

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

I.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Thousand Oaks, CA, Employer**

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**Docket No. 09-481
Issued: September 14, 2009**

Appearances:

*William H. Brawner, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On December 9, 2008 appellant filed a timely appeal from a September 10, 2008 merit decision of the Office of Workers' Compensation Programs' Branch of Hearings and Review affirming a November 5, 2007 merit decision of the Office. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of appellant's claim.

ISSUE

The issue is whether appellant established that he sustained a back condition in the performance of duty causally related to his federal employment.¹

¹ The Board notes that appellant's claim originally included carpal tunnel syndrome as a claimed condition. By decision dated October 15, 2008, the Office accepted his claim for right carpal tunnel syndrome and therefore the Board has no jurisdiction over the carpal tunnel syndrome aspect of his appeal.

FACTUAL HISTORY

On September 25, 2007 appellant, a 47-year-old letter carrier, filed an occupational disease claim (Form CA-2) for possible carpal tunnel syndrome and other conditions.² He first became aware of his condition on June 2, 2007 and realized the condition was caused or aggravated by his federal employment on August 21, 2007. Appellant stopped work on June 2, 2007 and has not returned to full duty.³

On September 21, 2007 appellant alleged that, on June 2, 2007, while at work, he felt numbness and pain in his face, back and shoulder, which radiated into his right arm, right hand and right leg. He also reported feeling dizzy, nauseous and that his vision was blurry. Because of the pain, discomfort and fearing that he might die at any moment, appellant was afraid to drive a car and telephoned his sister, who picked him up from work and drove him to the emergency room.

On June 2, 2007 Dr. Eric Moll, Board-certified in emergency medicine, diagnosed multi-level bone spurs in the cervical and thoracic spine. He recommended that appellant follow up with his primary care physician for further pain control and provided a referral to a neurosurgeon for consultation and physical therapy.

On June 20, 2007 Dr. Gretchen H. Jacobson, a Board-certified neurosurgeon, reported that a cervical magnetic resonance imaging (MRI) scan was unremarkable. She noted that she did not think that the small disc bulge at T2-3 was causing appellant's symptoms. Dr. Jacobson opined that this small disc bulge could be producing some of his leg and right flank numbness, but not his arm pain nor facial numbness.

Appellant submitted a June 27, 2007 report signed by Dr. Eric Chun, Board-certified in family medicine, who diagnosed right-sided weakness with paresthesias and gait instability.

Appellant submitted an August 6, 2007 report signed by Dr. Mark R. Mitchell, a Board-certified diagnostic radiologist, who reported that an MRI scan of appellant's cervical spine revealed a three millimeter (mm) right paramedian protrusion at the T2-3 level indenting the right side of the spinal cord which was reducing the anterior posterior dimension of the dural sac to approximately seven mm. At the T3-4 level Dr. Mitchell observed a three to four mm indentation of the right posterolateral dural sac due to the probable proliferation around the facet

² The record reflects that appellant has several prior claims which were accepted by the Office. He filed a claim, case file number xxxxxx425, for an injury occurring August 13, 1990 which was accepted for "injury/body." Under case file number xxxxxx286 appellant's injury of May 13, 1992 was accepted for exposure to fumes. Under case file number xxxxxx899, his injury of May 21, 1999 was accepted for lower back strain. Under case file number xxxxxx786, appellant's injury of November 5, 2005 was accepted for left wrist sprain, for which no time was lost. The record also reflects all of these claims were retired.

³ The record reflects that appellant and his attorney submitted evidence in support of his claim containing reports and notes diagnosing and providing treatment for conditions ranging from anxiety to respiratory infections. As this appeal concerns the denial of a claim for back injury, reports and notes concerning diagnosis of or treatment for conditions unrelated to the back or spine are not relevant.

joint. The MRI scan revealed two mm of posterior disc bulging at the C3-4 level as well as mild to moderate foraminal stenosis at multiple levels, the worst of which was at the C5-6 level.

By letter dated October 1, 2007, the Office notified appellant that the evidence he submitted in support of his claim was insufficient because none of the medical evidence established a diagnosed condition was caused by a factor of his employment or an employment incident. It advised appellant that he needed to submit additional evidence in support of his claim and provided guidance concerning the type of evidence required.

