

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

J.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Valdosta, GA, Employer**

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**Docket No. 09-529
Issued: September 21, 2009**

Appearances:

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

Case Submitted on the record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 16, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated October 29, 2008, which affirmed the denial of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the issue in this case.

ISSUE

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty, causally related to factors of his federal employment.

FACTUAL HISTORY

On July 14, 2006 appellant, then a 45-year-old mail processing clerk, filed an occupational disease claim alleging that he sustained low back pain at work. He noted that he originally injured his back at work on while lifting boxes. Appellant first became aware of the injury and its relation to his work on March 29, 1995. He stopped work on June 7, 2006. The

employing establishment indicated that appellant was last exposed to work conditions alleged to have caused his claimed condition on June 7, 2006. The employing establishment controverted the claim and noted instances in which appellant was disciplined.¹

In a separate statement, appellant noted that he originally injured his back on March 29, 1995, while lifting boxes of mail. He alleged that since the original injury he was unable to do normal things and activities without having pain and discomfort in the lower back, buttocks and legs.

In reports dated August 17, 2006, Dr. Thomas Walsh, a Board-certified orthopedic surgeon and treating physician, noted that on March 29, 1995 appellant was lifting heavy boxes of mail and sustained a back injury. He stated that appellant “had trouble with it ever since.” Dr. Walsh diagnosed L5-S1 degenerative disc disease, disc herniation and spinal stenosis. Dr. Walsh related that appellant “feels that he continues to have problems from the same injury site and that this continues to be problematic from the same injury.” He noted that the primary pain source was from the degenerative disc and secondarily a pinched nerve. Dr. Walsh opined that appellant’s current complaint was still related to the pain he had in 1995, which was related to the lifting injury at work.

In a statement dated August 24, 2006, appellant noted working for the employing establishment since February 7, 1984. His duties included lifting, carrying, stooping, bending over and dragging mail items to various locations. Appellant also indicated that his duties included unloading trucks of mail containers weighing over 700 pounds, using a hand jack as well as manually pulling, pushing and tugging the hand jack to move it from one location to another. He stated that his duties included constant standing, bending and lifting various parcels. Appellant was required to stand and twist using his upper torso for prolonged periods of six to eight hours a day to sort letters and flats.

In a February 16, 2007 decision, the Office denied appellant’s claim. It found that the medical evidence did not establish that the claimed back condition was related to established work-related events.²

On February 23, 2007 appellant requested a hearing, which was held on June 29, 2007. On March 1 and July 30, 2007 his representative submitted arguments and medical evidence.

In a February 20, 2007 report, Dr. Walsh noted that appellant had a degenerative disc at L5-S1 with central disc herniation causing spinal stenosis. He advised that this was consistent with appellant’s complaints of low back pain with radiation into the right posterior thigh. Dr. Walsh noted that appellant denied previous problems with his back until a lifting injury at

¹ The record also reflects that appellant has an accepted claim for a March 29, 1995 back injury under claim File No. xxxxxx409. That claim is not before the Board on the present appeal.

² The Office initially denied the claim on October 26, 2007 finding that it was not timely filed within three years of his injury. On February 1, 2007 an Office hearing representative reversed the Office’s decision finding that appellant claimed an occupational disease that occurred over a number of years and that his claim was timely filed within three years of his last exposure to injurious work factors. The hearing representative directed that the Office address the merits of the claim.

work on March 29, 1995. Appellant related that his pain had become steadily worse since that time. Dr. Walsh explained that appellant's job duties required repetitive bending, lifting and twisting activities as well as prolonged standing or sitting. These activities and positions aggravated his back condition and caused pain. Dr. Walsh recommended an L5-S1 discectomy with fusion, which would likely improve appellant's back and leg pain by about 50 percent and allow him to return to work. He explained that appellant had failed nonsurgical treatment and he did not see any reason to expect that he would improve without surgery. Dr. Walsh advised that appellant had elected not to pursue surgery and was therefore at maximum medical improvement. He indicated that appellant was unable to work due to continued pain. Dr. Walsh stated that appellant "most likely had a preexisting lumbar degenerative disc condition preceding the 1995 event. However, it was aggravated by the lifting at work and continues to be further aggravated as he ages over time. It is now bulging to the extent that it is pinching the nerve and is causing increased pain." In a May 31, 2007 report, Dr. Walsh opined that appellant had 12 percent whole body impairment.

In a September 11, 2007 decision, the Office hearing representative affirmed the February 16, 2007 decision.

