United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant	)	
	)	**Docket No. 06-1363**
and	)	**Issued: September 25, 2006**
	)	
U.S. POSTAL SERVICE, POST OFFICE, New Haven, MO, Employer	)	

Appearances:
T.M., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 30, 2006 appellant filed a timely appeal from Office of Workers' Compensation Programs' merit decisions dated August 11, 2005 and March 21, 2006, which denied appellant's claim for an occupational disease. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue on appeal is whether appellant has met his burden of proof in establishing that he developed isthmic spondylolisthesis while in the performance of duty.

FACTUAL HISTORY

On March 29, 2005 appellant, then a 38-year-old auxiliary letter carrier, filed an occupational disease claim alleging that he developed isthmic spondylolisthesis while performing his work duties. Appellant became aware of his condition on November 26, 2003. He stopped work on December 4, 2003.

Appellant submitted an undated statement indicating that he worked for the employing establishment since 2001 as a substitute mail carrier and asserted that his work duties caused him to develop isthmic spondylolisthesis. He submitted a magnetic resonance imaging (MRI) scan of the lumbar back dated May 21, 2002, which revealed Grade 1 to 2 spondylolisthesis of L5-S1 and mild to moderate degenerative changes at L4-5 and L5-S1 with no definite disc herniation identified.

The employing establishment submitted a statement controverting appellant's claim indicating that the medical evidence did not demonstrate a causal relationship between appellant's condition and his employment. The employing establishment noted that appellant began his employment on July 14, 2001.

In a letter dated June 2, 2005, the Office advised appellant of the type of factual and medical evidence needed to establish his claim, particularly requesting that appellant submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors. In a letter of the same date, the Office requested information from the employing establishment regarding appellant's employment duties.

Appellant submitted an undated statement indicating that he worked several days a month as a substitute mail carrier and that his duties included standing on concrete two to four hours per day and driving and reaching across car to place mail in mailboxes. Also submitted were emergency room treatment notes dated June 18, 2002, which indicated that appellant was treated for a backache. An x-ray of the lumbar spine dated June 18, 2002 revealed chronic Grade 1 spondylolisthesis at L5-S1 with no significant additional subluxation on the flexion and extension views. Appellant came under the treatment of Dr. Karl A. Jacob, Jr., a Board-certified neurosurgeon, who noted on September 25, 2002 that appellant was a painter by occupation and presented with low back and bilateral thigh joint pain commencing one year ago. He diagnosed spondylolisthesis at L5-S1, Grade 1 to 2, lumbar spondylosis with myelopathy, possible peripheral neuropathy of the lower extremities and L5 pars interarticularis defect. Appellant was treated by Mark W. Heywood, a chiropractor, who noted in a report dated March 26, 2003, that appellant was being treated for structural problems in his low back and was restricted from bending, twisting or performing heavy lifting. Appellant submitted a note from Dr. Thomas Davis, a Board-certified family practitioner, dated December 3, 2003, who noted that appellant would be excused from work until December 8, 2003. Appellant came under the treatment of Dr. Mathew F. Gornet, a Board-certified orthopedist, from January 29 to May 17, 2004, who diagnosed isthmic spondylolisthesis at L5-S1 and recommended an anterior/posterior spinal decompression and fusion surgery. In an operative report dated June 4, 2004, he noted that he performed a posterior fusion at L4-S1 with local bone; posterior fixation with L4-S1 with pathfinder and diagnosed isthmic spondylolisthesis L5-S1 with discogenic low back pain. In a reports dated June 17 to October 7, 2004, Dr. Gornet noted that appellant was progressing well postoperatively and could return to work on August 16, 2004 subject to various restrictions. Appellant also submitted a fully favorable decision from the Social Security Administration (SSA) dated May 18, 2005.

The employing establishment submitted a statement noting that appellant worked as a temporary rural carrier and was responsible for sorting, collecting and delivering mail along a rural route. The employing establishment noted that appellant worked 104 days in 2002, 103 days in 2003 and 3 days in 2004 and also worked as a painter in the private sector.

In a decision dated August 11, 2005, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that his condition was caused by the his employment duties as required by the Federal Employees' Compensation Act.[1]

In a letter dated August 24, 2005, appellant requested an oral hearing before an Office hearing representative. The hearing was held on February 8, 2006. Appellant submitted an MRI scan of the lumbar spine dated August 9, 2000, which revealed bilateral pars defects at L5 with approximately one centimeter anterior subluxation of L5 with respect to L4 and S1 and bilateral neural foraminal stenosis at L4-5 and L5-S1. Also submitted was a report from Dr. Robert C. Dunn, Jr., a Board-certified neurosurgeon, dated August 30, 2000, who treated appellant for low back pain which occurred episodically with a severe spell two months previously. He diagnosed Grade 1 L5-S1 spondylolisthesis. Appellant submitted a report from Dr. Michael F. Boland, a Board-certified neurosurgeon, dated May 12, 2003, who noted that appellant worked as a painter and a construction worker and presented with back pain and bilateral lower extremity pain. Appellant reported that he was in a motor vehicle accident in December 2002, which aggravated his back condition. Dr. Boland diagnosed bilateral L5 spondylolysis with spondylolisthesis producing chronic back pain with the lower extremity complaints related to neuroforaminal stenosis. In a report dated July 9, 2003, Dr. Boland noted that due to the structural problem in appellant's lumbar spine he should avoid excessive lifting, bending and twisting.

By a decision dated March 21, 2006, the hearing representative affirmed the decision of the Office dated August 11, 2005.

LEGAL PRECEDENT

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or 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 the 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[2]

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) factual statement identifying employment factors alleged to have caused or contributed to the presence

[1] 5 U.S.C. §§ 8101-8193.

