United States Department of Labor
Employees' Compensation Appeals Board

W.T., Appellant	)	
and	)	**Docket No. 10-763**
	)	**Issued: February 10, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Arthur G. Girton, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 27, 2010 appellant, through his attorney, filed a timely appeal from a September 21, 2009 Office of Workers' Compensation Programs' decision that denied modification of its prior decisions which denied his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty on August 7, 2008.

FACTUAL HISTORY

On August 12, 2008 appellant, then a 41-year-old transitional letter carrier, filed a traumatic injury claim alleging that, on August 7, 2008, he was delivering mail when he had muscle spasms on the right side of his lower back as well as pain and numbness in the right leg and back. The employing establishment controverted the claim and noted that appellant had a previous back injury at home in June 2008. He stopped work on August 8, 2008.

In support of his claim, appellant submitted reports dated August 14 and 25, 2008 from Dr. Edward O'Dell, a Board-certified internist and an osteopath, who related that appellant was walking down steps and started having muscle spasms in the lower back and shooting pain down

the right leg and tingling in the toes. Dr. O'Dell noted that appellant had a history of low back pain and spondylosis in 2006, as well as muscle spasm and diagnosed sciatica. He advised that appellant could work but that he could not operate a car or truck, he could not bend, kneel or squat and should be placed on sedentary duty with the ability to stand and walk as needed. In his August 25, 2008 report, Dr. O'Dell noted that appellant was still in pain and continued the work restrictions. He advised that appellant was not working.

On September 4, 2008 the Office advised appellant that additional evidence was needed. It stated that he had not described an "inciting event" and that pain did not constitute a work injury. The Office requested details of appellant's prior history of low back pain. Appellant was advised that he should have his attending physician submit a detailed medical report providing a history of previous injuries along with a medical explanation as to how the reported work incident caused the claimed injury as well as the effects of the preexisting condition.

The Office received a September 3, 2008 report from Dr. O'Dell, who diagnosed an L3-4 lumbar disc herniation. Dr. O'Dell recommended a four-hour workday, five days a week, due to the "large disc herniation."

In an August 11, 2008 note, Dr. Bao T. Nguyen, a Board-certified family practitioner and osteopath, noted that an x-ray of the lumbar spine was ordered due to unknown back pain. In a separate August 11, 2008 report, he advised that appellant could not do heavy lifting until he was medically cleared.

In an email correspondence dated September 4, 2008, the employing establishment explained that it was controverting appellant's claim because in June 2008 he "injured his back at home (off the clock). [Appellant] fell on his deck/porch at this home, when he had slipped on a step." The employer stated that he was off work for one week.

In a letter dated September 15, 2008, appellant alleged that on August 7, 2008, he was delivering mail while carrying "a full mailbag which consisted of Ikea catalogs and weekly advertisement mailings, weighing approximately 40 to 50 pounds. It was an unusually heavy day." Appellant did not address his prior back injury.

In a letter dated September 16, 2008, Diane Castro, a health and resource manager, controverted the claim. She enclosed email correspondence dated September 9, 2008 from Patricia L. Whalen, a postmaster, who confirmed that appellant had a back injury at home in June 2008, about two months before he claimed a work-related injury on August 7, 2008. Ms. Whalen alleged that he returned to full duty but believed that he had not fully recovered.

Dr. O'Dell continued to treat appellant and recommend restrictions. On September 30, 2008 he placed appellant off work until October 9, 2008. Appellant received physical therapy from September 2008.

In an October 8, 2008 decision, the Office denied the claim finding that appellant did not identify a work incident or specific work factors as causing the claimed condition.

The Office received additional physical therapy notes and copies of previously received reports. It also received another controversial letter from the employing establishment dated September 8, 2008.

On October 17, 2008 appellant requested an examination of the written record. He provided an October 8, 2008 report from Dr. Andrew Freese, a Board-certified neurosurgeon, who related that, on August 7, 2008, appellant was on his walking route, carrying a 50-pound bag and, as he turned, developed muscle spasm in his back and shooting pain down the right leg. Dr. Freese noted that appellant's past medical history was remarkable for a pinched nerve in 2006, which responded to physical therapy, but that he was out of work for six months, and able to return to work with no restrictions. He advised that appellant "has otherwise, no significant medical history." Dr. Freese reviewed magnetic resonance imaging (MRI) scans of the lumbar spine from 2006 and determined that they revealed some degenerative changes at L1-2 and L3-4, without a large herniation. He advised that the MRI scan from 2008 showed some progression with evidence of further collapse at L3-4 and a disc herniation. Dr. Freese also noted that appellant had a less noticeable abnormality at L1-2 with evidence of degenerative changes throughout the lumbar spine.

