United States Department of Labor
Employees' Compensation Appeals Board

C.W., Appellant	)	
and	)	**Docket No. 08-1764**
	)	**Issued: February 9, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Vestal, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 6, 2008 appellant timely appealed the October 17, 2007 merit decision of the Office of Workers' Compensation Programs denying his occupational disease claim and a February 5, 2008 nonmerit decision denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim and over the nonmerit February 5, 2008 decision.[1]

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty; and (2) whether the Branch of Hearings and Review properly denied appellant's November 19, 2007 request for an oral hearing.

[1] The Board notes that appellant submitted additional evidence following the Office's February 5, 2008 decision. This evidence was not in the record before the Office, and the Board cannot consider new evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On July 10, 2007 appellant, a 54-year-old building maintenance custodian, filed an occupational disease claim for low back, hip and groin pain. He first became aware of his injury on April 1, 1999. However, it was not until January 9, 2004, that appellant realized the condition was employment related. Appellant attributed his claim to twisting, lifting and shoveling snow. He reported working in cold, damp conditions and standing for long periods of time. Furthermore, appellant specifically identified an incident on April 1, 1999 when he lifted a 60-pound recyclable container. He also identified a January 16, 2004 incident when he lifted a bucket of water above his waist and emptied it into a sink.

The employing establishment controverted appellant's claim, alleging his claim was duplicative. The employing establishment argued that he was using the same date of injury as the basis for a new claim even though there was no new exposure at work and no new injury. The employing establishment noted that appellant filed an April 1, 1999 back injury claim and a left hip injury claim on January 9, 2004 for which he was treated and returned to full duty.

Furthermore, the employing establishment stated that appellant shovels very little snow as a snow blower is used for snow removal tasks, he has minimal exposure to cold conditions, and that it has instructed him on how to safely lift heavy objects above his waist. The employing establishment denied that his position required long periods of standing, contending that his job functions left him little time for standing still.

Appellant submitted several medical reports from Dr. Laurence Schenk, a Board-certified orthopedic surgeon, from April 8, 1999 to July 11, 2000. On this date, these reports surrounded an April 1, 1999 injury he allegedly received while lifting discarded recyclable mail. Appellant experienced lower back pain radiating down the left posterior thigh. According to Dr. Schenk's report, appellant had been working light duty for the prior week and seemed to tolerate this work load fairly well. X-rays revealed possible unilateral spondylolisthesis, which Dr. Schenk decided not to pursue at that time. Dr. Schenk classified appellant's condition as a lumbosacral sprain and recommended light duty and physical therapy. Reports noted that appellant responded well to physical therapy.

Appellant also submitted medical reports surrounding an incident on January 1, 2004 where he was lifting a bucket of water. Dr. Schenk, by report dated January 9, 2004, diagnosed him with a hip strain.

By report dated January 21, 2004, Dr. Lazarus Gehring, Board-certified in family medicine, treated appellant for hip strain. Nurse notes reflected that his hip strain occurred at work while lifting a heavy bucket of water.

Appellant submitted medical reports from Dr. Jonathan A. Harris, Board-certified in family and geriatric medicine, dated January 27, 2004, also diagnosing hip strain. He underwent a course of treatment for acute flare of arthritis secondary to twisting at work. Appellant was discharged to full-duty status with limited restrictions.

Appellant submitted a medical report, dated April 27, 2006, from Dr. David E. Kammerman, a Board-certified physiatrist, who stated that a magnetic resonance imaging (MRI) scan showed degenerative changes at the L4-5 and L5-S1 facet joints. Dr. Kammerman also reported the existence of slight anterolisthesis on L5 on S1 and that the L4-5 disc was mildly bulged. He diagnosed appellant with lumbar facet arthropathy/lumbar pain syndrome and recommended a trial of chiropractic treatments.

By report dated January 18, 2007, Dr. Kammerman diagnosed appellant with lumbar facet mediated pain. In this report, he stated that this condition commenced on April 1, 1999. Dr. Kammerman stated that this condition was chronic and permanent.

Appellant sought chiropractic treatment to relieve his low back pain. By report dated July 5, 2007, Dr. Douglas J. Taber, chiropractor, diagnosed him with lumbalgia. No x-rays were taken or reviewed in arriving at this diagnosis. The record also contains follow-up reports from Dr. Taber.

