

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

T.I., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Milwaukee, WI, Employer**

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**Docket No. 09-96
Issued: March 19, 2009**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 15, 2008 appellant, through counsel, filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated December 31, 2007 and February 27 and September 23, 2008 denying his claim for a lower back condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has established that he sustained a lower back condition causally related to factors of his employment.

FACTUAL HISTORY

On October 8, 2007 appellant, then a 50-year-old mail handler, filed an occupational disease claim alleging that on March 20, 2006 he first realized his lower back condition was due to his repetitive work duties. The employing establishment noted his last work exposure was March 20, 2006.

In support of his claim, appellant submitted reports for the period April 17, 2006 through October 9, 2007 by Laura Mays, a physician's assistant, and an August 1, 2007 letter stating that appellant underwent back surgery that day; an August 1, 2007 lumbar discectomy surgery report and unsigned September 18, 2006 report by Dr. Thomas Perlewitz, an attending Board-certified orthopedic surgeon; and a July 5, 2006 report by Dr. Jamie Edwards, a Board-certified family practitioner.

In the July 5, 2006 report, Dr. Edwards diagnosed C4-6 discectomy and fusion with chronic pain and L5-S1 disc degeneration with spondylosis and referred pain. A physical examination revealed limited range of motion in the neck and lumbar spine.

In a September 18, 2006 report, Dr. Perlewitz noted that appellant continued to have complaints of significant low back pain. He indicated that appellant "has received extensive care in relation to his low back through the Veterans Administration Medical Center in the past." Dr. Perlewitz stated that appellant had been on permanent light duty with a restriction on lifting no more than 40 pounds. He noted options available to appellant and suggested surgery would be "the best case scenario for improvement."

In various reports during the period April 17, 2006 to October 9, 2007, Ms. Mays diagnosed L4-5 degenerative disc disease with discogenic referred pain and status post anterior cervical discectomy with fusion at C4 to C6 with adjacent segment degeneration. She diagnosed severe L5-S1 disc degeneration with discogenic referred pain and reported on appellant's progress following his August 1, 2007 lumbar surgery.

By letter dated November 5, 2007, the Office advised appellant that additional factual and medical evidence was needed to support his claim. Appellant was requested to describe the work factors that caused his conditions and to submit records from a physician which included dates of examination and treatment, a history of injury, a detailed description of findings, the results of all x-rays and laboratory tests, a diagnosis, prognosis and course of treatment. The Office explained that a physician's opinion on causal relation was crucial to his claim and allotted 30 days to submit the requested information.

In response to the Office's request, appellant submitted a November 21, 2007 disability note by Dr. Perlewitz indicating that appellant was currently disabled due to his cervical fusion and reports dated November 8 and December 10, 2007 by Ms. Mays. The physician's assistant diagnosed status post anterior lumbar interbody fusion surgery and reported on his progress.

By decision dated December 31, 2007, the Office denied his claim on the grounds that the medical evidence failed to establish that his lower back condition was caused or aggravated by his employment.

Subsequent to the Office's decision, it received disability notes, an August 1, 2007 lumbar discectomy surgery report and an unsigned August 1, 2007 report by Dr. Perlewitz and reports by Ms. Mays for the period April 17, 2006 through December 10, 2007.

On January 25, 2008 appellant requested reconsideration.

By decision dated February 27, 2008, the Office denied modification of the December 31, 2007 decision.

On March 4, 2007 the Office received an August 1, 2007 letter from Ms. Mays. It also received a July 5, 2006 report by Dr. Edwards and disability notes, an August 1, 2007 surgery report and unsigned dictated reports dated September 18, 2006 and August 1 and 20 and September 10 and 22, 2007 and February 4, 2008 by Dr. Perlewitz. In the August 20 and September 10, 2007 reports, Dr. Perlewitz stated that appellant was doing well following his anterior lumbar interbody fusion surgery. He noted in the September 22, 2007 report that appellant would be assessed in six weeks for his ability to return to light-duty work.