In an October 14, 2008 report, Dr. O'Dell noted that appellant presented on August 14, 2008 for treatment of right lower back and right leg pain that was due to an August 7, 2008 work injury. Appellant related that he was walking down steps while carrying a mailbag when he felt a sharp stabbing pain in his right lower back. Dr. O'Dell noted that appellant described the pain as "muscle spasms" and that the pain radiated down the right leg to the foot with the pain worsening over the next week. He stated that appellant had a history of low back pain associated with lumbar spondylolisthesis in 2000 and a work injury on October 26, 2006 for lumbosacral sprain and radiculopathy. Dr. O'Dell advised that a 2006 MRI scan revealed mild spondylolisthesis, L5 on S1, bulging of the L2-3, L3-4 and L5-S1 discs but no evidence of herniation. It also revealed mild degenerative arthritis. Dr. O'Dell also noted that the August 26, 2008 MRI scan revealed a new right paracentral and right lateral disc herniation at L3-4, which was not previously present. He advised that appellant had a worsening of degenerative changes at L3-4. Dr. O'Dell diagnosed L3-4 disc herniation with lower extremity radiculopathy, which was complicated by degenerative changes and central spinal stenosis at L3-4.

The Office also received a September 18, 2008 report from Dr. Kenan Aksu, an osteopath, who advised that appellant related that he was delivering mail and turned to walk off a porch and felt a pull in his lumbar spine and right lower extremity pain. Dr. Aksu diagnosed L3-4 disc herniation and right lower extremity radiculopathy.

In a January 8, 2009 decision, an Office hearing representative affirmed the October 8, 2008 decision.

Appellant requested reconsideration and submitted a January 28, 2009 report from Dr. O'Dell, who advised that he had reviewed medical records pertaining to appellant's injury on June 3, 2008. Dr. O'Dell noted that he originally saw him on August 14, 2008 for an August 7, 2008 injury. He advised that appellant noted a history of low back pain dating back to 2006 but that he did not reveal a June 3, 2008 low back injury. Dr. O'Dell reviewed the reports pertaining to the June 3, 2008 injury and noted that appellant was treated very conservatively with rest and medication. He advised that the June 10, 2008 report revealed that appellant's pain completely resolved as he had a completely normal examination. Dr. O'Dell indicated that appellant was discharged pain free on June 10, 2008. He opined that while appellant "may have suffered a disc injury on June 3, 2008 (it is impossible to say what was injured) his symptoms did completely resolve and he was discharged without functional deficits." Dr. O'Dell advised that he could "comfortably state within a reasonable degree of medical certainty, that [appellant] did suffer a

low back injury while working on [August 7, 2008]." He opined that appellant continued to have pain and disability due to the injury he sustained on August 7, 2008.

In the June 10, 2008 report, of which Dr. O'Dell referred, Dr. Charles J. Barr, a Board-certified family practitioner, noted that appellant was out with a back injury since "June 2nd" and advised that he could return to full duty on June 11, 2008.

By decision dated April 30, 2009, the Office modified its prior decision to find that the evidence established that the claimed incident occurred as alleged on August 7, 2008 but denied the claim finding that the medical evidence did not establish that the claimed medical condition was related to the established incident.

On September 26, 2009 appellant requested reconsideration and submitted additional evidence. In an April 13, 2009 report, Dr. Aksu diagnosed lumbago, displacement of lumbar intervertebral disc without myelopathy and sciatica. He noted that appellant was involved in a work-related accident in the summer of 2008. Dr. Aksu advised that appellant was working for the employing establishment when he stepped off a porch and experienced a sharp pain in the lumbar spine and right lower extremity.

In an August 14, 2009 report, Dr. Barr noted that appellant complained of work-related back pain from an August 2008 injury. He diagnosed lumbosacral radiculopathy. In an August 20, 2009 report, Dr. Barr noted initially seeing appellant in June 2008 after an injury that occurred at home. He advised that at that time he diagnosed lumbar strain. Dr. Barr explained that appellant reported that his injury improved and that he was able to return to his full work duties without pain. He indicated that appellant had a subsequent injury in August while working and appellant was diagnosed with "a new disc herniation of the lumbar spine." Dr. Barr noted that appellant continued to have disabling pain a year later. He explained that the June 2008 injury for which he treated appellant was not related to the subsequent injury in August. Dr. Barr noted that appellant's rapid improvement and return-to-normal work duties were not consistent with a herniated disc. He opined that there was no evidence that appellant had a herniated lumbar disc prior to the August injury and noted that an MRI scan the year before treatment for back pain revealed no disc herniation. Dr. Barr stated that, while appellant had a history of back problems, it appears to me that "the injury he sustained in August of 2008 is different in nature, and was the cause of his recent disc herniation and disability." Appellant also submitted a report from a physician's assistant.

