

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

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**C.K., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Painesville, OH, Employer**

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**Docket No. 10-369  
Issued: October 18, 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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 23, 2009 appellant filed a timely appeal from an October 23, 2009 merit decision of the Office of Workers' Compensation Programs that denied her claim. 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 met her burden of proof to establish that she has a back condition that was caused or aggravated by factors of her federal employment. On appeal her attorney asserts that the Office decisions are contrary to fact and law.

**FACTUAL HISTORY**

On July 12, 2007 appellant, then a 54-year-old city letter carrier, filed an occupational disease claim alleging that the constant walking and weight bearing of her mail route caused back problems including bulging discs and degenerative disc disease. The case was adjudicated by the Office under file number xxxxxx099, and by decision dated October 2, 2007, the Office denied the claim on the grounds that the medical evidence did not establish that the claimed

medical condition was employment related, noting that appellant was working light duty. Appellant, through her attorney, requested a hearing that was held on February 6, 2008. At the hearing appellant's attorney argued that, as the Office had accepted lumbar radiculopathy under file number xxxxxx604, the two claims should be doubled. Appellant testified that she did not begin limited duty until the summer of 2006, stopped work completely on January 29, 2007 and was on disability retirement. By decision dated March 27, 2008, an Office hearing representative affirmed the October 2, 2007 decision. Appellant filed an appeal with the Board, and in an order dated October 24, 2008, the Board found that the Office hearing representative relied on evidence found in additional Office file numbers that were not contained in the case record before the Board and remanded to the Office to obtain file number xxxxxx604 and for further reconstruction and assemblage deemed necessary, to be followed by a *de novo* decision on the merits of appellant's claim.<sup>1</sup> The law and the facts of the previous Board order are incorporated herein by reference.

Following remand, the Office combined appellant's claims, and in a February 10, 2009 decision, reviewed the combined medical evidence and denied appellant's claim on the grounds that the record did not contain a detailed and definitive medical opinion explaining that her diagnosed back condition was causally related to her employment duties. Appellant, through her attorney, timely requested a hearing, that was held on August 19, 2009. She described her job duties, and her attorney argued that the letter carrier duties and altered gait caused by the accepted foot conditions led to an aggravation of preexisting back conditions. In an October 23, 2009 decision, an Office hearing representative affirmed the February 10, 2009 decision.

The medical evidence relevant to appellant's claimed back condition includes a treatment note dated August 16, 2005 in which Dr. Mark A. Tozzi, a podiatrist, noted appellant's complaint of back pain aggravated by awkward walking. Dr. Tozzi observed an antalgic gait and opined that it appeared that she was developing "flow through" problems causing acute radiculitis and recommended MRI scan. Under Office file number xxxxxx604, on November 4, 2005, the Office accepted lumbar radiculopathy.<sup>2</sup> A November 11, 2005 MRI scan of the lumbar spine demonstrated bulging annuli at L2-3, L3-4 and L4-5 with degenerative facet joint disease present at the lower two disc space levels. On November 17, 2005 Dr. Tozzi reviewed appellant's MRI scan and advised that the bulging discs were the main reason she was having difficulty walking. He referred her to Dr. Jerome B. Yokiell, Board-certified in anesthesiology and pain medicine.

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<sup>1</sup> Docket No. 08-1396 (issued March 27, 2008). The records indicate that under Office file number xxxxxx604 appellant's claim was accepted for left ankle sprain and plantar fasciitis of the right foot. On October 25, 2002 Dr. Mark A. Tozzi, a podiatrist, performed a left ankle stabilization procedure. Under file number xxxxxx979, the Office accepted bilateral heel spurs. Appellant accepted a limited-duty assignment on March 26, 2003. By report dated August 16, 2005, Dr. Tozzi advised that appellant had radiculitis and recommended magnetic resonance imaging (MRI) scan. On November 4, 2005 the Office expanded the xxxxxx604 claim to include lumbar radiculopathy. On September 23, 2006 appellant filed a recurrence claim, stating that she had trouble walking and her pain had increased. By decision dated March 21, 2007, the Office denied appellant's recurrence claim. On July 26, 2007 appellant filed an emotional condition claim and submitted reports dated February 28, 2007 and June 19, 2009 in which Jill H. Mushkat, Ph.D., diagnosed depression and pain disorders.

<sup>2</sup> *Id.*

In a December 13, 2005 report, Dr. Yokiell noted appellant's past medical history including a brain aneurysm and her complaint of worsening back pain with radiation to both lower extremities. He provided findings on physical examination and diagnosed degenerative lumbar disc disease and degenerative lumbar facet disease. Dr. Yokiell performed lumbar epidural steroid injections on February 7 and 14, 2006, and on June 6, 2006 noted appellant's continued complaints of low back and right lower extremity pain. He performed right L3 through S1 lumbar facet injections on June 27, July 11 and 18, 2006. In reports dated September 8, 2006, Dr. Yokiell advised that appellant had chronic back pain due to lumbar degenerative disc disease and lumbar spondylosis that began years previously and stated that appellant would be incapacitated for work possibly one to two days each month. He described her medication regimen and stated that she could perform her regular job duties with restrictions of no climbing and a 10- to 15-pound weight restriction. Dr. Yokiell continued to submit reports, and on December 22, 2006 noted that appellant was having right upper quadrant pain, weight loss, nausea and vomiting and referred her to a urologist. On December 24, 2006 he advised that appellant was unable to carry mail and should case only.

