

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

E.G., Appellant)	
)	
and)	Docket No. 17-1955
)	Issued: September 10, 2018
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS HEALTH ADMINISTRATION,)	
Loma Linda, CA, Employer)	
)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant¹
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 September 20, 2017 appellant, through counsel, filed a timely appeal from a March 27, 2017 merit decision and a July 10, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.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 July 10, 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).

ISSUES

The issues are: (1) whether appellant met his burden of proof to expand the acceptance of his claim to include additional conditions causally related to the accepted May 14, 2015 employment injury; (2) whether appellant has met his burden of proof to establish that he was totally disabled from work for the period October 16, 2015 through January 2, 2016 due to the accepted May 14, 2015 employment injury; and (3) 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 4, 2015 appellant, then a 62-year-old physician, filed a traumatic injury claim (Form CA-1) alleging that on May 14, 2015 he injured his lower back while repositioning a patient in a wheelchair in the performance of duty. He stopped work on May 26, 2015 and has not returned. On July 22, 2015 OWCP accepted appellant's claim for back sprain, lumbar region.

In a June 19, 2015 report, Dr. Olumide A. Danisa, a Board-certified orthopedic surgeon, diagnosed strain of lumbar paraspinal muscle and lumbar degenerative disc disease. He referred appellant to physical therapy. In a June 19, 2015 note, Dr. Danisa held appellant off work until July 1, 2015. He indicated that once appellant returned to work, he would be placed on a weight restriction.

In a December 14, 2015 report, Dr. Danisa noted the history of the May 14, 2015 employment injury. He also noted results of a lumbar magnetic resonance imaging (MRI) scan and x-rays.⁴ Dr. Danisa diagnosed chronic lower back pain and bilateral lumbar radiculopathy. He noted that he first saw appellant in August 2015⁵ and recommended physical therapy, which appellant underwent with no symptomatic improvement. Dr. Danisa indicated that he had recommended lumbar epidural injections in September, but these procedures were not performed due to insurance issues. He explained that he held appellant off work until November, which he then extended to January 2, 2016. Dr. Danisa instructed appellant to remain out of work until the lumbar epidurals were completed.

A December 14, 2015 x-ray of appellant's lumbar spine noted congenital spondylolisthesis. A diagnostic impression of anterolisthesis of L4 on L5 suggestive of ligamentous laxity and moderate multilevel degenerative changes in the lower lumbar spine was provided.

On January 5, 2016 OWCP received appellant's October 12, 2015 claim for wage-loss compensation (Form CA-7) for the period October 16 through 30, 2015. On January 11, 2016 it received appellant's claim for wage-loss compensation (Form CA-7) for the period October 31 through January 2, 2016.

⁴ Dr. Danisa indicated that a lumbar MRI scan showed listhesis at L4-5 and disc bulge at L4-5. X-rays showed L4-5 low grade listhesis, which appeared stable, severe lumbar disc disease at L5-S1, and anterior spondylosis at L3-4 and L4-5 with anterior osteophytes.

⁵ The record reflects that appellant first saw Dr. Danisa on June 19, 2015.

In a development letter dated January 21, 2016, OWCP advised appellant of the deficiencies in his claims for wage-loss compensation. It advised him to submit medical evidence supporting disability during the periods alleged. OWCP afforded appellant 30 days in which to submit the requested evidence.

In a February 5, 2016 report, Dr. Danisa diagnosed severe low back pain with bilateral lumbar radiculopathy. He instructed appellant to remain off work due to his inability to stoop, twist, bend, squat, work at or above shoulder level, push or pull, and climb, and perform minimal walking. In a February 5, 2016 note, Dr. Danisa opined that appellant had sustained a permanent back injury which “apparently precludes him from returning to work.”

By decision dated April 5, 2016, OWCP denied compensation for the periods claimed as the medical evidence of record was insufficient to establish that appellant was disabled from work due to his accepted work-related medical condition.

On April 21, 2016 appellant, through counsel, requested reconsideration. In an April 21, 2016 letter, counsel requested that the acceptance of appellant’s claim be expanded to include additional back conditions.

In an April 18, 2016 report, Dr. Danisa indicated that appellant’s chronic back pain was unchanged after the work-related injury. He opined that appellant was permanently disabled and unable to return to work. In an April 18, 2016 letter, Dr. Danisa requested that the acceptance of appellant’s claim be expanded to include the conditions of spondylolisthesis at L4-5; disc bulge at L4-5; lumbar disc disease at L5-S1; and anterolisthesis at L3-4 and L4-5 as found on radiographic examination and lumbar MRI scan.⁶ He explained that when appellant lifted the patient on May 14, 2015, the force involved in lifting the heavy patient placed extreme pressure on appellant’s spine, which then placed stress on the lumbar discs at L3-4, L4-5 and L5-S1. This caused structural damage to both the discs and the vertebrae and caused a disc slippage at L3-4 to L4-5.