By decision dated September 21, 2009, the Office denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act[2] and that an injury was

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989).

sustained in the performance of duty.[3] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. 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.[5] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[6]

ANALYSIS

The evidence supports that appellant was delivering mail on August 7, 2008 as alleged. Therefore, the Board finds that the first component of fact of injury is established. However, the medical evidence is insufficient to establish the second component of fact of injury, that the employment incident caused an injury. The medical reports of record do not establish that turning to go down steps while delivering mail at work caused a personal injury on August 7, 2008. The medical evidence contains no reasoned explanation of how the specific employment incident on August 7, 2008 caused or aggravated an injury.[7]

Appellant submitted reports from Dr. O'Dell beginning August 14, 2008, shortly after the claimed injury. Although the reports from Dr. O'Dell generally support a work injury, the Board finds that his most contemporaneous reports did not contain an accurate history. For example in the August 14, 25 and October 14, 2008 reports, he does not appear to be aware of the June 2008 nonwork injury. Dr. O'Dell notes a history of low back pain and spondylosis in 2006. However, he does not address the nonwork injury from June 3, 2008. Medical conclusions based on an inaccurate or incomplete factual history are of diminished probative value.[8]

The Board notes that the first time Dr. O'Dell appeared to be aware of the June 2008 nonwork injury was in his January 28, 2009 report. Dr. O'Dell noted reviewing medical evidence pertaining to the June 3, 2008 nonwork injury and advised that appellant's pain had completely resolved as he was discharged pain free on June 10, 2008. He opined that while appellant "may have suffered a disc injury on June 3, 2008 (it is impossible to say what was injured) his symptoms did completely resolve and he was discharged without functional deficits." Dr. O'Dell indicated that he could "comfortably state within a reasonable degree of

[3] *James E. Chadden Sr.*, 40 ECAB 312 (1988).

[4] *Delores C. Ellyett*, 41 ECAB 992 (1990).

[5] *John J. Carlone*, 41 ECAB 354 (1989).

[6] *Id*.

[7] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[8] *See James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

medical certainty, that [appellant] did suffer a low back injury while working on [August 7, 2008]." However, he explained it was "impossible" to tell what was injured and he did not explain why he concluded that appellant's disc injury occurred during mail delivery on August 7, 2008, as opposed to the earlier incident. A physician's opinion on causal relationship between a claimant's disability and an employment injury is not conclusive simply because it is rendered by a physician. To be of probative value, a physician must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.[9]

In an August 20, 2009 report, Dr. Barr noted that he initially saw appellant in June 2008 for an injury that occurred at home. He diagnosed a lumbar strain that improved such that appellant returned to his full duties without pain. Dr. Barr noted that appellant had an injury in August 2008 while working and was diagnosed with "a new disc herniation of the lumbar spine." He explained that the June 2008 injury was not related to the August injury. Dr. Barr advised that appellant's rapid improvement and return-to-normal work duties were not consistent with a herniated disc and there was no evidence that appellant had a herniated lumbar disc before the August injury. He explained that an MRI scan from 2006 revealed no disc herniation. An August 26, 2008 MRI scan did reveal a herniation disc. Dr. Barr noted that, while appellant had a history of back problems, it appears to me that "the injury he sustained in August of 2008 is different in nature, and was the cause of his recent disc herniation and disability." The Board notes that his report did not fully explain the process whereby appellant's lumbar condition resulted only from the August 7, 2008 employment incident and could not have occurred from the June 2008 nonemployment incident. A medical opinion that states that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after is insufficient, without supporting rationale, to establish causal relationship.[10]

The Office received a September 18, 2008 report from Dr. Aksu, an October 8, 2008 report from Dr. Freese and an April 13, 2009 report from Dr. Aksu. However, these physicians provided opinions that were insufficient as the physicians did not appear to be aware of the June 2008 nonemployment injury. As noted above, medical conclusions based on an inaccurate or incomplete factual history are of diminished probative value.[11] These reports do not otherwise provide medical rationale explaining the reasons why the August 7, 2008 incident caused or aggravated a diagnosed condition. Other medical reports submitted by appellant did not specifically address causal relationship.

The Office received physical therapy reports. Health care providers such as nurses, acupuncturists, physician's assistants and physical therapists are not physicians under the Act. Thus, their opinions on causal relationship do not constitute rationalized medical opinions and have no weight or probative value.[12]

[9] *T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009).

[10] *See id.*

[11] *See supra* note 8.

[12] *Jane A. White*, 34 ECAB 515, 518 (1983).

On appeal, appellant generally disagrees with the disposition of his claim and asserts that his condition is employment related. As noted above, the medical evidence is insufficient to establish his claim.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty on August 7, 2008.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board