

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

K.B., Appellant	)	
	)	
and	)	<b>Docket No. 19-0398</b>
	)	<b>Issued: December 18, 2019</b>
<b>DEPARTMENT OF DEFENSE, DEFENSE</b>	)	
<b>LOGISTICS AGENCY, New Cumberland, PA,</b>	)	
<b>Employer</b>	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
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  
JANICE B. ASKIN, Judge

**JURISDICTION**

On December 13, 2018 appellant, through counsel, filed a timely appeal from a July 6, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish a lumbar condition causally related to the accepted March 16, 2017 employment incident.

## FACTUAL HISTORY

On March 22, 2017 appellant, then a 49-year-old distribution process worker (DPW), filed a traumatic injury claim (Form CA-1) alleging that on March 16, 2017 he injured his lower back while in the performance of duty. He indicated that he “slipped and fell catching self while twisted.” Appellant stopped work on March 16, 2017 and returned on March 21, 2017.

Appellant initially received treatment from Dr. Lauren Cashman, a Board-certified family physician. In a March 16, 2017 report, Dr. Cashman noted that appellant complained of lower back and sciatic nerve pain after he slipped on ice while shoveling snow at work. She noted that he had a history of occasional low back pain radiating down the back of his right leg. Dr. Cashman described a December 26, 2016 incident when appellant felt a twinge in his back when he got up. Upon examination of appellant’s back, she observed bilateral tenderness in the paraspinal region and decreased range of motion with extension, right flexion, and left flexion. Straight leg raise testing was positive on the right. Dr. Cashman diagnosed acute low back pain and right sciatic neuropathy. She indicated that appellant may return to work with restrictions.

In a March 23, 2017 report, Dr. Amanda L. Keller-Smith, an osteopath Board-certified in family practice, indicated that appellant was seen for follow-up of worsening lower back injuries. She recounted that appellant noticed back pain approximately one week prior at work. Dr. Keller-Smith reported examination findings of normal alignment and mobility of his lumbar spine. She diagnosed acute low back pain and paresthesia of the right leg.

A March 23, 2017 thoracic spine x-ray revealed mild degenerative changes of the lower thoracic spine and limited lumbar spine examination with no definitive gross malalignment or acute abnormality.

In a March 27, 2017 report, Dr. Annie M. Harberger, an osteopath Board-certified in family practice, noted that appellant was seen for follow-up of acute low back pain with sciatica neuropathy symptoms and paresthesia of the right lower extremity. She reported that on March 16, 2017 appellant slipped on ice when he was shoveling snow outside his building. Upon examination of appellant’s lumbar spine, Dr. Harberger observed moderate right-sided paralumbar tenderness and antalgic gait. Gross motor and sensation were intact. Dr. Harberger diagnosed acute low back pain, right sciatic neuropathy, and right leg paresthesia. She concluded that appellant suffered low back pain with radiculopathy to the right leg after a March 16, 2017 work injury. In a work status note, Dr. Harberger indicated that appellant was excused from work from March 27 to April 12, 2017 due to his March 16, 2017 work-related injury.

Appellant began physical therapy treatment on March 29, 2017 and submitted physical therapy progress notes dated March 29 to June 19, 2017.

In an April 4, 2017 report, Dr. Arnold Salotto, a Board-certified neurological surgeon, noted that appellant injured his back several weeks prior while shoveling snow at work. Examination of appellant's back demonstrated good range of motion in flexion and extension. Dr. Salotto opined: "I suspect that he mostly has strain injury to the back." He recommended a lumbar spine magnetic resonance imaging (MRI) scan to rule out acute changes.

In an April 12, 2017 report, Dr. Harberger noted that appellant continued to have occasional and intermittent lower back pain. She also noted the March 16, 2017 work injury and reported lumbar examination findings of moderate right-sided paralumbar spinal tenderness and antalgic gait. Dr. Harberger diagnosed lumbar radiculopathy, paresthesia of right leg, and right sciatic neuropathy. She provided a work status note and duty status report (Form CA-17) indicating that appellant should remain off work until May 22, 2017.

An April 13, 2017 lumbar spine MRI scan showed degenerative changes of the lower lumbar spine with small central disc herniation at L4-5, mild lower lumbar facet arthrosis, moderate neural foraminal stenosis bilaterally at L5-S1, and mild scoliosis.

In a letter dated April 28, 2017, F.S., an injury compensation specialist for the employing establishment, contended that it was unclear whether appellant's injury on March 16, 2017 was a result of a new medical condition or an aggravation of his preexisting, nonwork-related condition.