By decision dated June 29, 2016, OWCP denied modification of its April 5, 2016 decision. It found that the medical evidence of record was insufficiently rationalized to establish additional conditions causally related to the accepted employment injury.

On August 2, 2016 counsel requested reconsideration. He requested that OWCP reconsider the denial of wage-loss compensation based on new medical evidence and to expand acceptance of the claim to include acute lumbar disc herniation and protrusion.

In a July 12, 2016 report, Dr., James J. Huang, an internist, noted that he had taken care of appellant since 2008 and that appellant never complained of any debilitating low back pain, never missed any lengthy period of work, and was not prescribed pain medications or anti-inflammatory medications for his congenital conditions. Rather, appellant was functionally intact and had no physical restrictions prior to his work-related injury. Dr. Huang opined that appellant’s severe low back pain, which occurred after helping an obese patient out of his chair, was clearly explained by the acute disc herniation and protrusion seen on the MRI scan.⁷ He indicated that the severity of

⁶ A copy of the lumbar MRI scan was not of record.

⁷ A copy of the lumbar MRI scan was not of record.

his pain was inconsistent with his congenital spine condition and mild arthritis. Dr. Huang explained that the mechanism of injury clearly placed an undue axial stress on the lumbar discs and caused the disc slippage. Furthermore, the MRI scan findings were consistent with the severity of appellant's back pain and his resultant physical disability caused by the work-related accident.

By decision dated October 26, 2016, OWCP denied modification of its June 29, 2016 decision. It found that there was no rationalized medical opinion evidence supported by objective findings to expand the acceptance of the claim to include additional conditions or pay wage-loss compensation.

On December 28, 2016 counsel requested reconsideration of the October 26, 2016 decision.

OWCP thereafter received an August 11, 2016 fitness-for-duty report, from Dr. Andrew H. Guo, Board-certified in occupational and preventative medicine. Dr. Guo noted appellant's history of injury and his medical course. He also reviewed a May 30, 2015 lumbar MRI scan and reported examination findings. Dr. Guo provided an impression of low back pain and lumbar disc bulge with radicular symptoms. He noted that appellant had chronic radicular pain to the lower left extremity after the lifting injury sustained over one year ago with minimal improvement with conservative treatment, but that his orthopedic surgeon had deemed him not to be a surgical candidate. Dr. Guo opined that appellant could not perform the duties of his position as a physician.

By decision dated March 27, 2017, OWCP denied modification of its October 26, 2016 decision. It found that the contemporaneous medical evidence did not support disability as a result of the accepted condition for the specific period claimed.

In a June 30, 2017 letter, counsel requested reconsideration and submitted additional medical evidence.

In a May 26, 2015 emergency room note, Dr. Ofelia A. Willis, an internist, noted the history of appellant's employment injury and presented examination findings. She noted that a lumbar spine x-ray showed no evidence of acute fracture or dislocation with mild degenerative changes of the lumbar spine. Dr. Willis provided an assessment of low back strain, rule out disc disease, and mild degenerative joint disease of the low back. A lumbar MRI scan was scheduled due to appellant's symptoms. Appellant was referred to physical therapy.

A May 26, 2015 x-ray of appellant's lumbar spine indicated mild degenerative changes of the lumbar spine. A May 30, 2015 MRI scan of appellant's lumbar spine indicated mild degenerative changes superimposed on congenitally narrow canal due to short pedicles. At L4-5, a diffuse disc bulge with superimposed small central/right paracentral disc protrusion was noted along with unroofing of the disc due to spondylolisthesis. Disc marginal osteophytes and moderate-to-severe facet arthropathy was seen. Also seen, in conjunction with short pedicles, was a mild spinal stenosis with mild bilateral neural foraminal narrowing.

In an August 5, 2015 report, Dr. Christopher Hein, an orthopedic surgeon, noted the history of injury and that appellant did not have a previous history of symptoms. He noted an outside MRI scan showed mild listhesis at L4-5, a small disc bulge at L4-5, and no significant stenosis.

Dr. Hein provided an assessment of low back pain, likely secondary to muscle strain. He reported that he had given appellant a note to stay off work.