In a May 12, 2008 statement, appellant noted that he was unable to return to work as of June 6, 2006 due to military injuries to his right knee, flare-ups of his back pain, loss of hearing in his right ear, as well as hypertension vascular disease and headaches. He had stopped work on June 6, 2006 and did not have a medical report contemporaneous with his work stoppage prior to Dr. Walsh's August 10, 2006 report. Appellant received treatment from chiropractors and private physicians for his back pain at a Veteran's hospital.

On September 10 and 11, 2008 appellant requested reconsideration. In an April 29, 2008 report, Dr. S. Terry Persaud, Board-certified in anesthesiology and pain medicine, noted that he had treated appellant since February 22, 2008 for back and bilateral leg pain. He reviewed appellant's job description, which included lifting up 70 pounds, carrying 45 pounds or more and strenuous physical exertion. Appellant related that his back pain began in 1993 after a lifting accident and that he retired in 2006. Dr. Persaud reviewed Dr. Walsh's February 20, 2007 report, which stated that appellant's preexisting lumbar degenerative disc condition was aggravated by the lifting at work. He concurred with Dr. Walsh's opinion, stating that appellant's condition "appears to be a chronic degenerative process which may have been provoked and intensified with his work[-]related activities. Specifically, in discogenic disease heavy lifting, repetitive bending, pushing, pulling and high[-]impact[-]type activities can potentiate and provoke an underlying discogenic process. This can result in worsening of pain and potentially lead to progression of the degenerative process." Dr. Persaud concluded by noting that "apparently his previous work[-]related activities involved strenuous exertion and this may have exacerbated or aggravated his chronic underlying condition."

By decision dated October 29, 2008, the Office denied modification of its September 11, 2007 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act³ 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.⁴ 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.⁵

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.⁶

ANALYSIS

Appellant alleged that he developed a back condition while performing his work duties as a mail processing clerk. In the instant case, it is not disputed that his duties as a processing clerk included lifting and carrying parcels, moving heavy mail containers in addition to prolonged standing and walking, bending and twisting.

The Office denied appellant's claim for compensation on the grounds that the medical evidence was not sufficient to establish that his back condition was causally related to his employment. The Board notes that the medical evidence submitted by appellant generally supports that his preexisting degenerative disc disease condition was aggravated by his lifting activities at work. On August 17, 2006 Dr. Walsh stated that appellant had a March 29, 1995

³ 5 U.S.C. §§ 8101-8193.

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ *Id.*

injury at work related to lifting heavy boxes of mail and that he “has had trouble with it ever since.” He explained that appellant’s pain was due to a degenerative disc and pinched nerve, which was related to the lifting injury at work. In a February 20, 2007 report, Dr. Walsh noted that appellant had a degenerative disc at L5-S1 with a central disc herniation causing spinal stenosis, which was consistent with his complaints of low back pain. He noted that appellant did not report having any problems until a lifting injury in 1995. Since that time, the job duties appellant performed aggravated his condition and caused pain. While Dr. Walsh opined that appellant likely had preexisting lumbar degenerative disc before the 1995 event, it was further aggravated by lifting at work. Although the Office found this report to be speculative, the Board notes that Dr. Walsh opined that appellant’s condition had been aggravated by his work duties. Dr. Walsh advised that appellant’s job duties required “repetitive bending, lifting and twisting activities as well as prolonged standing or sitting. All of these activities and positions aggravate his condition and cause pain that he cannot tolerate.”

Dr. Persaud concurred with Dr. Walsh in an April 29, 2008 report. Dr. Persaud reviewed Dr. Walsh’s opinion, noted appellant’s history and job and explained that all of these job activities and positions aggravated his condition and caused pain that he could not tolerate. He noted that appellant’s previous work activities involved strenuous exertion and indicated that this could have exacerbated or aggravated his chronic underlying condition.

Although these reports are not sufficiently rationalized to meet appellant’s burden of proof in establishing his claim, they stand uncontroverted in the record and are sufficient to require further development of the case.⁷

Proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter. While the appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.⁸

The Board will remand the case to the Office for referral to an appropriate medical specialist for a rationalized medical opinion regarding whether appellant’s work duties caused or aggravated an occupational low back condition. Following this and any other further development as deemed necessary, the Office shall issue an appropriate merit decision on appellant’s claim.

CONCLUSION

The Board finds that this case is not in posture for decision.

⁷ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

⁸ *John W. Butler*, 39 ECAB 852 (1988).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 29, 2008 is set aside and remanded for further development in accordance with this decision of the Board.

Issued: September 21, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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