

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

EDWARD KALSKY, Appellant)
and) Docket No. 06-334
U.S. POSTAL SERVICE, COLLEGEVILLE) Issued: April 21, 2006
POST OFFICE, Collegeville, PA, Employer)
)

Appearances:

*Jeffrey P. Zeelander, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 28, 2005 appellant, through his attorney, filed a timely appeal of a November 14, 2005 merit decision of the Office of Workers' Compensation Programs' hearing representative, which found that he did not sustain an injury while in the performance of duty. 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 an injury while in the performance of duty.

FACTUAL HISTORY

On April 11, 2003 appellant, then a 51-year-old mail carrier, filed an occupational disease claim (Form CA-2), Office File No. 032017759, alleging that on July 12, 2002 he realized that his central disc herniation at L4-5 with mild degenerative changes at L2-3 and L3-4 were caused by factors of his federal employment. In an accompanying narrative, appellant stated that he had

worked for the employing establishment for 30 years. He provided a detailed description of his work duties and attributed his lumbar condition to his work duties. Appellant indicated that in 1998 or 1999 he hurt his back while performing his work duties and received medical treatment. He stated that on July 15, 2002 Dr. Xiaobin X. Li-Burns, a Board-certified internist, informed him that he had degenerative changes and a bulging disc in his back due to his occupational duties. Appellant previously filed a traumatic injury claim for a back injury he sustained on July 12, 2002 and Dr. Lewis S. Sharps, a Board-certified orthopedic surgeon, performed surgery at L4-5 on December 5, 2002. His claim was accepted for a lumbar sprain and was not accepted for degenerative disc disease or a bulging disc and his request for authorization of the back surgery was denied. Appellant noted that Dr. Anthony W. Salem, a Board-certified orthopedic surgeon, to whom the Office referred him for a second opinion medical examination, found that his degenerative disc disease and bulging discs were not work related. Appellant disagreed with Dr. Salem's finding and was advised by an Office claims examiner to file a Form CA-2.

Appellant submitted Dr. Salem's March 6, 2003 medical report, which found that his herniated disc and subsequent surgery were not caused by the July 12, 2002 employment injury, although he had multiple levels of significant bulging discs, apophyseal hypertrophy and degenerative instability. He believed that appellant may have strained his back and experienced some discomfort and complaints at that time but he was not disabled by the incident. Dr. Salem reported normal neurological findings and stated that appellant's significant history of being an alcoholic and smoking multiple packs of cigarettes daily until 12 years ago contributed more to the underlying degenerative disc disease than the July 12, 2002 employment injury. He stated that the need for the surgery performed by Dr. Sharps was questionable as it did not usually work with hypertrophic apophyseal joints, multiple levels of arthritis and instability. He also stated that appellant's decision to retire at 51 years old was not related to the accepted employment injury. Dr. Salem indicated that he had a significant preexisting, nonindustrial disability prior to the July 12, 2002 work injury, he did not have any residuals of the accepted employment injury and his prognosis was fair.

Appellant also submitted Dr. Salem's April 7, 2003 report, which reiterated that appellant's disability and need for surgery were not causally related to the July 12, 2002 employment injury. He opined that the accepted employment injury resolved within one to two months of the incident.

Appellant submitted a description of his mail carrier position and an unsigned July 12, 2002 report from Dr. Li-Burns, which diagnosed a lumbar strain and provided his medical treatment and physical limitations.

By letter dated July 25, 2003, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office further advised him about the factual and medical evidence he needed to submit to establish his claim.

In response, appellant submitted medical documents related to his July 12, 2002 traumatic injury claim and December 5, 2002 percutaneous discectomy nucleoplasty at L4-5, which covered intermittent dates from July 15, 2002 to May 5, 2003. He also submitted a partial copy of the Office's decision in File No. 032009109, which terminated his compensation effective August 25, 2003 on the grounds that he no longer had any residuals or disability

causally related to the July 12, 2002 employment injury based on a July 3, 2003 medical report of Dr. William H. Spellman, a Board-certified orthopedic surgeon and impartial medical specialist.¹

In an August 22, 2003 letter, appellant stated that he did not engage in any other employment or activity outside of his postal job and that his alleged degenerative back condition was caused by the work duties he performed for 30 years.

By letter dated September 25, 2003, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Steven J. Valentino, a Board-certified orthopedic surgeon, for a second opinion medical examination. In an October 22, 2003 medical report, Dr. Valentino found that appellant's July 12, 2002 employment-related lumbar sprain and strain had resolved. He stated that magnetic resonance imaging (MRI) scan findings indicated that appellant's symptoms were chronic and they clearly predated his work-related injury. As such, Dr. Valentino stated that a disc herniation and percutaneous discectomy could not be causally connected to the history of the accepted employment injury. He found that appellant's degenerative disc disease was preexistent and not related to his employment as a letter carrier.

