

relationship between the May 4, 2010 employment incident and appellant's neck and back conditions.

FACTUAL HISTORY

On June 2, 2010 appellant, then a 55-year-old window clerk, filed a traumatic injury (Form CA-1) alleging that he sustained neck and back injuries as a result of lifting/carrying and stacking approximately 45 to 50 full buckets of flats and then bending down in the performance of duty on May 4, 2010. In a May 4, 2010 narrative statement, he indicated that he bent over to scan collection boxes when he felt pain in the right side of his lower back. Appellant stated that he brought over 40 buckets of flats to carrier cases, double-stacked under their cases at an awkward angle and aggravated his preexisting back condition.

Appellant submitted reports dated May 21 through 29, 2010 from Dr. Edwin Berry, a chiropractor, who diagnosed lumbosacral sprain complicated by muscular imbalances. On May 26, 2010 Dr. Berry indicated that appellant experienced an exacerbation the past weekend.

In a June 8, 2010 letter, OWCP informed appellant of the deficiencies in his claim and afforded him 30 days to submit additional evidence and respond to its inquiries.

Subsequently, appellant submitted a June 10, 2010 report from Dr. Berry, who indicated that he had chiropractic adjustments to correct vertebral subluxations on intermittent dates during the period May 5 through June 2, 2010. Dr. Berry opined that appellant had reached a plateau in his recovery and was advised to seek other healthcare.

On June 17, 2010 Dr. Robert Swotinsky, a Board-certified occupational medicine physician, diagnosed chronic low back pain and indicated that appellant had a preexisting condition since 1982.

In a June 18, 2010 report, Dr. William Fazzino, appellant's chiropractor, diagnosed thoracic and lumbosacral subluxations with radiculitis into the left shoulder, legs and feet. He opined that appellant's condition was caused or aggravated by lifting/carrying boxes, bending, twisting and pushing in the course of his federal employment. On July 1, 2010 Dr. Fazzino indicated that appellant's spinal subluxations were evident on x-rays dated June 17, 2010 in the cervical and lumbar spine, along with multiple degenerative changes and hypertrophic spondylosis. He opined that appellant was totally disabled for work and his condition was consistent with the history of the injury as described by appellant.

By decision dated July 9, 2010, OWCP found that the evidence did not contain a medical diagnosis in connection with the injury or events and denied the claim on the basis that appellant failed to establish the medical component of fact of injury.

On August 4, 2010 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative and submitted physical therapy notes dated August 3 to 16, 2010.

A June 17, 2010 x-ray of the lumbosacral spine revealed degenerative changes.

In reports dated June 17 through August 3, 2010, Dr. Swotinsky indicated that appellant had preexisting back problems and hernia surgeries and reported an exacerbation of his back pain after his boss made him lift something he did not want to lift at work. He stated that he was “not sure of the cause of his pain.”

A July 28, 2010 electromyography and nerve conduction study was mildly abnormal due to mild, chronic denervation of the left flexor digitorum longus muscle and the clinical significance of this isolated finding was not clear. Otherwise, there was no other evidence of left tibial neuropathy or left lumbar sacral radiculopathy.

Appellant submitted reports dated August 11 through September 22, 2010 from Dr. Rivera who diagnosed lumbar radiculopathy, lumbar disc herniation and myofascial pain syndrome. On August 11, 2010 Dr. Rivera indicated that appellant aggravated his neck and back conditions at work on May 4, 2010 while lifting crates weighing anywhere from 25 to 45 pounds and in a lifting-twisting motion felt a sharp pain in his back area. Appellant complained of pain in the posterior aspect of his neck and also his low back and noticed occasional radiation going down his left gluteal area and around his hamstring. This was also associated with some numbness and tingling in the left toes.

An August 17, 2010 magnetic resonance imaging (MRI) scan of the lumbar sacral spine revealed degenerative disc disease identified by anterior and posterior disc bulge osteophyte complexes seen at L2-3 through L5-S1.

