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R.B., Appellant)	
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and)	Docket No. 12-1108
)	Issued: December 3, 2012
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, San Francisco, CA, Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On April 24, 2012 appellant, through his attorney, filed a timely appeal from a February 7, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether appellant sustained a back injury causally related to his federal employment.

On January 22, 2010 appellant, then a 62-year-old police officer, filed a Form CA-2, occupational disease or illness claim, alleging that he sustained a back injury causally related to

¹ 5 U.S.C. § 8101 *et seq.*

wearing a heavy belt with equipment in the performance of duty. The reverse of the claim indicated that he was provided with a clerical position as of November 30, 2009. Appellant submitted treatment notes for back pain dated December 3 and 22, 2009 from Dr. Rebecca Poliskin, a Board-certified internist, a December 23, 2009 note from Dr. Ralph Crisostomo, a Board-certified physiatrist and lumbar magnetic resonance imaging scans dated January 4 and 15, 2010. In a February 11, 2010 state workers' compensation form report, Dr. Jeffrey Gao, a Board-certified occupational medicine specialist, reported November 27, 2009 as the date of injury, stating that appellant felt a pop and pain in his back and leg. He diagnosed lumbar disc disease.

By decision dated April 15, 2010, OWCP denied the compensation. It found that the factual and medical evidence was insufficient to establish the claim.

Appellant requested reconsideration in a letter dated May 25, 2010. He stated that his sciatica and bulging discs were related to wearing a utility belt during his federal employment as a police officer.

In a decision dated August 17, 2010, OWCP reviewed the merits of the claim and denied modification. It found the factual and medical evidence did not establish the claim for compensation.

By letter dated April 26, 2011, appellant, through his representative, requested reconsideration. In a December 16, 2010 statement, he indicated that he had worked from February 2004 to February 2010 as a police officer wearing a uniform duty belt that included equipment such as a loaded weapon, telephone, baton and other items. Appellant stated that the belt weighed 25 to 30 pounds. In a report dated April 7, 2011, Dr. Jacob Tauber, a Board-certified orthopedic surgeon, provided a history that had worked as a police officer for the employing establishment since April 2004. He noted job duties such as assisting the lifting of patients and restraining patients. Dr. Tauber provided results on examination and diagnosed spinal stenosis with sciatica. He noted that during employment appellant felt a pop in his back. Dr. Tauber stated, "There is no question that [appellant] has substantial spinal pathology and that he is actually a surgical candidate. Without question, his six years of duty contributed to his degenerative disease, resulting in the spinal stenosis and without question there is substantial pathology. The incident at work caused a permanent aggravation."

OWCP prepared a statement of accepted facts (SOAF) dated June 24, 2011, describing the utility belt and job duties. It also stated, "Preexisting or concurrent medical conditions include: lumbar degenerative disc disease." Appellant was referred for a second opinion examination by Dr. J. Hearst Welborn, Jr., a Board-certified orthopedic surgeon. In a report dated July 25, 2011, Dr. Welborn provided a history, noting that appellant reported no low back pain prior to 2009. He provided results on examination and diagnosed degenerative disc disease, lumbar scoliosis and radiculopathy. Dr. Welborn stated, "The diagnosed medical conditions are not medically connected to [f]ederal work activities described in the SOAF. He had previous low back pain and evidence of previous degeneration and scoliosis."

According to OWCP there was a conflict in the medical evidence pursuant to 5 U.S.C. § 8123(a) and appellant was referred to Dr. John Lang, a Board-certified orthopedic surgeon

selected as a referee physician.² In a report dated August 30, 2011, Dr. Lang provided a history of injury, stating that appellant felt a pop in his back on November 30, 2009. He provided results on examination and reviewed evidence, noting the June 24, 2011 SOAF describing appellant's job duties and carrying a utility belt. The diagnoses included: lumbar syndrome, degenerative lumbar scoliosis, multilevel lumbar degeneration with spondylosis and probable L4-5 herniated nucleus pulposus. Dr. Lang stated that appellant had developed the lumbar conditions over an unknown period of time. He further stated that the "initiation factor" with regard to clinical onset was walking in November 2009, which led to treatment a few days later after he experienced a "pop" in his right lower back and right lower extremity. Dr. Lang opined that "[a]t that point the degenerative disc at L4-5 in all probability presented enough to produce pressure on a contiguous nerve root...." He further stated that there was "in the records a history of prior, but not significant lower back dysfunction and apparently no lost time from work over the years...." As to causal relationship, Dr. Lang stated, "Certainly, the scoliosis and degenerative disc disease in the lumbar spine was not caused by his work activities nor was the acute change in the L4-5 disc due to his work activities, rather it is part of the pathological process in this particular individual."

