

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

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| LUIS A. BERRIOS, Appellant |) | |
| |) | |
| and |) | Docket No. 03-966 |
| |) | Issued: December 16, 2003 |
| U.S. POSTAL SERVICE, Longwood, FL, |) | |
| Employer |) | |
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Appearances:
Luis A. Berrios, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On March 10, 2003 appellant filed a timely appeal of an Office of Workers' Compensation Programs' decision dated January 14, 2003. 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 back or neck condition causally related to factors of his federal employment.

FACTUAL HISTORY

On June 30, 2002 appellant, then a 48-year-old city carrier/acting supervisor, filed an occupational disease claim. In an accompanying statement, appellant noted that in February 2001 he experienced radiating back pain. Appellant's supervisor indicated on the claim form that appellant stopped work on June 10, 2002, when he failed to return to work after a scheduled vacation. The employing establishment submitted letters from appellant's supervisors challenging the claim on the grounds that appellant did not report

an employment injury, had a preexisting service-related back condition and stated that he had injured his back on vacation. The employing establishment further noted that appellant had not worked as a letter carrier for the past 15 months and had his own business repairing upholstery.

By letter dated August 15, 2002, the Office requested additional information from appellant. In responses received September 13, 2002, appellant attributed his neck condition and the worsening of his preexisting back condition to lifting, carrying and pushing parcels as a letter carrier for 15 years. Appellant further noted that he had reported an employment-related back injury in February 2001 and had informed his supervisor that he had aggravated his neck and back at work but noticed the effects while on vacation.¹ Appellant also indicated that he had not worked in furniture reupholstery for two years.

In support of his claim, appellant submitted a report dated September 26, 2001 from Dr. John A. Jenkins, a Board-certified neurosurgeon, who noted that appellant complained of neck pain which “began gradually eight months ago without a specific injury.” He described appellant’s complaints of increased “left leg numbness and tingling which is associated with a low back injury in the military some 20 years ago.” Dr. Jenkins reviewed the reports of appellant’s cervical and lumbar magnetic resonance imaging (MRI) scan studies and diagnosed cervical degenerative disease, a herniated central disc at C3-4 and C4-5 and lumbar strain. He listed work restrictions of “office work only.”

In an office visit note dated June 11, 2002, Dr. Jenkins discussed appellant’s complaints of neck pain for about one year and back pain. He stated, “[Appellant] was initially hurt in the military. The back pain returned on May 31, 2002. [Appellant] was on vacation and may have li[f]ted some luggage.” He recommended further MRI scan studies. In an office visit note dated June 25, 2002, Dr. Jenkins noted that appellant’s cervical MRI scan revealed disc herniations at C3-4, C4-5 and C5-6 and lumbar congenital stenosis. He recommended an anterior cervical discectomy and fusion, which was performed on July 10, 2002.

Appellant further submitted evidence, including progress notes, physical therapy reports and nurse notes, regarding his treatment for back and neck pain by the Department of Veterans Affairs (VA) from June 2000 through June 2002. In a report dated September 21, 2001, Dr. Maureen A. O’Hallaron, an internist, diagnosed low back pain, noted that appellant worked as a mail handler and indicated that she had advised him that it might not be the best occupation. In a report dated November 9, 2002, Dr. O’Hallaron discussed appellant’s complaints of neck pain on the right side with decreased strength. She again advised him that his current work as a mail handler “may not be best.”

¹ Appellant submitted a routing sheet from the employing establishment dated February 23, 2001 showing that he had requested a claim form on that date for a work injury.

By letter dated November 22, 2002, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Jack Gresham, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated December 10, 2002, Dr. Gresham noted that appellant had a history of low back and neck injuries while in the military and that his service-connected disability had increased over the years from 10 to 50 percent. Dr. Gresham listed findings on examination and opined that appellant had no “measurable degree of aggravation or worsening of his low back condition with his work-related activities.” He diagnosed probable early degenerative disc disease of the lumbar spine and status posterior anterior cervical spine fusion unrelated to factors of his federal employment any “more than the relationship of these diagnoses to regular activities of daily living.”

LEGAL PRECEDENT

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.² The medical opinion 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 claimant.³

ANALYSIS

Appellant filed an occupational disease claim alleging that his work for the employing establishment caused or aggravated his neck and back condition. Appellant attributed the aggravation of his condition to his work lifting and carrying parcels as a letter carrier for 15 years. The employing establishment challenged appellant’s claim on the grounds that he had not worked as a letter carrier for the past 15 months, did not report an employment injury to his back but instead described an injury on vacation, had a preexisting back condition and performed outside work in furniture reupholstery. However, the employing establishment did not dispute the employment factors to which appellant attributed his neck and back condition, lifting and carrying parcels as a letter carrier for 15 years, and thus the evidence is sufficient to establish that appellant was required to perform those duties. The Office, in its January 14, 2003 decision, found that appellant had not presented sufficient medical evidence to establish a condition arising from the employment factors he identified as causing his condition. The question, therefore, is whether appellant’s employment duties caused or aggravated the neck and back condition for which he seeks compensation.

