previously of record.

Appellant also resubmitted Dr. Lasser's March 22, 2017 report which included a July 19, 2017 addendum. In his addendum, Dr. Lasser reported that, following review of the medical records, there was sufficient history and mechanism of injury to attribute appellant's severe sciatica, disc protrusion, and subsequent surgical intervention to the injury that occurred while at

work in June 2016 when the chair he was sitting on broke, resulting in his fall to the floor. He reported that the injury that occurred when the chair collapsed and resulted in a concussion and injury to the lumbar discs. He opined that "this was without a doubt the mechanism of injury to his lower back due to the sudden acceleration and deceleration of the collapsing chair, which can produce more than enough energy to result in his spinal injuries." Dr. Lasser opined that this was the primary mechanism leading to the disc herniation and also caused the protrusion. He concluded that, within a reasonable degree of medical certainty, appellant's surgical treatment was secondary to this injury.

By decision dated August 21, 2017, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[6] 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 are causally related to the employment injury.[7] 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.[8]

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence supporting such causal relationship.[9] 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. This medical opinion must include an accurate history of the employee's employment incident and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[10]

[6] *Supra* note 2.

[7] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[8] *Michael E. Smith*, 50 ECAB 313 (1999).

[9] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[10] *James Mack*, 43 ECAB 321 (1991).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish that his lumbar conditions are causally related to the accepted June 28, 2016 employment injury.[11]

On the date of injury, appellant sought emergency medical treatment at Baptist Medical Plaza ER for head and low back pain. Dr. Lewis' June 28, 2016 report provided a diagnosis of closed head injury and back pain. The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis.[12] The lumbar spine x-ray taken on that date was of no probative value as it revealed findings of no acute bony abnormality, failing to provide support for an injury.[13] Dr. Lewis failed to provide a firm medical diagnosis and opinion on causal relationship pertaining to his lumbar condition. As such, her report is insufficient to establish the June 28, 2016 traumatic injury claim.[14]

In medical reports dated July 27, 2016 through March 22, 2017, Dr. Lasser discussed the June 28, 2016 employment injury and diagnosed lumbar intervertebral disc degeneration, lumbar intervertebral disc displacement, lumbar spondylosis, and persistent severe left sciatica with intense lower back pain secondary to the lumbar disc disease with a far lateral disc extrusion at L4-5. He opined that appellant's pain symptoms, sciatica, and August 2016 surgery were directly related to his fall in his chair at work on June 28, 2016. The Board finds that the opinions of Dr. Lasser are not well rationalized.

Dr. Lasser's statement that appellant's pain symptoms were a direct result of the incident is highly speculative as he is attributing symptoms to the June 28, 2016 employment injury and not to his diagnosed conditions.[15] He opined that appellant's current lumbar conditions were not related to his prior 2011 work injury and 2015 motor vehicle accident because his symptoms changed dramatically following the June 28, 2016 incident, requiring the need for surgery. The Board has held that an opinion that a condition is causally related because the employee was asymptomatic before the injury is insufficient, without adequate rationale, to establish causal relationship.[16] Moreover, Dr. Lasser emphasizes the change in appellant's symptoms as evidence of a new work-related injury. However, the medical reports of record predating the June 28, 2016 employment injury document complaints of severe low back pain radiating to the leg. It is unclear how and to what degree appellant's symptoms changed to determine that this shift establishes the cause of his injury. The Board also notes that Dr. Lasser failed to provide a sufficient explanation as to the mechanism of injury pertaining to this traumatic injury claim, namely, how falling backwards from a chair and striking his back would cause or aggravate herniation at L4-5 and herniation with extrusion at L5-S1.[17] Dr. Lasser's statement that appellant's symptoms

[11] *See Robert Broome*, 55 ECAB 339 (2004).

[12] *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

[13] *J.P.*, Docket No. 14-87 (issued March 14, 2014).

[14] *Id.*

[15] *M.R.*, Docket No. 14-11 (issued August 27, 2014).

