United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 09-1711**
	)	**Issued: March 9, 2010**
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, Employer	)	

Appearances:
Appellant, pro se
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 June 15, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' March 20, 2009 merit decision, denying his traumatic injury claim and the May 18, 2009 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant sustained a traumatic injury to his back on November 12, 2008; and (2) whether the Office properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 9, 2008 appellant, a 38-year-old letter carrier, filed a traumatic injury claim alleging that he sustained a lower back injury on November 12, 2008. He stated that, while delivering mail with a bag on his shoulder, he "felt severe pain in his lower back."

Appellant submitted a November 12, 2008 emergency room report, signed by Yolanda A. Acklin, an advanced nurse practitioner. The report reflected a diagnosis of "muscle spasm, back." Appellant stated that his current symptoms began on November 12, 2008, but that the condition started with an injury in 2006.

The record contains an October 10, 2008 report from Dr. Robert P. Margolis, a Board-certified internist and neurologist, noting that he examined appellant on August 28, 2008. In a January 8, 2009 attending physician's report, Dr. Margolis diagnosed "back pain" and noted that the date of injury was November 12, 2008. Dr. Margolis indicated by placing a checkmark in the "yes" box that the diagnosed condition was caused or aggravated by employment activities. He stated that he first examined appellant on January 31, 2008.

On January 28, 2009 Dr. Barry Feinberg, a Board-certified anesthesiologist, prescribed physical therapy for appellant's lower back pain. He diagnosed lumbosacral and thoracic spondylosis; lumbago; and sacroiliitis. In a January 30, 2009 request for authorization for physical therapy, Dr. Feinberg reiterated his diagnoses and identified the date of injury as November 12, 2008.

In a February 9, 2009 letter, the Office informed appellant that although the evidence established that the incident had occurred as alleged, namely that he had delivered mail on November 12, 2008, the evidence failed to establish that he had sustained a traumatic injury on that date. It advised him to submit a physician's report with a diagnosis and an explanation as to how his diagnosed condition was causally related to the accepted work-related incident. The Office asked appellant to answer clarifying questions regarding the circumstances of the alleged injury. Noting that he had a previous claim, which was accepted on October 29, 2006 for lumbar sprain, the Office informed him that he could file a Form CA-2a if he believed that his current condition was a recurrence of the 2006 injury.

On February 17, 2009 appellant indicated that he walked approximately one block, carrying a high volume of mail (approximately 35 pounds), on November 12, 2008. He stated, "I've had different types of pain, but I've never felt the pain that I felt on this day 11-12-2008." Appellant reported that he went to the emergency room because he was "in so much pain."

In a February 20, 2009 report, Dr. Feinberg diagnosed lumbar spondylosis, exacerbated by work-related injury, sacroiliitis and low back syndrome. Examination findings included positive Gaenslen's maneuver on the left with sacroiliac compression. Femoral strength test and Spurling's maneuver were positive on the left. Gluteal trigger points on the left were noted. Increased lumbar par vertebral muscle trigger points were noted, with increased myofascial tone. Dr. Feinberg stated that appellant's underlying problem began in August 2006 as a result of an injury at work, when he was attacked by a dog and fell on his left side. He indicated, however, that work-related activities, especially walking his mail route, worsened his pain. Dr. Feinberg stated that the most recent exacerbation occurred on November 12, 2008.

By decision dated March 20, 2009, the Office denied appellant's claim on the grounds that the evidence of record was insufficient to establish that the claimed medical condition was caused by the established work-related event. It noted that Dr. Feinberg did not identify the

pathology which supported a change at any specific level of appellant's spine, as a result of walking his mail route on November 12, 2008.

On March 26, 2009 appellant requested reconsideration. He submitted a copy of Dr. Feinberg's February 20, 2009 report, as well as authorization request forms and an authorization to release information to his union representative.

By decision dated May 18, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act[1] provides for payment of compensation for disability or death of an employee, resulting from personal injury sustained while in the performance of duty.[2] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[3]

An employee seeking benefits under the Act has the burden of proof to establish 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 or specific condition for which compensation is claimed is causally related to the employment injury.[4] When an employee claims that he sustained a traumatic injury in the performance of duty, he must establish the "fact of injury," consisting of two components which must be considered in conjunction with one another. The first is whether the employee actually experienced the incident that is alleged to have occurred at the time, place and in the manner alleged. The second is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[5]

An award of compensation may not be based on appellant's belief of causal relationship.[6] Neither, the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or

[1] 5 U.S.C. §§ 8101-8193.