By decision dated July 10, 2017, OWCP denied reconsideration of the merits of appellant's claim as the medical evidence received after the March 27, 2017 decision was irrelevant or immaterial to the issues of claim expansion and disability for the claimed period October 16, 2016 through January 2, 2017.

LEGAL PRECEDENT -- ISSUE 1

An employee has the burden of proof to establish that any specific condition for which compensation is claimed is causally related to the employment injury.⁸ Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.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 employee.¹⁰ Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish that additional medical conditions were caused or aggravated by the accepted May 14, 2015 employment injury.

The opinion of a physician supporting causal relationship must be based on a complete factual and medical background, supported by affirmative evidence, must address the specific factual and medical evidence of record, and must provide medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.¹²

In his June 19, 2015 report, Dr. Danisa diagnosed lumbar degenerative disc disease. However, there is no discussion regarding the history of appellant's preexisting degenerative disc disease or an opinion supported by objective testing which explains how an aggravation or acceleration of the underlying condition was precipitated by the May 14, 2015 employment

⁸ *Kenneth R. Love*, 50 ECAB 276 (1999).

⁹ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁰ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹¹ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹² *Robert Broome*, 55 ECAB 339 (2004).

injury.¹³ Medical opinions based on incomplete or inaccurate history are of little probative value.¹⁴ This report, therefore, is insufficient to establish appellant's claim.

In his December 14, 2015 report, Dr. Danisa diagnosed bilateral lumbar radiculopathy. Similarly, Dr. Guo diagnosed lumbar disc bulge with radicular symptoms. However, neither Dr. Danisa nor Dr. Guo provided an opinion regarding the cause of these diagnosed conditions.¹⁵ The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁶ These reports are, therefore, insufficient to establish appellant's claim.

In his April 18, 2016 letter, Dr. Danisa attributed the conditions of spondylolisthesis at L4-5; disc bulge at L4-5; lumbar disc disease at L5-S1; and anterolisthesis at L3-4 and L4-5 as found on radiographic examination and lumbar MRI scan to the incident of May 14, 2015. The record does not contain a report of the lumbar MRI scan. The Board notes that Dr. Danisa reviewed a lumbar MRI scan in his December 14, 2015 report and noted a disc bulge, but only diagnosed lumbar sprain and lumbar degenerative disease. Dr. Danisa did not diagnose the disc bulge as work related until 11 months post-injury. While he offered some rationale to explain how the May 14, 2015 employment injury caused disc slippage at L3-4 to L4-5, he essentially ignores appellant's preexisting congenital spinal conditions and the effect, if any, on appellant's conditions. Accordingly, Dr. Danisa opinion is of limited probative value regarding the issue of causal relationship as it is not based on a complete medical background of appellant nor is it supported by medical rationale which explains the nature of the relationship between the diagnosed conditions and the accepted employment injury.¹⁷

Dr. Huang opined in his July 12, 2016 report that appellant's severe low back pain which occurred after the work-related accident was caused by the acute herniation and protrusion seen on MRI scan. He noted that appellant was functionally intact and had no physical restrictions, debilitating low back pain or any medications prescribed for his congenital conditions prior to the work-related injury and that the severity of the low back pain was consistent with the MRI scan findings of acute disc herniation and protrusion. A medical opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury, but symptomatic after is insufficient, without supporting rationale, to establish causal relationship.¹⁸ Dr. Huang also concluded, without a clear explanation of mechanism, that the work injury placed an undue axial stress on the lumbar discs and caused the disc's slippage. 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.¹⁹ For the above reasons,

¹³ *R.E.*, Docket No. 10-0679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007).

¹⁴ *Douglas M. McQuaid*, 52 ECAB 382 (2001).

¹⁵ *R.E.*, *supra* note 13.

¹⁶ *K.W.*, *supra* note 13; *A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, 50 ECAB 313 (1999).

¹⁷ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹⁸ *See Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹⁹ *See B.L.*, Docket No. 17-0227 (issued July 23, 2018).

Dr. Huang's opinion is of limited probative value and is insufficient to meet appellant's burden of proof.

Appellant submitted various diagnostic test reports in support of his claim. Diagnostic studies are of limited probative value as they do not address whether the employment incident caused any of the diagnosed conditions.²⁰ These reports, therefore, are also insufficient to establish appellant's claim.

Rationalized medical evidence must be of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.²¹ The Board finds that appellant has not submitted sufficient rationalized medical evidence supporting causal relationship between any of the claimed additional conditions and the May 14, 2015 employment injury.

