

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

E.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kissimmee, FL, Employer**

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**Docket No. 09-1873
Issued: April 9, 2010**

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 July 14, 2009 appellant filed a timely appeal from the June 22, 2009 merit decision of the Office of Workers' Compensation Programs, which denied his new injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty after he returned to regular work on January 3, 2008.

FACTUAL HISTORY

On April 25, 2007 appellant, then a 50-year-old lead sales and service associate, sustained an injury in the performance of duty when he slipped and fell while handling a large express parcel. The Office accepted his claim for temporary aggravation of an old disruption of the right anterior cruciate ligament. It expanded its acceptance to include lumbar strain, right medial meniscus tear, right anterior cruciate ligament tear and cervical strain. Appellant received a schedule award for a three percent impairment of the right lower extremity.

On December 6, 2007 appellant returned to a modified assignment performing sedentary administrative duties. On January 3, 2008 he returned to regular work with a 25-pound lifting restriction.¹

On February 19, 2008 appellant filed a claim alleging that he sustained a recurrence of total disability on February 9, 2008 causally related to his April 25, 2007 employment injury: “Returned to work on 12/06/2007 restricted to sedentary work. On Jan 03, 2008 was changed to restricted 25 lbs. max. weight, until now.” He noted that since he returned to work his back and knee conditions had not improved. “The type of work I do requires standing for prolonged periods of time, carrying, reaching, twisting and bending.” Appellant twice mentioned that he was diagnosed with vertigo on February 7, 2008.

On April 15, 2008 the Office notified appellant that it was converting his recurrence claim to a new injury claim, as he had returned to work and was implicating new employment factors.² In a decision dated May 23, 2008, it denied appellant’s claim on the grounds that the evidence was insufficient to establish that an event occurred on February 9, 2008, and the medical evidence did not explain how conditions such as dizziness, vertigo and an ear infection resulted from any factor of employment on February 9, 2008.

On May 11, 2009 an Office hearing representative set aside the May 23, 2008 decision and remanded the case for further development. The hearing representative found that the Office developed the claim for inappropriate conditions, as appellant was claiming an increase in his back and knee pain. The hearing representative remanded the case for a consolidation of case records and further development of whether appellant sustained a new back or knee injury in the performance of duty on February 9, 2008.

On May 21, 2009 Dr. Marcus Kornberg, the attending orthopedic surgeon, related appellant’s complaints and described his findings on physical examination. He offered the following assessment:

“[Appellant] has documented L3-L4 pathology based on an MRI [magnetic resonance imaging] [scan] of the lumbar spine performed August 30, 2007. He was initially seen by me December 11, 2007 at which time it was determined that the patient suffered aggravation of preexisting lumbar spondylosis. [Appellant] did have lumbar issues prior to the industrial event of April 25, 2007. He was actually seen by Dr. Henningsen in the office for symptoms of back pain with degenerative disease, however, at that time he did not have sciatica. Presently [appellant] has back pain with sciatica secondary to herniation at the L3-L4 level

¹ On December 28, 2007 appellant filed a claim alleging that he sustained a recurrence of disability for work on or about December 21, 2007 causally related to his April 25, 2007 employment injury. The Office denied his recurrence claim and a hearing representative affirmed. OWCP File No. xxxxxx130. On February 19, 2008 appellant filed a claim alleging that he sustained a vertigo injury in the performance of duty on January 31, 2008 when he became very dizzy while lying on a table doing his physical rehabilitation routine. The Board affirmed the Office’s denial of his claim. Docket No. 09-1541 (issued February 5, 2010). OWCP File No. xxxxxx236.

² OWCP File No. xxxxxx130.

on the right. It is my opinion [that he] suffered permanent aggravation of preexisting lumbar spondylosis with resultant lumbar disc herniation.”³

In a decision dated June 22, 2009, the Office denied appellant’s injury claim on the grounds that the medical evidence did not establish that the claimed medical condition resulted from the accepted events. It noted that Dr. Kornberg offered no objective findings to support a material worsening of appellant’s back condition, failed to provide an accurate factual and medical background and failed to provide medical rationale.

