

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

M.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Las Vegas, NV, Employer**

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**Docket No. 09-1315
Issued: January 26, 2010**

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 22, 2009 appellant, through his attorney, filed a timely appeal of the June 23, 2008 and March 25, 2009 merit decisions of the Office of Workers' Compensation Programs finding that he did not sustain an injury while in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that he sustained a back injury while in the performance of duty.

FACTUAL HISTORY

On August 1, 2007 appellant, then a 46-year-old letter carrier, filed an occupational disease claim alleging that on November 11, 2004 he first became aware of his degenerative spine disease and spondylothesis. On March 8, 2007 he first realized that these conditions were caused by his federal employment. Appellant's work required driving, standing, bending, twisting, walking, lifting up to 70 pounds, pushing equipment and loading and unloading

vehicles. On the reverse of the claim form, the employing establishment indicated that his last exposure to conditions alleged to have caused his injuries was on December 3, 2006. In an August 1, 2007 narrative statement, appellant related that on November 11, 2004 he experienced extreme pain in his back and legs. He fell down three times on that date. Appellant stated that Dr. John S. Thalgott, an attending Board-certified orthopedic surgeon, found him permanently and totally disabled.

In an August 16, 2007 medical report, Dr. Thalgott noted appellant's back and leg pain and his work duties as a letter carrier for 19 years. Appellant advised him that his work duties precipitated and aggravated his current complaints and rendered him totally disabled for work.

In an October 12, 2007 letter, the Office notified appellant that the evidence submitted was insufficient to establish his claim. It requested additional factual and medical evidence.

In reports dated March 8 and 13, 2007, Dr. Thalgott advised that appellant had a degenerative lumbar spine, spondylothesis and radiculopathy. Appellant also experienced numbness and tingling into his lower extremities. Dr. Thalgott stated that appellant's conditions commenced approximately two years prior. He opined that appellant was permanently and totally disabled from performing his letter carrier duties due to severe and chronic low back pain.

Diagnostic test reports, dated December 13, 2006 to September 6, 2007, were obtained by Dr. Saul Ruben and Dr. Aanshu A. Shah, Board-certified radiologists, and David L. Ginsburg, a Board-certified neurologist. The studies noted that appellant sustained Grade 1 anterior spondylolisthesis at L5-S1 secondary to bilateral spondylolysis, disc protrusions at L5-S1, L4-5, L3-4, L1-2 and an extruded disc at T11-12. Appellant also sustained bilateral L5 radiculopathies and chronic denervation with evidence of active and chronic denervation. He had normal thoracic kyphosis with multilevel thoracic spondylosis, prominent disc protrusion/extrusion and minimal annular bulging at T6-7 and T7-8.

In a January 5, 2007 report, Dr. Michael Fishell, a Board-certified anesthesiologist, advised that appellant sustained lumbar vertebral degeneration, disc protrusions, radiculopathy and spondylolisthesis at L5. His conditions commenced in September 2006. Dr. Fishell opined that appellant was unable to work due to his back and leg pain. In a report dated January 16, 2007, he diagnosed lumbar discogenic disruption with radiculopathy. On January 16, 2007 Dr. Fishell advised that appellant experienced approximately a 20 to 30 percent reduction in his usual left lower extremity discomfort following a selective nerve root block that was performed on that date. In a February 6, 2007 report, he advised that appellant continued to experience thoracic and lumbar spondylosis with elements of facet arthropathy, disc degeneration and spondylolisthesis. Dr. Fishell had possible compression fractures. Appellant was treated with a transforaminal steroid epidural injection. In a February 6, 2007 treatment note, Dr. Fishell advised that appellant was an unlikely candidate for further aggressive physical work requiring use of his vertebral column. He stated that such activity would likely be disastrous for appellant resulting in disability sooner rather than later.

An October 10, 2007 report noted appellant's pain level and ability to fall asleep easier after taking pain medication. Unsigned reports addressed his back treatment from July 17 to September 13, 2007.

By decision dated November 29, 2007, the Office denied appellant's claim, finding the medical evidence insufficient to establish that he sustained a back condition causally related to his work-related duties.

By letter dated December 20, 2007, appellant, through counsel, requested a telephonic hearing before an Office hearing representative.