In a May 16, 2017 report, Dr. Deborah L. Bernal, Board-certified in physical medicine and rehabilitation, described the March 16, 2017 employment incident and reviewed the medical treatment that appellant had received. She reported lumbar physical examination findings of decreased lumbar lordosis and painful range of motion. Dr. Bernal diagnosed lumbar radiculopathy, right leg paresthesia, and scoliosis. She answered "yes" in response to a question indicating that appellant's injury was consistent with work-related etiology. Dr. Bernal completed a work status note, which recommended that appellant remain off work from May 9 through June 7, 2017.

In a June 6, 2017 development letter, OWCP informed appellant that his claim was initially accepted as a minor injury, but was now being reopened to formally consider the merits of the claim. It advised him of the factual and medical evidence necessary to establish his claim and also provided a questionnaire for completion. OWCP afforded appellant 30 days to provide the necessary factual information and medical evidence.

In a June 12, 2017 report, Dr. Harberger noted appellant's complaints of chronic right thigh and back pain. She conducted an examination and reported active problems of acute low back pain, lumbar radiculopathy, right leg paresthesia, right sciatic neuropathy, and scoliosis.

In a June 19, 2017 letter, Dr. Harberger indicated that appellant had been evaluated in her office several times since March 16, 2017 after he injured his lower back at work. She noted that he was initially seen by Dr. Cashman and was diagnosed with acute lumbar back pain, lumbar radiculopathy, and sciatica. Dr. Harberger opined that appellant's current medical condition was caused by the employment incident on March 16, 2017. She explained that appellant was trying to shovel snow/ice outside of his workplace, subsequently sustained a fall from slipping on the ice, and immediately noticed pain.

On June 21, 2017 OWCP received appellant's response to its development letter. Appellant described his job duties and discussed the March 16, 2017 employment incident. He explained that when he came into work, none of the walkways in front of Building 58 had been cleared of snow. Appellant further explained that he began shoveling the walkway between the 58 warehouse and office when he slipped on some ice, twisted, and caught himself. He noted that he felt immediate pain in his lower back. Appellant indicated that he sought medical treatment and was informed that he had strained his lower back.

In a June 19, 2017 report, Dr. Bernal noted that appellant continued to complain of lower back and leg pain. She noted a March 16, 2017 date of injury and responded "yes" indicating that his injury was consistent with work-related etiology. Dr. Bernal recommended that appellant undergo an electromyography (EMG) examination.

By decision dated July 14, 2017, OWCP denied appellant's claim. It accepted that the March 16, 2017 employment incident occurred as alleged, but denied the claim finding that the evidence of record was insufficient to establish a valid medical diagnosis in connection with the accepted employment incident. Therefore, appellant had not met the requirements to establish an injury as defined by FECA.

On August 14, 2017 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

OWCP received a July 27, 2017 EMG and nerve conductive velocity (NCV) study by Dr. Ravi Dukkupati, a Board-certified neurologist, who noted abnormal findings. Dr. Dukkupati indicated that the abnormal results were suggestive of sensorimotor polyneuropathy, but there was no evidence of focal neuropathy or radiculopathy.

In an August 8, 2017 letter, Dr. Harberger indicated that appellant had diagnosed degenerative changes in his lower lumbar spine with disc herniation at L4-5 levels. She noted that the diagnosis was made with diagnostic imaging and specialty visits with pain management and neurosurgery. Dr. Harberger opined that the symptoms appellant was currently experiencing were exacerbated by his work-related injury that occurred on March 16, 2017.

In a November 20, 2017 progress note, Dr. Bernal noted a date of injury of March 16, 2017. She provided examination findings and diagnosed lumbar radiculopathy. Dr. Bernal explained that appellant completed his physical therapy and functional capacity evaluation (FCE) and was able to return to medium work. She submitted an FCE and cardiovascular tests dated November 8, 2017.

By decision dated January 25, 2018, an OWCP hearing representative affirmed the July 14, 2017 denial decision finding that the medical evidence of record was insufficient to establish a diagnosed medical condition causally related to the accepted March 16, 2017 employment incident.

OWCP subsequently received a January 31, 2018 letter from the employing establishment. It asserted that appellant had not provided probative medical documentation to support his claimed March 16, 2017 work-related injury. The employing establishment noted that multiple medical documents in the record demonstrated that appellant has multiple, nonindustrial health conditions.

