



## **ISSUE**

The issue is whether appellant has met his burden of proof to expand the acceptance of the claim to include lumbar radiculopathy, lumbar degenerative disc disease, and neurological changes in the extremities causally related to his accepted January 18, 2018 employment injury.

## **FACTUAL HISTORY**

On January 18, 2018 appellant, then a 54-year-old materials handler, filed a traumatic injury claim (Form CA-1) alleging that on that date he strained and bruised his low back when he slipped on ice and fell backward on concrete stairs while in the performance of duty. He stopped work on January 19, 2018.

In a January 29, 2018 report, Dr. Nasser Ani, a Board-certified orthopedic surgeon, recounted appellant's complaints of lower back pain and numbness and tingling in the lower extremities following a January 18, 2018 slip and fall incident at work. He reported lumbar examination findings of mildly limited range of motion and muscle stiffness. Straight leg raise testing was positive on the left. Dr. Ani diagnosed lumbar intervertebral disc displacement, lumbar intervertebral disc degeneration, and lumbar radiculopathy.

In a January 29, 2018 attending physician's report (Form CA-20), Dr. Ani noted a January 18, 2018 date of injury. He reported that an x-ray scan showed abnormal findings of degenerative disc disease at L4-5 and L5-S1 with disc bulge and herniation at L3-S1, intervertebral disc degeneration, lumbar radiculopathy, and lumbar spondylosis. Dr. Ani checked a box marked "Yes" indicating that appellant's condition was caused or aggravated by the described employment activity. He noted "aggravated by slip [and] fall at work."

In a February 1, 2018 work capacity evaluation form (Form OWCP-5c), Dr. Ani indicated that appellant was unable to work.

In a February 14, 2018 development letter, OWCP informed appellant that, when his claim was first received, it appeared to be a minor injury that resulted in minimal or no lost time from work and; therefore, payment of a limited amount of medical expenses was administratively approved without formal consideration of the merits of his claim. It, however, reopened his claim for consideration of the merits because he had not yet returned to full-time work, and that his claim would now be formally adjudicated. OWCP advised appellant of the deficiencies of his claim, requested additional factual and medical evidence, and provided a questionnaire for his completion. It afforded him 30 days to respond.

OWCP subsequently received reports and referral notes dated February 12 through March 19, 2018 by Dr. Ani. Dr. Ani recounted the January 18, 2018 employment incident and noted appellant's continued complaints of lumbar pain with numbness and tingling in the lower extremities. He provided examination findings and diagnosed lumbar intervertebral disc displacement, lumbar intervertebral disc degeneration, lumbar radiculopathy, and lumbar spondylolisthesis.

On February 20, 2018 appellant underwent a lumbar spine magnetic resonance imaging (MRI) scan, which revealed disc bulges at L3-4, L4-5, and L5-S1 with herniation at L3-4 and L4-5, Grade 1 listhesis at L5-S1, and moderate L3-4 central canal stenosis.

In a March 5, 2018 work status form, Dr. Ani indicated that appellant could work with restrictions of no pushing, no pulling, and no heavy manual labor.

On March 5, 2018 appellant accepted a light-duty job offer with the employing establishment.

In a March 21, 2018 letter, Dr. Ani related that on January 29, 2018 he examined appellant and diagnosed lumbar disc herniation, degeneration, and lumbar radiculopathy. He opined that these diagnoses were directly caused by appellant's traumatic injury that occurred at work when he slipped and fell down on stairs. Dr. Ani provided examination findings. He explained that a diagnosis of disc herniation would occur with a sudden jerking of the spine, which occurred when appellant slipped and fell due to black ice. Dr. Ani indicated that this mechanism of injury was synonymous with the description appellant provided and would also cause a spondylolisthesis when the vertebra slips forward and the spine becomes unstable. He reported that appellant's preexisting lumbar condition was aggravated by the January 18, 2018 work accident.

In a March 23, 2018 decision, OWCP denied appellant's claim. It accepted that the January 18, 2018 incident occurred as alleged and that lumbar conditions had been diagnosed; however, it denied his claim, finding that he had not established causal relationship between the accepted employment incident and the diagnosed conditions.

On April 17, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated July 25, 2018, the hearing representative set aside the March 23, 2018 decision and remanded the case for additional development of the medical evidence.

Appellant submitted lumbar operative reports dated December 13, 2002 and April 20, 2005, which indicated that he underwent left L4-5 hemilaminectomy, left medial facetectomy, and left microlumbar discectomy.