In a September 5, 2003 report, Dr. Sharps provided a history of his treatment of appellant's July 12, 2002 employment injury beginning on August 21, 2002. He opined that the accepted work injury necessitated the assignment of modified work and surgery that was performed on December 5, 2002. Dr. Sharps reiterated this opinion in an addendum note dated September 5, 2003. In an October 29, 2003 addendum note, he described appellant's work duties and opined that, in addition to his July 12, 2002 employment injury, he experienced prior multiple episodes that contributed to the accepted work injury.

By decision dated December 10, 2003, the Office found that appellant did not sustain an injury while in the performance of duty based on Dr. Valentino's October 22, 2003 medical report. In a letter dated January 9, 2004, appellant requested an oral hearing before an Office hearing representative.

In a decision dated May 24, 2004, a hearing representative set aside the Office's December 10, 2003 decision and remanded the case for further development. He directed that a supplemental medical report be obtained from Dr. Valentino because the statement of accepted facts he reviewed did not describe the specific duties of appellant's mail carrier position. In addition, Dr. Valentino was not provided with appellant's complete medical record. On remand the hearing representative instructed the Office to again refer appellant to Dr. Valentino, together with a new statement of accepted facts and complete medical record, to submit a reasoned

¹ By decision dated January 21, 2005, the Board affirmed September 2, 2003 and July 13, 2004 Office decisions finding that it properly terminated appellant's compensation effective August 25, 2002, based on the report of Dr. Spellman, the impartial medical specialist appellant no longer had any residuals causally related to the July 12, 2002 employment injury. The Board further found that appellant failed to establish that his herniated disc, degenerative disc disease and surgery were due to the July 12, 2002 employment injury. Docket No. 04-1853 (issued January 21, 2005).

medical opinion as to whether his work factors caused or contributed to his degenerative lumbar spine condition.

Appellant submitted numerous medical records which covered intermittent dates from May 19, 1997 through October 23, 2003 regarding his left knee, chest and colorectal conditions and laboratory test results.

Dr. Valentino submitted an October 6, 2004 report, which noted that appellant was asymptomatic, but infrequently experienced low back pain after heavy lifting. His symptoms disappeared with the passage of time. Dr. Valentino also noted that appellant denied any radicular symptoms, paresthesias, weakness, bowel or bladder dysfunction, fevers, chills, night sweats or night pain. He provided a history that appellant sustained a work-related back injury in 1998 and left knee injury in the same year which required arthroscopic surgery. Dr. Valentino noted the July 12, 2002 employment-related back injury. He provided a history of appellant's medical treatment including, back surgery related to the July 12, 2002 employment injury and his family background. Dr. Valentino reviewed appellant's medical records including, September 14 and November 27, 2002 MRI scans, his letter carrier position description and both the prior and new statement of accepted facts. He reported essentially normal findings on physical and neurological examination and diagnosed a resolved lumbar strain and sprain. Dr. Valentino opined that the record did not establish that appellant sustained a traumatically-induced disc herniation at L4-5 that could be apportioned to his history of work injury. He noted that Dr. Spellman and Dr. Salem shared this opinion. Dr. Valentino stated that the medical records did not show any evidence of radiculopathy or sciatica that would typically be associated with a symptomatic disc herniation. He further stated that it was clear that appellant had long-standing chronic and preexisting degenerative changes in the lumbar spine for which he underwent percutaneous discectomy nucleoplasty. Dr. Valentino agreed with Dr. Salem that, at most, appellant sustained a lumbar strain and sprain that resolved within one to two months. He found no evidence that appellant's letter carrier duties caused or contributed to his underlying degenerative lumbar spine condition or that he had any ongoing disability or impairment. Dr. Valentino noted that the degenerative changes found on MRI scans were consistent with a 53-year-old male. He further stated that appellant was not symptomatic at the time of his examination. Although appellant admitted that he experienced occasional low back pain prior to his work-related injury, he denied any significant history of preexistent disability with the exception of time off from work for arthroscopic surgery on the left knee.

On December 10, 2004 the Office issued a decision, finding that appellant did not sustain an injury while in the performance of duty based on Dr. Valentino's October 6, 2004 report as the claimed herniation and degenerative disc disease was not caused, aggravated, precipitated or accelerated by appellant's federal employment factors.