In a June 23, 2008 decision, an Office hearing representative affirmed the November 29, 2007 decision, finding the medical evidence insufficient to establish that appellant sustained a back condition causally related to the accepted work duties.

In a December 21, 2008 letter, appellant, through counsel, requested reconsideration of the June 23, 2008 decision.

In a July 17, 2008 report, Dr. William S. Muir, a Board-certified orthopedic surgeon, advised that appellant was disabled for work due to chronic low back pain. Appellant had disc protrusions at multiple levels and symptomatic spondylolisthesis at L5-S1. Dr. Muir stated that appellant's chronic low back pain was related to chronic stress that was placed on his back due to working as a mail carrier for many years. He stated that lifting of heavy trays of mail above chest height from a delivery vehicle put significant stress on appellant's low back. Dr. Muir further stated that loading additional heavy trays of packages, bundles and advertisements into the back of the vehicle involved pushing, pulling and bending often with the outreached body which also put an extreme amount of stress on appellant's lower back area. He opined that appellant's complaints, physical examination findings and magnetic resonance imaging (MRI) scans all supported a causal relationship between his employment as a mailman and his present low back disability.

By decision dated March 25, 2009, the Office denied modification of the June 23, 2008 decision. Appellant failed to submit sufficient rationalized medical evidence to establish that he sustained a back condition causally related to the his employment.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his 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.² These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *See Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

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 a causal relationship 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.⁴ Neither the fact that appellant's condition became apparent during a period of employment, nor his belief that the condition was caused by his employment, is sufficient to establish a causal relationship.⁵

ANALYSIS

The Board finds that the case is not in posture for decision as to whether appellant sustained a back condition while in the performance of duty. Appellant attributed his back conditions to performing his work duties as a letter carrier. The Office accepted that his duties as a letter carrier included driving, standing, bending, twisting, walking, lifting up to 70 pounds, pushing equipment and loading and unloading a vehicle while performing his work duties. It denied appellant's claim for a back injury on the grounds that causal relationship was not established. The Board finds, however, that he submitted medical evidence which generally supports that he sustained due to the established work-related duties and has thus established a *prima facie* case.

Dr. Muir's July 17, 2008 report advised that appellant was disabled for work due to chronic low back pain. He stated that appellant sustained disc protrusions at multiple levels and symptomatic spondylolisthesis at L5-S1. Dr. Muir further stated that appellant's chronic low back pain was related to chronic stress that was placed on his back due to working as a mail carrier for many years. He explained that lifting heavy trays of mail above chest height from a delivery vehicle put significant stress on appellant's low back. Dr. Muir also explained that loading additional heavy trays of packages, bundles and advertisements into the back of the vehicle involved pushing, pulling and bending often with the outreached body which also put an extreme amount of stress on appellant's lower back area. He opined that appellant's complaints, physical examination findings and MRI scans all supported a causal relationship between his employment as a mailman and his present low back disability. Although the Office found that Dr. Muir's opinion was not based on any examination findings or a review of appellant's medical

⁴ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

⁵ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

background, the Board notes that he opined that appellant's lumbar conditions were caused by the established work-related duties.

Although Dr. Muir's opinion is not sufficiently rationalized to carry appellant's burden of proof in establishing his claim, it stands uncontroverted in the record and is sufficient to require further development of the case by the Office.⁶ Proceedings under the Act are not adversary in nature nor is the Office a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. The Office has the obligation to see that justice is done.⁷ In view of the noted medical evidence, it should have referred the matter to an appropriate medical specialist to determine whether appellant may have developed a lumbar condition as a result of the established employment duties.

Therefore, the Board finds that the case will be remanded to the Office for preparation of a statement of accepted facts concerning appellant's working conditions and referral of the matter to an appropriate medical specialist, consistent with Office procedures, to determine whether he may have developed a lumbar condition as a result of performing his employment duties. 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 as to whether appellant sustained a back injury while in the performance of duty.

⁶ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

⁷ *Jimmy A. Hammons*, 51 ECAB 219 (1999); *Marco A. Padilla*, 51 ECAB 202 (1999); *John W. Butler*, 39 ECAB 852 (1988).

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2009 and June 23, 2008 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further development in accordance with this decision of the Board.

Issued: January 26, 2010
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