

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

G.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Freehold, NJ, Employer**

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**Docket No. 09-1768
Issued: May 17, 2010**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 1, 2009 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated May 1, 2009 finding that he did not sustain a back injury causally related to his federal employment. 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 has met his burden of proof to establish that he sustained a back injury.

FACTUAL HISTORY

This case has previously been before the Board. On January 24, 2004 appellant, then a 51-year-old letter carrier, filed a notice of traumatic injury claim alleging that a Rottweiler broke from a chain and ran at him, biting his right lower arm. Dr. Michael Gartner, a Board-certified plastic surgeon, examined appellant on January 24, 2004 and diagnosed a large laceration of the right forearm. Appellant returned to light-duty work four hours a day on February 26, 2004.

Dr. Robert H. Beam, a chiropractor, examined appellant on March 2, 2004 and reported that appellant slipped on ice in a street when the dog attacked him landing on his right hand and arm and then hitting his head and neck on the street. Appellant reported pain in his right arm, neck and back. Dr. Beam diagnosed cervical subluxations at C3-7 on x-ray. He also diagnosed cervical sprain/strain and thoracic sprain/strain which he attributed to appellant's work-related accident. The Office accepted appellant's claim for right forearm laceration and right hand/wrist contusion on May 4, 2004.

Appellant filed a recurrence of disability claim on October 27, 2004 alleging that on October 9, 2004 he sustained pain in the right wrist and lower back. On the reverse of the form, appellant's supervisor indicated that appellant returned to light-duty work on February 12 and worked until April 17, 2004. He resumed regular full-time duty on March 1, 2004.

Appellant filed an occupational disease claim on August 24, 2005 alleging that he developed a low back condition with pain into the legs due to his duties as a letter carrier. The Office requested additional factual and medical evidence from appellant by letter dated September 28, 2005.

In a letter dated September 21, 2005, appellant's attorney requested authorization for low back surgery. On January 8, 2006 Dr. Bruce R. Rosenblum, a Board-certified neurosurgeon, noted appellant's history of a dog bite in January 2004. The dog jumped on the front of appellant's body "striking him onto his back wherein [sic] he fell on the ground." Dr. Rosenblum stated that prior to the January 2004 injury appellant had experienced low back pain with radiation down the left leg. Two months after the injury appellant's back condition worsened and he developed weakness in the left leg. Dr. Rosenblum found that a lumbar magnetic resonance imaging (MRI) scan was consistent with a central L3-4 disc herniation and left lateralizing L2-3 disc herniation. On October 14, 2005 appellant underwent left L2-3, L3-4 and L4-5 hemidecompression and L3-4 microlumbar discectomy/decompression. Dr. Rosenblum opined that appellant had an exacerbation of his preexisting lumbar spine syndrome as a result of the January 2004 work injury. On March 3, 2006 appellant's attorney requested that the Office accept his lumbar condition and surgery.

By decision dated September 22, 2005, the Office denied appellant's recurrence of disability claim.

Appellant, through his attorney, requested an oral hearing. He withdrew this request at the hearing on March 2, 2006.

Appellant responded to the Office's request for information in his occupational disease claim on November 9, 2005. He stated that he had experienced low back pain for more than 10 years and that his physicians had attributed his condition to his employment activities. Appellant noted his January 24, 2004 employment injury and stated that he paid little attention to his back until he returned to work, at which point he felt his back condition had worsened. He attributed his back condition to years of lifting, bending, walking, twisting, climbing and carrying a heavy bag. The January 2004 dog attack added to his low back pain which had become constant. Appellant submitted medical records dated October 14, 2005 from Dr. Rosenblum describing the January 2004 work incident and back surgery.

By decision dated January 25, 2006, the Office denied appellant's occupational disease claim. Appellant's attorney requested an oral hearing on January 30, 2006.