In a September 22, 2010 report, Dr. F. Joseph Celona, a Board-certified internist, indicated that appellant was lifting mail at work in May 2010 when he injured his lumbar, thoracic and cervical spine. Dr. Celona diagnosed an aggravation of underlying degenerative disc disease at the lumbar spine and strain of the cervical spine soft tissues.

On September 30, 2010 Dr. Michael H. Kelleher, a Board-certified internal and emergency medicine physician, diagnosed cervical pain of uncertain etiology and lumbar radiculitis. He indicated that appellant had been disabled for the last five months because of low back pain which he stated began with a lifting strain. Initially, all of appellant’s symptoms were confined to the low back, but more recently he complained of tightness in the neck with limited range of motion.

A telephonic hearing was held before an OWCP hearing representative on October 20, 2010.

Appellant submitted a report from Dr. Berry indicating that he saw him in his office on May 5, 2010 after he injured his neck and back from bending and twisting motions at work on May 4, 2010. Dr. Berry stated that appellant had muscle spasms and significant subluxations in the neck and back consistent with a bending and twisting injury.

On October 26, 2010 Dr. Fazzino indicated that he saw appellant on June 18, 2010 for a neck and back injury consistent with a bending and twisting-type injury as described by appellant, which occurred at his place of employment on May 4, 2010.

In a November 4, 2010 report, Dr. Rivera reiterated his diagnoses and opined that appellant's conditions appeared to be secondary to an employment-related injury that he sustained on May 4, 2010 due to a bending and twisting motion at work.

On November 4, 2010 Dr. Wendy Bergman, a Board-certified internist, indicated that appellant's neck pain started after a bending and twisting injury at work on May 4, 2010.

An October 11, 2010 MRI scan of the cervical spine showed mild narrowings of the spinal canal at C4-7 due to mild disc bulges without causing significant spinal stenosis, mild loss of normal cervical lordosis and degenerative discitis at C5-7 and plates.

By decision dated February 9, 2011, an OWCP hearing representative affirmed the July 9, 2010 decision.

On February 6, 2012 appellant, through his attorney, requested reconsideration and submitted a November 30, 2011 report from Dr. Rivera who reiterated his diagnoses and medical opinions. On December 21, 2011 Dr. Rivera diagnosed cervical radiculitis and opined that appellant's conditions were causally related to a work-related injury on May 4, 2010. He stated that "[it] appears that, while lifting and causing a twisting motion of his lower back, it caused [appellant] to develop a lumbar radiculopathy issue." Dr. Rivera further indicated that "even if this was a preexisting lumbar disc bulge, the injury could still cause the disc herniation to become more severe and cause impingement of the surrounding nerve roots given his present symptoms." Regarding appellant's neck condition, he opined that most of it appeared to be myofascial pain.

By decision dated April 17, 2012, OWCP denied modification of the February 9, 2011 decision.

On August 10, 2012 appellant, through his attorney, requested reconsideration and submitted an April 30, 2012 report from Dr. Rivera who reiterated his statements that appellant sustained a work-related injury on May 4, 2010. Dr. Rivera explained that, upon further examination of the history, appellant was lifting, bending and twisting at work on May 3, 2010 and developed some focal low back pain with no radiating symptoms. On the morning of May 4, 2010, appellant injured himself again while lifting, bending and twisting at work. Dr. Rivera stated that "the act of doing a repetitive motion of bending and twisting is enough to cause an irritation and/or impingement of an existing nerve root of the lumbar spine. This occurred in [appellant's] case. This would be the cause of his back pain radiating into his leg."

By decision dated May 29, 2013, OWCP denied modification of its April 17, 2012 decision on the basis that the medical evidence relied on an incorrect history of injury and, therefore, was insufficient to establish that appellant sustained an injury in the performance of duty.

LEGAL PRECEDENT

An employee seeking benefits under FECA² 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 injury³ 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.⁴

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.⁵

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. 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.⁶

ANALYSIS

In order to determine whether an employee sustained an injury in the performance of duty. The analysis begins whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident, which is alleged to have occurred.⁷ An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the

² *Id.*

³ OWCP 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).

⁴ *See T.H.*, 59 ECAB 388 (2008). *See also Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *Id.* *See Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

⁶ *Id.* *See Gary J. Watling*, 52 ECAB 278 (2001).

