United States Department of Labor
Employees' Compensation Appeals Board

A.W., Appellant	)	
and	)	**Docket No. 08-1625**
	)	**Issued: February 10, 2009**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Cincinnati, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 20, 2008 appellant timely appealed the April 18, 2008 merit decision of the Office of Workers' Compensation Programs, which denied his claim for wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant is entitled to compensation for intermittent disability during the period January 22 to August 3, 2007.

FACTUAL HISTORY

Appellant, a 54-year-old mail handler, sustained employment-related injuries on February 26, 2006 when the forklift he was operating fell off a tractor trailer and landed on the ground some five feet below. He remained seated in the forklift and hit the top of his head as he was falling. Appellant was transported by ambulance to a nearby hospital where he received a diagnosis of scalp contusion, cervical strain and possible mild concussion. He returned to the

emergency room on March 2, 2006 and was diagnosed with bilateral trapezius muscle strain. Dr. James D. Keller saw appellant on March 8, 2006 and diagnosed scalp contusion and cervical/thoracic sprain.[1] On March 10, 2006 appellant saw Dr. Andrea Jewell, a chiropractor. A recent cervical x-ray revealed decreased lordosis, intersegmental instability at C3-4 and C4-5, and rotational malpositions. Dr. Jewell diagnosed subluxation of the cervical spine. She also found appellant to be totally disabled.

On March 29, 2006 the Office accepted appellant's claim for scalp contusion, cervical strain and mild concussion.

Dr. Matthew M. Merz, a Board-certified physiatrist, examined appellant on May 18, 2006 for complaints of back pain. He diagnosed lumbar strain, which he attributed to the February 26, 2006 forklift incident when appellant's forklift dropped to the ground from a height of about four to six feet. Dr. Merz noted "an onset of back, shoulder and neck pain," that was purportedly documented in appellant's first report of injury. He advised that low back strain should have been among the accepted conditions. Dr. Merz had appellant remain off work but anticipated a return to work in six weeks and a complete recovery in three to four months.

Dr. Jewell released appellant to return to limited-duty work effective June 29, 2006. Appellant had a 20-pound lifting restriction and was advised to avoid bending and twisting continuously. Dr. Jewell also recommended positional changes and no more than two hours sitting and two hours standing.

On June 29, 2006 the employing establishment offered appellant a limited-duty assignment as a modified mail handler. The duties included sorting loose mail, rewrapping damaged parcels and other duties within appellant's restrictions, as needed. Appellant was also expected to perform minor lifting. He accepted the June 29, 2006 limited-duty job offer, but was unable to return to work because of a nonwork-related medical condition, which eventually led to open heart surgery on August 10, 2006.

In a letter dated August 31, 2006, Dr. Tom D. Ivey, a Board-certified thoracic surgeon, advised that appellant had a coronary artery bypass on August 10, 2006. He indicated that appellant was unable to work for two months following surgery and during this time he was restricted to lifting no more than 20 pounds.

Appellant received continuation of pay from February 27 to April 12, 2006, and the Office paid him wage-loss compensation from April 13 to June 28, 2006.

On September 21, 2006 Dr. John J. Brannan, a Board-certified physiatrist, examined appellant and diagnosed cervical, thoracic and lumbar strains.[2] He attributed appellant's condition to the February 26, 2006 incident when he was reportedly "knocked off a forklift." Dr. Brannan found that appellant was able to perform sedentary/light work, but was currently off

[1] Dr. Keller is Board-certified in occupational medicine.

[2] Dr. Brannan submitted an attending physician's report (Form CA-20) as well as a narrative report.

work due to recent heart surgery. He explained that appellant would remain off work at least until October 10, 2006, per his surgeon's instructions.

On September 21, 2006 Dr. Brannan provided a more detailed account of the February 26, 2006 employment incident. He noted that appellant had been operating a forklift when the truck he was unloading backed into him tipping his forklift over. Appellant reportedly struck his head on the machine and was later taken to the emergency room. Several days later, appellant felt some stiffness and soreness in the cervical, thoracic and lumbar spines. Four months of chiropractic treatment reportedly did not resolve his problems. Dr. Brannan indicated that appellant had not worked since July 2006 and had undergone a coronary artery bypass graft on August 10, 2006. He diagnosed contusion of the scalp and "probably mild strains of the cervical, thoracic and lumbar spines." Dr. Brannan described appellant's symptoms of back pain as "mechanical." He also noted some mild spondylitic changes at the thoracic and lumbar spine. Dr. Brannan recommended a more active form of rehabilitation focusing on spine biomechanics, posture and functional tasks. For appellant's recent surgery, he indicated that he would support an immediate return to restricted duties.