² *Jerry D. Osterman*, 46 ECAB 500 (1995); *see also Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

³ *See Morris Scanlon*, 11 ECAB 384-85 (1960); *Williams E. Enright*, 31 ECAB 426, 430 (1980).

In support of his claim, appellant submitted a report dated September 26, 2001 from Dr. Jenkins, who noted that appellant complained of neck pain which “began gradually eight months ago without a specific injury” and increased left leg numbness associated with an old injury. Dr. Jenkins diagnosed cervical degenerative disease, a herniated central disc and C3-4 and C4-5 and lumbar strain and listed work restrictions. Dr. Jenkins, however, does not address the cause of the diagnosed conditions. Medical evidence that does not offer any opinion regarding the cause of an employee’s condition is of diminished probative value on the issue of causal relationship.⁴

In an office visit note dated June 11, 2002, Dr. Jenkins noted that appellant experienced a return of back pain on May 31, 2002 when he was “on vacation and may have li[f]ted some luggage.” As Dr. Jenkins relates appellant’s increased back pain to possible lifting on vacation rather than factors of his federal employment, his office visit note does not constitute probative evidence in support of appellant’s claim.

In an office visit note dated June 25, 2002, Dr. Jenkins diagnosed disc herniations at C3-4, C4-5 and C5-6, lumbar congenital stenosis. Dr. Jenkins, however, did not address the cause of appellant’s condition or relate it in any way to his federal employment and thus his opinion is insufficient to meet appellant’s burden of proof.⁵

Regarding appellant’s submission of records from nurses and physical therapists, the Board notes that these reports are of no probative value as neither a nurse nor a physical therapist is considered a physician under the Act and, therefore, are not competent to provide a medical opinion.⁶

Appellant further submitted reports from the VA indicating that he had received treatment there for back and neck pain from June 2000 through June 2002. However, none of the reports contain a finding by a physician that factors of appellant’s federal employment caused or aggravated a diagnosed condition. In a report dated September 21, 2001, Dr. O’Hallaron diagnosed low back pain, noted that appellant worked as a mail handler and indicated that she had advised him that it might not be the best occupation. In a report dated November 9, 2002, Dr. O’Hallaron discussed appellant’s complaints of neck pain on the right side with decreased strength. She again advised him that his current work as a mail handler “may not be best.” Dr. O’Hallaron’s statement that it might be better for appellant to find other work does not constitute a finding that his employment caused or aggravated a back or neck condition. 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.⁷ Instead of addressing causal relationship, Dr. O’Hallaron’s recommendation appears to be a prophylactic

⁴ *Linda I. Sprague*, 48 ECAB 386 (1997).

⁵ *Id.*

⁶ 5 U.S.C. § 8101(2); *Thomas R. Horsfall*, 48 ECAB 180 (1996); *Vicky L. Hannis*, 48 ECAB 538 (1997).

⁷ *Robert G. Morris*, 48 ECAB 238 (1996).

restriction preventing future injury. The Board, however, has held that fear of future injury is not compensable.⁸

Moreover, the record contains evidence that appellant has not sustained an employment-related back or neck condition. In a report dated December 10, 2002, Dr. Gresham, a Board-certified orthopedic surgeon and Office referral physician, discussed appellant's medical and work history and listed findings on examination. He found that appellant's employment activities had not aggravated his low back condition or the diagnosed conditions of probable early degenerative disc disease of the lumbar spine and status posterior-anterior cervical spine fusion.

On appeal, appellant contends that his increased award for his back from the VA establishes that his back has worsened due to his federal employment. However, the findings of other governmental agencies are not dispositive with regard to questions arising under the Federal Employees' Compensation Act.⁹ The findings by other agencies do not address the relevant issue of the relationship between appellant's condition and his federal employment and thus are of diminished probative value.

An award of compensation may not be based upon surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between his condition and his employment.¹⁰ To establish causal relationship, appellant must submit a physician's report in which the physician reviews that factors of employment identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination of appellant and appellant's medical history, state whether these employment factors caused or aggravated appellant's diagnosed condition.¹¹ Appellant failed to submit such evidence and therefore failed to discharge his burden of proof.¹²

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained a back or neck condition causally related to factors of his federal employment.

⁸ See *William A. Kandel*, 43 ECAB 1011 (1992).

⁹ *Henry C. Garza*, 52 ECAB 205 (2001).

¹⁰ *William S. Wright*, 45 ECAB 498 (1993).

¹¹ *Id.*

¹² Appellant submitted evidence subsequent to the Office's January 14, 2003 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; see 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: December 16, 2003
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member