

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

D.L., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Corpus Christi, TX, Employer)

**Docket No. 08-2328
Issued: June 8, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 25, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated May 20, 2008, which affirmed the denial of his occupational disease claim. 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 is whether appellant met his burden of proof to establish that he developed a low back condition while in the performance of duty.

FACTUAL HISTORY

On January 25, 2006 appellant, then a 55-year-old part-time flexible mail processing clerk, filed an occupational disease claim alleging that he developed a back condition as a result of performing his work duties. He became aware of his condition on March 15, 2005 and realized it was caused by his work on April 20, 2005. Appellant stopped work on November 10, 2005. He noted that his back condition began in 1970 while working as an

aircraft mechanic in the military. Appellant believed that his current condition was caused by performing his duties which included operating a digital bar code sorting (DBCS) machine where he was required to twist, bend, turn, lift and handle letter trays.

In an October 25, 2005 report, Dr. Cynthia M. Airhart, a chiropractor, first treated appellant on March 15, 2005 for chronic lumbar and leg pain. Appellant reported that his back pain began when he was in the military and was exacerbated by his clerk duties. Dr. Airhart diagnosed S1 radiculopathy, intervertebral disc syndrome, calcaneal spur formations and degenerative changes of the ankles and knees. She opined that his job duties irritated his low back condition.

In a letter dated February 13, 2006, the Office advised appellant of the factual and medical evidence needed to establish his claim. It requested that he submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors.

The employing establishment controverted the claim, noting that appellant began work in 1998 and performed a variety of duties including operation of a DBCS machine, culling presort mail and postage due duties and distributing mail to carrier cases. The employer noted that appellant was currently not working due to a nonwork-related motorcycle accident and was recovering from surgery related to this accident.

In a March 7, 2006 statement, appellant reiterated that his clerk duties exacerbated his low back condition and noted that he was recovering from a motorcycle accident in which he injured his right shoulder. He submitted reports from Dr. Donna Westerman, a Board-certified internist, dated February 28, 2005 to March 31, 2006, who treated him for back pain.

In a March 30, 2006 decision, the Office denied appellant's claim on the grounds that the medical evidence did not establish that his back condition was caused by his work duties.

In a letter postmarked on May 1, 2006, appellant requested a review of the written record. In an April 11, 2006 report, Dr. Airhart diagnosed S1 radiculopathy, intervertebral disc syndrome, lumbar segmental dysfunction and subluxation. An April 11, 2006 report from Dr. James B. Shook, an osteopath, evaluated appellant for his back condition. He noted that appellant related that his aircraft mechanic duties on a DBCS machine required twisting and turning which caused an exacerbation and acceleration of his preexisting spinal condition. Dr. Shook noted restricted range of motion of the trunk, tenderness in the trochanteric area and diagnosed degenerative changes of the lumbar spine producing S1 radiculopathy and neurological changes effecting the muscles of the lower extremities. He opined that appellant's long-term military service activities produced significant degenerative changes affecting his lumbar spine, knees and feet. Dr. Shook noted that appellant's employment activities including twisting, turning, bending, lifting and long periods of standing aggravated these conditions.

By decision dated May 23, 2006, the Office denied appellant's request for a review of the written record as untimely filed.¹

Appellant resubmitted the April 11, 2006 report from Dr. Shook, and the April 11, 2006 report of Dr. Airhart, both previously of record. On July 13, 2006 Dr. Shook diagnosed S1 radiculopathy affecting the hips, degenerative joint disease of the knees and ankles, chronic plantar fasciitis, calcaneal spurring, capsulitis of the talonavicular joint bilaterally and tarsal tunnel syndrome. He noted that these conditions were the result of appellant's activities in the service and his current work activities. Dr. Shook opined that it was more likely that his spinal condition was service related.

In a decision dated November 9, 2006, the Office denied modification of the March 30, 2006 decision.

On October 17, 2007 appellant requested reconsideration. He submitted lumbar spine x-rays dated September 27, 1996 to April 1, 2005 showing multilevel degenerative disc disease and L5/S1 facet arthropathy. A December 8, 2006 magnetic resonance imaging (MRI) scan of the lumbar spine revealed degenerative disc and facet disease, most severe at L5/S1 causing left neuroforamina stenosis. Appellant submitted Veteran's Administration Medical Center reports from November 10, 2001 to March 22, 2007, which noted treatment for chronic low back pain, osteoarthritis, hypertension, urinary incontinence, foot and knee pain and depressive disorder. A February 23, 2004 electromyogram (EMG) revealed no abnormalities. In a February 12, 2007 note, Dr. Brad B. Hall, a Board-certified orthopedic surgeon, treated appellant for chronic low back pain. Appellant reported having several falls from aircraft wings and while moving furniture and a 2005 motorcycle crash, which may have caused his low back pain. Dr. Hall diagnosed mild disc disease and neuroforamina stenotic changes at L5-S1 and recommended physical therapy. Appellant also submitted a May 1, 2007 report from Dr. Shook, who noted that, based on his clinical findings and a positive MRI scan of the lumbar spine, appellant had lumbar spine changes causing S1 radiculopathy and neurological changes affecting the leg muscles.