In a February 8, 2018 letter, K.F., appellant's union steward, noted his disagreement with the employing establishment's January 31, 2018 letter. He related that in her August 8, 2017 report, Dr. Harberger provided a diagnosis of degenerative changes of his lower lumbar spine with disc herniation and also opined that his lumbar condition was exacerbated by the March 16, 2017 employment injury. K.F. indicated that appellant did not have physical limitations before the claimed employment injury and also that appellant had been capable of performing basic life functions.

On April 9, 2018 appellant requested reconsideration. He clarified that the December 26, 2016 incident mentioned by Dr. Cashman was for a previous injury and noted that he highlighted an addendum to address that concern.

In a March 23, 2018 addendum, Dr. Cashman explained that the December 26, 2016 injury mentioned in appellant's history was not pertinent to the March 16, 2017 work injury. She opined that he sustained a new injury on March 16, 2017 and was seen in her office on that same day.

By decision dated July 6, 2018, OWCP modified the January 25, 2018 decision finding that appellant had met his burden of proof to establish a medical diagnosis of exacerbation or aggravation of degenerative changes of the lumbar spine with disc herniation at L4-5. However, the claim remained denied as the medical evidence of record was insufficient to establish causal relationship between his diagnosed condition and the accepted March 16, 2017 employment incident.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</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 of FECA,<sup>4</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>5</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>6</sup>

In order to determine whether a federal employee has sustained a traumatic injury in the performance of duty, OWCP must first determine whether fact of injury has been established.<sup>7</sup> There are two components involved in establishing fact of injury. First, the employee must submit

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<sup>3</sup> *Id.*

<sup>4</sup> *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>6</sup> *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>7</sup> *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *S.P.*, 59 ECAB 184 (2007).

sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.<sup>8</sup> Second, the employee must submit evidence to establish that the employment incident caused a personal injury.<sup>9</sup>

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.<sup>10</sup> The opinion of the physician must be based on a complete factual and medical background of the employee, 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 factor(s) identified by the employee.<sup>11</sup> The weight of the 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.<sup>12</sup>

In cases where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.<sup>13</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a lumbar condition causally related to the accepted March 16, 2017 employment incident.

Appellant submitted reports and letters by Dr. Harberger dated March 27 to August 8, 2017. In a March 27, 2017 report, Dr. Harberger recounted his complaints of acute low back pain and noted an initial injury of March 16, 2017 when appellant slipped on ice while shoveling snow outside his work building. She reported that diagnostic imaging demonstrated that he had degenerative changes in his spine. Dr. Harberger diagnosed acute low back pain, right sciatic neuropathy, and right leg paresthesia. She concluded that appellant suffered low back pain with radiculopathy to the right leg after a March 16, 2017 work injury. The Board has held, however, that a medical opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury, but symptomatic after it is insufficient,

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<sup>8</sup> *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

<sup>9</sup> *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>10</sup> *See S.A.*, Docket No. 18-0399 (issued October 16, 2018); *see also Robert G. Morris*, 48 ECAB 238 (1996).

<sup>11</sup> *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>12</sup> *James Mack*, 43 ECAB 321 (1991).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

without supporting rationale, to establish causal relationship.<sup>14</sup> This report, therefore, lacks probative value to meet appellant's burden of proof.

In an August 8, 2017 letter, Dr. Harberger indicated that appellant had diagnosed degenerative changes in his lower lumbar spine with disc herniation at L4-5 levels. She opined that the symptoms appellant was experiencing were exacerbated by his employment injury that occurred on March 16, 2017. While Dr. Harberger provided an affirmative opinion on causal relationship, she did not explain how appellant sustained an aggravation of his degenerative lumbar condition with disc herniation due to the accepted March 16, 2017 employment incident. Medical evidence that states a conclusion, but does not offer a rationalized medical explanation regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>15</sup> The need for rationalized medical opinion evidence is particularly important in this case because an April 13, 2017 MRI scan revealed degenerative changes of the lower lumbar spine with small central disc herniation at L4-5.<sup>16</sup> Dr. Harberger did not provide a discussion of the underlying degenerative condition or provide a detailed opinion explaining how appellant's preexisting lumbar spine condition had been aggravated beyond what was expected with normal degeneration.<sup>17</sup> For these reasons, Dr. Harberger's medical opinion is insufficient to establish appellant's claim.

