

ISSUE

The issue is whether appellant has met his burden of proof to establish a lumbar condition causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 26, 2015 appellant, then a 44-year-old veterans rating service representative, filed an occupational disease claim (Form CA-2) alleging that he developed degenerative joint disease (DJD) of the lumbar spine due to factors of his federal employment. He noted that he first became aware of his condition and of its relationship to his employment on October 1, 2009. In an accompanying narrative statement, appellant reported that he began working for the employing establishment in August 2009 at which time he was provided a standard-sized chair and desk. He explained that, because he was 6 foot 5 inches and 215 pounds, he requested a chair that would properly accommodate his body frame as he experienced lumbar pain and discomfort in the chair he was provided. However, appellant's request for a properly fitting chair went unanswered. He noted that his job entailed sitting for eight hours per day and, prior to working for the employing establishment, he had never worked in a sedentary position.⁵ Appellant reported that, despite trying other chairs that were in his office, he could not find one that suited his size. He noted that the chair he was provided was adjustable up to 21 inches from the floor whereas an ergonomic evaluation found that his chair base should be 24 to 25 inches off the ground.

Appellant sought treatment with his attending physician Dr. Juan-Kin K. Fong, a Board-certified orthopedic surgeon. In reports dated September 12, 2014 through October 9, 2015, Dr. Fong described appellant's employment duties, noting that his work required that he sit in a chair for prolonged periods of time. He explained that appellant was 6 foot 5 inches tall while his workstation chair was only 23 inches high, causing him to sit in an awkward position with his back and neck significantly flexed. Dr. Fong reviewed diagnostic testing, explaining that an August 12, 2014 x-ray of the lumbar spine revealed mild facet changes due to narrowing of the neuroforaminae at L4-5/S1. He explained that the presence of these hypertrophic changes in the facets suggested early degenerative disc disease of the facets due to activities such as prolonged sitting, especially in an ergonomically poor position. Dr. Fong explained that increasing the load on these structures would precipitate inflammation of the facet joints, leading to localized muscle spasm and pain with decreased motion and activity tolerance.

Dr. Fong noted that appellant's work required prolonged sitting at ergonomically inadequate workstations (due to his height), thus increasing the pressure in the lower spine. As

⁴ Docket No. 16-1222 (issued March 9, 2017).

⁵ The record reflects that appellant began his employment as a veterans rating service representative on August 16, 2009. His work was primarily sedentary and he was provided with a computer, mouse, and appropriate computer systems technology. Appellant received an ergonomic chair on or about January 19, 2012, and on February 14, 2012 his workstation was relocated to accommodate for voice recognition software and a desk top podium.

such, the combination of the prolonged sitting and poor ergonomics precipitated appellant's lumbar spine condition which was the cause of the continued back dysfunction. Dr. Fong explained that ergonomic adjustments were not made for some time, leaving appellant exposed to substandard conditions.

By decisions dated July 10, 2015 and January 4, 2016, OWCP denied appellant's claim finding that the medical evidence of record failed to establish that his diagnosed lumbar conditions were causally related to the accepted factors of his federal employment.

On May 17, 2016 appellant appealed to the Board. By decision dated March 9, 2017, the Board remanded the case to OWCP for further development of the medical evidence.⁶ The Board found that Dr. Fong's medical reports provided a detailed medical history, physical examination findings, and review of diagnostic testing, and that, while none of his reports were completely rationalized, they were consistent in indicating that appellant sustained an employment-related injury.

On remand OWCP referred appellant, together with a statement of accepted facts (SOAF) and the medical record, to Dr. John Hearst Welborn Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a May 24, 2017 report, Dr. Welborn diagnosed "degenerative joint disease" of the lumbar spine and mild facet arthropathy. He opined that these conditions were more than likely not medically connected to the reported work injury of sitting in a chair for eight hours at a time from 2009 to 2013. Dr. Welborn noted that appellant reported complaints of pain two to three months after he started working for the employing establishment in 2009 and this did not cause the early degeneration of his facet joints. He explained that appellant had preexisting early lumbar facet arthropathy which would be temporarily aggravated by sitting and would not be caused by sitting. Dr. Welborn reported that appellant had temporary aggravation with sitting in a regular chair and was provided an ergonomic chair to avoid this aggravation, which ceased in 2013. He opined that appellant's prognosis was poor as his preexisting degeneration would likely worsen with time and age. Dr. Welborn concluded that he could continue to work full duty with an ergonomic workstation.

