

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

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**R.W., Appellant**

**and**

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

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**Docket No. 10-382  
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 25, 2009 appellant, through his attorney, filed a timely appeal from July 24 and October 19, 2009 merit decisions of the Office of Workers' Compensation Programs denying his claim for wage-loss compensation. 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 was disabled beginning July 5, 2008 causally related to his May 14, 2008 employment injury.

**FACTUAL HISTORY**

On May 28, 2008 appellant, then a 46-year-old mail handler, filed a claim alleging that he sustained an injury to his back on May 14, 2008 when he was struck from behind by a general purpose container. The Office accepted the claim for a low back contusion. Appellant received continuation of pay from May 21 through July 4, 2008. On July 25, 2008 he filed a claim for compensation beginning July 5, 2008.

By letter dated July 30, 2008, the Office requested that Dr. John E. Carey, an attending Board-certified anesthesiologist, provide an estimate of appellant's return to work date and any continued work restrictions. On August 11, 2008 Dr. Carey advised that he should remain off work pending the results of a magnetic resonance imaging (MRI) scan study of the cervical spine.

On October 3, 2008 the Office informed appellant that he should submit medical evidence supporting that he was disabled beginning July 5, 2008. It also requested medical records addressing his prior nonemployment-related motor vehicle accident.

In a narrative report dated August 11, 2008, received by the Office on November 7, 2008, Dr. Carey evaluated appellant for low back pain radiating into the left posterior calf. He noted that the most recent MRI scan study showed multilevel spondylosis and an L4-5 disc protrusion. Dr. Carey also diagnosed persistent paresthesias of the upper extremity. In a state workers' compensation form dated September 25, 2008, he indicated that he was treating appellant for a work-related condition and referred him to a neurosurgeon for a consultation.

In a work restriction evaluation dated October 29, 2008, Dr. Carey found that appellant could not perform his usual employment due to limitations from a herniated nucleus pulposus (HNP) of the cervical spine and an HNP at L4/5. He opined that he was unable to work until examined by a surgeon.

On February 10, 2009 Dr. Eric W. Scott, a Board-certified neurosurgeon, described appellant's injury as occurring when he was struck from behind by a heavy mail cart resulting in a whiplash injury to his low back and neck. He stated:

"Since that time he has had pain radiating from the back of his neck across the scapular border and down the left arm. He also has frontal headaches. He notes diminished grip strength on the left as well as triceps weakness. He has had numbness and paresthesias in the left hand, particularly the middle finger. He has had exacerbation of a preexisting lumbar injury as well. Notably [appellant] has been involved in three motor vehicle accidents, 1995 and 1997, as well as 2005. He did have an MRI [scan] study of the cervical spine four months ago which indicates some aggravation of a previous disc bulge and spondylostenosis at the C4-5 level, which is now progressed."

Dr. Scott related that the September 17, 2008 MRI scan study showed a C4-5 disc bulge with a more prominent protrusion upon the spinal cord than in a 2005 MRI scan study. He diagnosed preexisting cervical spondylosis mildly aggravated by his work injury, chronic low back pain and left cervical brachial pain of uncertain origin.

By decision dated February 26, 2009, the Office denied appellant's claim for compensation beginning July 5, 2008. It found that the medical evidence was insufficient to show that he was disabled from work due to his accepted employment injury. The Office further indicated that the factual evidence conflicted as appellant initially stated that he was struck from behind by a mail cart but later stated that he was hit from behind by a postcon.

On March 6, 2008 appellant, through his attorney, requested a telephone hearing.

In a report dated September 25, 2008, received by the Office on April 10, 2009, Dr. Carey discussed appellant's complaints of low back pain which radiated into his left lower extremity into the calf. He found that a September 17, 2008 MRI scan study showed progression of a central disc protrusion at C4-5. Dr. Carey provided similar findings in an October 6, 2008 report. On January 29, 2009 he found that appellant could not work until an evaluation of his cervical cord.<sup>1</sup>

In a March 24, 2009 progress report, Dr. Scott related that an electromyogram revealed findings consistent with a mild brachial plexus injury. He diagnosed a cervical disc bulge at C4-5 and C5-6 spondylosis and mild left brachial plexitis following a probable stretch-type injury. Dr. Scott recommended against surgery.

