

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

R.G., Appellant

and

**DEPARTMENT OF AGRICULTURE, APHIS
PLANT PROTECTION & QUARANTINE,
Tampa, FL, Employer**

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**Docket No. 18-0917
Issued: March 9, 2020**

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 26, 2018 appellant, through counsel, filed a timely appeal from a February 14, 2018 merit 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 this case.

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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a lumbar condition causally related to his accepted November 12, 2015 employment incident.

FACTUAL HISTORY

On November 23, 2015 appellant, then a 34-year-old plant protection quarantine officer, filed a traumatic injury claim (Form CA-1) alleging that, on November 12, 2015, he experienced a sharp pain in his low back as he climbed into his vehicle following a nursery inspection while in the performance of duty. He stopped work on November 18, 2015. Appellant's supervisor noted that based upon an attending physician's report, Part B of an authorization for examination and/or treatment (Form CA-16), the first date of treatment was "10/10."

OWCP received a (Form CA-16) dated November 18, 2018 issued to the Wellness Center. An attending physician report (Part B of Form CA-16) was received from Dr. Alexandra Ellison-Cherny, a chiropractor, on November 23, 2015, with supplemental handwritten notes which related that appellant was initially examined on November 19, 2018. The notes summarized that x-ray of appellant's spine revealed: loss of lumbar lordosis and decreased disc height from L4-S1 and appellant's diagnoses were presented as paresthesia of skin; sprain of ligaments of the lumbar spine, initial encounter; other intervertebral disc degeneration, lumbosacral region; other abnormalities of gait and mobility; abnormal posture; lumbago with sciatica, left side; muscle weakness (generalized); muscle spasm of the back; pain in the thoracic spine and cervicalgia.

In a December 2, 2015 development letter, OWCP advised that additional factual and medical evidence was necessary to establish appellant's traumatic injury claim. It requested that appellant complete a factual questionnaire and that he obtain a comprehensive medical report which explained how a diagnosed medical condition was caused or aggravated by the alleged employment incident. OWCP informed appellant that a chiropractor must diagnose a spinal subluxation based on x-ray evidence to be considered a physician under FECA. It afforded appellant 30 days to respond.

OWCP subsequently received physical therapy notes dating from November 23 to December 28, 2015.

Also received was a November 25, 2015 magnetic resonance imaging (MRI) scan report by Dr. Timothy Richter, a Board-certified diagnostic radiologist, which revealed findings to include an L4-5 central disc extrusion projecting inferiorly under the posterior longitudinal ligament and an L5-S1 foraminal annular tear.

In a December 7, 2015 narrative statement, appellant explained that from September 3 to October 12, 2015, he performed a considerable amount of heavy lifting at work. Appellant noted that his back pain first began on September 26, 2015, but he continued to work and, while getting into his truck after performing an inspection on November 12, 2015, he felt a sharp pain in his lower back. His condition thereafter continued to worsen to the point that he was unable to move without tremendous pain, and he notified his supervisor of his injury. In response to whether his claim was one for an occupational disease or a traumatic injury, appellant explained that he had

filed a Form CA-1 because he was unable to work on November 12, 2015. He noted that his pain started in September; however, the activity that caused the flare-up of pain on November 12, 2015 was different from the lifting that contributed to his September pain.

OWCP also received treatment notes from November 18 to December 30, 2015, from Dr. Ellison-Cherny who provided treatment for appellant's low back pain, as well as hamstring, calf and cervical pain. In her November 18, 2015 report, she repeated her diagnoses of paresthesia of skin; sprain of ligaments of the lumbar spine, initial encounter; other intervertebral disc degeneration, lumbosacral region; other abnormalities of gait and mobility; abnormal posture; lumbago with sciatica, left side; muscle weakness (generalized); muscle spasm of the back; pain in the thoracic spine and cervicgia. Dr. Ellison-Cherny requested that appellant be excused from work beginning November 16, 2015 and until he was reevaluated in four weeks. In her November 25, 2015 report, she reviewed findings from a magnetic imaging (MRI) scan of appellant's lumbar spine. Dr. Ellison-Cherny thereafter diagnosed intervertebral lumbar disc disorder with myelopathy, lumbar spinal stenosis, lumbar intervertebral disc degeneration, lumbago with sciatica, and lumbar ligament sprain. He continued to note these diagnoses in her subsequent progress reports.