OWCP subsequently referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Howard M. Pecker, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding whether appellant sustained a medical condition causally related to the January 18, 2018 employment incident. In a September 27, 2018 report, Dr. Pecker accurately described the January 18, 2018 employment incident and discussed the medical records that he had reviewed. He indicated that appellant's low back pain had markedly improved. Upon examination of appellant's lumbar spine, Dr. Pecker observed no paravertebral spasm. Neurologic testing of the lower extremities revealed decreased strength in the right ankle and cavus deformity of the right foot. Dr. Pecker reported that appellant sustained a temporary aggravation of preexisting lumbar degenerative disease on January 18, 2018 that would have ceased after three months of the slip and fall injury.

By decision dated October 17, 2018, OWCP accepted appellant's claim for temporary aggravation of preexisting degenerative changes of the lumbar spine.

By separate decision of even date, OWCP denied appellant's claim for lumbar radiculopathy, lumbar degenerative disc changes, and neurological changes in the extremities. It found that the medical evidence of record was insufficient to establish causal relationship between these diagnosed conditions and the accepted January 18, 2018 employment incident.

On October 25, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 11, 2019.

Appellant continued to receive treatment from Dr. Ani and submitted reports and referral notes dated December 3, 2018 through January 24, 2019. Dr. Ani recounted appellant's complaints of low back pain, numbness, and tingling in the lower extremities. He provided examination findings and diagnosed intervertebral disc displacement of the lumbar spine, intervertebral disc degeneration of the lumbar spine, lumbar radiculopathy, lumbar spondylolisthesis, and lumbar spondylolysis. In a December 26, 2018 report, Dr. Ani noted his disagreement with Dr. Pecker's September 27, 2018 report and asserted that appellant also sustained lumbar herniation and listhesis as injuries related to the January 18, 2018 work incident.

In a March 5, 2019 letter, Dr. Bruce R. Rosenblum, a Board-certified neurosurgeon, indicated that appellant was under his care for lumbar radiculopathy and was scheduled for lumbar spine surgery on March 8, 2019.

By decision dated April 16, 2019, an OWCP hearing representative set aside the October 17, 2018 decision. He found that a conflict in medical opinion evidence existed between Dr. Ani, appellant's treating physician, and Dr. Pecker, an OWCP second opinion examiner, regarding whether appellant sustained additional conditions causally related to the January 18, 2018 employment injury. As such, the hearing representative remanded the case for referral for an impartial medical examination in order to resolve the conflict of medical evidence.

OWCP subsequently referred appellant, along with an updated SOAF,<sup>3</sup> for an impartial medical examination to resolve the conflict of medical evidence. In a May 27, 2019 report, Dr. Ian B. Fries, a Board-certified orthopedic surgeon serving as an impartial medical examiner (IME), noted his review of the SOAF and appellant's medical records. He noted that the SOAF did not include appellant's accepted diagnosis. Dr. Fries described the January 18, 2018 work injury and noted that appellant had previous lumbar surgeries in 2002 and 2005. Upon physical examination, he observed that appellant walked with a normal gait, but could not tiptoe on the right. Examination of appellant's lower extremities revealed clear atrophy of his right calf, compared to the left, and mild varus in his left knee. Dr. Fries reported that lumbar examination demonstrated full range of motion and no tenderness about his low back. He indicated that current findings were consistent with chronic preexisting problems temporarily aggravated on January 18, 2018. Dr. Fries explained that no mechanism of injury could cause multilevel degenerative changes. He also reported that, while the neurological changes in the right lower extremity were new, these findings were not consistent with a slip and fall trauma. In response to OWCP's questions, Dr. Fries indicated that he could not provide all diagnoses or conditions

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<sup>3</sup> The SOAF, dated April 18, 2019, did not mention accepted appellant's claim for temporary aggravation of preexisting degenerative changes of the lumbar spine.

causally related to the January 18, 2018 employment incident without recent medical records, including MRI scan and operative findings.

In a June 4, 2019 letter, Dr. Rosenblum indicated that appellant was status post lumbar spine surgery and may return to light duty on June 4, 2019.

In a June 24, 2019 development letter, OWCP requested that appellant provide a copy of the March 8, 2019 operative report and all medical records from Dr. Rosenblum. It afforded him 30 days to submit the requested information.

On July 19, 2019 OWCP received Dr. Rosenblum's March 8, 2019 operative report, which noted preoperative diagnoses of status post prior left L4-5 decompression and microdiscectomy with recurrent left lumbar radiculopathy and left L3-4 lateral recess subarticular neural foraminal stenosis. Appellant also submitted a March 2, 2019 lumbar spine MRI scan, which revealed stable grade 1 anterolisthesis of L5 upon S1, prior left hemilaminectomy at L4-5 with no residual or recurrent disc herniation, and moderate-to-severe canal stenosis, as well as left paracentral disc herniation with annular fissure at L3-4.

In a July 30, 2019 letter, Dr. Rosenblum indicated that appellant was status post lumbar spine surgery and was to remain on light-duty sedentary work for an additional eight weeks.