By letter dated August 2, 2007, the Office notified appellant that the evidence submitted was not sufficient to determine whether he was eligible for benefits under the Federal Employees' Compensation Act. Specifically, it stated that the evidence did not contain a diagnosis of any condition resulting from his alleged injury. Moreover, the Office found the evidence insufficient to support that appellant was injured while performing any duty of his employment. Finally, it concluded that the evidence lacked a physician's opinion as to how his injury resulted in the condition diagnosed.

Appellant submitted the medical report of Dr. Kammerman dated August 17, 2007. Dr. Kammerman noted that appellant was experiencing pain that woke him up at night, which increased with prolonged standing, driving or bending forward. He diagnosed lumbar facet mediated pain with history of anterolisthesis of L5 on S1 and bulge at L4-5. Dr. Kammerman stated that appellant's pain condition was related to his original injury of April 1, 1999.

By letter dated August 29, 2007, Dr. Gehring asserted that appellant's condition commenced in April 1999 and flared up again in 2004. He asserted that appellant's condition is "basically a chronic low back, left hip and groin pain associated with osteoarthritis from lifting type work he [ha]s done on concrete floors through his career with the [p]ostal [s]ervice."

By decision dated October 17, 2007, the Office denied appellant's claim for compensation benefits because he had not established that his condition was caused by factors of employment.

By letter dated November 16, 2007, appellant requested an oral hearing. By decision dated February 5, 2008, the Branch of Hearings and Review denied his request for an oral hearing as untimely. The Branch of Hearings and Review noted that the request was postmarked November 19, 2007, beyond the 30-day statutory period. As such, appellant was not entitled, as a matter of right, to an oral hearing or a review of the written record.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act[2] 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.[3] 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.[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 causal relationship, generally, 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 nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[5]

ANALYSIS -- ISSUE 1

Appellant has submitted insufficient medical evidence to establish that his medical condition was caused or aggravated by his federal employment.

The medical evidence submitted consisted of treatment reports from Drs. Schenk, Harris, Gehring and Kammerman. The Board notes that appellant also submitted several treatment reports from Dr. Tabor, a chiropractor. Under section 8101(2) of the Act, chiropractors are only considered physicians, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.[6] The Office's regulations at 20 C.F.R.

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] *Id.*

[6] 5 U.S.C. § 8101(2). *See Paul Foster*, 56 ECAB 208 (2004); *Jack B. Wood*, 40 ECAB 95, 109 (1988).

§ 10.5(bb) have defined subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.[7] As Dr. Taber did not diagnose subluxation, as demonstrated by x-rays, he is not considered a physician for purposes of this analysis. Thus his reports do not constitute medical evidence.[8]

The substantively relevant physician reports merely state findings on examination and provide no opinion concerning the cause of his alleged medical conditions. Medical reports that do not contain a rationale on causation are generally insufficient to meet an employee's burden of proof.[9]

The April 8, 1999 medical opinion of Dr. Schenk diagnosed appellant with lumbosacral sprain. However, nowhere in this or any of the subsequent reports does Dr. Schenk opine a causal link between factors of appellant's federal employment and the alleged diagnosed condition. To establish a causal relationship, a claimant must submit a physician's report in which the physician reviews the employment factors identified as causing the claimed condition and, taking these factors into consideration as well as findings upon examination, explain whether the employment injury caused or aggravated the diagnosed condition and presents a medical rational in support of his or her opinion.[10]

Furthermore, the Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference or presumption that there is a causal relationship between the two.[11] Neither the fact that the condition became apparent during a period of federal employment nor the belief that the condition was caused or aggravated by an employment incident or factor(s) is sufficient to establish causal relationship.[12] Causal relationship must be substantiated by reasoned medical opinion evidence, which is appellant's responsibility to submit.[13]

Additionally, appellant submitted several reports from Drs. Schenk, Harris and Gehring containing a diagnosis of hip strain. But none of these medical reports provide any rationalized opinion or explanation as to how appellant's work activities caused or aggravated his condition.

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[7] 20 C.F.R. § 10.5(bb); *see also Mary A. Ceglia*, 55 ECAB 626 (2004); *Bruce Chameroy*, 42 ECAB 121 (1990).

[8] 5 U.S.C. § 8101(3), 20 C.F.R. § 10.311(a). *See Thomas W. Stevens*, 50 ECAB 288 (1999); *George E. Williams*, 44 ECAB 530 (1993).

