

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

L.D., Appellant and U.S. POSTAL SERVICE, POST OFFICE, Seattle, WA, Employer)))))))))))	Docket No. 11-1372 Issued: February 14, 2012
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Appearances:
George R. Guinn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 17, 2011 appellant, through his attorney, filed a timely appeal from a December 1, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for an employment-related injury and an April 1, 2011 nonmerit decision denying his request for reconsideration. 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.²

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained injuries to his back, legs, knees, right arm, right elbow and right shoulder in the

¹ 5 U.S.C. § 8101 *et seq.*

² Following the issuance of the April 1, 2011 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).

performance of duty on April 25, 2010, as alleged; and (2) whether OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant's attorney contends that the factual and medical evidence submitted supports causal relationship between a fall at work and injuries sustained.

FACTUAL HISTORY

On April 25, 2010 appellant, then a 58-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries to his left leg, right leg, right arm, right shoulder, right elbow and back due to a slip and fall after his right leg gave out in the performance of duty that day.

In an April 26, 2010 attending physician's report, Dr. James Ellis, an emergency medicine physician, diagnosed contusions of the knees and right arm. In an April 25, 2010 accident/incident worksheet, he reported that appellant fell on a cupped metal washer that was laying on the floor while at work on April 25, 2010. The washer slid, causing appellant to fall to his knees. To avoid hitting his face, he rolled to his right side landing on his right elbow and shoulder.

Appellant submitted x-rays dated April 26, 2010, which showed no acute osseous abnormality with mild degenerative joint disease of the acromioclavicular (AC) and humeral joints in the right shoulder and a normal right elbow.

In a second April 26, 2010 report, Dr. Ellis diagnosed fall, knee contusions, shoulder strain and right upper arm contusions. He reported that appellant had some knee problems in the past and had no neck or back pain. Dr. Ellis indicated that x-rays of appellant's shoulder and arm were normal.

In a May 1, 2010 report, Dr. Walter A. Fernau, III, a Board-certified family medicine physician, diagnosed back and knee pain. He noted that appellant fell on April 24, 2010 after slipping at work. Dr. Fernau reported that appellant tripped on a washer that was about an eighth of an inch thick. One knee went forward and the other one gave way as he lunged forward. Appellant's left knee went out and he fell on his right knee, rolled to his side and struck his right elbow and then struck his back against the setup for an eye wash and a buffer he was using to clean the floors. He had paravertebral muscle spasms and his buttocks were both in spasm. Appellant had no knee swelling or erythema and no anterior or posterior drawer sign. He had negative Lachman's sign and no medial or lateral laxity with varus or valgus deformity, although Dr. Fernau was not able to straighten his knees completely due to his pain.

On May 4, 2010 Dr. Paula M. Silha, a Board-certified family medicine physician, diagnosed low back pain. She indicated that appellant fell at work on April 25, 2010.

In a May 11, 2010 report, Dr. Robert P. Yost, a Board-certified orthopedic surgeon, diagnosed low back pain status post mechanical fall on April 25, 2010. He indicated that appellant had some low-grade chronic back pain, but it was significantly worsened by the fall which also exacerbated his bilateral knee pain.

Appellant submitted four radiological reports dated May 21, 2010 which revealed: no definite compression fracture and probable diffuse idiopathic skeletal hyperostosis of the thoracic spine; no compression fracture and multilevel disc degeneration most pronounced at L5-S1 of the lumbar spine; mild-to-moderate bilateral hip degenerative joint disease with no acute bony abnormality identified in the hips and pelvis; and mild-to-moderate AC joint degenerative disc disease without acute bony abnormality in the right shoulder.

On May 21 and 22, 2010 Dr. Carolyn Wickenkamp, a Board-certified family medicine physician, diagnosed sprain shoulder/arm, sprain thoracic region, sprain lumbar region due to a fall at work on April 25, 2010. She took appellant off work due to an estimated period of total temporary disability of 7 and 10 days, respectively.

Appellant submitted chiropractic notes dated May 24 and 25, 2010 with illegible signatures diagnosing thoracic, lumbar and sacroiliac (SI) subluxations, calcification of anterior longitudinal ligament, multiple levels of degeneration in the thoracic lumbar sacral (TLS) spine and moderate degeneration of the AC joint.

On June 2, 2010 Dr. Wickenkamp reiterated her diagnoses and took appellant off work due to an estimated period of temporary total disability of 10 days.

By letter dated June 23, 2010, OWCP informed appellant that the evidence was insufficient to support his claim and requested additional factual and medical information. It allotted him 30 days to submit additional evidence and respond to its inquiries.

In a June 11, 2010 report, Dr. Wickenkamp reiterated her diagnoses and released appellant to work that same day. She indicated that he must have a sedentary job, must alternate sitting, standing and walking four hours per shift, not work near moving machinery, not work overhead, not kneel or squat, not climb and limit his standing, walking, stooping, bending to two hours a day and not lift, pull or push over 20 pounds.

On June 17, 2010 Dr. Wickenkamp released appellant to full duty without restrictions at four hours a week. The date of his maximum medical improvement was that same day.

By decision dated July 29, 2010, OWCP denied appellant's claim on the basis that the evidence submitted was not sufficient to establish that the employment incident occurred at the time, place and in the manner alleged.

