

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

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<b>R.C., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-1321</b>
	)	<b>Issued: July 7, 2021</b>
<b>U.S. POSTAL SERVICE, VADNAIS HEIGHTS</b>	)	
<b>ANNEX POST OFFICE,</b>	)	
<b>St. Paul, MN, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On June 23, 2020 appellant filed a timely appeal from a February 27, 2020 merit decision and a May 19, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish a lower back condition causally related to the accepted September 16, 2019 employment incident; and

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the May 19, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

(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 September 30, 2019 appellant, then a 56-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 16, 2019 he injured his lower back when he twisted to place a small box down, while in the performance of duty. He indicated that he injured his back at the L4-5 level, where he had previously undergone surgery, and that it hurt to twist and sit in his vehicle.<sup>3</sup> On the reverse side of the claim form the employing establishment controverted the claim because appellant had significant preexisting conditions. It noted that appellant stopped work on September 23, 2019 and returned to work on October 1, 2019.

In a development letter dated October 23, 2019, OWCP informed appellant that additional evidence was needed to establish his claim. It advised him of the type of medical evidence necessary to establish his claim and afforded 30 days for him to submit the requested evidence.

September 23, 2019 x-rays of appellant's lumbar spine interpreted by Dr. Deepak Somashekar, a Board-certified radiologist, revealed unchanged transitional anatomy with a lumbarized S1 segment, an L5-S1 posterior spinal fusion hardware with interbody spacer, overall unchanged retrolisthesis of L5 on S1, and anterolisthesis of S1 on S2.

September 23, 2019 progress notes by Dr. Asif Maknojia, a Board-certified neurosurgeon, indicated that on May 28, 2019 appellant underwent a transforaminal lumbar interbody fusion and left L2-3 discectomy, which had initially resolved his back and leg pain. Dr. Maknojia related that appellant indicated that the previous Monday at work his back started to hurt when he was lifting a box; however, he indicated that the pain had improved. He conducted a physical examination, which revealed normal findings, reviewed appellant's diagnostic imaging, and diagnosed back pain with sciatica. A September 23, 2019 work restriction report from Dr. Maknojia advised that appellant could return to work without restrictions on October 1, 2019.

In October 25, 2019 controversion letters, the employing establishment indicated that appellant had a significant preexisting back condition. It additionally stated that medical documentation did not indicate that appellant sustained a work-related injury.

November 6, 2019 progress notes by Dr. Maknojia reviewed appellant's medical history and history of injury. Dr. Maknojia indicated that appellant was experiencing a recurrence of back and leg pain following his injury at work. Appellant indicated that pain traveled down the front of his left leg towards his ankle, which was very similar to how he felt before his surgery. Dr. Maknojia conducted a physical examination, which revealed normal results. He indicated that appellant should perform light-duty work and listed restrictions.

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<sup>3</sup> The Board notes that on April 11, 2006 appellant filed a traumatic injury claim (Form CA-1) alleging that on April 3, 2006 he twisted and threw out his back when he put a tray of flat mail into his hamper while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxxx591. This file was closed without a formal decision. Appellant's claims have not been administratively combined.

A November 12, 2019 magnetic resonance imaging (MRI) scan of appellant's lumbar spine interpreted by Dr. Zackary Royce, a Board-certified radiologist, revealed transitional lumbosacral anatomy with lumbarized S1 vertebra and probable recurrent L3-4 left subarticular disc extrusion without significant migration that effaced the left lateral recess and contacts and may exert mass effect on the descending left L4 nerve root.

A November 13, 2019 letter from Dr. Maknojia indicated that appellant could return to work with restrictions.

A November 15, 2019 duty status report (Form CA-17) by Dr. Maknojia indicated that on September 16, 2019 appellant dropped a parcel and, when he picked it up, he twisted to put it on a shelf. Dr. Maknojia diagnosed a lumbar disc herniation, which he stated was due to appellant's injury.

In a November 20, 2019 work capacity evaluation (Form OWCP-5c), Dr. Maknojia indicated that appellant had a lumbar disc herniation and he had hurt his back when he picked up a dropped parcel to place on a shelf. He related that appellant could not perform his usual job without restrictions, but was able to work an eight-hour day with restrictions. Dr. Maknojia stated that he did not know how long appellant's restrictions would apply, and that appellant had not yet reached his maximum medical improvement (MMI).