Appellant submitted no additional evidence in support of his claim and by decision dated November 5, 2007, the Office denied his claim because the evidence of record was insufficient to establish that he sustained an injury as defined by the Federal Employees' Compensation Act.

Appellant disagreed and, through his attorney, requested an oral hearing.

Appellant submitted a May 23, 2008 report from Dr. Marvin Pietruszka, Board-certified in anatomic and clinical pathology, who reported findings upon examination and a review of appellant's employment and medical history. Dr. Pietruszka reported that physical examination of appellant's spine revealed tenderness and myospasm of the posterior cervical paraspinal musculature, primarily on the right. He observed that appellant experienced pain in all his joints during range of motion testing. Dr. Pietruszka noted that appellant exhibited decreased strength in the musculature of his upper right extremity as compared to the left. Specifically, he noted that appellant's forearm musculature, as well as that of the upper portion of the extremity, were functioning with a limitation of 40 percent less than that on the left. Dr. Pietruszka also observed that appellant had decreased strength in his lower extremity musculature. Appellant exhibited hypesthesia to pinprick of the lower right extremity down to the great toe of his right foot.

Dr. Pietruszka reported that x-rays taken October 25, 2007 of appellant's cervical spine revealed marked straightening of the normal lordotic curve. An x-ray of appellant's thoracic spine revealed a slight rotation of the upper thoracic vertebrae and an x-ray of his lumbar spine revealed marked straightening and reversal of the normal curve. X-rays of his right and left shoulder taken October 25, 2007 revealed no abnormalities.

Dr. Pietruszka diagnosed right carpal tunnel syndrome, cervical and lumbar discopathy, right hemiparesis of unknown etiology and hyperlipidemia. He also diagnosed appellant with anxiety/stress disorder, sleep disorder, hypertension aggravated by work-related injury, history of migraine headaches, bilateral hearing loss, hyperkeratosis of the skin of both heels, hepatic steatosis and left de Quervain's tenosynovitis.

Dr. Pietruszka opined that appellant's cervical and lumbar discopathy were aggravated by movement. He opined that appellant's description of his job injuries and the mechanism of injury of his lower back and cervical spine was consistent with the "mechanism of injury as described by the patient." Dr. Pietruszka explained that: "The mechanism by which [appellant] suffers pain due to his lumbar and cervical discopathy ... relates to the transmission of nerve impulses stimulated by pressure sensitive, heat sensitive and pain sensitive nerve fibers via afferent nerve fibers which ultimately stimulate a cerebral response...." He opined that appellant

was disabled from work and asserted that appellant was precluded from working his usual job because the duties exacerbated his medical conditions.

By letter dated June 3, 2008, appellant's attorney argued that appellant's medical conditions were not attributable to nonwork factors, particularly his skydiving hobby. Counsel asserted that Dr. Pietruszka's report was comprehensive and, because of its thoroughness, entitled to special consideration and the weight accorded second opinion physicians. Citing the Office's procedural manual as well as several cases, counsel argued that this claim was one where doubling was appropriate because appellant sustained spinal injuries and carpal tunnel syndrome. Counsel also provided a narrative of appellant's job description, the duties he performs on a daily basis and a history of his injury and medical treatment.

A hearing was conducted on June 3, 2008 and appellant's attorney argued that appellant's claim was for both carpal tunnel and spinal injuries, because the injury claimed on his CA-2 form was carpal tunnel and other testing. Counsel, noting that the Office's development letter mentioned both the carpal tunnel and spinal conditions, argued that the Office's November 5, 2007 decision was improper as it only addressed the carpal tunnel condition.

Appellant testified that he was a master skydiver and had been skydiving since 1980. He reported that he has never sustained any skydiving-related injuries and never saw a physician in connection with a condition attributable to his skydiving hobby. Appellant reported that he dove at least twice a month and that he stopped skydiving in 2005.

Appellant testified that while casing mail he started to feel dizzy as well as pain and numbness in his hand and arms. He alleged that he reported his condition to his supervisor who told him to just hang in there. Appellant testified that he went to the emergency room where a physician told him he had a herniated disc and that he should follow up with his primary care physician.