On January 19, 2007 Dr. Yokiell noted appellant's complaint that her medications were not providing relief and that she was having difficulty with limited duty. He diagnosed lumbar disc degeneration and lumbar facet arthrosis, again advised that she could work with restrictions, stating:

"I believe that her current condition is an exacerbation of her previous condition when she was injured at work. [Appellant] has had ongoing problems with her back since that time. The type of work that she has been doing, even the light, limited duty, does tend to aggravate her condition. [Appellant] has had to limit her work activities to a certain number of hours rather than full time and also has had to limit the types of activities she has been doing, not carrying mail but casing mail only, because of this back condition."

In a January 25, 2007 report, Dr. Yokiell advised that appellant had chronic back pain secondary to degenerative disc disease and spondylosis, stating that the condition commenced 25 years previously, "according to patient." He recommended limited duty but advised that she was presently incapacitated for three to six months.

By report dated February 5, 2007, Dr. Tozzi noted that appellant was first seen on June 18, 2002 for an ankle sprain and described his subsequent care including an October 25, 2002 left ankle stabilization procedure and a right endoscopic plantar fasciotomy on January 13, 2003. He opined that appellant's ankle conditions and surgeries caused an altered gait that affected her back adversely resulting in chronic low back pain with radicular symptoms in both legs.

In reports dated February 16, 2007, Dr. Yokiell advised that appellant should remain off work and she had applied for disability retirement. On March 15, 2007 he noted appellant's complaints of increasing back pain that made her work difficult, reiterated the diagnoses, and described her treatment regimen. Dr. Yokiell opined that appellant's condition had become permanent and that she could not return to work in any capacity due to her chronic pain condition. He continued to submit reports describing her condition and advising that she could

not work. On September 26, 2007 Dr. Yokiell further diagnosed cervical radiculopathy and on April 9, 2008 diagnosed lumbar radiculopathy. In reports dated July 16, 2008 to June 29, 2009, he reiterated his findings and conclusions.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>3</sup> 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 asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.<sup>4</sup>

Office regulations define the term "occupational disease or illness" as a condition produced by the work environment over a period longer than a single workday or shift."<sup>5</sup> 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 diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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.<sup>6</sup>

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>7</sup> Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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.<sup>8</sup> Neither the mere fact

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Roy L. Humphrey*, 57 ECAB 238 (2005).

<sup>5</sup> 20 C.F.R. § 10.5(ee).

<sup>6</sup> *Roy L. Humphrey*, *supra* note 4.

<sup>7</sup> *D.G.*, 59 ECAB 734 (2008).

<sup>8</sup> *Id.*

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 incidents is sufficient to establish causal relationship.<sup>9</sup>

### ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish that the diagnosed degenerative disc disease of the lumbar spine or other lumbar spine condition was causally related to factors of her federal employment. The Board notes that the term physician, as defined under section 8101(2) of the Act, includes podiatrists within the scope of their practice as defined by state law.<sup>10</sup> Ohio law provides that podiatrists may perform services of medical, mechanical and surgical treatment of ailments of the foot, the muscles and tendons of the leg governing the foot, and superficial lesions of the hand other than those associated with trauma. The podiatrist may also treat the local manifestation of systemic disease as they appear in the hand and foot, but the patient must be concurrently referred to a doctor of medicine or doctor of osteopathic medicine and surgery for treatment of the systemic disease itself.<sup>11</sup> Thus, Dr. Tozzi is not qualified as a physician to render an opinion on the subject of a back condition.

An attending pain management specialist, Dr. Yokiel, submitted a number of reports dating from December 13, 2005 to June 29, 2009, noting appellant's complaints of radiating back pain. He diagnosed degenerative lumbar disc disease, degenerative lumbar facet disease, and lumbar spondylosis and noted appellant's report that she had the condition for 25 years. While he advised that appellant's job duties including light or limited work aggravated her condition, and that she could not return to any type work, the physician did not enumerate specific duties or provide an explanation of a mechanism of injury.<sup>12</sup> It is well established that where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for periods of disability related to the aggravation. Where the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working conditions or injuries, such disability is compensable. However, the normal progression of untreated disease cannot be said to constitute "aggravation" of a condition merely because the performance of normal work duties reveal the underlying condition. For the conditions of employment to bring about an aggravation of preexisting disease, the employment must be such as to cause acceleration of the disease or to precipitate disability.<sup>13</sup> A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimant's work exposure could result in a diagnosed condition is not sufficient to meet a claimant's burden of proof.<sup>14</sup>

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<sup>9</sup> *Roy L. Humphrey, supra* note 4.

<sup>10</sup> 5 U.S.C. § 8101(2).

<sup>11</sup> Ohio Admin. Code § 5101:3-7-02 (2005).

<sup>12</sup> *See T.H.*, 59 ECAB 388 (2008).

<sup>13</sup> *A.C.*, 60 ECAB \_\_\_\_ (Docket No. 08-1453, issued November 18, 2008).

<sup>14</sup> *See Beverly A. Spencer*, 55 ECAB 501 (2004).

An award of compensation may not be based on surmise, conjecture, speculation, or appellant's belief of causal relationship.<sup>15</sup> Appellant must submit a physician's report in which the physician reviews those factors of employment identified by him as causing the diagnosed condition and, taking those factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her conclusions. The Board finds that, as Dr. Yokiell did not provide a probative medical opinion with sufficient rationale, appellant has not established that her federal employment caused or aggravated her preexisting degenerative lumbar spine condition.<sup>16</sup>

**CONCLUSION**

The Board finds that appellant did not establish under the instant claim that her diagnosed lumbar spine condition was caused or aggravated by factors of her federal employment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 23, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: October 18, 2010  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>15</sup> *Patricia J. Glenn*, 53 ECAB 159 (2001).

<sup>16</sup> *A.C.*, *supra* note 13.