United States Department of Labor
Employees' Compensation Appeals Board

W.L., Appellant	)	
and	)	**Docket No. 11-99**
	)	**Issued: August 16, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 20, 2010 appellant filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated July 22, 2010. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability as of May 5, 2008; (2) whether appellant sustained a lower back injury in the performance of duty on May 5, 2008; and (3) whether OWCP abused its discretion by denying appellant's authorization for lumbar laminectomy/spinal fusion surgery.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] Appellant, then a 63-year-old truck driver, injured his lower back on October 29, 2007 while pushing heavy cases of wire mail off a truck. OWCP accepted the claim for lumbosacral sprain under case number xxxxxx309. Appellant stopped work on October 29, 2007 and returned to work on November 7, 2007. In a Form CA-2a dated May 27, 2008, he alleged a recurrence of disability as of May 5, 2008. On June 3, 2008 a Dr. Brian J. Sullivan requested authorization to perform lumbar surgery. On July 28, 2008 appellant filed a Form CA-1 traumatic injury claim under case file number xxxxxx389, alleging that he sustained a low back injury in the performance of duty on May 5, 2008 while unloading heavy mail containers off the truck.

In the May 19, 2010 decision, the Board affirmed OWCP decisions dated July 17, November 6, 2008, February 20 and May 7, 2009. The Board found: appellant failed to submit rationalized probative evidence to show that he sustained a worsening of his lower back condition as of May 5, 2008; while he established that the May 5, 2008 incident involving pushing of heavy mail containers occurred as alleged, he did not submit medical evidence sufficient to establish that he sustained an injury to his lower back in the performance of duty on May 5, 2008; and OWCP did not abuse its discretion to deny appellant authorization for lumbar laminectomy/spinal fusion surgery. The Board found that the June 30, 2008 report of the second opinion physician, Dr. Robert Allen Smith, a Board-certified orthopedic surgeon constituted the weight of the evidence and established that appellant's current conditions of spondylolisthesis, degenerative disease of the spine and neurogenic claudication were not related to the accepted lumbar spine strain, and therefore appellant had not established a recurrence of disability, or the need for lumbar surgery resulting from the accepted injury. The facts of this case are set forth in the Board's May 19, 2010 decision and incorporated by reference.[3]

By letter dated June 15, 2010, appellant's attorney requested reconsideration. In support of the request, he submitted a May 14, 2010 report from Dr. Sullivan, who noted that he had been asked to comment whether the May 5, 2008 aggravation of appellant's back necessitated surgery. Counsel stated:

> "In reviewing my notes ... from May 23, 2008, my conversation with [appellant] indicated that he had ongoing troubles since the onset of his October 29, 2007 work-related accident. While he attempted to return to work and had significant but tolerable discomfort until May 5, 2008 [and] exacerbation of a same symptoms it simply make sense to me that the work-related accident originally in October 29, 2007 is directly related to his May 5, 2008 flare of discomfort…. I cannot discern the difference between the two injuries. I do not believe that [appellant] was able to discern the two either and therefore in my mind the May 5, 2008 issue is exactly the same as the October 27, 2007 issue. Again, [appellant]

[2] Docket No. 09-1545 and 09-1546 (issued May 19, 2010).

[3] The Board originally issued a decision in this case on April 23, 2010. Due to a nonsubstantive erratum, the decision was reissued on May 19, 2010.

has told me repeatedly that he had no difficulties with his lumbosacral spine before that work-related accident of 2007.

"It is my opinion that the May 2008 injury is simply a continuation of the ongoing troubles begun with the work-related accident of October 2007."

By decision dated July 22, 2010, OWCP denied modification of its previous decisions in this case.

LEGAL PRECEDENT -- ISSUE 1

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury, and who supports that conclusion with sound medical reasoning.[4] A recurrence of disability is defined as the inability to work caused by a spontaneous change in a medical condition which results from a previous injury or illness without an intervening injury or new exposure in the work environment that caused the illness.[5]

ANALYSIS -- ISSUE 1

The Board finds appellant failed to submit sufficient medical evidence containing a rationalized, probative opinion which relates his claimed recurrence of disability for work as of May 5, 2008 to his accepted lumbosacral strain condition. For this reason, appellant has not discharged his burden of proof to establish his claim that he sustained a recurrence of disability as a result of his accepted employment condition. He has failed to submit evidence to show that he sustained a worsening of his lower back condition as of May 5, 2008. As appellant did not submit medical evidence sufficient to establish that he sustained a recurrence of his work related, October 29, 2007 lower back condition, OWCP properly denied modification of its February 20 and July 17, 2008 decisions.

Appellant submitted Dr. Sullivan's May 14, 2010 report. Dr. Sullivan reiterated his prior opinion that appellant had experienced ongoing troubles since the onset of his alleged October 29, 2007 work injury and that the May 5, 2008 incident was an exacerbation of the same symptoms. His opinion on causal relationship is of limited probative value in that he did not provide adequate medical rationale in support of his stated conclusions.[6] Dr. Sullivan did not discuss any objective findings which would support his opinion that appellant's condition worsened on May 5, 2008, and that the worsening was a continuation of the October 2007 injury. Furthermore, he did not describe appellant's May 5, 2008 incident in any detail and explain how appellant's condition on May 5, 2008 was a spontaneous return of the accepted condition, rather

[4] *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

[5] *See* 20 C.F.R. § 10.5(x); *Donald T. Pippin*, 54 ECAB 631 (2003).