[9] *Lois E. Culver* (*Clair L. Culver*), 53 ECAB 412 (2002).

[10] *J.M.,* 58 ECAB ___ (Docket No. 06-2094, issued January 30, 2007); *D.E.*, 58 ECAB ___ (Docket No. 07-27, issued April 6, 2007).

[11] *Joe T. Williams*, 44 ECAB 518, 521 (1993).

[12] *Id.*

[13] *See Edgar G. Maiscott*, 4 ECAB 558 (1952) (holding appellant's subjective symptoms and self-serving declarations did not constitute evidence of a sufficiently substantial nature); *Samuel Buchanan*, 7 ECAB 441 (1955).

Dr. Schenk's January 9, 2004 treatment report diagnosed appellant with hip strain. He proffers no rationalized medical opinion concerning how this condition was causally related to appellant's federal employment duties or, for that matter, an employment-related incident.

Similarly, the treatment report from Dr. Harris dated January 27, 2004, is substantively inadequate medical opinion evidence. While he noted treating appellant for an acute flare of arthritis secondary to twisting at work, he offers no detailed rationalized opinion explaining how factors of his federal employment caused or aggravated the diagnosed condition.[14]

Dr. Gehring's letter of August 29, 2007 stated that appellant's condition is "basically chronic low back, left hip and groin pain associated with osteoarthritis." As a matter of law such terms as "basically, could, may or might be" indicate that the report is equivocal, speculative or conjectural and, therefore, is of limited probative value.[15]

Finally, the record contains numerous reports from Dr. Kammerman. But, again, these reports are insufficient because they do not address the issue of causation. While in his August 17, 2007 report, Dr. Kammerman concluded that he believes that appellant's pain condition is related to his original work injury of April 1, 1999, he proffers no opinion or explanation as to why this is so. Furthermore, he furnishes no rationalized opinion concerning how the diagnosed lumbar facet mediated pain is causally related to factors of appellant's federal employment or an employment-related incident.

The Office advised appellant that it was his responsibility to provide a comprehensive medical report which described his symptoms, test results, diagnosis, treatment and the doctor's opinion, with medical reasons, on the cause of his condition. Appellant failed to submit sufficient medical documentation in response to the Office's request. As the medical evidence explaining how his employment duties caused or aggravated a hip or other diagnosed condition, he has not met his burden of proof in establishing he sustained a medical condition in the performance of duty causally related to factors of employment.

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record.[16] A request for either an oral hearing or review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.[17] If the request is not made within 30 days, a claimant is not entitled to a hearing or review of the written record as a matter of right.

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[14] *A.D.*, 58 ECAB ___ (Docket No. 06-1183, issued November 14, 2006) (stating that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence,* Chapter 2.810.3(g) (April 1993).

[16] 20 C.F.R. § 10.615 (2008).

[17] 20 C.F.R. § 10.616(a).

Furthermore, Office regulations provide that the "claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision."[18]

Although a claimant may not be entitled to a hearing as a matter of right, the Office has discretionary authority with respect to granting a hearing and the Office must exercise such discretion.[19]

ANALYSIS -- ISSUE 2

Appellant's request for an oral hearing was postmarked November 19, 2007 which is more than 30 days after the Office issued its October 17, 2007 decision. The regulations clearly specify that "[t]he hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[20] Appellant's request was, therefore, untimely and as such, he was not entitled to an oral hearing as a matter of right.

In its February 5, 2008 decision, the Branch of Hearings and Review also denied appellant's request on the grounds that the pertinent issue could be addressed by requesting reconsideration and submitting additional evidence to the district Office. This is considered a proper exercise of the hearing representative's discretionary authority.[21] Moreover, there is no evidence indicating that the Branch of Hearings and Review otherwise abused its discretion in denying appellant's request.

Accordingly, the Board finds that the Branch of Hearings and Review properly exercised its discretion in denying appellant's request for an oral hearing.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty. The Board further finds that the Branch of Hearings and Review properly denied appellant's November 19, 2007 hearing request.

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[18] *Id.*

[19] *See Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994); *Herbert C. Holley*, 35 ECAB 140 (1981).

[20] 20 C.F.R. § 10.616(a).

[21] *Mary B. Moss*, 40 ECAB 640, 647 (1989).

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2007 decision of the Office of Workers' Compensation Programs and the February 5, 2008 decision of the Branch of Hearings and Review are affirmed.

Issued: February 9, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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