By decision dated January 7, 2016, OWCP denied appellant's claim finding that the medical evidence of record was insufficient to establish a medical condition causally related to the accepted employment incident. It noted that the evidence submitted from the chiropractor, Dr. Ellison-Cherny, was insufficient because she did not diagnose a subluxation demonstrated by x-ray and therefore was not a qualified physician under FECA. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On January 19, 2016 counsel for appellant requested a telephonic hearing before an OWCP hearing representative. The telephonic hearing was held on September 12, 2016.

OWCP received physical therapy notes dated December 11 and 30, 2015. Additional chiropractic treatment notes dated December 11, 30, 2015 and January 6, 2016 from Dr. Ellison-Cherny were also received wherein she repeated her prior diagnoses.

By decision dated November 28, 2016, OWCP's hearing representative affirmed the January 7, 2016 decision.

On November 20, 2017 appellant, through counsel, requested reconsideration and submitted new evidence.

In a November 8, 2017 report, Dr. Neil Allen, a Board-certified neurologist and internist, noted that appellant's medical records were evaluated in order to establish whether a causal relationship existed between appellant's lumbar spine condition and work-related trauma sustained on November 12, 2015. He indicated that appellant's diagnoses included lumbar spine strain and aggravation of degenerative disc disease, lumbar region. Dr. Allen advised that appellant denied symptoms prior to the incident on November 12, 2015.

Dr. Allen referred to a medical reference manual, *Functional Anatomy of the Spine*, 2nd Edition, which explained that even though "a patient might describe an isolated flexion movement causing injury to the lumbar spine, in many cases, the offending movement was probably the last

in a succession of repeated flexion movement.” He opined that the traumatic event on November 12, 2015, compounded by the repetitive flexion required by appellant’s position to inspect plants and climb into and out of his vehicle was the direct cause of the manifestation of symptomatic lumbar disc herniation(s). Dr. Allen added that muscle fibers are subjected to the same stress and damage as the fibers of the disc and these injuries were referred to as muscle strains. He explained that typical symptoms in a case of symptomatic disc pathology and or/ muscle strain included low back pain. Dr. Allen advised that an examination would reveal lumbar tenderness, pain with motion, aberrant reflexes, and a positive straight leg raise (indicative of radiculitis). He noted that appellant’s records indicated that he had findings of tenderness, painful and reduced range of motion and muscle weakness. Dr. Allen opined that the aggravation of appellant’s underlying disc condition and lumbar muscle strain resulted from the alleged November 12, 2015 employment incident. He indicated that these findings were both reasonable and expected based upon the mechanism described by appellant and documented within his medical records.

By decision dated February 14, 2018, OWCP modified the November 28, 2017 decision, finding that Dr. Allen provided a diagnosis; however, the claim remained denied as he did not provide a well-rationalized medical opinion supporting causal relationship between the diagnosed conditions and the accepted employment incident.

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,³ 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.⁴ 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.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the

³ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *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).

time, place, and in the manner alleged. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.⁶

Rationalized medical opinion evidence is required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, 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 event identified by the claimant.⁷

In any case 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.⁸

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a lumbar condition causally related to the accepted November 12, 2015 employment incident.