On February 27, 2006 Dr. Robert Dennis, a Board-certified orthopedic surgeon, stated that appellant was attacked and knocked to the ground on January 24, 2004 by a dog. Appellant reported an exacerbation of his preexisting low back pain following this incident. Dr. Dennis stated that appellant had a history of degenerative disc disease of the cervical and lumbar spine and herniated discs at L3-4 and L4-5. He reviewed the medical reports and performed a physical examination. Dr. Dennis stated that appellant did not realize at the time of the dog bite that he had also sustained an injury to his back. He opined that the dog bite played a role in aggravating appellant's back syndrome. Dr. Dennis concluded: "It is not too clear, but nonetheless it is probable that the event worsened his back condition, at least to some degree, and precipitated resumption of care of his lumbar spine (four months later) which continued up until the time he had surgery in October of 2005. The surgery was, at least in part, related to injuries sustained on January 24, 2004. Certainly I acknowledge that preexisting conditions and prior confirmation of herniated discs, at least at one of the levels involved in the subsequent surgery."

Appellant testified on May 9, 2006 regarding his occupational disease claim. He first experienced back pain in 1991 or 1992 when he was bending and lifting parcels. Appellant stated that his back was not bothering him on January 24, 2004 as he had been exercising and lost some weight. He described the January 24, 2004 incident, stating that he felt the dogs presence, turned, began to run and slipped flat on the ground banging his head. Appellant then struggled with the dog and eventually kicked him off. He stated that after he returned to work his back was not too bad until April 2004.

By decision dated June 2, 2006, the Office found that appellant's back condition and surgery was not related to the 2004 injury.

Appellant, through his attorney, requested an oral hearing.

In a July 21, 2006 decision, the Office hearing representative denied appellant's occupational disease claim finding that all the medical evidence attributed appellant's back condition to his January 24, 2004 dog bite.

The Branch of Hearings and Review found that the traumatic injury case was not in posture for a decision on August 4, 2006 and remanded appellant's claim for additional development.

In a letter dated August 17, 2006, the Office requested additional factual and medical evidence in support of his traumatic claim for a back injury. A police report of January 24, 2004 included appellant's description of the incident that day. The dog broke from a chain, jumped on top of appellant and knocked him to the ground. While appellant was on the ground, the dog approached his throat. When appellant raised his right arm protectively, the dog bit him. He submitted a statement that on January 24, 2004 while delivering mail a Rottweiler broke from a chain and charged him. Appellant tried to escape, but slipped on ice and fell breaking his fall with his right hand, but landing on his back and head. The dog charged toward appellant's neck and appellant raised his right arm. He stated, "As I lay flat on my back, the dog attacked my

right forearm and yanked and shook me while his teeth were clamped on my arm.” Appellant stated that he did not immediately report his back injury because the shock and pain of his arm injury was paramount and due to the medication he received at the hospital and at home for his arm pain. He noted that it was not until he returned to work that the “full impact” of his back injury became apparent.

On September 25, 2006 an Office medical adviser found that, although the trauma appellant sustained could be sufficient to cause an aggravation of his prior back problems, the symptoms of any aggravation should have appeared within less than three months.

By decision dated October 3, 2006, the Office denied appellant’s back injury.

Appellant, through his attorney, requested an oral hearing on October 10, 2006. In a September 12, 2005 report, Dr. Rosenblum diagnosed lumbar radiculopathy exacerbated by traumatic injury. Appellant testified at the oral hearing on February 6, 2007 and further described his January 2004 employment injury. He stayed in bed for 10 days and continued on painkillers. Appellant first noticed back pain in March 2004 when he returned to light-duty work.

By decision dated April 20, 2007, the hearing representative found that appellant had not submitted sufficient medical opinion evidence to establish that the accepted employment incident resulted in an aggravation of his underlying back condition necessitating surgery.

Appellant requested reconsideration on June 18, 2007.

In a report dated May 20, 2007, Dr. Martin Riss, an osteopath, noted appellant’s history of injury on January 24, 2004. He also stated that appellant returned to work as a carrier further aggravating his back condition and that in March 2004 appellant complained of low back pain. Dr. Riss opined, “It is within the bounds of reasonable medical probability that the fall that occurred on the date of the dog bite aggravated the petitioner’s back condition and was further aggravated after he returned to work as a letter carrier.” He further opined that appellant’s low back surgery was related to the January 24, 2004 injury as well as appellant’s return to work as a letter carrier.