[2] *Gary J. Watling*, 52 ECAB 357 (2001).

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 claimant. The medical evidence required to establish causal relationship is generally 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 nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[3]

ANALYSIS

It is not disputed that appellant's duties as a auxiliary letter carrier included lifting, bending and twisting while delivering, sorting and collecting mail. However, he has not submitted sufficient medical evidence to support that a condition has been diagnosed in connection with the employment factor and that any alleged isthmic spondylolisthesis condition is causally related to the employment factors or conditions. On June 2, 2005 the Office advised appellant of the type of medical evidence needed to establish his claim. Appellant did not submit a rationalized medical report from an attending physician addressing how specific employment factors may have caused or aggravated his claimed condition.

Appellant submitted a report from Dr. Dunn dated August 30, 2000, who treated appellant for low back pain and diagnosed Grade 1 L5-S1 spondylolisthesis. Also submitted was a report from Dr. Jacob dated September 25, 2002, who noted that appellant was a painter by occupation and presented with low back and bilateral thigh joint pain. He diagnosed spondylolisthesis at L5-S1, Grade 1 to 2, lumbar spondylosis with myelopathy, possible peripheral neuropathy of the lower extremities and L5 pars interarticularis defect. However, neither Drs. Jacob or Dunn noted a history of the injury nor the employment factors believed to have caused or contributed to the appellant's condition.[4] Additionally, the physician's failed to provide a rationalized opinion regarding the causal relationship between appellant's condition and the factors of employment believed to have caused or contributed to such condition and a medical report that does not contain such opinion is insufficient to meet appellant's burden of proof.[5]

Appellant also submitted a treatment note from Dr. Heywood, a chiropractor, dated March 26, 2003, who noted that appellant was being treated for structural problems in his low back and could not bend, twist or perform heavy lifting.

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[3] *Solomon Polen*, 51 ECAB 341 (2000).

[4] *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

[5] *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

Section 8101(2) of the Act provides that chiropractors are considered physicians "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 and subject to regulation by the Secretary."[6] Section 10.311 of the implementing federal regulations provides:

> "(c) A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. [The Office] will not necessarily require submittal of the x-ray or a report of the x-ray, but the report must be available for submittal on request."

Thus, where x-rays do not demonstrate a subluxation (a diagnosis of a subluxation based on x-rays has not been made), a chiropractor is not considered a "physician," and his or her reports cannot be considered as competent medical evidence under the Act.[7] In the present case, Dr. Heywood did not diagnose a subluxation as demonstrated by x-ray to exist and, therefore, his reports are not those of a physician.

Other reports from Dr. Gornet, a Board-certified orthopedist, dated January 29 to October 7, 2004, diagnosed isthmic spondylolisthesis at L5-S1 and noted performing an anterior/posterior spinal decompression and fusion surgery. He noted that appellant was progressing well postoperatively and could return to work on August 16, 2004 with various restrictions. He, however, did not provide an opinion regarding the cause of appellant's isthmic spondylolisthesis at L5-S1 and a medical report that does not contain such opinion is insufficient to meet appellant's burden of proof.[8]

Appellant submitted reports from Dr. Boland dated May 12 and July 9, 2003, who noted that appellant presented with back pain and bilateral lower extremity pain. Appellant reported that he was a painter and also did minor construction. Dr. Boland diagnosed bilateral L5 spondylolysis with spondylolisthesis producing chronic back pain with the lower extremity complaints related to neuroforaminal stenosis. However, as noted above the physician neither noted a history of the injury nor the employment factors believed to have caused or contributed to appellant's condition.[9] Rather, Dr. Boland noted that appellant was employed as a painter and construction worker and neither indicated knowledge of appellant's employment as a rural letter carrier nor did he attribute appellant's condition to his letter carrier duties. Additionally, the physician failed to provide a rationalized opinion regarding the causal relationship between appellant's condition and the factors of employment believed to have caused or contributed to

[6] 5 U.S.C. § 8101(2).

[7] *See Susan M. Herman*, 35 ECAB 669 (1984).

[8] *See Michael E. Smith*, 50 ECAB 313 (1999).

[9] *Frank Luis Rembisz*, *supra* note 4.

such condition and a medical report that does not contain such opinion is insufficient to meet appellant's burden of proof.[10]

Appellant submitted a fully favorable decision from the SSA dated May 18, 2005. However, the Board has also held that entitlement to benefits under another act does not establish entitlement to benefits under the Act.[11] The Board has noted that there are different standards for medical proof on the question of disability under the Act and under the Social Security Act.[12]

The remainder of the medical evidence, including an MRI scan of the lumbar spine dated August 9, 2000, an MRI scan of the lumbar back dated May 21, 2002, an x-ray of the lumbar spine dated June 18, 2002, emergency room treatment notes dated June 18, 2002 and treatment notes from Dr. Davis dated December 3, 3003, fail to provide an opinion on the causal relationship between appellant's job and his diagnosed conditions of isthmic spondylolisthesis. For this reason, this evidence is not sufficient to meet appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.[13] Causal relationships must be established by rationalized medical opinion evidence. Appellant failed to submit such evidence and the Office, therefore, properly denied appellant's claim for compensation.

CONCLUSION

The Board, therefore, finds that, as none of the medical reports provided an opinion that appellant developed an employment-related injury in the performance of duty, appellant failed to meet his burden of proof.

[10] *See Jimmie H. Duckett, supra* note 5.

[11] *Freddie Mosley*, 54 ECAB 255 (2002).

[12] *Daniel Deparini*, 44 ECAB 657 (1993).

[13] *See Dennis M. Mascarenas*, 49 ECAB 215 (1997).

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2006 and August 11, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 25, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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