In a letter dated June 27, 2008, appellant's counsel requested reconsideration.

By decision dated September 23, 2008, the Office again denied modification of the December 31, 2007 decision.¹

LEGAL PRECEDENT

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.² The medical evidence required to establish causal relationship, generally, is rationalized medical evidence.³ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.⁴ The opinion of the physician must be based on a complete and accurate factual and medical background of the employee, 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 employee.⁵

¹ The Board notes that, following the September 23, 2008 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. § 501.2(c); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

² See *R.H.*, 59 ECAB ____ (Docket No. 07-2124, issued March 7, 2008); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

³ *D.E.*, 58 ECAB ____ (Docket No. 07-27, issued April 6, 2007).

⁴ *G.T.*, 59 ECAB ____ (Docket No. 07-1345, issued April 11, 2008).

⁵ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

ANALYSIS

It is not disputed that appellant's duties as a mail handler included repetitive activities. It is also not disputed that appellant has been diagnosed with a lower back or lumbar condition. However, appellant has not submitted sufficient medical evidence to establish that the lower back or lumbar spine condition is causally related to specific employment factors or conditions.

Appellant's burden of proof includes the submission of rationalized medical opinion evidence addressing causal relationship. The Board finds that he has not submitted sufficient evidence in support of his claim for a lower back or lumbar condition. There is no explanation by a physician how factors of appellant's employment caused or contributed to his lower back or lumbar condition or aggravated a preexisting medical condition. The record contains no rationalized medical opinion explaining how the implicated employment factors caused appellant's lumbar back condition.

Appellant submitted various reports and disability notes from Dr. Perlewitz. In a September 18, 2006 report, Dr. Perlewitz noted that appellant continued to have complaints of significant low back pain and recommended surgery. In reports dated August 20 and September 10, 2007, he stated that appellant was doing well following his anterior lumbar interbody fusion surgery. In a September 22, 2007 report, Dr. Perlewitz stated that appellant would be assessed in six weeks for his ability to return to light-duty work. Appellant also submitted a July 5, 2006 report by Dr. Edwards who diagnosed C4-6 discectomy and fusion with chronic pain and L5-S1 disc degeneration with spondylosis and referred pain. However, neither Dr. Edwards nor Dr. Perlewitz offered any opinion as to whether appellant's lumbar back condition was caused or aggravated by his employment duties.⁶ As this medical evidence does not offer any opinion as to the cause of appellant's diagnosed condition, it is insufficient to establish appellant's claim.

The record also contains reports from Ms. Mays, a physician's assistant. However, these reports have no weight or probative value as medical evidence as they have not been signed or approved by a physician and physician's assistants are not defined as physicians in the Act.⁷ Section 8101(2) of the Act provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by the applicable state law.⁸

The Office advised appellant of her responsibility to provide a comprehensive medical report which described employment injury history, his symptoms, test results, diagnosis, treatment and the doctor's opinion, with medical reasons, on the cause of his condition.

⁶ *K.W.*, 59 ECAB ____ (Docket No. 07-1669, issued December 13, 2007); *J.M.*, 58 ECAB ____ (Docket No. 06-2094, issued January 30, 2007) (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 See *J.M.*, 58 ECAB ____ (Docket No. 06-2094, issued January 30, 2007); *Lyle E. Dayberry*, 49 ECAB 369 (1998) (the reports of a physician's assistant are entitled to no weight as a physician's assistant is not a "physician" as defined by section 8101(2) of the Act).

⁸ 5 U.S.C. § 8101(2). See also *Thomas O. Bouis*, 57 ECAB 602 (2006).

Appellant failed to do so. As there is no probative, rationalized medical evidence addressing how his claimed lumbar back condition was caused or aggravated by his employment duties, he has not met his burden of proof to establish that he sustained a lumbar back condition in the performance of duty.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained a lumbar back condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 23 and February 27, 2008 and December 31, 2007 are affirmed.

Issued: March 19, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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