⁷ *See Elaine Pendleton*, *supra* note 4.

employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁸ An employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁹ 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, if otherwise unexplained, cast doubt on an employee's statements in determining whether a *prima facie* case has been established.¹⁰ However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.¹¹

Appellant reported that he was injured as a result of lifting, carrying, stacking and bending in the performance of duty on May 4, 2010. He further sought medical treatment on the day after the alleged incident and the medical reports of record contain a history of injury consistent with appellant's account of events. Dr. Berry reported that he saw appellant in his office on May 5, 2010 after he injured his neck and back from bending and twisting motions at work on May 4, 2010. In his reports, Dr. Rivera indicated that appellant sustained an injury while lifting, twisting and bending at work on May 4, 2010 subsequent to developing some low back pain on May 3, 2010 while doing the same repetitive motions. On September 22, 2010 Dr. Celona indicated that appellant was lifting mail at work in May 2010 when he injured his lumbar, thoracic and cervical spine. On October 26, 2010 Dr. Fazzino indicated that he saw appellant for a neck and back injury consistent with a bending and twisting type injury, which occurred at his place of employment on May 4, 2010. On November 4, 2010 Dr. Bergman indicated that appellant's neck pain started after a bending and twisting injury at work on May 4, 2010.

The Board finds that the evidence of record does not contain inconsistencies sufficient to cast serious doubt on appellant's version of the employment incident. As such, the Board finds that the evidence of record is sufficient to establish an incident occurred at the time, place and in the manner alleged by appellant on May 4, 2010.¹²

The remaining issue is whether the medical evidence establishes that appellant sustained an injury causally related to the May 4, 2010 employment incident.¹³

The Board finds that this case is not in posture for decision on the issue of causal relationship.

⁸ See *Charles B. Ward*, 38 ECAB 667 (1989).

⁹ See *Tia L. Love*, 40 ECAB 586 (1989).

¹⁰ See *Merton J. Sills*, 39 ECAB 572 (1988).

¹¹ See *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

¹² See *Leonard T. Munson*, Docket No. 98-1478 (issued December 23, 1999).

¹³ *Id.*

In his reports, Dr. Rivera diagnosed lumbar radiculopathy, lumbar disc herniation, myofascial pain syndrome and cervical radiculitis. He opined that appellant's conditions were causally related to lifting crates weighing approximately 25 to 45 pounds and repetitive bending and twisting motions at work on May 4, 2010. On December 21, 2011 Dr. Rivera stated that "[it] appears that while lifting and causing a twisting motion of his lower back, it caused [appellant] to develop a lumbar radiculopathy issue." He further indicated that "even if this was a preexisting lumbar disc bulge, the injury could still cause the disc herniation to become more severe and cause impingement of the surrounding nerve roots given his present symptoms." On April 30, 2012 Dr. Rivera stated that "the act of doing a repetitive motion of bending and twisting is enough to cause an irritation and/or impingement of an existing nerve root of the lumbar spine. This occurred in [appellant's] case. This would be the cause of his back pain radiating into his leg."

The Board notes that, while Dr. Rivera's reports are not completely rationalized, they are consistent in finding that appellant's duties included lifting, bending and twisting and the repetitive nature of his duties could not only cause the development of lumbar radiculopathy or an impingement of the lumbar spine, but also aggravate preexisting disease from a normal activity or an employment-related injury, such as one that occurred on May 4, 2010. These reports are not contradicted by any substantial medical or factual evidence of record.¹⁴ While the reports are not sufficient to meet appellant's burden of proof to establish a claim, they raise an inference of causal relationship between the claimed conditions and factors of his federal employment.¹⁵

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.¹⁶

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 as to whether his federal employment duties caused or aggravated new and/or preexisting neck and back conditions. After such further development as it deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision on the issue of causal relationship.

¹⁴ See *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

¹⁵ *Id.*; see also *John J. Carlone*, 41 ECAB 354 (1989).

¹⁶ 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).

ORDER

IT IS HEREBY ORDERED THAT the May 29, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: November 20, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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