With regard to whether work did "contribute or not" to the conditions, Dr. Lang stated that even though the symptoms began while appellant was at work, this did not constitute a work injury per se. He stated, "It is reasonable to opine that the incident where [appellant] felt a 'pop' in his lower back and subsequent right lower extremity pain could have occurred at any time, any place without any specific causation or trauma. Certainly, [appellant's] work and using the belt, etc. did not cause degeneration, which lead to scoliosis and stenosis. Physiologic factors that occurred as he was aging in his 6th and early 7th decade."

By decision dated September 21, 2011, OWCP denied the claim for compensation. It found the weight of the evidence was represented by Dr. Lang.

In a letter dated November 9, 2011, appellant requested reconsideration. He argued that Dr. Lang's report was not sufficient to represent the weight of the medical evidence. By decision dated February 7, 2012, OWCP reviewed the merits of the claim and denied modification.

LEGAL PRECEDENT

A claimant seeking benefits under FECA³ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.⁴

² FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination. 5 U.S.C. § 8123(a). 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. 20 C.F.R. § 10.321 (1999).

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.115(e), (f) (2005); see *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

To establish that an injury was sustained in the performance of duty, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁵

Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.⁶ A physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors must be based on a complete factual and medical background of the claimant.⁷ Additionally, in order to be considered rationalized, the 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 specific employment factors.⁸

ANALYSIS

In the present case, appellant has alleged that he sustained a back condition causally related to his federal employment commencing in 2004. He has discussed the wearing of a belt carrying necessary equipment that weighed 25 to 30 pounds. There is also discussion in the record of appellant's general job duties as a police officer that included such activity as occasional lifting or restraining of patients.

The Board finds the record contains medical evidence of diminished probative value that does not resolve the issue presented. The April 7, 2011 report from attending physician, Dr. Tauber, is of little probative value on the specific issue presented. Dr. Tauber referred to appellant feeling a pop in his low back and he states that "the incident at work" caused a permanent aggravation. The claim in this case was not based on an incident at work in November 2009. Appellant has not discussed an incident at work in November 2009 and the only evidence in this regard is medical evidence noting that he reported back pain at work November 2009. The claim is primarily based on the wearing of a utility belt commencing in 2004. Dr. Tauber briefly noted in his history that appellant wore a utility belt and his opinion was that "six years of duty" contributed to appellant's condition. He does not clearly explain how the years of "duty" contributed or otherwise provide any medical rationale in support of his opinion.

The July 25, 2011 report from the second opinion physician, Dr. Welborn, is also of diminished probative value. The Board notes that the SOAF provided to him included an unexplained reference to lumbar degenerative disease as "preexisting or concurrent." It is not

⁵ *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁶ *See Robert G. Morris*, 48 ECAB 238 (1996).

⁷ *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁸ *Id.*

clear why OWCP referred to a potential preexisting condition as this is a medical determination and the record contains no medical evidence prior to 2004. Dr. Wellborn opined that appellant's condition was not related to employment and stated only that he had "previous low back pain and evidence of previous degeneration and scoliosis." But the history provided stated that appellant did not report low back pain until 2009. No discussion was provided for the statement as to "previous" degeneration and scoliosis. It is not clear to what evidence Dr. Wellborn was referring or why such evidence would establish that work duties from 2004 did not contribute to appellant's condition. The Board finds Dr. Wellborn's opinion was not a rationalized medical opinion based on an accurate background.

Since both Dr. Tauber and Dr. Wellborn provided reports of diminished probative value, they are insufficient to create a conflict under 5 U.S.C. § 8123(a). When medical reports are of diminished probative value, there is no conflict in the medical evidence warranting referral to a referee physician.⁹ The referral to Dr. Lang is considered a second opinion examination.¹⁰

While a second opinion report can constitute the weight of the evidence,¹¹ the Board finds that Dr. Lang's report is not sufficient to represent the weight of the evidence. The Board notes that Dr. Lang was provided with the same SOAF containing improper language regarding preexisting or concurrent conditions. Dr. Lang stated that "certainly" appellant's job did not cause the underlying conditions, but did not provide adequate rationale explaining why such a finding was certain. His response to the question of whether work did or did not contribute to appellant's condition was not a rationalized medical opinion. Dr. Lang referred to appellant's pain in November 2009 as not being produced by a specific work trauma, but again, that is not the claim presented in this case. The issue is whether there is a causal relationship between appellant's back condition and the work factors commencing in 2004. Dr. Lang did not provide a rationalized medical opinion on this issue.

The case will be remanded for further development of the medical evidence. OWCP should prepare a proper SOAF with no reference to "preexisting or concurrent" conditions and secure a rationalized medical opinion on the issues presented. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the case is not in posture for decision and requires further development of the medical evidence.

⁹ See *Mary L. Henninger*, 52 ECAB 408 (2001).

¹⁰ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: December 3, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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