Appellant returned to work on October 12, 2006. On October 19, 2006 Dr. Brannan noted that appellant was back at work, his heart was doing well, and he was recovering from his strains. He advised appellant to begin his physical therapy program and return in a month's time. Appellant's October 30, 2006 physical therapy treatment records indicated that his only work restriction was a 20-pound lifting limitation that was to remain in effect until the middle of December 2006.[3]

On December 12, 2006 the Office expanded appellant's claim to include bilateral trapezius strain and subluxation at C3-4 and C4-5.

Dr. Brannan's January 25, 2007 treatment notes indicated that appellant was still sore and cold weather bothered him. Work was noted to be "OK." Appellant was reportedly on "some limitations," but the only thing noted was that he was not on the dock lifting sacks of mail. With respect to the lumbar spine, Dr. Brannan indicated that appellant still had symptoms of strain and he needed to continue his home exercise program. He further noted that appellant would remain on the same duties for now, in doors especially. Dr. Brannan advised appellant to return for follow-up in two months.

Dr. Patricia I. Okocha, a Board-certified internist, treated appellant on March 29, 2007 and diagnosed back and neck pain. She advised that appellant was able to perform light duty. Appellant was to avoid heavy lifting and perform other activities as tolerated. Dr. Okocha also provided an April 5, 2007 note indicating that appellant should perform light-duty work for six months. In an April 20, 2007 duty status report (Form CA-17), she reiterated that appellant could perform light duty. Dr. Okocha imposed a 20-pound lifting restriction. She also imposed a five- to six-hour limitation on sitting, standing and walking. Appellant was to avoid climbing and kneeling. Dr. Okocha also noted some restrictions with respect to driving a vehicle and operating machinery but her handwriting is illegible. Other activities such as twisting,

[3] Appellant's physical therapy ended December 28, 2006 due to lack of progress.

bending/stooping, pulling/pushing, simple grasping, fine manipulation and reaching above shoulder were to be performed "as tolerated."

On April 20, 2007 the employing establishment offered appellant a limited-duty mail handler assignment in accordance with the limitations imposed by Dr. Okocha. Appellant accepted the offer.[4]

On May 1, 2007 Dr. Anne-Barbara Mongey, a Board-certified rheumatologist, diagnosed degenerative disc disease of the cervical and lumbar spine, facet arthropathy and lumbar stenosis. She prescribed physical therapy twice a week for six weeks. The Office approved the therapy, which began on May 15, 2007.[5]

In a July 18, 2007 attending physician's report (Form CA-20), Dr. Okocha diagnosed back pain and neck pain, which she attributed to a February 26, 2006 incident where appellant "fell from fork lift [at] work." She also advised appellant that he could perform light duty. However, this handwritten report is mostly illegible.

On August 6, 2007 appellant filed a claim for compensation (Form CA-7) for the period January 22 to July 22, 2007. He sought compensation for leave without pay (LWOP), night differential and Sunday premium pay. Appellant listed a total of 241 hours LWOP over 31 days where he claimed he was "off due to cervical/back pain." The employing establishment certified an additional 32.5 hours LWOP from July 28 to August 3, 2007.[6]

The Office wrote to appellant on August 21, 2007 requesting medical documentation to support his absence from work on the days claimed. It identified a total of 298.16 hours LWOP over 40 days during the period January 22 to August 3, 2007.[7]

On September 17, 2007 Dr. James T. Frecka, a Board-certified internist, indicated that he had been seeing appellant during the prior month for significant degenerative disease of the spine. He stated that he was not appellant's physician back in the spring of 2007, but appellant had reported "disability due to his back problem and a reported injury." Dr. Frecka further noted that appellant was still on light duty for his back problem and had been referred to an orthopedic specialist for further evaluation.

Dr. Grigory Goldberg, a neurosurgeon, saw appellant on September 25, 2007 and noted a history of back pain since February 2006. Appellant was reportedly operating a forklift when the truck he was in the process of unloading backed into him, tipping his forklift over. He

[4] Appellant's tour of duty was 7:00 p.m. to 3:50 a.m.

[5] Appellant's attendance was somewhat irregular. The treatment records indicate that he began physical therapy on May 15, 2007, but did not return again until June 14, 2007. Appellant had two more sessions in June and another three in the July, with a final session on July 17, 2007.

[6] Appellant claimed eight hours LWOP on April 5, 2007, but the employing establishment certified that he had taken eight hours annual leave that day. He was also credited with .67 hours LWOP on April 30, 2007, which he had not previously claimed and 8 hours each on May 3, 28 and 31, 2007.

[7] Most of the days claimed for LWOP fell in the months of May (9 days), June (13 days) and July 2007 (11 days).

complained of pain concentrated in his back, which he rated 8 on a scale of 0 to 10. Dr. Goldberg indicated that lumbar x-rays showed decreased space at L5-S1, which probably was indicative of degenerative disc disease. He recommended obtaining a new lumbar magnetic resonance imaging (MRI) scan.