[6] *William C. Thomas*, 45 ECAB 591 (1994).

than a new injury. Moreover, Dr. Sullivan's opinion is of limited probative value for the further reason that it is generalized in nature and equivocal.

As noted, appellant has the burden of proof to submit rationalized medical evidence establishing the relationship of the claimed recurrence to the original injury. The weight of the medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.[7] Appellant has not submitted a physician's reasoned opinion in which the physician explains the reasons why appellant's current condition is causally related to the May 5, 2008 work injury. For these reasons, the medical evidence is insufficient to establish a recurrence of a medical condition causally related to the accepted lumbosacral sprain condition. The Board affirms the denial of appellant's claim for a recurrence of disability beginning May 5, 2008.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA[8] has the burden of establishing that 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 injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[9] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[10]

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.[11] 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.[12]

OWCP cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty,[13] nor can OWCP

[7] *See Ann C. Leanza*, 48 ECAB 115 (1996).

[8] 5 U.S.C. § 8101 *et seq.*

[9] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[10] *Victor J. Woodhams*, 41 ECAB 345 (1989).

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

[12] *Id.* For a definition of the term "injury," *see* 20 C.F.R. § 10.5(e)(e).

[13] *Pendleton*, *supra* note 9.

find fact of injury if the evidence fails to establish that the employee sustained an "injury" within the meaning of FECA. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and her subsequent course of action.[14] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may case doubt on an employee's statements in determining whether he or she has established his or her claim.[15]

ANALYSIS -- ISSUE 2

Dr. Sullivan's May 14, 2010 report does not constitute rationalized medical opinion evidence which sufficiently describes or explains the medical process by which the claimed May 5, 2008 work accident would have been competent to cause the claimed injuries. He did not describe the May 5, 2008 accident in any detail or state how the accident would have been competent to cause the claimed lower back condition.

In this regard, the Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[16]

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.[17] Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

As noted above, Dr. Sullivan indicated in his May 14, 2010 report that appellant experienced ongoing back problems since his accepted October 29, 2007 work injury. He stated that the May 5, 2008 incident was merely a continuation and exacerbation of these problems. Appellant failed to provide a rationalized, probative medical opinion relating his current condition to the May 5, 2008 incident. Accordingly, as he has failed to submit any probative medical evidence establishing that he sustained an injury to his lower back in the performance of duty on May 5, 2008, OWCP properly denied modification of its denial of appellant's claim for compensation.

[14] *See Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

[15] *See Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

[16] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[17] *Id.*

LEGAL PRECEDENT -- ISSUE 3

Section 8103 of FECA[18] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[19] In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under FECA. OWCP has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[20]

Section 8123(a) of FECA provides that, if there is 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 an examination.[21]

ANALYSIS -- ISSUE 3

OWCP accepted a claim for lumbosacral sprain. On June 3, 2008 Dr. Sullivan requested authorization for lumbar spine fusion/laminectomy surgery. By letter dated June 5, 2008, OWCP found that the need for such surgery was not related to any employment-related incident or activity. In its July 17, 2008 decision, relying on Dr. Smith's opinion, it found that appellant did not require any additional treatment for his accepted lumbosacral sprain condition.

As noted, the only restriction on OWCP'a authority to authorize medical treatment is one of reasonableness. While appellant submitted Dr. Sullivan's May 14, 2010 report, it is not sufficient to overcome Dr. Smith's opinion, which negated the causal relationship between appellant's condition and the proposed lumbar laminectomy/spinal fusion surgery. OWCP properly determined that the weight of the medical evidence of record, as represented by Dr. Smith's referral opinion, established that appellant's spondylolisthesis, degenerative disease of the spine and neurogenic claudication conditions were not work related. Dr. Sullivan did not render an opinion regarding the necessity of surgery in his May 14, 2010 report. Therefore there are no grounds to modify OWCP's prior determination denying appellant's request for surgery to ameliorate these conditions.

[18] *Supra* note 1.

[19] *Id*. at § 8103.

[20] *Dale E. Jones*, 48 ECAB 648 (1997); *Daniel J. Perea*, 42 ECAB 214 (1990).

[21] 5 U.S.C. § 8123 (a).

CONCLUSION

The Board finds that appellant has not met his burden to establish that he was entitled to compensation for a recurrence of disability as of May 5, 2008 causally related to his accepted lower back condition. The Board finds that OWCP properly found that appellant failed to meet his burden of proof to establish that he sustained an injury to his lower back in the performance of duty. The Board finds that OWCP did not abuse its discretion to deny appellant authorization for lumbar laminectomy/spinal fusion surgery.

Appellant's attorney argues in his appeal brief that Dr. Sullivan's May 14, 2010 report is sufficient to create a conflict in the medical evidence with Dr. Smith's opinion and that therefore the case should be remanded for referral to an impartial medical examiner. For the reasons set forth in this decision and in the Board's May 19, 2010 decision, the Board rejects this argument. Dr. Sullivan's report is merely a reiteration of his previously stated findings and conclusions which were outweighed by Dr. Smith's opinion, for the reasons set forth in this decision and in the Board's May 19, 2010 decision.

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: August 16, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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