On August 10, 2010 appellant, through his attorney, requested a review of the written record by an OWCP hearing representative. He submitted four narrative statements dated August 10, 2010 and one dated August 12, 2010. Counsel also resubmitted a May 21, 2010 report by Dr. Wickenkamp, a witness statement by appellant's supervisor, Robert P. Olson, and emergency room progress notes dated April 26, 2010 all describing appellant's fall at work.

By decision dated December 1, 2010, an OWCP hearing representative affirmed the July 29, 2010 decision. Although the evidence of record was sufficient to establish that the employment incident occurred at the time, place and in the manner alleged, the medical evidence was insufficient to establish an injury connected to the April 25, 2010 employment incident.

On January 6, 2011 appellant, through his attorney, requested reconsideration. In an April 26, 2010 radiological report, Dr. Joel C. Sim, a Board-certified radiologist, diagnosed mild narrowing in the medial aspect of the right and left knee joints and calcification in the insertion of the quadriceps tendon into the right patella, noting that the rest of the examination was unremarkable. He submitted a December 28, 2010 designation notice approving leave and resubmitted emergency room progress notes of April 26, 2010.

By decision dated April 1, 2011, OWCP denied appellant's request for reconsideration on the basis that he did not submit relevant and pertinent new evidence not previously considered by OWCP, did not show that OWCP erroneously applied or interpreted a point of law or advanced a point of law or fact not previously considered. It noted that the alleged errors in the December 1, 2010 decision were typographical in nature and unrelated to the issue of causal relationship.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ 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, that an injury⁴ 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.⁵

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. A fact of injury determination is based on two elements. 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. 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. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.⁶

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete

³ 5 U.S.C. §§ 8101-8193.

⁴ OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

⁵ See *Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989). See also *E.K.*, Docket No. 09-1827 (issued April 21, 2010).

⁶ *Id.* See *Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

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.⁷

ANALYSIS -- ISSUE 1

OWCP accepted that appellant slipped and fell at work on April 25, 2010 while working as a custodian. The Board finds that this case is not in posture for decision as to whether appellant's claimed back, bilateral leg, bilateral knee, right arm, right elbow and right shoulder conditions were caused or aggravated by the accepted employment incident.

On April 26, 2010 Dr. Ellis diagnosed knee contusions, shoulder strain and right upper arm contusions. He reported that appellant fell on a cupped metal washer that was laying on the floor at work on April 25, 2010. The washer slid causing appellant to fall to his knees. To avoid hitting his face, he rolled to his right side landing on his right elbow and then shoulder. On May 4, 2010 Dr. Silha diagnosed low back pain and indicated that appellant fell at work on April 25, 2010. On May 11, 2010 Dr. Yost diagnosed low back pain status post mechanical fall on April 25, 2010 and indicated that appellant had some low-grade chronic back pain, but it was significantly worsened by the fall which also exacerbated his bilateral knee pain. Dr. Wickenkamp also reported lumbar, shoulder and thoracic strains resulting from the April 25, 2010 fall at work.⁸

The Board notes that, while the reports of record are not completely rationalized, they are consistent in finding that appellant sustained the diagnosed knee contusions, shoulder strain, right upper arm contusions and low back pain conditions because of the April 25, 2010 incident. These reports are not contradicted by any substantial medical or factual evidence of record.⁹ While the reports are not sufficient to meet appellant's burden of proof to establish his claim, they raise an inference of causal relationship between his claimed conditions and the April 25, 2010 employment incident.¹⁰

It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden of establishing entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹¹

On remand, OWCP should refer appellant, together with the case record and a statement of accepted facts, for examination by an appropriate specialist and a rationalized medical opinion

⁷ *Id.* See Gary J. Watling, 52 ECAB 278 (2001).

⁸ The Board notes that, although Dr. Fernau reported a history of injury similar to that of Dr. Ellis, Dr. Fernau indicated the date-of-injury as April 24, 2010, which is not the date appellant claimed. The incorrect date of injury, coupled with the lack of rationale, diminishes the probative value of Dr. Fernau's report.

⁹ See *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

¹⁰ *Id.*; see also John J. Carlone, *supra* note 6.

¹¹ See Phillip L. Barnes, 55 ECAB 426 (2004); see also Virginia Richard (*Lionel F. Richard*), 53 ECAB 430 (2002); William J. Cantrell, 34 ECAB 1233 (1993); Dorothy L. Sidwell, 36 ECAB 699 (1985).

as to whether his back, bilateral leg, bilateral knee, right arm, right elbow and right shoulder conditions were causally related to the April 25, 2010 employment incident. After such further development as it deems necessary, it shall issue a *de novo* decision concerning appellant's claim.

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant established that he sustained a traumatic injury to his back, legs, knees, right arm, right elbow and right shoulder on April 25, 2010 in the performance of duty, as alleged.¹²

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2011 and December 1, 2010 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision.

Issued: February 14, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

¹² In light of the Board's disposition of the traumatic injury issue, the second issue of whether OWCP properly refused to reopen appellant's case for further reconsideration of the merits is rendered moot. *See Sharon Edwards*, 56 ECAB 749 (2005).