In a November 8, 2017 report, Dr. Allen reviewed appellant's medical records to determine whether a causal relationship existed between appellant's lumbar spine condition and the accepted employment-related incident of November 12, 2015. He diagnosed lumbar spine strain and aggravation of degenerative disc disease, lumbar region, following his review of an MRI scan. Dr. Allen related that appellant denied symptoms prior to the November 12, 2015 employment incident, but appellant indicated that he began to experience back pain on September 26, 2015. His opinion is therefore not based on a complete factual and medical background.⁹ Additionally, Dr. Allen referred to a medical reference manual and opined that the traumatic event on November 12, 2015, was the direct cause of the manifestation of symptomatic lumbar disc herniation and muscle strain. However, the Board has explained that medical publications are of general application and not determinative regarding whether specific conditions are causally related to particular employment factors in a claim.¹⁰ While Dr. Allen attempted to explain that muscle fibers and discs were subjected to stress from flexion movements, he did not explain how the accepted employment incident of November 12, 2015 actually physiologically caused any

⁶ See *P.A., id.*; *John J. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee) and 10.5(q) (traumatic injury and occupational disease defined, respectively).

⁷ *A.W.*, Docket No. 19-0327 (issued July 19, 2019); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 45 ECAB 345 (1989).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013). See *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

⁹ *Supra* note 7.

¹⁰ *K.U.*, Docket No. 15-1771 (issued August 26, 2016).

diagnosed condition.¹¹ Given these deficiencies, Dr. Allen's report lacks probative value and is insufficient to establish appellant's claim.¹²

The record also contains treatment notes dating from November 18 to January 6, 2016 from a chiropractor. The Board notes that section 8101(2) of FECA¹³ provides that the term physician, as used therein, includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.¹⁴ OWCP's implementing federal regulation at 20 C.F.R. § 10.5(bb) defines subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. While chiropractor Dr. Ellison-Cherny's handwritten notes of her November 19, 2018 examination summarized that x-ray of appellant's spine revealed loss of lumbar lordosis and decreased disc height from L4-S1, she never explained that she offered appellant manual manipulation of the spine to correct a spinal subluxation, based upon this x-ray. Her treatment notes instead related numerous other diagnoses for which treatment was offered. Consequently, she is not considered a physician under FECA and her opinion on causal relationship does not constitute probative medical evidence.¹⁵

OWCP also received physical therapy notes. The Board finds that these reports have no probative value because physical therapists are not considered physicians as defined under FECA.¹⁶ Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.¹⁷

A November 25, 2015 MRI scan from Dr. Richter was also submitted to the record. The Board has held that diagnostic studies lack probative value as they do not provide an opinion on causal relationship between accepted employment factors and a claimant's diagnosed conditions.¹⁸

¹¹ *A.H.*, Docket No. 19-0270 (issued June 25, 2019); *M.W.*, Docket No. 18-1624 (issued April 3, 2019).

¹² *See P.A.*, Docket No. 18-0559 (issued January 29, 2020).

¹³ 5 U.S.C. § 8101(2).

¹⁴ *Id.*; 20 C.F.R. § 10.311.

¹⁵ *R.D.*, Docket No. 19-1528 (issued January 17, 2020); *see Jay K. Tomokiyo*, 51 ECAB 361 (2000).

¹⁶ 5 U.S.C. § 8101(2). *B.K.*, Docket No. 19-0829 (issued September 25, 2019); *T.C.*, Docket No. 19-0227 (issued July 11, 2019); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (under FECA the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by the applicable state law). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *J.F.* Docket No. 18-0492 (issued January 16, 2020) (physical therapists are not considered physicians under FECA).

¹⁷ *See K.N.*, *id.*; *see also Y.H.*, Docket No. 18-1618 (issued January 21, 2020).

¹⁸ *See I.C.*, Docket No. 19-0804 (issued August 23, 2019).

Because the medical evidence of record is insufficient to establish causal relationship between his November 12, 2015 employment incident and his low back condition, the Board finds that appellant has not met his burden of proof.¹⁹

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 and 20 C.F.R. §§ 10.605 through 10.607.²⁰

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a lumbar condition causally related to the accepted November 12, 2015 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ *Supra* note 7.

²⁰ The Board notes that the employing establishment issued a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).