By decision dated November 25, 2019, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish a medical diagnosis in connection with the accepted September 16, 2019 employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

A July 11, 2019 x-ray of appellant's lumbar spine interpreted by Dr. Eric Carolan, a Board-certified radiologist, revealed transitional anatomy with five non-rib-bearing lumbar-type vertebrae seated transitional lumbarized S1 segment, a posterior spinal instrument fusion of L5-S1 with an accompanying interbody fusion device, stable four millimeter (mm) anterolisthesis of S1 on S2, and mild L3-4 and L4-5 degenerative disc disease. It additionally revealed unchanged leftward curvature to the lumbar spine, unchanged exaggerated lumbar lordosis, unchanged minimal retrolisthesis of L4-5, and unchanged six mm retrolisthesis of L5 on S1.

In a December 9, 2019 work capacity evaluation (Form OWCP-5c), Dr. Maknojia indicated that appellant sustained a lumbar disc herniation and he picked up a dropped parcel to put on a shelf and hurt his back. He related that appellant could not perform his usual job without restrictions, but was able to work an eight-hour day with restrictions.

On December 31, 2019 appellant requested reconsideration.

By decision dated February 27, 2020, OWCP modified its November 25, 2019 decision, finding that the evidence of record was sufficient to establish a diagnosed condition. However, it continued to deny appellant's claim, finding that the evidence of record was insufficient to establish causal relationship between appellant's diagnosed back condition and the accepted September 16, 2019 employment incident. OWCP stated that it was particularly important for the medical evidence to address causal relationship because appellant had a preexisting back condition.

On March 23, 2020 appellant requested reconsideration.

On May 19, 2020 OWCP received an April 23, 2020 narrative medical report by Dr. Zeke McKinney, Board-certified in preventive medicine. Dr. McKinney noted an extensive review of appellant's diagnostic studies. He related that appellant had L3-4 disc herniation, status post L4-5 fusion and L2-3 discectomy on May 29, 2019, and work-related recurrent herniation on September 16, 2019. Dr. McKinney explained that appellant had a history of L3-4 disc herniation that was surgically treated with success until a work-related incident caused a recurrence of herniation. He related that "regardless of whether this is a new or unrelated herniation at the same level, or simply an exacerbation of his prior herniation, this is a work-related injury."

By decision dated May 19, 2020, OWCP denied appellant's reconsideration request, finding that the evidence of record was insufficient to warrant review of its February 27, 2020 decision. It stated that the evidence reviewed in support of appellant's reconsideration request included his undated statement.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>4</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 period of FECA,<sup>5</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>6</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>7</sup>

To determine whether a claimant sustained a traumatic injury in the performance of duty, it must first be determined whether fact of injury has been established.<sup>8</sup> Fact of injury consists of two components that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.<sup>9</sup> Second, the employee must submit

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> *G.L.*, Docket No. 18-1057 (issued April 14, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>6</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>7</sup> *See J.C.*, Docket No. 18-1803 (issued April 19, 2019); *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>8</sup> *G.L.*, *supra* note 5; *S.S.*, Docket No. 18-1488 (issued March 11, 2019); *T.H.*, 59 ECAB 388 (2008).

<sup>9</sup> *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>10</sup>

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical opinion evidence. 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 incident.<sup>11</sup>

In a case in which 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>12</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met his burden of proof to establish a lower back condition causally related to the accepted September 16, 2019 employment incident.

Dr. Maknojia's September 23, 2019 progress notes indicated that on May 28, 2019 appellant underwent a transforaminal lumbar interbody fusion and left L2-3 discectomy, which had initially resolved his back and leg pain. He related that, the previous Monday at work, appellant's back started to hurt when he was lifting a box; however, he indicated that the pain had improved. Dr. Maknojia conducted a physical examination, reviewed appellant's diagnostic imaging, and diagnosed back pain with sciatica. The Board has consistently held that pain is a symptom, not a compensable medical diagnosis.<sup>13</sup> As such, this medical report is insufficient to establish appellant's claim.

Dr. Maknojia's November 6, 2019 progress notes reviewed appellant's medical history and history of injury. He indicated that appellant was experiencing a recurrence of back and leg pain following his injury at work. Appellant indicated that pain traveled down the front of his left leg down to his ankle, which was very similar to how he felt before his surgery. Dr. Maknojia conducted a physical examination, which revealed normal results, and he diagnosed back and leg pain. As stated above, the Board has consistently held that pain is a symptom, not a compensable medical diagnosis.<sup>14</sup> As such, this medical report is insufficient to establish appellant's claim.

