United States Department of Labor
Employees' Compensation Appeals Board

W.J., Appellant	)	
and	)	**Docket No. 09-988**
	)	**Issued: December 9, 2009**
U.S. POSTAL SERVICE, BULK MAIL FACILITY, 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:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 4, 2009 appellant, through counsel, filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated August 22, 2008 denying his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish that he sustained an occupational disease causally related to factors of his federal employment, as alleged.

On appeal, appellant, through counsel, argues that he has established a *prima facie* case that his work duties assigned in 2006 aggravated his underlying condition. He argued that the evidence is sufficient to require further development of the evidence.

FACTUAL HISTORY

On October 1, 2006 appellant, then a 48-year-old clerk, filed an occupational disease claim alleging that he suffered injuries in his right and left ankle and lower back as a result of his

federal duties. He indicated that he first became aware of his illness on August 25, 2006. On the claim form the employing establishment indicated that appellant was intermittently working approximately two hours a day.

In a statement accompanying the claim form, appellant stated that he believed that his present condition is related to his original injury because to retain his employment he was forced to give up a sedentary position and was given a simulated light-duty position.[1] He noted that just walking from the parking lot to the work area aggravated his ankles and lower back. Appellant stated that he was presently throwing parcels over his head, standing and twisting constantly and doing some bending, pushing and pulling of heaving equipment and lifting heavy sacks. He noted that he works two hours per night. Appellant noted that the constant standing caused his right and left ankles to swell and the constant shifting has thrown his lower back out of alignment, thus causing lower back pain, tingling and numbness in his lower back radiating down both right and left ankles and feet.

In a medical report dated September 14, 2006, Dr. George Rodriguez, a Board-certified physiatrist, indicated that he has been treating appellant for injuries sustained in a work-related incident that occurred on December 27, 1998. He opined that appellant sustained the following injuries as a result of the December 27, 1998 injury: spondylolisthesis (lumbar); radiculopathy-lumbosacral left; sprain, left ankle; tendinopathy Achilles left ankle; sprain, right ankle; gait abnormality; degenerative disc disease (lumbosacral); and herniated nucleolus pulposus. Appellant noted that the herniation of the lumbar spine, as well as the spondylolisthesis and associated sacral radiculopathy are not expected to resolve. He further noted that the left ankle sprain was progressively worsening. Dr. Rodriguez also submitted a November 14, 2006 restriction form indicating that appellant could perform sedentary work lifting at a maximum five pounds. He noted that appellant could not squat, kneel or crawl and could occasionally bend, climb, push and pull. Dr. Rodriguez listed no restrictions on reaching and grasping.

By decision dated December 22, 2006, the Office denied appellant's claim as the medical evidence did not demonstrate that the claimed medical condition was related to the established work events.

By letter dated January 3, 2007, appellant, through his attorney, requested an oral hearing.

At the hearing held on May 15, 2007, appellant testified that before he started work with the employing establishment in 1986 as a manual distribution clerk, he had no trouble with his ankles, legs or lower back. He noted that before he was hired he passed the physical. Appellant testified that he had a prior work injury in 1987, when walking across the bridge at his annex and his foot went underneath a piece of rubber. He noted that he fractured his ankle and that his claim was accepted by the Office. After this, appellant noted that he was placed on light duty. He testified that benefits from this case were terminated sometime around October 5, 2005. Appellant described a second injury in 1998 when he jumped out of the way of a forklift and his

[1] The record reveals that appellant sustained various injuries at work in 1987, which included his left ankle. On December 27, 1998 appellant sustained a second injury to his left ankle. The Office assigned file number xxxxxx067.

foot went down a drain. He noted that he started falling and grabbed hold of a piece of the wall to break his fall. Appellant noted that at that time he sustained injuries to his left ankle and back. He testified that this claim was also approved. Appellant noted that after this he was out of work for a while. He indicated that, after this later injury, he was fired but that he fought to get his job back and that when he returned to work they placed him on light duty in 2002 and he worked in this position until 2006. Appellant testified that he had restrictions of no prolonged standing, twisting, bending or climbing stairs. He noted that he had a long walk from the parking lot on a concrete surface and that he sometimes had to take stairs to get to his duty station. Appellant noted that, when he did a lot of standing, his ankle and back pain was worse. He indicated that the job was not strictly sedentary and that he had to get up frequently. In June 2006, appellant was again placed on light duty, but that this work consisted of standing for the tour, throwing mail over his head, twisting, bending and pulling containers that sometimes weighed a couple of hundred pounds. He suggested that these activities aggravated his ankle. Appellant started getting fever hours at the job after he filed his compensation claim. He noted that he currently was out of work for a month and one-half.

By decision dated July 20, 2007, the hearing representative affirmed the denial of appellant's claim. She noted that there was no dispute as to appellant's work history and duties. However, the hearing representative noted that the medical evidence did not establish a causal relationship between appellant's duties after June 2006 and his medical condition.

On October 29, 2007 appellant, through his attorney, request reconsideration. In support thereof, appellant's attorney submitted reports by Dr. Rodriguez dated May 22, June 21 and August 28, 2007. In these reports, Dr. Rodriquez noted that appellant was complaining of low back pain with radiation in the left lower extremity as well as bilateral ankle pain. He noted that appellant was currently working as a full-time clerk at the employing establishment. Dr. Rodriquez again diagnosed spondylolisthesis -- lumbar (L5-S1, preexisting with exacerbation); radiculopathy -- lumbosacral; left ankle sprain; tendinopathy -- Achilles; right ankle sprain unrelated to accident; gait abnormality, degenerative disc disease, herniated nucleous pulposus -- lumbar; and chronic pain. He attributed these conditions, within a reasonable degree of medical certainty, to the work-related injury of December 27, 1998. Dr. Rodriquez restricted appellant from climbing, bending, crouching, kneeling, prolonged sitting or standing and lifting greater than five pounds.

