

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

P.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Wilmington, DE, Employer**

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**Docket No. 06-1039
Issued: August 21, 2006**

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 6, 2006 appellant filed a timely appeal from a November 14, 2005 merit decision of the Office of Workers' Compensation Programs which denied his claim. Pursuant to 20 C.F.R. §§ 501.2(c), 501.3, the Board has jurisdiction over this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has a neck or back condition causally related to factors of his federal employment. On appeal, counsel argued that a conflict in medical opinion evidence had been created.

FACTUAL HISTORY

On July 1, 2002 appellant, then a 36-year-old tractor-trailer operator, filed a Form CA-2, occupational disease claim, alleging that factors of his federal employment aggravated a neck and low back condition. The employing establishment advised that appellant had not worked

from May 15, 2001 to April 29, 2002 when he returned to light duty in the manual cases or “return to sender” area.¹

In support of his claim, appellant submitted an August 29, 1997 report in which Dr. Frank Sarlo, a physiatrist, noted a history of ongoing back spasms. He provided examination findings and advised that appellant could return to his regular work. In reports dated December 11, 2001, January 14 and 22 and August 26, 2002, Dr. Stephen J. Duggan, Board-certified in family medicine, advised that appellant was first seen on May 18, 2000 for low back problems. He noted appellant’s work as a tractor-trailer operator, which required strenuous activity and reported that cervical and lumbar spine magnetic resonance imaging (MRI) scan on February 7, 2001 revealed multiple levels of neural foraminal stenosis and facet hypertrophy from C3 to C7 and L5 to S1 with moderate arthritis present in both the cervical and lumbar spine. Examination findings included tenderness in the L4-5 region with radiation to the lower extremity, decreased range of motion of the spine and tenderness in the C4-6 region with radiation to the upper extremities. He diagnosed cervical and lumbar stenosis with radiculopathy and opined that the conditions were aggravated by appellant’s job duties of heavy lifting and pulling and other strenuous activities and by rotating his head while driving. Dr. Duggan stated that he placed appellant on permanent disability on May 22, 2001 and opined that his condition would worsen if he returned to his regular job. He recommended light duty with a lifting restriction of 20 pounds. In a duty status report dated May 30, 2001, a chiropractor whose signature is illegible advised that appellant could not work.

By letters dated February 19, 2004, the Office advised appellant of the additional evidence needed to support his claim and requested that the employing establishment respond. Appellant submitted a July 8, 2002 statement in which he described his job duties as a truck driver, noting that this required climbing, pushing, pulling, stooping, bending, heavy lifting and constantly moving his head. He chronicled his condition and treatment since a 1997 employment injury² and submitted copies of the February 2001 MRI scan reports. In an April 15, 2004 report, Dr. Duggan reiterated his previous diagnoses and work restrictions, noting that appellant seemed improved but that he was not doing any type of work that would aggravate his cervical or lumbar problems. He opined that the strenuous activities of appellant’s previous job duties “have definitely contributed to his cervical and lumbar back conditions” and that he was permanently disabled from his previous work duties.

On August 2, 2004 the Office referred appellant, a statement of accepted facts, a set of questions and the medical record, to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a September 16, 2004 report, Dr. Draper noted the accepted 1997 injury, appellant’s job history as a tractor-trailer operator and described the work duties of the position. He reviewed x-rays and the February 2001 MRI scan studies. Examination findings included no tenderness about the cervical, thoracic or lumbar spines with negative

¹ The employing establishment noted that a previous recurrence claim had been denied and enclosed a copy of a November 12, 2002 decision in which an Office hearing representative advised that appellant’s condition should be developed under an occupational disease claim.

² The record indicates that on August 8, 1997 appellant sustained an employment-related lumbar and thoracic strain. He returned to work on August 29, 1997.

straight leg raising tests bilaterally. He diagnosed cervical degenerative disc disease and cervical spondylosis at C5-6 and lumbar spine degenerative disc disease at L4-5 and L5-S1 with a five percent anterior spondylolisthesis of L5 on S1 that was preexisting and degenerative in nature. Dr. Draper opined that the 1997 employment injury aggravated appellant's preexisting degenerative conditions but that this aggravation ceased within several months, stating that the degenerative disc disease had progressed due to the aging process and was not work related. He advised that appellant could work full time with a lifting restriction of 50 pounds, due to appellant's degenerative disease.

By decision dated October 15, 2004, the Office denied the claim, crediting the opinion of Dr. Draper that appellant's condition was due to the aging process and was not employment related. On October 20, 2004 appellant, through counsel, requested a hearing that was held on July 27, 2005. At the hearing he testified regarding the job requirements of the tractor-trailer driver position, noting that he had not done that work since May 2001 and had returned to work sorting mail in May 2002. Appellant stated that he was currently employed by the State of Delaware as a laboratory technician. Appellant submitted an August 12, 2005 report in which Dr. Duggan noted tenderness on examination of the cervical and lumbar spine and reiterated his prior diagnoses. He advised that the arthritis would worsen with time and that appellant could not return to his full duties at the employing establishment without permanent restrictions. By decision dated November 14, 2005, an Office hearing representative affirmed the October 15, 2004 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act³ 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 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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.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 diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty and must be supported by

³ 5 U.S.C. §§ 8101-8193.

⁴ *Gary J. Watling*, 52 ECAB 278 (2001).

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

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁶ Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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 nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁷ Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.⁸

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.⁹

Under the Act, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.¹⁰ Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.¹¹

⁵ *Solomon Polen*, 51 ECAB 341 (2000).

⁶ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁷ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

⁸ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

⁹ A Larson, *The Law of Workers' Compensation* § 10.01 (December 2000); see *Charles W. Downey*, 54 ECAB 421 (2003).

¹⁰ *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

¹¹ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹²

ANALYSIS

The Board finds that a conflict in the medical evidence exists between Dr. Duggan, appellant's attending physician, and Dr. Draper who provided a second opinion evaluation for the Office regarding whether appellant's daily job duties as a tractor-trailer operator caused or aggravated his neck and back conditions such that he had any disability from work beginning in May 2001 when Dr. Duggan placed him on permanent disability from driving a truck. Both physicians noted familiarity with the physical requirements of appellant's job duties as a tractor-trailer operator and Dr. Duggan opined that the strenuous activities of appellant's tractor-trailer operator duties "have definitely contributed to his cervical and lumbar back conditions" and that he was permanently disabled from his previous work duties. In his August 2, 2004 report, Dr. Draper advised that any aggravation from the 1997 employment injury would have ceased within a few months and that appellant's degenerative disc disease had progressed due to the aging process and was not work related. He advised that appellant could work full time with a lifting restriction of 50 pounds, due to appellant's underlying degenerative disease.

Due to the difference of opinion between appellant's attending physician, Dr. Duggan, and the Office referral physician, Dr. Draper, the Board finds that there is a conflict of medical opinion regarding whether appellant's neck and back conditions were caused or aggravated by his duties as a tractor-trailer operator, whether such aggravation was temporary or permanent and the physical limitations or disability therefrom. On remand the Office should refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician for an impartial medical evaluation regarding this issue. After such further development as the Office deems necessary, the Office shall issue an appropriate decision.

CONCLUSION

The Board finds this case is not in posture for decision as a conflict in medical evidence has been created.

¹² 5 U.S.C. § 8123(a); see *Elsie L. Price*, 54 ECAB 734 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 14, 2005 be vacated and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: August 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
Employees' Compensation Appeals Board