In a December 12, 2004 letter, appellant, through his attorney, requested an oral hearing. Counsel argued that Dr. Valentino failed to assess appellant's claim as an occupational disease claim rather than a traumatic injury claim based on his finding that appellant's lumbar strain and sprain had resolved. He requested that the Office remand the case and refer appellant to another second opinion physician to assess the claim based on Dr. Sharps' report. Alternatively, counsel argued that there was a conflict in the medical opinion evidence between Dr. Sharps and Dr. Valentino, which required resolution by an impartial medical examiner.

The Office received treatment notes from appellant's physical therapists, which covered intermittent dates from December 23, 2002 through March 4, 2003.

In an August 15, 2005 letter, appellant's attorney requested that the Office proceed with a review of the written record before an Office hearing representative rather than an oral hearing. He contended, however, that there was no conflict in the medical opinion evidence as Dr. Valentino did not apply the proper framework for assessing the claim as explained by the Office. Alternatively, counsel requested that the Office remand the case and refer appellant to a new second opinion physician.

By decision dated November 14, 2005, a hearing representative affirmed the Office's December 10, 2004 decision. He found that Dr. Valentino's October 6, 2004 report constituted the weight of the medical opinion evidence in finding that appellant did not sustain an injury while in the performance of duty.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, 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.³ These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

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 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 employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the

² 5 U.S.C. §§ 8101-8193.

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ See *Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁵

ANALYSIS

The Board finds that appellant has failed to establish a causal relationship between his bulging disc and herniation at L4-5 and degenerative disc disease at L2-3 and L3-4 and his federal employment.

In order to determine the extent and degree of appellant's claimed conditions, the Office referred appellant to Dr. Valentino, an Office referral physician, who submitted an October 6, 2004 medical report, in which he provided an accurate factual and medical background. He conducted a thorough medical examination, which provided essentially normal findings on physical and neurological examination. He reviewed a description of appellant's former letter carrier position. Dr. Valentino found that his July 12, 2002 employment-related lumbar strain and sprain had resolved. He further found no evidence of record to support a finding that appellant sustained a disc herniation at L4-5 causally related to factors of his employment. He explained that there was no evidence of radiculopathy or sciatica that would typically be associated with a symptomatic disc herniation and that appellant had a long history of chronic degenerative changes in the lumbar spine, which was treated with percutaneous nucleoplasty. Moreover, the doctor opined that the degenerative changes found on the MRI scan were consistent with appellant's age and gender, that appellant was asymptomatic at the time of the examination and there was no evidence that his letter carrier position caused or contributed to his underlying degenerative lumbar spine condition or that he had any ongoing disability or impairment.

The Board finds that the weight of the medical opinion evidence is represented by Dr. Valentino's opinion that appellant did not sustain a bulging and herniated disc at L4-5 or degenerative disc disease at L2-3 and L3-4 causally related to factors of his federal employment as it is sufficiently rationalized and based on a proper factual and medical background.

The Board finds that the contention that Dr. Valentino did not assess appellant's claim as an occupational disease claim is without merit. Dr. Valentino's opinion that appellant did not sustain the claimed conditions while in the performance of duty is not solely based on the prior history of the July 12, 2002 employment injury. He reviewed a complete history of the injuries appellant sustained, as well as, the work duties he performed for 30 years while working at the employing establishment. Dr. Valentino found no causal relationship between the claimed conditions and the factors of appellant's employment. He noted that the degenerative changes were typical of a man his age without contribution from employment. The traumatic injury aspect of the claim was previously adjudicated by the Office and affirmed by the Board on January 21, 2005.

The medical records which covered intermittent dates from May 19, 1997 through October 23, 2003, regarding appellant's left knee, chest and colorectal conditions and laboratory test results are insufficient to establish his claim because they fail to address whether he

⁵ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

sustained a medical condition causally related to factors of his federal employment. Therefore, the Board finds that this evidence does not outweigh the probative value of Dr. Valentino's October 6, 2004 report.

The treatment notes from appellant's physical therapists which covered intermittent dates from December 23, 2002 through March 4, 2003, do not constitute probative medical evidence inasmuch as a physical therapist is not considered a "physician" under the Act.⁶ Thus, this evidence does not outweigh the probative value of Dr. Valentino's October 6, 2004 report.

CONCLUSION

As there is no rationalized probative medical evidence establishing a causal relationship between appellant's claimed bulging disc and herniation at L4-5 and degenerative disc disease at L2-3 and L3-4 and his employment duties, appellant has failed to meet his burden of proof in establishing that he sustained an injury while in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Compensation Appeals Board

⁶ 5 U.S.C. §§ 8101-8193; 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000) (a physical therapist is not a physician under the Act).