By decision dated July 13, 2017, OWCP denied appellant's claim finding that the medical evidence of record was insufficient to establish that his diagnosed lumbar conditions were causally related to the accepted factors of his federal employment.

On April 27, 2018 appellant, through counsel, requested reconsideration of the July 13, 2017 OWCP decision. Counsel provided arguments in support of appellant's occupational disease claim and submitted a February 21, 2018 medical report from Dr. Michael Hebrard, Board-certified in physical medicine and rehabilitation.

In a February 21, 2018 report, Dr. Hebrard discussed appellant's history of injury, provided findings on physical examination, and summarized diagnostic testing. He diagnosed sprain of ligaments of the lumbar spine and other intervertebral disc degeneration of the lumbar region. Dr. Hebrard opined, to a reasonable degree of medical certainty, that appellant's condition was causally related to his employment over the past eight years which involved sitting for extended

⁶ *Supra* note 4.

periods of time. He explained that in his initial two to three years, appellant was sitting in a very ergonomically challenged situation during which he was in a squatted position for extended periods of time with his back and hips flexed, ultimately causing functional rotation of the pelvis, particularly posteriorly at the sacral region, leading to flattening of the normal lordosis, leading to an increased amount of stacking of the intervertebral disc.

Dr. Hebrard further explained that, for the last five years, appellant was provided with a standup desk and ergonomic keyboard and mouse. However, he opined that the initial events caused him to be in a flexed position and given his exceptional height aggravated his underlying lumbar spine condition leading to a posterior rotation of the sacral, leading to stress on the intervertebral disc, and subsequently to the SI joints and the ligaments. Dr. Hebrard noted that appellant's recovery period was partial and not complete because he had residual functional muscle spasms which reduced his functional capacity for sitting for extended periods of time.

On May 3, 2018 OWCP found that a conflict of medical opinion existed between Dr. Welborn, the second opinion physician, and Drs. Fong and Hebrard, appellant's treating physicians. OWCP prepared a SOAF dated May 3, 2018.

OWCP referred appellant, the case file, and an updated SOAF to Dr. Roger D. Dainer, a Board-certified orthopedic surgeon, for an impartial medical examination. It requested the referee physician provide all current diagnoses found with respect to the claim for employment-related low back injury. OWCP further requested that he explain the etiology, physiology, and physio-mechanism of the diagnoses in relation to appellant's employment factors.

In a June 25, 2018 medical report, Dr. Dainer evaluated appellant for the purposes of a referee examination and diagnosed chronic lumbar strain and lumbar facet arthrosis of the lower segments. He opined that absent appellant's employment with the employing establishment, he would still have the symptoms and clinical findings described in his report. Dr. Dainer further opined that any further evaluation and treatment in regards to appellant's low back condition should be procured outside of the claimed employment injury of October 1, 2009.

By decision dated July 24, 2018, OWCP denied modification of the July 13, 2017 decision. It found that the special weight of the medical evidence rested with Dr. Dainer, serving as the referee physician, who opined that appellant's chronic back conditions were not related to the accepted factors of his federal employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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,⁷ 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

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

to the employment injury.⁸ 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.⁹

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.¹⁰

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.¹¹ 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.¹²

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.¹³ For a conflict to arise, the opposing physicians' viewpoints must be of "virtually equal weight and rationale."¹⁴ Where OWCP has referred the case to an impartial medical examiner (IME) to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.¹⁵

When OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in his original report. If the referee physician fails to respond or does not provide an adequate response, OWCP should refer appellant for a new IME examination.¹⁶

⁸ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁹ *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

¹⁰ *E.M.*, Docket No. 18-0275 (issued June 8, 2018); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

¹¹ *A.M.*, Docket No. 18-0685 (issued October 26, 2018).

¹² *B.J.*, Docket No. 19-0417 (issued July 11, 2019).

¹³ 5 U.S.C. § 8123(a); *A.R.*, Docket No. 18-0632 (issued October 19, 2018).

¹⁴ *C.H.*, Docket No. 18-1065 (issued November 29, 2018).

¹⁵ *W.M.*, Docket No. 18-0957 (issued October 15, 2018).

¹⁶ See also *W.H.*, Docket No. 16-0806 (issued December 15, 2016); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(e) (September 2010).