By decision dated November 9, 2007, the Office reviewed appellant's case on the merits, but found that the evidence did not establish that he sustained injuries as a result of the claimed worked activities.

On July 1, 2008 appellant, through his attorney, requested reconsideration.[2] In support thereof, he submitted a June 13, 2008 report by Dr. Michael Schaeffer, from the Injury Institute in Philadelphia, Pennsylvania. In his report, Dr. Schaeffer noted that he was consulted by Dr. Rodriguez. He noted appellant's history of a fracture of his right tarsal navicular area in 1987 and noted that in 1998 appellant had a severe injury to his left ankle and back due to a

[2] Although on March 27, 2008 appellant, through his attorney, requested review by this Board, at the request of appellant's attorney, this Board dismissed the appeal so that appellant could request reconsideration. Docket No. 08-1324 (issued July 16, 2008).

forklift accident at work. Dr. Schaeffer noted that when appellant returned to work in June 2006 his position involved prolonged standing, twisting, walking and bending and that these maneuvers did not coincide well with his underlying pathologies. He noted that a tear of the tibialous anterior muscle, along with osteophytes of the Talo-navicular joint, as well as persistent joint effusion were noted in a magnetic resonance imaging scan in 2006. Dr. Schaeffer noted that appellant's conditions, when combined with prolonged standing, twisting, walking and bending make it unbearable to perform work-related duties beyond a 30-minute period and were the cause of pain and swelling of the affected extremity. He also noted that claimants with this type of pain try to compensate by using the other extremity, as is the case with appellant. Dr. Schaeffer noted that the type of motions involved with appellant's job description present *torque force* abnormalities. He noted that these directions of physical energy are sometimes overwhelming and can cause muscles to tear, joints to swell and leak fluid and osteophytes to form. Dr. Schaeffer noted that osteophytes are the ground work for the development of traumatic arthritis and, in his opinion, the underlying cause of his intense disruptions. He concluded that the injuries sustained by appellant were aggravated by the specific nature of those duties he performed as part of his work description. Dr. Schaeffer noted that every time appellant walks, stands or bends his condition becomes aggravated and worsens. Therefore, he declared, within a reasonable degree of medical certainty, that his specific duties appellant was assigned in 2006 aggravated and subsequently worsened his underlying condition.

By decision dated August 22, 2008, the Office denied modification of the Office's previous decision.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[3] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[4] including that he is an "employee" within the meaning of the Act[5] and that he filed his claim within the applicable time limitation.[6] The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.[7] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[8]

[3] 5 U.S.C. §§ 8101-8193.

[4] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[5] *See M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

[6] *R.C.*, 59 ECAB ___ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

[7] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[8] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (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.[9]

Causal relationship is a medical issue[10] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,[11] must be one of reasonable medical certainty[12] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[13]

It is well established that, where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for period of disability related to the aggravation. Where the medical evidence supports an aggravation or acceleration of any underlying condition precipitated by working conditions or injuries, such disability is compensable.[14]

ANALYSIS

The Board has long held that any aggravation of an underlying condition by employment factors must be established by probative medical evidence.[15] In the instant case, the opinions of Dr. Rodriguez are insufficient to establish a causal relationship because they do not attribute appellant's medical condition to his work duties after 2006. In fact, the doctor specifically attributed appellant's condition to the earlier work injury of December 27, 1998.

The Board further finds that Dr. Schaeffer is not clearly a physician under the Act. A physician under the Act includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.[16] Dr. Schaeffer refers to himself only as a "medical provider." Although

[9] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

[10] *Mary J. Briggs*, 37 ECAB 578 (1986).

[11] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[12] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[13] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[14] *A.C.*, 60 ECAB ___ (Docket No. 08-1453, issued November 18, 2008).

[15] *Id*.

[16] 5 U.S.C. § 8101(2).

he signs his opinion as "Dr. Michael Schaeffer," there is no indication of a medical specialty or even that he is a medical doctor.

Furthermore, there is no indication in the report that Dr. Schaeffer examined appellant. If he based his conclusion only on a review of the medical record, there is no indication as to what records he reviewed. Although Dr. Schaeffer notes that appellant's employment involved prolonged standing, twisting, walking and bending, it is not clear that he knew appellant's specific duties. In particular, there is no indication that Dr. Schaeffer was aware that, at the time he filed his claim, appellant was only working two hours a day.

An award of compensation may not be based on surmise, conjecture or speculation. Neither, the fact that appellant's claimed condition became apparent during a period of employment nor his belief that the condition was caused by his employment is sufficient to establish causal relationship.[17] The Board has held that the fact that a condition manifests itself or worsens during a period of employment[18] or that the work activities produce symptoms revelatory of an underlying condition[19] does not raise an inference of causal relationship between the two. As appellant failed to provide medical evidence establishing the causal relationship between his factors of employment and a medical condition, the Office properly denied his claim for compensation.

Appellant has failed to establish a *prima facie* case of a causal relationship between a diagnosed injury and the specified duties of his federal employment. Accordingly, the Office properly denied his claim.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an occupational disease causally related to factors of his federal employment, as alleged.

[17] *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

[18] *E.A.*, 58 ECAB ___ (Docket No. 07-1145, issued September 7, 2007); *Albert C. Haygard*, 11 ECAB 393, 395 (1960).

[19] *D.E.*, 58 ECAB ___ (Docket No. 07-27, issued April 6, 2007); *Fabian Nelson*, 12 ECAB 155, 157 (1960).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 22, 2008 is affirmed.

Issued: December 9, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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