LEGAL PRECEDENT -- ISSUE 2

Under FECA the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.²²

The issue of disability from work can only be resolved by competent medical evidence.²³ The issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors, and supports that conclusion with sound medical reasoning.²⁴ A physician's opinion on causal relationship between a claimant's disability and an employment injury is not dispositive simply because it is rendered by a physician. To be of probative value, the physician must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.²⁵

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish employment-related disability for the period October 16, 2015 through January 2, 2016 causally related to the accepted May 14, 2015 back sprain, lumbar region.

In his December 14, 2015 and February 5, 2016 reports, Dr. Danisa diagnosed chronic lower back pain and bilateral lumbar radiculopathy. He indicated that appellant was unable to return to work from September 2015 until lumbar epidural injections were received. A bilateral

²⁰ See *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

²¹ *C.O.*, Docket No. 10-0189 (issued July 15, 2010).

²² See 20 C.F.R. § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

²³ *R.C.*, 59 ECAB 546 (2008).

²⁴ See *Sandra D. Pruitt*, 57 ECAB 126 (2005).

²⁵ *Thaddeus J. Spevack*, 53 ECAB 474 (2002).

lumbar radiculopathy had not been accepted as causally related to the May 14, 2015 employment injury and Dr. Danisa did not relate any disability to the accepted lumbar sprain. As Dr. Danisa failed to offer any rationale for his opinion that appellant was disabled as of September 2015 due to his accepted lumbar sprain, his opinion is of limited probative value.²⁶ In his April 18, 2016 report, Dr. Danisa opined that appellant was permanently disabled due to his chronic back pain. However, an assessment of low back pain is a symptom, not a diagnosis.²⁷ Therefore, this medical report is insufficient to establish the claimed period of disability.

In his July 12, 2016 report, Dr. Huang opined that appellant's back pain and his resultant physical disability was caused by the work-related accident. However, he related the back pain to an acute disc herniation and protrusion, which are not accepted conditions. Dr. Huang also did not offer an explanation for the period of claimed disability causally related to the accepted employment injury. Likewise, Dr. Guo, in his August 11, 2016 report, did not offer a specific medical opinion addressing whether appellant's disability from work during the claimed periods of October 16, 2015 through January 2, 2016 was causally related to the accepted work injuries.

The issue of whether a claimant's disability is causally related to an accepted condition is a medical question, which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.²⁸ None of the medical reports of record explain with sufficient rationale how appellant's accepted lumbar sprain caused him to be disabled from work for the period October 16, 2015 through January 2, 2016.²⁹

As appellant did not submit sufficient rationalized medical opinion evidence to establish that he was disabled for work for the period October 16, 2015 through January 2, 2016 due to accepted lumbar sprain, he has failed to establish that the claimed disability was employment related. He was thus not entitled to wage-loss compensation for the period claimed.³⁰

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.

²⁶ *Id.*

²⁷ *C.F.*, Docket No. 08-1102 (issued October 10, 2008); *Robert Broome*, 55 ECAB 339 (2004).

²⁸ *See supra* note 24.

²⁹ *See S.B.*, Docket No. 13-1162 (issued December 12, 2013).

³⁰ *See C.H.*, Docket No. 17-0488 (issued September 12, 2017); *N.R.*, Docket No. 14-0114 (issued April 28, 2014).

LEGAL PRECEDENT -- ISSUE 3

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.³¹

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.³²

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.³³ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.³⁴ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.³⁵

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; and he has not advanced a relevant legal argument not previously considered by OWCP. Consequently, he is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

The underlying issues in this case were whether appellant had submitted sufficient medical evidence to establish that additional conditions were causally related to the accepted employment injury and whether he has established total disability for the claimed period due to the accepted employment injury.

Appellant submitted a copy of the May 26, 2015 emergency room report, a May 26, 2016 x-ray report, a May 30, 2015 MRI scan report of the lumbar spine, and an August 5, 2015 report from Dr. Hein. While this evidence was new to the record, it is not relevant to either of the underlying issues as it does not address causal relationship of any additional conditions, or causal

³¹ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

³² 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

³³ *Id.* at § 10.607(a).

³⁴ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

³⁵ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

relationship of any disability during the period claimed. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.³⁶

The Board finds, therefore, that appellant has not met any of the regulatory requirements and OWCP properly declined his request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).³⁷

CONCLUSION

The Board finds that appellant has not met his burden of proof to expand the acceptance of his claim to include additional conditions causally related to the accepted May 14, 2015 employment injury, and further finds that he has not met his burden of proof to establish that he was totally disabled for the period October 16, 2015 through January 2, 2016 due to the accepted May 14, 2015 employment injury. The Board also finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 10 and March 27, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 10, 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

³⁶ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

³⁷ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).