By letter dated March 25, 2009, Dr. Scott informed the Office that he had evaluated appellant regarding treatment for a May 14, 2008 employment injury. He related that, while the initial diagnosis due to the injury was a back contusion, diagnostic studies revealed cervical disc protrusions and cervicobrachial pain. Dr. Scott related, "These are the conditions for which I was evaluating and treating him. I request that you review and update the file to include these diagnoses. This is directly related to the May 14, 2008 injury."

On April 20, 2009 Dr. Carey diagnosed a displacement of lumbar and cervical intervertebral discs without the need for surgery. He recommended lumbar epidural injections.

A telephone hearing was held on March 29, 2009.<sup>2</sup> At the hearing, appellant explained that his statements differed because a general purpose container was also called a postcon by some employees.

By decision dated July 24, 2009, the Office hearing representative affirmed the February 26, 2009 decision. He found that appellant had explained any factual discrepancies and thus accepted that he was struck with a loaded mail container on May 14, 2008. The hearing representative determined, however, that the medical evidence was insufficient to establish that he was disabled beginning July 5, 2008 due to the work incident or establish that it caused or contributed to cervical disc disease or a lumbar disc protrusion.

In a report dated July 29, 2009, Dr. Carey provided a detailed history of his treatment of appellant for motor vehicle accidents in 1995, 1999 and August 2004 and for a work injury on May 14, 2008. When he began treating appellant in 2005 diagnostic studies showed a C4-5 disc extrusion and degenerative changes of the cervical spine and some annular bulging in his lumbar discs. By 2006, following treatment, appellant had minimal symptoms and was managing well.

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<sup>1</sup> Dr. Carey continued to submit state workers' compensation forms.

<sup>2</sup> In a June 9, 2009 progress report, Dr. Carey noted that appellant experienced improvement following lumbar epidurals.

Dr. Carey related that he evaluated appellant on June 4, 2008 for radicular symptoms into the left lower extremity and left upper extremity. He stated:

“[We] found him to have significant muscle spasms and limited range of motion in the lumbar and cervical spine regions with a positive straight leg raise on the left being his only neurologic abnormality. We gave him a diagnosis of lumbosacral sprain/strain with left lower extremity L5 radiculitis and neck pain with sprain/strain injury with left upper extremity radiculitis in the C6-7 distribution.... We took him off work until he was reevaluated again and the MRI scans were reviewed.”

A repeat MRI scan study of the lumbar spine dated July 31, 2008 showed a new L4-5 “posterior central herniation causing effacement of the thecal sac which was a new injury finding on the MRI scan which correlated with the left L5 radicular symptoms in the left lower extremity.” A September 17, 2008 cervical MRI scan study showed a “acute progression of the C4-5 central disc protrusion without any acute impingement....” Dr. Carey stated, “Overall, [appellant] has sustained new injuries related to the accident which occurred on May 14, 2008. He clearly has new MRI [scan] study findings in the lumbar area. At the L4-5 segment, there is a new disc herniation that correlates with left lumbosacral radicular features which are partially improved with epidural therapy.” Dr. Carey advised that appellant should minimize his time operating machinery. He assigned an additional impairment rating for the neck and back due to his May 14, 2008 work injury.

On September 2, 2009 appellant, through his attorney, requested reconsideration. By decision dated October 19, 2009, the Office denied modification of the prior decision. It found that there were inconsistencies in the factual evidence and that Dr. Carey did not explain how the container bumping into appellant’s back caused a disc herniation.

#### **LEGAL PRECEDENT**

The term disability as used in the Federal Employees’ Compensation Act<sup>3</sup> means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.<sup>4</sup> Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.<sup>5</sup> When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.<sup>6</sup> The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which

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<sup>3</sup> 5 U.S.C. §§ 8101-8193; 20 C.F.R. § 10.5(f).

<sup>4</sup> *Paul E. Thams*, 56 ECAB 503 (2005).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

compensation is claimed. To do so would essentially allow employee's to self-certify their disability and entitlement to compensation.<sup>7</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>8</sup> 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.<sup>9</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>10</sup> must be one of reasonable medical certainty<sup>11</sup> explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>12</sup>

Proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.<sup>13</sup>

### **ANALYSIS**

The Office accepted that appellant sustained a low back contusion when he was struck from behind on May 14, 2008 by a general purpose container. The Board notes that, while the Office indicated that he had submitted conflicting statements regarding whether he was struck by a general purpose container or a postcon, he explained at the hearing that both terms were used to describe the same container. The Board found that appellant had explained any factual inconsistencies. He received continuation of pay until July 4, 2008. On July 25, 2008 appellant filed a claim for compensation beginning July 5, 2008.