By report dated June 4, 2007, Dr. Chun reported findings upon examination and diagnosed cervical and thoracic spondylosis. On July 31, 2007 he diagnosed cervical radiculopathy. Appellant also submitted reports from a certified physician's assistant and physical therapists.

Appellant submitted a November 1, 2007, report signed by Dr. Paul F. Parks, a Board-certified orthopedic surgeon, who reported that an MRI scan of appellant's cervical and upper thoracic spine revealed a small right-sided disc protrusion at the T2-3 level. Dr. Parks noted that the results of this MRI scan did not explain appellant's symptoms and recommended an MRI scan of his thoracic and lumbar spine. He diagnosed degeneration of the thoracic intervertebral disc.

On November 4, 2007 Dr. Edward Helmer, a radiologist, reported that an MRI scan of appellant's thoracic spine revealed degenerative facet disease with ligamentum flavum buckling that was causing mild indentation on the dorsolateral aspect of the dural sac. He noted that there was a focal disc bulge at the T1-2 level, degenerative disc disease at the T2-3 level and degenerative facet disease on the right side of the T3 level as well as in the mid-thoracic region. An MRI scan of appellant's lumbar spine revealed an asymmetric disc bulge at the L5-S1 level.

Appellant submitted a November 5, 2007 report signed by Dr. Charles S. Brenner, a Board-certified orthopedic surgeon, who diagnosed appellant with bilateral carpal tunnel syndrome with cervical spine stenosis and right C6 radiculopathy. Dr. Brenner noted that an MRI scan revealed significant foraminal stenosis particularly at the C5-6 level.

By decision dated September 10, 2008, the hearing representative affirmed the Office's November 5, 2007 decision with regard to appellant's claimed back condition but set aside and remanded the carpal tunnel claim for further development.⁴

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.⁵

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. 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. The opinion of the physician must be based on a complete 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.⁶

ANALYSIS

Appellant, through his attorney, alleged that he sustained a back condition in the performance of duty.⁷ As noted above, his burden is to establish that identified factors of his employment caused or contributed to the presence or occurrence of his back condition and to establish, through production of probative rationalized medical evidence, that his alleged back condition is causally related to the identified employment factors.⁸ The Board finds the Office properly denied appellant's claim because the evidence of record is insufficient to satisfy appellant's burden of proof.

⁴ See *supra* note 1.

⁵ See *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁶ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁷ See *supra* note 1.

⁸ See *supra* note 6.

The burden of proof in this case is with appellant, not the Office. The record reflects that appellant's claim was denied because the medical evidence did not establish that he sustained an injury as defined by the Act and that the evidence of record was insufficient to establish that his alleged back condition was causally related to his federal employment.

Counsel argues that Dr. Pietruszka's report is sufficiently well reasoned such that it satisfies appellant's burden of proof.⁹ The Board finds, however, that Dr. Pietruszka's report is substantively deficient and therefore inadequate to satisfy appellant's burden of proof. Dr. Pietruszka's report merely repeated a narrative of appellant's job description and medical history identical to that provided by appellant's attorney in his letter dated June 3, 2008.

Although Dr. Pietruszka's report provided a review of appellant's medical history and proffered findings upon examination, he provided no substantive opinion on the causal relationship between any of the conditions he diagnosed and any identified factor of appellant's federal employment. The Board has consistently held that medical reports lacking a rationale on causal relationship are of diminished probative value.¹⁰ A rationalized medical opinion is based on a complete factual and medical background and is supported by medical rationale.¹¹ As noted above, rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and employment factors.

While Dr. Pietruszka opined that appellant's medical history, his findings upon examination, review of appellant's job description and appellant's description of injury were consistent with the mechanism of injury, at no time did he explain what the mechanism of injury was as it related to any specific employment duty, nor did he provide specific details concerning how appellant's job caused, contributed or produced this injury. His causal relationship opinion provided a generalized explanation of the neurological mechanics underlying how appellant's alleged cervical and lumbar condition produced pain, rather than a rationalized opinion concerning how a specific employment factor caused or contributed to the cervical and lumbar condition that he diagnosed.