By decision dated July 23, 2007, the Office declined modification of its prior decisions.

The Office denied appellant’s request for reconsideration in his occupational disease claim on August 17, 2007.

Appellant requested review by the Board of the Office’s July 23, 2007 decision; but in an order dated March 14, 2008, the Board remanded the case to the Office to combine appellant’s back claims and issue a merit decision.¹ In a decision dated April 2, 2008, the Office reissued the July 23, 2007 decision. Appellant appealed this decision to the Board. In an order dated

¹ Docket No. 07-2444 (issued March 14, 2008).

April 1, 2009, the Board noted that the Office failed to properly consider all the evidence in the combined records and again remanded the case to the Office for an appropriate merit decision.²

By decision dated May 1, 2009, the Office reviewed the merits of appellant's claim and found that the medical evidence was not sufficient to support his claim for a back injury.

On appeal appellant's attorney alleged that appellant submitted sufficient medical evidence to establish that he sustained a low back injury on January 24, 2004 when he was bitten by a dog resulting in the need for surgery. He further alleged that appellant's letter carrier duties aggravated his low back condition.

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. 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.⁴

As part of an employee's burden of proof, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, establishing causal relation. The question of whether there is a causal relationship is medical in nature, and generally, can be established only by medical evidence. This medical opinion must be based upon a complete factual and medical background with an accurate history of appellant's employment injury. The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁵

The Act provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁶ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the

² Docket No. 08-1846 (issued April 1, 2009).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Anthony P. Silva*, 55 ECAB 179, 180 (2003).

⁵ *James Mack*, 43 ECAB 321, 328-29 (1991).

⁶ 5 U.S.C. §§ 8101-8193, 8123.

Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁷

ANALYSIS

Appellant had a preexisting back condition with herniated discs which he first became aware of in 1991. On January 24, 2004 he was bitten by a dog on the right forearm. The Office accepted appellant's claim for the dog bite injury to his arm and appellant returned to part-time work in February 2004. Thereafter, appellant sought treatment for his back in March 2004 and informed the Office that he had fallen on his back during the dog attack. He requested that his traumatic injury claim be accepted for an aggravation of his back condition and resulting surgery. Appellant also filed an occupational disease claim alleging that his ongoing employment duties contributed to his back condition.

In a report dated January 8, 2006, Dr. Rosenblum, a Board-certified neurosurgeon, opined that appellant sustained an exacerbation of his preexisting lumbar spine syndrome as a result of the January 2004 work injury. Dr. Dennis, a Board-certified orthopedic surgeon, reported on February 27, 2006 that it was probable that the January 24, 2004 incident worsened appellant's preexisting back condition. Dr. Riss, an osteopath, completed a report on May 20, 2007 and described appellant's history of injury on January 24, 2004. He noted that appellant's return to work as a carrier further aggravated his back. Dr. Riss opined, "It is within the bounds of reasonable medical probability that the fall that occurred on the date of the dog bite aggravated the petitioner's back condition and was further aggravated after he returned to work as a letter carrier."

An Office medical adviser opined on September 25, 2006 that, although the trauma appellant sustained on January 24, 2004 could be sufficient to cause an aggravation of his prior back problems, the symptoms of such aggravation would have appeared within less than three months following the incident. He negated causal relation.

The Board finds that there is an unresolved conflict of medical opinion evidence between appellant's physicians who support a causal relationship between his January 24, 2004 fall and the aggravation of his underlying back condition and the district medical adviser who negated causal relation. On remand the Office should develop the evidence by obtaining any medical records and diagnostic studies of appellant's preexisting back treatment. It should provide a statement of accepted facts, to an appropriate Board-certified physician to determine whether the January 2004 employment incident resulted in any aggravation of his preexisting back condition and if so, the nature of such aggravation and whether it contributed to the need for surgery. After such other development as the Office deems necessary, it should issue a merit decision on his claim.

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict of medical opinion evidence.

⁷ 20 C.F.R. § 10.321.

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2009 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: May 17, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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