Dr. Maknojia's November 15, 2019 duty status report (Form CA-17) reviewed appellant's history of injury. He diagnosed a lumbar disc herniation, which he stated was due to appellant's

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<sup>10</sup> *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *J.N.*, Docket No. 18-0675 (issued December 10, 2018); *E.H.*, Docket No. 16-1786 (issued January 30, 2017).

<sup>11</sup> *H.B.*, Docket No. 18-0781 (issued September 5, 2018).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

<sup>13</sup> *J.S.*, Docket No. 0764 (issued January 21, 2021).

<sup>14</sup> *Id.*

injury. Dr. Maknojia, in November and December 2019 Form OWCP-5c work capacity evaluations, reviewed appellant's history of injury and diagnosed a lumbar disc herniation. He noted that appellant had not reached MMI. In these reports, Dr. Maknojia does not explain how the accepted September 16, 2019 employment incident caused appellant's lumbar disc herniation, nor does he differentiate between the effects of appellant's employment incident and his preexisting condition. The Board has held that a medical opinion should offer a medically-sound explanation of how the specific employment incident physiologically caused the injury<sup>15</sup> and, in a case in which 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>16</sup> As such, these reports are insufficient to establish appellant's claim.

Appellant additionally submitted a July 7, 2019 lumbar spine x-ray, September 23, 2019 lumbar spine x-rays, and a November 12, 2019 lumbar spine MRI scan. The Board has held that diagnostic tests, standing alone, lack probative value on the issue of causal relationship as they do not address whether the employment incident caused a diagnosed condition.<sup>17</sup>

As the medical evidence of record is insufficient to establish a lower back condition causally related to the accepted employment incident, the Board finds that appellant has not met his burden of proof to establish his claim.

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**

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.<sup>18</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>19</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>20</sup>

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<sup>15</sup> *T.W.*, Docket No. 20-0767 (issued January 13, 2021); *see H.A.*, Docket No. 18-1466 (issued August 23, 2019); *L.R.*, Docket No. 16-0736 (issued September 2, 2016).

<sup>16</sup> *Supra* note 12.

<sup>17</sup> *V.Y.*, Docket No. 18-0610 (issued March 6, 2020).

<sup>18</sup> 5 U.S.C. § 8128(a).

<sup>19</sup> 20 C.F.R. § 10.607

<sup>20</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

A timely request for reconsideration, including all supporting documents, must set forth arguments, and contain evidence that either: (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.<sup>21</sup> When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>22</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that this case is not in posture for a decision with regard to whether OWCP properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

In the case of *William A. Couch*,<sup>23</sup> the Board held that when adjudicating a claim OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued.

OWCP's May 19, 2020 decision found that the only evidence submitted in support of appellant's reconsideration request was his undated statement. However, the record indicates that on May 19, 2020 OWCP received Dr. McKinney's April 23, 2020 narrative medical report. Whether OWCP receives relevant evidence on the date of the decision or days before, such evidence must be considered.<sup>24</sup>

It is crucial that OWCP address all evidence received prior to the issuance of its final decision, as the Board's decisions are final with regard to the subject matter appealed.<sup>25</sup> The Board finds that this case is not in posture for decision, as OWCP did not review the above-noted evidence in its May 19, 2020 decision.<sup>26</sup> On remand OWCP shall review all evidence of record, and following any further development as it deems necessary, it shall issue an appropriate decision.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish a lower back condition causally related to the accepted September 16, 2019 employment incident. The Board

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<sup>21</sup> *Id.* at § 10.606(b)(3); *see B.R.*, Docket No. 19-0372 (issued February 20, 2020).

<sup>22</sup> *Id.* at § 10.608.

<sup>23</sup> 41 ECAB 548 (1990); *see also R.D.*, Docket No. 17-1818 (issued April 3, 2018).

<sup>24</sup> *See G.A.*, Docket No. 19-1080 (issued January 2, 2020); *T.J.*, Docket No. 14-1854 (issued February 3, 2015); *J.J.*, Docket No. 12-1062 (issued December 12, 2012); *William McKennon*, 51 ECAB 145 (1999); *Linda Johnson*, 45 ECAB 439 (1994) (applying *Couch* where OWCP did not consider a medical report received on the date of its decision).

<sup>25</sup> *See C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); *see also William A. Couch*, *supra* note 23.

<sup>26</sup> *See V.C.*, Docket No. 16-0694 (issued August 19, 2016).

further finds that this case is not in posture for decision with regard to whether OWCP properly denied appellant's request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 27, 2020 decision of the Office of Workers' Compensation Programs is affirmed, and the May 19, 2020 decision of OWCP is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 7, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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