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's January 4, 2016 decision because the Board has already considered that evidence in its March 9, 2017 decision.¹⁷ Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁸

Following development of the case on remand from the Board, OWCP found a conflict in medical opinion between Dr. Welborn, the second opinion physician, and Drs. Fong and Hebrard, appellant's treating physicians. On June 25, 2018 it referred appellant to Dr. Dainer, for an impartial medical evaluation (referee examination) to resolve the conflict.

The Board notes that OWCP requested Dr. Dainer provide all current diagnoses. OWCP further requested that he explain which, if any, were medically connected to appellant's employment and to explain the etiology, physiology, and physio-mechanism of the diagnoses in relation to the factors of appellant's employment. In his June 25, 2018 report, Dr. Dainer diagnosed chronic lumbar strain and lumbar facet arthrosis. He responded to OWCP's request and opined that absent appellant's employment with the employing establishment, he would still have had the symptoms and clinical findings described in his report. Dr. Dainer further opined that any further evaluation and treatment in regards to appellant's low back condition should be procured outside of the claimed employment injury of October 1, 2009.

The Board finds that the opinion of Dr. Dainer is not well rationalized regarding whether appellant's claimed lumbar conditions were causally related to the accepted factors of his federal employment, directly or through aggravation, precipitation, or acceleration. The Board has consistently held that a medical opinion not fortified by rationale is of limited probative value.¹⁹

OWCP specifically requested that Dr. Dainer provide current diagnoses and an opinion as to whether these diagnoses were causally related to appellant's employment. While OWCP provided a timeline in the SOAF as to when appellant was provided an ergonomic chair, Dr. Dainer was not asked to address appellant's diagnoses between October 2009, when he first became aware of his lumbar condition, and 2012, when he was provided an ergonomic chair. Dr. Dainer therefore did not address appellant's lumbar condition as of the date the claim was filed nor did he provide sound medical rationale for his opinion that appellant's lumbar condition was not related, either wholly or in part, to the accepted factors of employment. The record reflects that appellant's treating physicians provided extensive discussion as to how his lumbar condition developed due to sitting in a small chair.

The Board finds that Dr. Dainer did not describe the development of appellant's lumbar condition, he did not discuss appellant's diagnoses as of the date the claim was filed, nor did he explain why sitting in an inappropriately-sized chair could not have been competent to cause or

¹⁷ *R.H.*, Docket No. 19-0311 (issued July 2, 2019).

¹⁸ *T.H.*, Docket No.18-1585 (issued March 22, 2019).

¹⁹ *J.N.*, Docket No. 17-0237 (issued July 13, 2017); *A.D.*, 58 ECAB 149 (2006).

aggravate his condition, as discussed by Dr. Fong and Dr. Hebrard. Furthermore, his blanket statement that appellant would still have his current low back symptoms and clinical findings irrespective of his employment was unrationalized.²⁰ The Board has held that to be entitled to special weight, a referee physician's opinion must contain clear, persuasive rationale on the critical issue in the claim.²¹ However, Dr. Dainer's report does not contain such rationale and the physician failed to resolve the conflict in medical opinion as to whether appellant developed a lumbar condition due to sitting in the undersized chair between August 2009 and January 2012. Thus, the Board finds that Dr. Dainer's opinion is of insufficient probative value to carry the special weight of the evidence and the case must be remanded for further development.²²

Once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.²³ When it obtains an opinion from a referee physician for the purpose of resolving a conflict in the medical evidence and the opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report.²⁴

On remand OWCP should obtain a supplemental report from Dr. Dainer to resolve the conflict pertaining to whether appellant's lumbar condition at the time the claim was filed, and thereafter, was causally related to the accepted factors of his federal employment, either directly or through aggravation, precipitation, or acceleration. If Dr. Dainer is unable to clarify or elaborate on his original report, or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed SOAF to a new impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue.²⁵ Following this and any other further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's occupational disease claim.

CONCLUSION

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

²⁰ *J.M.*, Docket No. 09-1399 (issued February 22, 2010).

²¹ *A.R.*, Docket No. 17-1358 (issued February 1, 2018).

²² *Id.*

²³ *See K.S.*, Docket No. 18-0845 (issued October 26, 2018).

²⁴ *C.B.*, Docket No. 16-1713 (issued April 21, 2017).

²⁵ *R.H.*, Docket No. 17-1903 (issued July 5, 2018); *J.W.*, Docket No. 15-0020 (issued August 17, 2016).

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: September 5, 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