[16] *Id.*

[17] *S.W.*, Docket 08-2538 (issued May 21, 2009).

significantly worsened are vague and generalized without sufficient detail pertaining to the cause of injury. Such generalized opinions do not establish causal relationship because they merely repeat appellant's allegations and are unsupported by adequate medical rationale explaining how this physical activity actually caused the diagnosed conditions.[18] Without explaining how physiologically the movements involved in the June 28, 2016 employment injury caused or contributed to the diagnosed lumbar conditions, Dr. Lasser's opinion is of limited probative value and insufficient to meet appellant's burden of proof.[19]

The Board notes that appellant's July 11, 2011 and January 6, 2015 lumbar MRI scan reports reveal preexisting degenerative changes and lumbar disc involvement. Dr. Lasser reported that both the 2011 and 2015 MRI scans showed bulges of the L4-5 and L5-S1 lumbar discs. He noted that when comparing the 2011 and 2015 images to those of July 2016, the relevant T2-weighted images revealed significant increase in the herniation at L4-5 and a herniation with extrusion at L5-S1. While Dr. Lasser provided a detailed interpretation of the July 22, 2016 lumbar MRI scan when compared to the two prior studies, the anatomical changes alone are insufficient to establish a new work-related injury. He failed to discuss whether appellant's preexisting injury had progressed beyond what might be expected from the natural progression of that condition.[20] This is of significant importance as appellant has a prior 2011 work-related injury and 2015 motor vehicle accident involving the same region of the body. It is unclear if appellant's lumbar disc herniation was caused or aggravated by the June 28, 2016 employment injury, a result of a preexisting condition, or due to degenerative changes. A well-rationalized opinion is particularly warranted when there is a history of preexisting condition.[21]

The remaining medical evidence of record is also insufficient to establish appellant's claim. Dr. Myer's July 15, 2016 report provided a diagnosis of left lumbago with sciatica and lumbosacral disc displacement without an opinion relative to the cause of the diagnosed conditions. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[22]

The diagnostic reports of record are also insufficient to establish appellant's claim. While the reports are relevant for documenting and interpreting radiologic findings, the physicians failed to provide a firm medical diagnosis or opinion on the cause of appellant's injury.[23]

The Board notes that the medical evidence of record which predates the June 28, 2016 employment injury is also insufficient to establish appellant's claim. Appellant references his prior medical reports as evidence that his symptoms worsened and that his physicians did not recommend surgery until after the June 28, 2016 employment injury. The Board notes that while this medical evidence is relevant in determining whether appellant's condition is due to a

[18] *K.W.*, Docket No. 10-98 (issued September 10, 2010).

[19] *John W. Montoya*, 54 ECAB 306 (2003).

[20] *R.E.*, Docket No. 14-868 (issued September 24, 2014).

[21] *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

[22] *See E.D.*, Docket No. 18-0138 (issued May 14, 2018).

[23] It is not possible to establish the cause of a medical condition, if the physician has not stated a firm medical diagnosis. *T.G.*, Docket No. 13-76 (issued March 22, 2013).

preexisting or nonoccupational injury, lack of prior surgery and changes in diagnostic testing are alone not enough to establish a current work-related injury. Any medical opinion evidence appellant may submit to support his claim should reflect a correct history and offer a medically sound explanation by the physician of how the specific employment incident, in particular physiologically, caused or aggravated his lumbar injuries.[24]

The Board notes that there is no requirement that the federal employment be the only cause of appellant's injury. An employee is not required to prove that occupational factors are the sole cause of his claimed condition. If work-related exposures caused, aggravated, or accelerated appellant's condition, he is entitled to compensation.[25] However, an award of compensation may not be based on surmise, conjecture, speculation, or on the employee's own belief of causal relation.[26] Appellant's honest belief that the June 28, 2016 employment injury caused lumbar injury is not in question, but that belief, however sincerely held, does not constitute the medical evidence necessary to establish causal relationship.[27]

The Board has found that the record lacks rationalized medical evidence establishing a causal relationship between the June 28, 2016 employment injury and appellant's lumbar conditions. Thus, appellant has failed to meet 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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[28] Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[29]

[24] *See L.M.*, Docket No. 14-973 (issued August 25, 2014); *R.G.*, Docket No. 14-113 (issued April 25, 2014); *K.M.*, Docket No. 13-1459 (issued December 5, 2013); *A.J.*, Docket No. 12-548 (issued November 16, 2012).