On August 11, 2008 Dr. Carey discussed appellant's complaints of low back pain radiating into his left lower extremity and paresthesias of the upper extremity. He advised that appellant should remain off work pending diagnostic testing. In an October 29, 2008 work restriction evaluation, Dr. Carey found that he was disabled from employment due to an HNP of the cervical spine and an HNP at L4-5.

On February 10, 2009 Dr. Scott discussed appellant's history of a whiplash injury to his lower back and neck after he was struck from behind by a heavy mail cart. He diagnosed a mild

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<sup>7</sup> *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>8</sup> *John J. Montoya*, 54 ECAB 306 (2003).

<sup>9</sup> *Conrad Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>10</sup> *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>11</sup> *John W. Montoya*, *supra* note 8.

<sup>12</sup> *Judy C. Rogers*, 54 ECAB 693 (2003).

<sup>13</sup> *J.B.*, 60 ECAB \_\_\_\_ (Docket NO. 08-1735, issued January 27, 2009); *Jimmy A. Hammons*, 51 ECAB 219 (1999).

aggravation of preexisting cervical spondylosis due to appellant's employment injury, chronic low back pain and left cervical brachial pain of unknown etiology. On March 25, 2009 Dr. Scott requested that the Office update the claimed conditions to include cervical disc protrusions and cervicobrachial pain.

In a report dated July 29, 2009, Dr. Carey discussed his treatment of appellant in 2005 for the effects of motor vehicle accidents in 1995, 1999 and 2004 and noted that he also treated him for a May 14, 2008 employment injury. He advised that at the end of treatment in 2006 appellant had few symptoms. Dr. Carey examined him on June 4, 2008 and found muscle spasms, a positive straight leg raise and limited cervical and lumbar range of motion. He obtained repeat cervical and lumbar MRI scan studies which he advised showed a new central disc herniation at L4-5 effacing the thecal sac and corresponding to appellant's complaints of left lower radiculopathy. Dr. Carey also found an acute progression of a preexisting disc herniation at C4-5 without acute impingement. He concluded that appellant had sustained new injuries due to his May 14, 2008 employment injury based on the results of MRI scan studies and the physical findings on examination.

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.<sup>14</sup> The Board has reviewed Dr. Carey's reports and notes that he provided a clear opinion that appellant had a new lumbar disc herniation and an aggravation of a preexisting cervical disc herniation due to his May 14, 2008 work injury. He based his diagnosis on the objective findings on the new cervical and lumbar MRI scan studies, obtained shortly after appellant's work injury and the corresponding findings on examination and subjective complaints. Dr. Carey had treated appellant since 2005 and was aware of his history of prior nonemployment-related motor vehicle accidents. His opinion is supportive, unequivocal, bolstered by objective findings and based on a firm diagnosis and an accurate history.

Dr. Carey's findings regarding appellant's cervical condition is also supported by Dr. Scott, who determined that the work injury mildly aggravated preexisting spondylosis. Dr. Carey's opinion lacks only an explanation of why appellant being struck on the back by a general purpose container resulted in a herniated lumbar disc and an aggravation of a preexisting cervical disc herniation. Consequently, while the medical evidence is insufficiently rationalized to meet his burden of proof to establish that he sustained these conditions and resulting disability due to his May 14, 2008 work injury, it raises an undisputed inference of causal relationship sufficient to require further development by the Office.<sup>15</sup> Accordingly, the Board will remand the case to the Office. On remand, the Office should further develop the medical record to determine whether appellant sustained a herniated lumbar disc and an aggravation of a preexisting cervical disc herniation due to his May 14, 2008 employment injury and, if so, any resulting periods of disability. Following this and such further development as the Office deems necessary, it shall issue a *de novo* decision.

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<sup>14</sup> A.A., 59 ECAB 726 (2008); *Phillip L. Barnes*, 55 ECAB 426 (2004).

<sup>15</sup> *Id.*

**CONCLUSION**

The Board finds that the case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 19 and July 24, 2009 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

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