In a March 16, 2017 report, Dr. Cashman recounted that on that day appellant slipped on ice while shoveling snow at work and experienced back and sciatic nerve pain. She noted that he had a history of occasional low back pain and also described a December 26, 2016 incident. Dr. Cashman conducted an examination and diagnosed acute low back pain and right sciatic neuropathy. In a March 23, 2018 addendum, she clarified that the December 26, 2016 injury was not pertinent to the March 16, 2017 employment incident and that appellant sustained a new injury on March 16, 2017. Although Dr. Cashman described the March 16, 2017 employment incident and provided diagnosed conditions, she did not provide a reasoned opinion explaining how the March 16, 2017 employment incident caused or contributed to his current lumbar condition, in light of his underlying degenerative condition.<sup>18</sup> The Board has found that a physician must provide a narrative description of the identified employment incident and a reasoned opinion on whether the employment incident described caused or contributed to appellant's diagnosed medical condition(s).<sup>19</sup> This medical report, therefore, is insufficient to establish his claim.

In a March 23, 2017 report, Dr. Keller-Smith provided examination findings and noted an assessment of acute low back pain and paresthesia of the right leg. Although she described

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<sup>14</sup> *K.R.*, Docket No. 18-1388 (issued January 9, 2019); *E.D.*, Docket No. 16-1854 (issued March 3, 2017); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

<sup>15</sup> *D.H.*, Docket No. 17-1913 (issued December 13, 2018); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

<sup>16</sup> *Supra* note 13.

<sup>17</sup> *See K.C.*, Docket No. 19-0834 (issued October 28, 2019).

<sup>18</sup> *See M.B.*, Docket No. 17-1346 (issued September 11, 2018).

<sup>19</sup> *John W. Montoya*, 54 ECAB 306 (2003).

appellant's symptoms, she did not provide an opinion on causal relationship. Consequently, this report lacks probative value to meet appellant's burden of proof.<sup>20</sup>

The diagnostic evidence of record, including the April 13, 2017 lumbar spine MRI scan, the March 23, 2017 thoracic spine x-ray, and the July 27, 2017 EMG/NCV, also lack probative value and are insufficient to establish appellant's claim. The Board has explained that diagnostic studies lack probative value as they do not address whether the employment incident caused any diagnosed conditions.<sup>21</sup>

In an April 4, 2017 report, Dr. Salotto noted that appellant experienced back pain when shoveling snow at work. He provided examination findings and indicated: "I suspect that he mostly has strain injury to the back." Dr. Salotto's diagnosis of "mostly has strain injury to the back" is of diminished probative value, however, as it is speculative in nature.<sup>22</sup>

In reports dated May 16 to November 20, 2017, Dr. Bernal described the March 16, 2017 employment incident and provided examination findings. She diagnosed lumbar radiculopathy, right leg paresthesia, and scoliosis. Dr. Bernal answered "yes" in response to a question indicating that appellant's injury was consistent with work-related etiology, but provided no rationale in support of the opinion. Thus, the Board finds that these medical reports are insufficient to establish appellant's claim.<sup>23</sup>

Appellant submitted physical therapy progress notes dated March 29 to June 19, 2017. These documents do not constitute competent medical evidence because a physical therapist is not considered a "physician" as defined under FECA.<sup>24</sup> As such, this evidence is also insufficient to meet appellant's burden of proof.

On appeal counsel argues that OWCP's reasoning in denying appellant's traumatic injury claim was flawed and inaccurate. He alleges that Dr. Harberger's August 8, 2017 letter establishes that appellant sustained an aggravation of his preexisting lumbar condition. As explained above, the medical evidence in the record, including Dr. Harberger's August 2017 letter, was insufficient to establish that appellant sustained an aggravation or exacerbation of his lumbar condition causally related to the accepted March 16, 2107 employment incident. Thus, OWCP properly denied appellant's traumatic injury claim.

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<sup>20</sup> See *supra* note 14.

<sup>21</sup> See *M.V.*, Docket No. 18-1132 (issued September 16, 2019); *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

<sup>22</sup> Medical opinions that are speculative or equivocal in character are not well rationalized and are of diminished probative value. *D.D.*, 57 ECAB 734, 738 (2006); *Kathy A. Kelley*, 55 ECAB 206 (2004).

<sup>23</sup> See *supra* note 19.

<sup>24</sup> See *M.M.*, Docket No. 17-1641 (issued February 15, 2018); *K.J.*, Docket No. 16-1805 (issued February 23, 2018); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law).



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 March 16, 2017 employment incident.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 6, 2018 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 18, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board