In an August 16, 2019 addendum report, Dr. Fries noted his review of the July 22, 2019 SOAF and additional medical records. He indicated that the March 8, 2019 surgery revealed findings consistent with residuals of prior operations and spinal degeneration and no specific traumatic injury findings. Dr. Fries explained that no disc herniation was noted during the surgery. In response to OWCP's questions, he responded that there were no additional lumbar spine or lower extremity conditions causally related to the January 18, 2018 work injury.

By decision dated September 13, 2019, OWCP denied expansion of appellant's claim to include degenerative disc changes of the lumbar spine, lumbar radiculopathy, and neurological changes in the extremities. It found that the special weight of the medical evidence rested with Dr. Fries, the IME, who determined in May 27 and August 16, 2019 reports that appellant did not have any disability, residuals nor additional conditions causally related to the accepted January 18, 2018 employment injury.

On September 19, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on January 17, 2020.

By decision dated April 2, 2020, the hearing representative affirmed the September 13, 2019 decision.

## LEGAL PRECEDENT

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>4</sup>

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.<sup>5</sup> A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.<sup>6</sup> Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's employment injury.<sup>7</sup>

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, OWCP shall appoint a third physician (known as a referee physician or IME) who shall make an examination.<sup>8</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>9</sup> When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>10</sup>

## ANALYSIS

The Board finds that appellant has not met his burden of proof to expand the acceptance of the claim to include lumbar radiculopathy, lumbar degenerative disc disease, and neurological changes in the extremities causally related to his accepted January 18, 2018 employment injury.

OWCP properly determined that a conflict in medical evidence existed between appellant's treating physician, Dr. Ani, who diagnosed additional employment-related conditions, and Dr. Pecker, who determined that the only condition causally related to the January 18, 2018 employment incident was temporary aggravation of preexisting lumbar degenerative disease,

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<sup>4</sup> *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>5</sup> *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>6</sup> *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>7</sup> *Id.*

<sup>8</sup> 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

<sup>9</sup> 20 C.F.R. § 10.321.

<sup>10</sup> *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *J.W.*, Docket No. 19-1271 (issued February 14, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

resolved. It referred him to Dr. Fries for an impartial medical examination to resolve the conflict in medical evidence, pursuant to 5 U.S.C. § 8123(a).

In a May 27, 2019 report, Dr. Fries described the January 18, 2018 work injury and noted appellant's preexisting lumbar injury. He reported that examination of appellant's lower extremities revealed atrophy of the right calf, compared to the left, and mild varus in the left knee. Examination of appellant's lumbar spine demonstrated full range of motion and no tenderness about his low back. Dr. Fries indicated that his current findings were consistent with chronic preexisting problems temporarily aggravated on January 18, 2018. He explained that, while the neurological changes in the right lower extremity were new, these findings were not consistent with a slip and fall trauma. In an August 16, 2019 addendum report, Dr. Fries noted his review of the updated SOAF and additional medical records. He concluded that there were no additional lumbar spine or lower extremity conditions causally related to the January 18, 2018 work injury.

The Board finds that Dr. Fries accurately described the accepted employment injury and noted his review of the medical record, including the updated July 22, 2019 SOAF. Dr. Fries performed a thorough clinical examination and provided detailed findings. He is a specialist in the appropriate field and reached a reasoned conclusion regarding whether appellant's claim should be expanded, noting that there was no evidence to find causal relationship between additional lumbar and lower extremity conditions and the accepted employment injury.<sup>11</sup> Dr. Fries' opinion, as set forth in his May 27 and August 16, 2019 reports, constitute probative and reliable evidence. The Board, therefore, finds that Dr. Fries' opinion is entitled to the special weight accorded to an IME with regard to the issue of whether acceptance of appellant's claim should be expanded to include additional lumbar and lower extremity conditions.<sup>12</sup> Consequently, appellant has not met his burden of proof to expand the accepted conditions of his claim.

On appeal counsel argues that Dr. Fries' medical opinion was not sufficiently rationalized to exclude additional lumbar conditions, specifically paracentral disc herniation at L3-4. As explained above, however, Dr. Fries' medical opinion was sufficiently rationalized to establish that appellant did not sustain additional conditions causally related to the accepted January 18, 2018 employment injury and, thus, was entitled to the special weight of the medical evidence.

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 expand the acceptance of the claim to include lumbar radiculopathy, lumbar degenerative disc disease, and neurological changes in the extremities causally related to his accepted January 18, 2018 employment injury.

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<sup>11</sup> See *R.R.*, Docket No. 19-0086 (issued February 10, 2021); see also *D.S.*, Docket No. 18-0353 (issued February 18, 2020).

<sup>12</sup> *W.C.*, Docket No. 19-1740 (issued June 4, 2020); *M.M.*, Docket No. 16-1655 (issued April 4, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 2, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 21, 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