In an October 11, 2007 report, Dr. Frecka advised that appellant had been found to have significant degenerative disease of his spine. He stated that appellant was involved in a work accident that caused a worsening of his back pain. Since then appellant had significant back pain and stiffness, which limited his day-to-day activities. Dr. Frecka explained that there were no neurologic problems related to appellant's back problem. He advised that appellant remained on light duty while undergoing further evaluation by an orthopedic specialist.

By decision dated November 14, 2007, the Office denied appellant's claim for wage-loss compensation.

Appellant requested an oral hearing, which was held on March 11, 2008.

A November 20, 2007 lumbar MRI scan revealed congenital spinal stenosis, disc protrusion at L4-5, facet osteoarthritis at L3-4 and L5-S1, bilateral spondylolysis at L5-S1 and severe neural foraminal stenosis at L4-5 bilaterally.

Dr. Goldberg reviewed the lumbar MRI scan on November 27, 2007. He reported that the scan did not show any degenerative disc disease and appellant's discs looked healthy. However, there was evidence of stenosis at L4-5 level. Dr. Goldberg noted that all of appellant's complaints were from his back pain and he specifically denied any leg pain. He did not believe there were any good surgical options for appellant, and thus, he advised appellant to continue nonoperative treatment with Dr. Brannan.

On November 14, 2007 Dr. Frecka recommended light-duty work with a 10- to 15-pound lifting restriction.

Dr. Brannan saw appellant again on December 4, 2007. He explained that a recent lumbar MRI scan showed minimal degenerative changes, no high-grade stenosis and fairly healthy discs. Dr. Brannan diagnosed chronic strain and also noted that appellant had minimal lumbar spondylosis. He further indicated that appellant still had primarily mechanical symptoms. Dr. Brannan referred appellant for chiropractic treatment with a diagnosis of lumbar strain and recommended that appellant continue with the same restricted duties at work.

On December 12, 2007 appellant saw Dr. Michael J. Rohlfs, a chiropractor, who diagnosed cervical sprain/strain. Dr. Rohlfs indicated that on February 26, 2006 appellant "was in the process of unloading a truck when the truck started moving forward causing him to lose his balance and he fell off the truck landing on his back and spine." Appellant reportedly told Dr. Rohlfs that he was currently working and had "worked since the injury on light duty." Dr. Rohlfs saw appellant on another four occasions in January 2008 and added the diagnosis of lumbar sprain to his prior diagnosis of cervical sprain.

On or about January 16, 2008 appellant received a diagnosis of thoracic strain with mild degenerative changes.[8] The record also includes a January 16, 2008 duty status report (Form CA-17) with an illegible signature. The reported diagnosis was "back injury," and February 26, 2006 was noted as the date of injury. Appellant was advised to resume work as of January 28, 2006. He was restricted to two hours of lifting/carrying a maximum of 15 pounds. Appellant was also limited to two hours standing, four hours walking, no climbing or twisting, one hour bending, two hours pushing/pulling, with a similar 15-pound weight limitation, and two hours each of driving a vehicle and operating machinery.

The employing establishment extended another limited-duty assignment on January 17, 2008, which appellant accepted.

On April 18, 2008 an Office hearing representative affirmed the November 14, 2007 decision. The record did not support that appellant's accepted conditions rendered him temporarily totally disabled from his limited-duty assignment as of January 22, 2007. The hearing representative also found that appellant did not establish that his lumbar spine condition was causally related to the February 26, 2006 employment injury.

LEGAL PRECEDENT

A claimant has the burden of establishing the essential elements of his claim, including that the medical condition for which compensation is claimed is causally related to the employment injury.[9] For wage-loss benefits, the claimant must submit medical evidence showing that the condition claimed is disabling.[10] The evidence submitted must be reliable, probative and substantial.[11]

ANALYSIS

The Board finds that appellant has not established that his cervical and lumbar conditions prevented him from working on any of the 40 days he was credited with taking LWOP from January 22 to August 3, 2007. No physician of record specifically excused appellant from work on any of the claimed days.[12] Moreover, the record indicates that during the relevant time period, appellant was capable of performing light or limited-duty work which the employing establishment made available. Drs. Brannan, Okocha and Mongey treated appellant during the period in question but none of the physicians supported appellant's claimed disability. When appellant saw Dr. Frecka in August to September 2007, he reportedly told the doctor that he was

[8] The diagnosis was handwritten on a letter the employing establishment sent to Dr. Frecka. However, the notations bear neither a date nor a signature.

[9] 20 C.F.R. § 10.115(e) (2008); *see Tammy L. Medley*, 55 ECAB 182, 184 (2003).