On appeal appellant argues that the Office was not diligent in consolidating his cases and either misfiled some of the documents or was not diligent in interpreting the medical evidence. He quoted the hearing representative’s finding that the Office improperly developed the claims for dizziness, vertigo and ear infection and stated that the hearing representative “ordered a remand for those conditions.”

LEGAL PRECEDENT

The Federal Employees’ Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his claim. When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.⁵

Causal relationship is a medical issue,⁶ and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician’s rationalized opinion on whether there is a causal relationship between the claimant’s diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,⁷ must be one of reasonable medical certainty,⁸

³ On December 11, 2007 Dr. Kornberg related the history of appellant’s April 25, 2007 injury and reported that appellant’s lumbar symptoms were related to preexisting lumbar spondylosis. “Patient is assured that he did not suffer significant or limiting injury to his lumbar spine.” On February 12, 2008 he advised appellant that he had symptoms secondary to disc disruption and protrusion, but that he had no herniation, no significant spinal canal or foraminal compromise, and there was no evidence of nerve root compression.

⁴ 5 U.S.C. § 8102(a).

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

⁶ *Mary J. Briggs*, 37 ECAB 578 (1986).

⁷ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁸ *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.⁹

ANALYSIS

Appellant claimed compensation for total disability beginning February 9, 2008, and he attributed this disability to the duties he performed after he returned to regular work on January 3, 2008. The employing establishment confirmed that he returned to regular work that date with a 25-pound lifting restriction. So while appellant's allegation of standing for "prolonged" periods of time, carrying, reaching, twisting and bending is vague and not well specified, it can be accepted that appellant was performing his regular duties with a 25-pound lifting restriction beginning January 3, 2008. The question becomes whether these duties caused an injury that disabled appellant beginning February 9, 2008.

The Board has reviewed appellant's case records,¹⁰ and the only narrative medical opinion he submitted to support this claim was his orthopedic surgeon's May 21, 2009 report. Dr. Kornberg stated that appellant suffered a permanent aggravation of his preexisting lumbar spondylosis with resultant lumbar disc herniation. But he did not say how. As it pertains to appellant's claim, Dr. Kornberg did not attribute the permanent aggravation to any specific duty appellant performed after he returned to regular work on January 3, 2008, and he did not soundly explain how any specific work duty aggravated the preexisting lumbar spondylosis and caused a herniation at L3-4.

Indeed, as the August 30, 2007 MRI scan would appear to establish, appellant had the L3-4 pathology prior to returning to regular work on January 3, 2008. It was on December 11, 2007, according to Dr. Kornberg, that he determined appellant had suffered an aggravation of preexisting lumbar spondylosis. So how these conditions relate to the duties appellant later performed when he returned to regular work on January 3, 2008 remains unaddressed.

Because Dr. Kornberg's opinion did not directly address appellant's claim, it carries no probative value in establishing a disabling low back injury in the performance of duty after appellant returned to regular work on January 3, 2008. This evidence does not establish the critical element of causal relationship. The Board therefore finds that appellant has not met his burden of proof. The Board will affirm the Office's June 22, 2009 decision.

Appellant expresses concern on appeal that the Office was not diligent in consolidating his cases and either misfiled some of the documents or was not diligent in interpreting the medical evidence, but the Board has reviewed all the medical evidence in each of his case records for the period relevant to his claim, and can find no probative medical opinion explaining how his duties on or after January 3, 2008 caused an injury. As for appellant's contention that the hearing representative remanded the case for further development of dizziness, vertigo and ear infection, that was not the case. On May 11, 2009 the hearing representative observed that appellant's current claim related to his back and knee pain, and so it was inappropriate for the

⁹ See *William E. Enright*, 31 ECAB 426, 430 (1980).

¹⁰ OWCP File Nos. xxxxxx139, xxxxxx130 and xxxxxx236.

Office, in its May 23, 2008 decision, to have developed and denied the claim based on other medical conditions. To correct this, the hearing representative remanded the case to allow appellant an opportunity to provide evidence sufficient to support a claim for his back and knee conditions. The Board has separately and very recently reviewed appellant's claim for vertigo and has affirmed the Office's denial of that claim.¹¹

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty after he returned to regular work on January 3, 2008. The medical opinion evidence fails to establish causal relationship.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 9, 2010
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

¹¹ See note 1.