[25] *See Beth P. Chaput*, 37 ECAB 158, 161 (1985); *S.S.*, Docket No. 08-2386 (issued June 5, 2008).

[26] *D.D.*, 57 ECAB 734 (2006).

[27] *See J.S.*, Docket No. 17-0967 (issued August 23, 2017).

[28] *D.K.*, 59 ECAB 141 (2007).

[29] *K.H.*, 59 ECAB 495 (2008).

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision.[30]

In its August 21, 2017 denial of appellant's reconsideration request, OWCP noted that appellant submitted duplicate medical evidence which was previously considered in the prior decision. It noted a list of the duplicate medical reports, including Dr. Lasser's March 22, 2017 report. Thus, OWCP denied merit review of appellant's claim finding that he failed to submit relevant and pertinent new evidence addressing causal relationship sufficient to warrant a merit review.[31]

However, the record reflects that OWCP received new evidence from appellant prior to the issuance of its August 21, 2017 decision. The Board notes that appellant submitted Dr. Lasser's March 22, 2017 report, received by OWCP on August 1, 2017, in support of his claim, which included a July 19, 2017 addendum. In his addendum, Dr. Lasser discussed appellant's lumbar injury and offered opinions pertaining to causal relationship and the mechanism of injury. As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to the subject matter of the claim, which was properly submitted to OWCP prior to the time of issuance of its final decision, be reviewed and addressed by OWCP.[32] In its August 21, 2017 decision, OWCP did not consider the additional evidence submitted in support of appellant's claim as it found that the March 22, 2017 report was a duplicate report previously submitted. However, contained at the end of the March 22, 2017 report, Dr. Lasser, authored an addendum The Board finds Dr. Lasser's addendum report to be relevant and pertinent new evidence not previously considered by OWCP.[33] Because OWCP did not consider the July 19, 2017 addendum as new evidence submitted by appellant, the Board cannot review such evidence for the first time on appeal.[34]

The Board finds that this case is not in posture for a decision.[35] On remand, OWCP should fully consider appellant's evidence which was properly submitted prior to the August 21, 2017 decision. Following this and such other development as deemed necessary, it shall issue an appropriate merit decision.

[30] *J.W.*, Docket No. 13-1666 (issued August 18, 2014).

[31] *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

[32] *See Yvette N. Davis*, 55 ECAB 475 (2004); *see also William A. Couch*, 41 ECAB 548 (1990) (OWCP did not consider new evidence received four days prior to the date of its decision); *see Linda Johnson*, 45 ECAB 439 (1994) (applying *Couch* where OWCP did not consider a medical report received on the date of its decision).

[33] *See R.M.*, Docket No. 08-734 (issued September 5, 2008); *Donald T. Pippin*, 54 ECAB 631 (2003).

[34] 20 C.F.R. § 501.2(c).

[35] The Board notes that OWCP procedures provide that cases should be combined when correct adjudication of the issues depends on frequent cross-referencing between files. Given that appellant's June 20, 2011 traumatic injury claim under OWCP File No. xxxxxx970 involves the same lumbar injuries alleged in this claim, on remand OWCP should combine File Nos. xxxxxx970 and xxxxxx467.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a lumbar condition causally related to the accepted June 28, 2016 employment injury. The Board further finds that OWCP improperly denied appellant's request for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated May 18, 2017 is affirmed. The August 21, 2017 decision is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: October 15, 2018
Washington, DC

Christopher J. Godfrey, 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