[10] 20 C.F.R. § 10.115(f).

[11] *Id.* at § 10.115.

[12] On two of the claimed dates, June 14 and July 5, 2007, appellant attended physical therapy. However, there is no indication that the therapy sessions occurred during appellant's scheduled tour of duty, which was 7:00 p.m. to 3:50 a.m.

disabled during the spring of 2007 due to his "back problem and a reported injury." Dr. Frecka was not appellant's physician during the spring of 2007. Other than reciting what appellant had told him, he did not provide an independent assessment regarding any disability. Accordingly, the record does not support that appellant was totally disabled on any of the 40 days he claimed LWOP from January 22 to August 3, 2007.

Moreover, the hearing representative properly found that appellant had not established that his lumbar condition was causally related to the February 26, 2006 employment injury. Where an employee claims that a condition not accepted or approved by the Office was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury.[13]

Appellant did not identify an injury to his lumbar spine when he filed his claim on February 26, 2006. The only reported injuries were scalp contusion, cervical strain and possible mild concussion. The emergency room treatment records from February 26, 2006 supported the injuries appellant identified on his claim form. These records further indicated that appellant was "not having any back pain." When he returned to the emergency room on March 2, 2006, there was reportedly no tenderness in the cervical spine itself, but tenderness in the bilateral trapezius muscles. The March 2, 2006 emergency room treatment records also stated that there was "No tenderness in the T-spine or L-spine." On March 8, 2006 Dr. Keller diagnosed scalp contusion and cervical/thoracic sprain. He did not identify any symptoms referable to appellant's lumbar spine. Similarly, on March 10, 2006 when appellant began chiropractic treatment with Dr. Jewell, there was no mention of injury to the lumbar region or any complaints with respect to that area of the spine. In fact, none of Dr. Jewell's subsequent treatment records through July 5, 2006 made mention of specific lumbar complaints or an injury to the lumbar spine.

The first mention of a lumbar injury was by Dr. Merz in a May 18, 2006 report. Dr. Merz diagnosed lumbar strain causally related to the February 26, 2006 employment injury. However, he mistakenly believed that appellant had complained of lumbar pain from the outset. Dr. Brannan was the next physician to attribute appellant's lumbar condition to the February 26, 2006 employment injury. His September 21, 2006 report also incorrectly reported an onset of lumbar complaints just a "couple days" after the February 26, 2006 injury. Neither Dr. Merz nor Dr. Brannan relied upon an accurate history of injury. Dr. Brannan reported that appellant was "knocked off a forklift." He also incorrectly reported that the "truck [appellant] was unloading backed into him, tipping his forklift over."[14]

[13] *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

[14] This is the same inaccurate history that Dr. Goldberg relied upon in his September 25, 2007 report.

Dr. Okocha consistently reported back and neck pain, which she attributed to the February 26, 2006 employment injury. However, pain is not a medical diagnosis, but merely a symptom. Moreover, Dr. Okocha relied on an inaccurate and incomplete history of injury. The only legible reference to the February 26, 2006 injury appeared in Dr. Okocha's July 18, 2007 report where she incorrectly noted that appellant "fell from forklift [at] work."

Dr. Frecka did not provide a specific history of injury in any of his reports. His October 11, 2007 report indicated that appellant was involved in a work accident that caused a worsening of his back pain. Dr. Frecka did not describe the mechanism of injury that purportedly contributed to appellant's worsening back pain.

Dr. Rohlfs, the chiropractor who treated appellant for cervical and lumbar strains beginning December 12, 2007, also relied on an incorrect history of injury. He reported that appellant "was in the process of unloading a truck when the truck started moving forward causing him to lose his balance and he fell off the truck landing on his back and spine." Dr. Rohlfs made no mention of the fact that appellant was operating a forklift at the time of his injury and that the forklift fell approximately six feet to the ground while appellant remained seated inside.

The evidence of record is insufficient to establish that appellant's lumbar condition is causally related to his February 26, 2006 employment injury. The medical evidence does not adequately account for the approximate three-month delay between the February 26, 2006 forklift incident and the first reported complaints of lumbar symptoms on May 18, 2006. Several physicians mistakenly reported that appellant's low back complaints began within a matter of days of the February 26, 2006 incident while others relied on inaccurate or incomplete histories of injury. As such, the record lacks a properly rationalized medical opinion on causal relationship. The Board will affirm the hearing representative's finding that appellant failed to establish a causal relationship between his lumbar condition and the February 26, 2006 employment injury.

CONCLUSION

Appellant failed to establish entitlement to compensation for intermittent wage loss during the period January 22 to August 3, 2007.

ORDER

IT IS HEREBY ORDERED THAT the April 18, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board