

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

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**D.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Philadelphia, PA, Employer**

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**Docket No. 12-891  
Issued: December 18, 2012**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On March 13, 2012 appellant, through his attorney, filed a timely appeal from a February 2, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied his claim. 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>

**ISSUE**

The issue is whether appellant met his burden of proof to establish that he developed a low back condition in the performance of duty causally related to factors of his federal employment.

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

<sup>2</sup> The Board notes that, following the issuance of the February 2, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

On appeal, appellant's attorney contends that OWCP decision was contrary to fact and law.

### **FACTUAL HISTORY**

On July 1, 2010 appellant, then a 42-year-old maintenance mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed back problems with depression due to factors of his federal employment. In a July 2, 2010 letter, the employing establishment controverted his claim.

Appellant submitted a March 23, 2010 report by Estella M. Carrigan, a nurse practitioner, who indicated that he had sharp pain in his lower back. On May 7, 2010 Ms. Carrigan noted that he worked as an industrial mechanic, climbing ladders and hauling equipment. Appellant stated that he felt that he was becoming a danger to his coworkers due to back pain and his inability to perform his job. His back pain waxed and waned and came on suddenly, sometimes with something as simple as lifting a bag. On June 21, 2010 Ms. Carrigan reported that appellant had been under her care since June 2007 for multiple medical problems, including chronic pain which had been well controlled until January 2010. Appellant had decreased range of motion in the lumbar-sacral spine and was unable to perform his job duties which aggravated his condition and could exacerbate his back pain. Ms. Carrigan stated that he was attending physical therapy but his attendance had been sporadic and progress had so far been fair. She explained that appellant was not getting adequate pain control because he could not try any narcotics due to the negative impact the medication would have on his balance and cognition.

Two x-ray reports dated March 24, 2010 by Dr. Solanki Indukumar, a Board-certified radiologist, revealed minor abnormality in the sacroiliac joints of the spine and degenerative changes and diminished disc space at L4-S1 in the lumbar spine.

Appellant also submitted a position description contending that his federal employment required arduous exertion involving the following: standing, walking, climbing, bending, reaching and stooping for prolonged periods of time; and intermittent lifting and carrying of heavy tools, tool boxes and equipment on level surfaces and up ladders and stairways.

By letter dated July 8, 2010, OWCP notified appellant of the deficiencies of his claim and afforded 30 days for the submission of additional evidence.

Appellant submitted reports dated February 3 to June 15, 2010 by Dr. Elena Shabash, a Board-certified psychiatrist, who diagnosed depression. In a July 16, 2010 report, Dr. Shabash diagnosed major depression recurrent. She opined that the symptoms of appellant's depression were intensified by his physical ailments and that his physical ailments also intensified his symptoms of depression not allowing him to perform normal activities at home and on his job.

By decision dated September 1, 2010, OWCP denied appellant's claim finding that the factual evidence did not establish the implicated work events and the medical evidence was insufficient to establish any injury.

On September 22, 2010 appellant, through his attorney, requested an oral hearing, which was held before an OWCP hearing representative on January 13, 2011. The hearing

representative held the record open for 30 days for the submission of additional evidence. Appellant did not respond.

By decision dated March 16, 2011, an OWCP hearing representative affirmed the September 1, 2010 decision finding that appellant's description of his work duties was accepted as factual but the medical evidence of record failed to establish causal relationship between his low back condition and the implicated employment factors. The hearing representative further found that as an employment-related physical condition had not been established, an employment-related emotional condition resulting from the physical condition was not established.

On January 13, 2012 appellant, through his attorney, requested reconsideration. He submitted a May 7, 2010 physical therapy note and an October 9, 2010 magnetic resonance imaging (MRI) scan of the lumbar spine showing disc bulge at L4-5 and disc herniation at L5-S1.

On April 15, 2010 Dr. Reema Malhotra, Board-certified in pain medicine, conducted an electromyography (EMG) and nerve conduction studies. She indicated that appellant complained of chronic low back pain ever since he was in boot camp. Dr. Malhotra found that the EMG and nerve conduction studies were technically limited due to skin thickening and dermatitis. No abnormalities were noted from a needle EMG examination and no evidence of lumbosacral radiculopathy were noted.

In an October 5, 2010 report, Dr. Anthony W. Salem, a Board-certified orthopedic surgeon, noted that appellant's low back pain radiated into the buttocks and down into both legs with a feeling of numbness. X-rays of appellant's back revealed a complete collapse at L5-S1, straightening of his thoracolumbar spine and narrowing at L4-5. On November 5, 2010 Dr. Salem reviewed an MRI scan of appellant's back that showed two significant discs, one at L4-5 and L5-S1, causing spinal stenosis and foraminal stenosis. He opined that appellant was not able to go back to a hard physical job based on his legs and his spine and concluded that he was disabled as a result of his back, his legs and his diabetes.