The remaining medical evidence of record is similarly insufficient to satisfy appellant's burden. The reports from Drs. Brenner, Chun, Helmer, Jacobson, Kong, Mitchell, Moll and Parks are of diminished probative medical value as none of these reports contained an opinion on the causal relationship between appellant's condition and identified factors of his employment. As noted above, reports lacking such an opinion are of diminished probative value.¹² As none of

⁹ Counsel for the appellant also argued the hearing representative erred by not "mention[ing] that the 'underlying conditions' relevant here [were] two previous (the Office approved) work injuries to the claimant's upper and lower back." This claim is not for a consequential injury or for recurrence of other injuries. This claim is an occupational injury claim. Appellant can file a claim for those contentions with the Office, but they are not before the Board at this time.

¹⁰ See *Mary E. Marshall*, 56 ECAB 420 (2005) (medical reports that do not contain rationale on causal relationship have little probative value).

¹¹ *Froilan Negrón Marrero*, 33 ECAB 796 (1982).

¹² See *supra* note 10.

the reports from these physicians proffered an opinion on the causal relationship between appellant's condition and identified factors of his employment, they are of diminished probative value and are insufficient to satisfy his burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.¹³ The Board has held that the fact that a condition manifests itself or worsens during a period of employment¹⁴ or that work activities produce symptoms revelatory of an underlying condition¹⁵ does not raise an inference of causal relationship between a claimed condition and employment factors.

Appellant also submitted reports from a certified physician's assistant and physical therapists. These reports are of no probative value because physicians' assistants and physical therapists do not constitute physicians' under the Act and thus their reports do not constitute medical evidence.¹⁶

Appellant's attorney argued that the Office's decision improperly placed the weight of the medical evidence on Wikipedia articles about skydiving submitted by the employing establishment. The Board notes that such materials are of no evidentiary value as the underlying issue here is a medical issue and these articles are of general application and therefore not determinative of whether a specific condition claimed is related to particular employment factors.¹⁷ At no time did the Office or the hearing representative find that appellant's condition was caused by a skydiving incident.

Appellant's attorney also argued that the Office improperly denied appellant's claim because the evidence of record was sufficient to satisfy his burden of proof. Appellant's CA-2 claim form did not contain a detailed description of any specific employment-related factors he believed that caused or contributed to his condition. Although appellant and his attorney provided a list of his job responsibilities and a narrative of the employment tasks performed during any given day, neither his claim form nor any of the other evidence of record contained specific information of how his employment conditions were responsible for causing his alleged back injury.

An employee cannot simply allege that his employment caused or contributed to his condition and, thus, be entitled to compensation; each employment factor alleged must be supported by probative and reliable evidence.¹⁸ A mere generalized allegation that he sustained

¹³ *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

¹⁴ *E.A.*, 58 ECAB ___ (Docket No. 07-1145, issued September 7, 2007); *Albert C. Haygard*, 11 ECAB 393, 395 (1960).

¹⁵ *D.E.*, 58 ECAB ___ (Docket No. 07-27, issued April 6, 2007); *Fabian Nelson*, 12 ECAB 155, 157 (1960).

¹⁶ See *George H. Clark*, 56 ECAB 162 (2004); *Thomas L. Agee*, 56 ECAB 465 (2005).

¹⁷ *Gloria J. McPherson*, 51 ECAB 441, 448 (2000).

¹⁸ *Roger Williams*, 52 ECAB 468 (2001).

a nonspecific back injury, standing alone, is insufficient to demonstrate or establish that the claimed condition was caused or produced by factors of his employment.¹⁹

As there is no other probative evidence of record, appellant has not met his burden of proof to establish that he sustained a back condition in the performance of duty causally related to his federal employment.

CONCLUSION

The Board finds that appellant has not established that he sustained a back condition in the performance of duty causally related to his federal employment.

ORDER

IT IS HEREBY ORDERED THAT September 10, 2008 decision of the Office of Workers' Compensation Programs' Branch of Hearings and Review is affirmed.

Issued: September 14, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁹ See *Edgar G. Maiscott*, 4 ECAB 558 (1952) (holding appellant's subjective symptoms do not, in the opinion of the Board, constitute evidence of a sufficiently substantial nature).