

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

R.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
West Palm Beach, FL, Employer**

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**Docket No. 09-2296
Issued: August 4, 2010**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On September 15, 2009 appellant filed a timely appeal from a July 24, 2009 merit decision denying his occupational disease 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 has established that he sustained a cervical condition in the performance of duty causally related to his employment.

FACTUAL HISTORY

On December 12, 2008 appellant, a 58-year-old mail processor, filed an occupational disease claim (Form CA-2) for cervical radiculopathy, which he attributed to lifting trays of mail as well as pushing and pulling general-purpose containers. He first became aware of his condition and that it was caused by his federal employment on November 29, 2008. On December 19, 2008 the employing establishment controverted the claim, noting that it was duplicative of a claim filed in April 2008.

Appellant submitted a note signed by a registered nurse, an April 16, 2008 report from the National Institute for Occupational Safety and Health and an appendix from a November 1, 2007 U.S. Department of Labor, Occupational Safety and Health Administration report.

On May 2, 2008 Dr. James V. Zelch, a Board-certified diagnostic radiologist, reported that a magnetic resonance imaging (MRI) scan of appellant's cervical spine revealed a left central disc herniation at the C3-4 level with left foramen stenosis, a disc bulge at the C5-6 level and a midline disc herniation at the C6-7 level.

Appellant submitted a June 16, 2008 note from Dr. John Conde, a chiropractor, diagnosing paresthesia, cervical segmented dysfunction and cervicalgia.

In a December 1, 2008 treatment note, Dr. Jeffery S. Penner, a Board-certified orthopedic surgeon, reviewed appellant's history of injury and stated that physical examination revealed slight findings of radiculopathy. He stated that his findings were consistent with cervical spine radiculopathy.

On December 22, 2008 Dr. Penner diagnosed degenerative arthritis and radiculopathy. He noted that additional information was required before he could conclude whether appellant's condition was employment related. Dr. Penner reported that an MRI scan of appellant's cervical spine, conducted May 1, 2008, revealed degenerative osteoarthritic spondylitic discs at the C3-4, C5-6 and C6-7 levels.

Appellant submitted a January 22, 2009 statement describing his history of injury and identifying the employment activities he considered responsible for his condition.

In a February 20, 2009 decision, the Office denied the claim. It found that appellant performed the employment activities, as alleged, but did not demonstrate these employment factors caused his cervical condition.

On March 5, 2009 appellant, through his attorney, requested an oral hearing that was held on June 2, 2009. In a July 24, 2009 decision, the Office affirmed the hearing representative's February 20, 2009 decision, finding that the evidence of record did not establish that the accepted employment factors caused his cervical condition.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of proof to establish the essential elements of his claim by the weight of the evidence,² including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment

¹ 5 U.S.C. §§ 8101-8193.

² *J.P.*, 59 ECAB ____ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

injury.³ As part of his burden, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.⁴ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.⁵

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.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 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

The Office accepted that appellant lifted mail trays and moved general-purpose containers in his employment as a mail processor. Appellant's burden of proof includes submitting probative medical opinion. As noted, causal relationship is a medical issue that can only be proven by rationalized medical opinion from a physician. Because appellant has not submitted sufficient medical opinion evidence to support his claim, the Board finds appellant has not established that he sustained a cervical condition in the performance of duty causally related to his employment.

The note signed by the registered nurse and report of Dr. Conde do not constitute probative medical opinion evidence. Healthcare providers, such as nurses, are not defined as a "physician" under the Act. Their medical reports do not constitute competent medical evidence.⁸

³ *G.T.*, 59 ECAB ____ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *Id.*; *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

⁵ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

⁶ *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁷ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁸ 5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB 389 (Docket No. 06-1564, issued February 27, 2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983).

Furthermore, as a chiropractor, Dr. Conde diagnosed paresthesia, cervical segmented dysfunction and cervicgia. He is not a “physician” for purposes of the Act, which includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.⁹ Dr. Conde noted that radiographs were not retaken as they were not clinically necessary or otherwise address how his diagnosis of cervical segmented dysfunction supported a subluxation of the cervical spine. Accordingly, this evidence does not establish a causal relationship between the established employment factors and appellant’s cervical condition as Dr. Conde is not considered a physician.

Dr. Penner’s reports have diminished probative value on the issue of causal relationship. He diagnosed several conditions but offered no opinion, supported by medical rationale, concerning the causal relationship between the established employment factors and the conditions he diagnosed.¹⁰ Dr. Penner acknowledged needing additional information before he could make such an assessment.

Dr. Zelch reported findings following an MRI scan of appellant’s cervical spine and diagnosed a left central disc herniation at the C3-4 level with left foramen stenosis, a disc bulge at the C5-6 level and a midline disc herniation at the C6-7 level. However, he did not provide an opinion explaining how appellant work duties could cause any of the diagnosed conditions.¹¹ Consequently, this evidence does not establish a causal relationship between the accepted employment factors and appellant’s cervical condition.

An award of compensation may not be based on surmise, conjecture or speculation.¹² Neither the fact that appellant’s claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship. The mere fact that a condition manifests itself or worsens during a period of employment¹³ or that work activities produce symptoms revelatory of an underlying condition¹⁴ does not raise an inference of causal relationship between a claimed condition and employment factors.

The medical evidence does not provide a reasoned discussion of causal relationship, one that soundly explains how the accepted work factors caused or aggravated appellant’s cervical condition. The Board finds that appellant has not established the essential element of causal relationship.

⁹ *Id.*; see also *Jack B. Wood*, 40 ECAB 95 (1988).

¹⁰ See *Mary E. Marshall*, 56 ECAB 420 (2005) (medical reports that do not contain rationale on causal relationship have little probative value).

¹¹ *Mary E. Marshall*, *supra* note 10.

¹² *Edgar G. Maiscott*, 4 ECAB 558 (1952) (holding appellant’s subjective symptoms and self-serving declarations do not, in the opinion of the Board, constitute evidence of a sufficiently substantial nature).

¹³ *E.A.*, 58 ECAB 677 (2007); *Albert C. Haygard*, 11 ECAB 393, 395 (1960).

¹⁴ *D.E.*, 58 ECAB 448 (2007); *Fabian Nelson*, 12 ECAB 155, 157 (1960).

CONCLUSION

The Board finds appellant has not established that he sustained a cervical condition in the performance of duty causally related to his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 4, 2010
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