By decision dated February 2, 2012, OWCP denied modification of its March 16, 2011 decision finding that the medical evidence submitted was not sufficient to establish causal relationship.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> has the burden of establishing 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 and that an injury<sup>4</sup> was sustained in the performance of duty. These

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> OWCP's regulations define an occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>5</sup>

To establish that an injury was sustained in the performance of duty in a claim for an occupational disease claim, an employee must submit the following: (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.<sup>6</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence. 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 factors identified by the employee.<sup>7</sup>

### ANALYSIS

The Board finds that appellant has failed to meet his burden of proof to establish that he developed an occupational disease in the performance of duty. The record reflects that he has a low back condition and that his federal employment requires standing, walking, bending, reaching, stooping, lifting, carrying and climbing ladders and stairways. The medical evidence however does not establish that appellant's condition is causally related to the factors of his federal employment.

On October 5, 2010 Dr. Salem indicated that appellant's low back pain radiated into the buttocks and down into both legs with a feeling of numbness. He found that x-rays of appellant's back revealed a complete collapse at L5-S1, straightening of his thoracolumbar spine and narrowing at L4-5. On November 5, 2010 Dr. Salem reviewed an MRI scan of appellant's back that showed two significant discs, one at L4-5 and L5-S1, causing spinal stenosis and foraminal stenosis. Although he found that appellant was not able to go back to a hard physical job based and concluded that he was disabled as a result of his back, his legs and his diabetes, the physician did not provide a rationalized medical opinion explaining how factors of appellant's federal employment caused or aggravated this disabling condition. The Board has held that the mere fact that appellant's symptoms arise during a period of employment or produce symptoms revelatory of an underlying condition does not establish a causal relationship between his condition and his employment factors.<sup>8</sup> Lacking thorough medical rationale on the issue of

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<sup>5</sup> See *J.C.*, Docket No. 09-1630 (issued April 14, 2010). See also *Ellen L. Noble*, 55 ECAB 530 (2004).

<sup>6</sup> *Id.* See also *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

<sup>7</sup> See *I.J.*, 59 ECAB 408 (2008). See also *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>8</sup> See *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

causal relationship, Dr. Salem's reports are insufficient to establish that appellant sustained an employment-related injury.

On April 15, 2010 Dr. Malhotra indicated that appellant complained of chronic low back pain ever since he was in boot camp. She found no abnormalities in the EMG and nerve conduction studies. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>9</sup>

The progress notes by Ms. Carrigan, a nurse practitioner, and the May 7, 2010 physical therapy note are of no probative value as nurse practitioners and physical therapists are not physicians under FECA.<sup>10</sup>

Similarly, the x-ray reports dated March 24, 2010 and the October 9, 2010 MRI scan are diagnostic in nature and therefore do not address causal relationship.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.<sup>11</sup> Causal relationship must be established by rationalized medical opinion evidence and he failed to submit such evidence. As appellant has not submitted sufficient medical evidence to support his allegation that his medical condition was caused by his employment factors, he failed to meet his burden of proof.

The Board notes that, in appellant's initial claim form and supportive statements, it appeared that he was attributing his development of major depression recurrent as a consequence of his occupational disease claim. The Board has held that an emotional condition related to chronic pain and limitations resulting from an employment injury may be covered under FECA.<sup>12</sup> However, there is no basis for establishing a consequential injury until the underlying condition has been accepted as employment related.<sup>13</sup> In light of the Board's finding that appellant failed to establish his low back condition as employment related there is no basis for establishing a consequential injury in this case.

On appeal, appellant's attorney contends that OWCP's decision was contrary to fact and law. For the reasons stated above, the Board finds that the attorney's arguments are not substantiated.

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<sup>9</sup> See *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

<sup>10</sup> 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law." See also *Paul Foster*, 56 ECAB 208, 212 n.12 (2004); *Joseph N. Fassi*, 42 ECAB 677 (1991); *Barbara J. Williams*, 40 ECAB 649 (1989).

<sup>11</sup> See *Anna C. Leanza*, 48 ECAB 115 (1996).

<sup>12</sup> See *Arnold A. Alley*, 44 ECAB 912, 921-22 (1993); *Charles J. Jenkins*, 40 ECAB 362, 367 (1988).

<sup>13</sup> See *J.S.*, Docket No. 06-1615 (issued February 5, 2007).

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 failed to meet his burden of proof to establish that he developed a low back condition in the performance of duty causally related to factors of his federal employment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 2, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 18, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board