[2] *Id*. at § 8102(a).

[3] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

[4] *Robert Broome*, 55 ECAB 339 (2004).

[5] *See also Tracey P. Spillane*, 54 ECAB 608 (2003). *Deborah L. Beatty*, 54 ECAB 340 (2003); *Betty J. Smith*, 54 ECAB 174 (2002). The term "injury" as defined by the Act, refers to a disease proximately caused by the employment. 5 U.S.C. § 8101(5). *See* 20 C.F.R. § 10.5(q), (ee).

[6] *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

incidents, is sufficient to establish a causal relationship.[7] Simple exposure to a workplace hazard does not constitute a work-related injury entitling an employee to medical treatment under the Act.[8]

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 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 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 established incident or factor of employment.[9]

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision as to whether appellant sustained an injury in the performance of duty.

An employee who claims benefits under the Act has the burden of establishing the essential elements of his claim. The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.[10] However, it is well established that, proceedings under the Act are not adversarial in nature and, while the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[11]

The Office accepted that the incident occurred as alleged, but found that there was no medical evidence that provided a diagnosis that could be connected to that incident. The Board finds, however, that the medical evidence of record supports that appellant sustained a work-related injury on November 12, 2008.

The November 12, 2008 emergency room report reflects that appellant sought treatment for severe muscle spasms on that date, when his symptoms began. As the report was signed by a

[7] *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[8] 20 C.F.R. § 10.303(a).

[9] *John W. Montoya*, 54 ECAB 306 (2003).

[10] *See Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); *see also Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

[11] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard*, *supra* note 10; *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

nurse practitioner, it does not constitute probative medical evidence.[12] However, it is factually consistent with appellant's claim that he was injured on that date.

Dr. Margolis' January 8, 2009 report also supports appellant's claim. His opinion that appellant's back condition was caused or aggravated by employment factors is not supported by rationale and is, therefore, of diminished probative value.[13] Dr. Margolis' statement, however, that the date of injury was November 12, 2008, is consistent with appellant's allegations that his condition was exacerbated by the accepted employment event. The Board notes that Dr. Margolis had been treating appellant for 10 months at the time of the accepted incident and, therefore, would have been familiar with his medical condition.

Dr. Feinberg diagnosed lumbar spondylosis, exacerbated by work-related injury; sacroiliitis; and low back syndrome. He stated that appellant's underlying problem began in August 2006 as a result of an injury at work, when he was attacked by a dog and fell on his left side. Appellant indicated, however, that work-related activities, especially walking his mail route, worsened his pain. Dr. Feinberg stated that the most recent exacerbation occurred on November 12, 2008. He did not fully describe the mechanism whereby appellant aggravated his back condition, but he provided an opinion, based on examination findings and an accurate factual and medical background, that he sustained an aggravation of his preexisting back condition on November 12, 2008.

The Board notes that, while none of the reports of appellant's attending physicians is completely rationalized, they are consistent in indicating that he sustained an employment-related injury to his lower back and are not contradicted by any substantial medical or factual evidence of record. While the reports are not sufficient to meet his burden of proof to establish his claim, they raise an uncontroverted inference between his claimed condition and the accepted employment incident and are sufficient to require the Office to further develop the medical evidence and the case record.[14] On remand, the Office shall obtain a rationalized opinion from a qualified physician as to whether appellant's current condition is causally related to the accepted incident and shall issue an appropriate decision in order to protect his rights of appeal.

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether appellant sustained a traumatic injury to his back in the performance of duty on November 12, 2008.

[12] A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as "physician" as defined in 5 U.S.C. § 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law." *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[13] The Board has previously found that a report that addresses causal relationship with a checkmark, without a medical rationale explaining how the work event caused the alleged injury, is of diminished probative value and is insufficient to establish causal relationship. *See Calvin E. King, Jr.*, 51 ECAB 394 (2000); *see also Frederick E. Howard, Jr.*, 41 ECAB 843 (1990).

[14] *See Virginia Richard, supra* note 10; *see also Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.[15]

Issued: March 9, 2010
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

[15] In light of the Board's ruling on the first issue, the second issue is moot.