By a decision dated May 20, 2008, the Office denied modification of the November 9, 2006 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act 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 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

¹ On May 31, 2006 appellant appealed his claim to the Board. In a letter dated July 3, 2006, he withdrew his appeal request and noted that he wished to pursue reconsideration before the Office. In an order dated September 1, 2006, the Board dismissed appellant's appeal. Docket No. 06-1505 (issued September 1, 2006).

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 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 mail processing clerk included standing and walking, bending, lifting and carrying. It is also not disputed that he has been diagnosed with chronic back pain and degenerative disc disease. However, appellant has not submitted sufficient medical evidence to establish that his back condition was caused or aggravated by specific employment factors. On February 13, 2006 the Office advised appellant of the medical evidence needed to establish his claim. Appellant did not submit a rationalized medical report from a physician addressing how specific employment factors may have caused or aggravated his claimed condition.

Appellant submitted reports from Dr. Airhart, a chiropractor, dated October 25, 2005 and April 11, 2006. However, 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[s] by the Secretary."⁴ 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.⁵ Although Dr. Airhart diagnosed a subluxation, she did not diagnose the

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

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

⁴ 5 U.S.C. § 8101(2); *see also* 20 C.F.R. § 10.311.

⁵ *See Susan M. Herman*, 35 ECAB 669 (1984).

spinal subluxation demonstrated by x-ray. Her reports cannot be considered as medical evidence.

Appellant submitted reports from Dr. Westerman, dated February 28, 2005 to March 31, 2006. However, these reports are insufficient to establish his claim as Dr. Westerman did not provide a history of injury or specifically address whether appellant's employment activities caused or aggravated his low back condition.⁶

On April 11, 2006 Dr. Shook evaluated appellant for a back condition arising out of activities he performed as a military aircraft mechanic for 26 years. Appellant related that his current employment as a clerk required twisting and turning which exacerbated and accelerated his preexisting spinal condition. Dr. Shook diagnosed degenerative changes of the lumbar spine producing S1 radiculopathy and neurological changes. He opined that appellant's long-term military service activities produced significant degenerative changes affecting his lumbar spine and his employment activities aggravated these conditions. However, Dr. Shook merely repeated the history of injury as reported by appellant without providing an opinion regarding whether his condition was work related. He failed to provide a rationalized opinion explaining how appellant's work duties caused or aggravated his preexisting low back condition.⁷ Additionally, Dr. Shook failed to address how the nonemployment factor of the motorcycle accident in 2005 might have affected appellant's back condition.

In reports dated July 13, 2006 and May 1, 2007, Dr. Shook diagnosed S1 radiculopathy and degenerative joint disease of the knees and ankles, chronic plantar fasciitis, calcaneal spurring, capsulitis of the talonavicular joint bilaterally and tarsal tunnel syndrome. He opined that it was more likely that appellant's spinal condition which was producing significant distress to the pelvic and lower extremities was service related. However, Dr. Shook's reports are insufficient to establish the claim as the physician appears to attribute appellant's back condition to military service related injuries and not his work duties. In neither report did he explain the reasons why particular employment activities would cause or aggravate the claimed low back condition.

Appellant submitted a Veterans Administration Medical Center note February 12, 2007 in which Dr. Hall treated him for chronic low back pain. He reported falling incidents from aircraft wings while in the military and while moving furniture and a motorcycle crash in 2005, all of which may have caused his low back pain. Appellant diagnosed mild disc disease and neuroforamina stenotic changes at L5-S1 and recommended physical therapy. However, Dr. Hall appears to attribute appellant's back condition to falls from aircraft, moving furniture and a 2005 motorcycle crash and not his work duties. He did not explain how specific work duties may have caused or aggravated a diagnosed condition. Therefore, these reports are insufficient to establish appellant's claim.

⁶ A.D., 58 ECAB ___ (Docket No. 06-1183, issued November 14, 2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

⁷ *Franklin D. Haislah*, 52 ECAB 457 (2001); see *Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

Similarly, reports of diagnostic testing, such as the x-rays, EMGs and MRI scan reports are insufficient to establish appellant's claim as they do not provide a physician's opinion on the causal relationship between his job factors and a diagnosed medical condition.

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 the condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.⁸ 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.⁹

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he developed an employment-related injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 8, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

⁹ On appeal, appellant submitted new medical evidence. However, the Board may not consider such evidence on appeal as its review is limited to the evidence which was before the Office at the time of its decision. See 20 C.F.R. § 501.2(c).