United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 10-587**
	)	**Issued: January 18, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer	)	

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 December 30, 2009 appellant filed a timely appeal from a November 25, 2009 merit decision of the Office of Workers' Compensation Programs. 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 she sustained an injury in the performance of duty, causally related to her employment.

FACTUAL HISTORY

On February 17, 2009 appellant, a 39-year-old mail handler, filed an occupational disease claim (Form CA-2) for herniated discs at the L4 and L5 vertebrae and a disc protrusion at the L5 and S1 vertebrae. She stated that her "neurosurgeon said that the problem was caused over a period of time from lifting heavy items." Appellant first became aware of her condition and that it was caused by her employment on January 13, 2009.

Appellant submitted a document, dated December 1, 1999, that described the employment duties required of a mail handler. The description provided that a mail handler "[l]oads, unloads and moves bulk mail and performs other duties incidental to the movement and processing of mail."

On January 7, 2009 Dr. Howard L. Kahen, a Board-certified diagnostic radiologist, reported that a magnetic resonance imaging (MRI) scan of appellant's lumbar spine revealed a "small to moderate" central disc protrusion at the L4-5 vertebrae "compatible" with a central herniated disc. He also diagnosed a "small central disc protrusion" at the L5-S1 level, "… again compatible with a herniated disc" and "mild facet joint osteoarthritis" in appellant's lower lumbar spine.

Appellant submitted notes signed by a registered nurse.

On January 13, 2009 Dr. Wayne L. Wittenberg, a Board-certified neurologist, presented findings on examination, reviewed appellant's medical history and diagnosed a "left greater than right mild central herniated nucleus pulposus with annular tear" at the L5-S1 level as well as a left "mild" herniated nucleus pulposus with extruded disc cephaled. In his history section, he notes that she "… has a history of low back pain." In an operative note dated January 15, 2009, following laminectomy, Dr. Wittenberg found postoperative diagnoses of left herniated nucleus pulposus and "large extruded disc" at the L4-5 level, as well as herniated nucleus pulposus at the L5-S1 level. In a subsequent note, dated February 16, 2009, he released appellant to work and provided work restrictions.

Dr. Wittenberg issued an addendum to his January 13, 2009 report, dictated and cosigned by a registered nurse who stated:[1]

> "I … shared with [appellant] on that visit that her overall back condition is likely due to her workload. [Appellant] has been working, lifting boxes of letters up to 70 pounds, multiple times per day, in her job at the [employing establishment]. This latest episode of severe lower back pain was exacerbated by sneezing and Dr. Wittenberg feels that there is a 50-50 percent chance after surgery that she will be able to return to a position such as hers with heavy lifting."

By letters dated February 18 and 25, 2009, the employing establishment controverted appellant's claim.

In a February 22, 2009 letter, the employing establishment submitted a report by William F. Stoddard, "SDO." Dr. Stoddard stated:

> "While filling out the paperwork on the 13th, I asked her if there was anything that caused her back to get so much worse that she suddenly required surgery. She

[1] This report was also signed by Dr. Wittenberg and, therefore, qualifies as competent medical opinion evidence because his signature demonstrates the addendum was prepared by a "physician" for purposes of the Federal Employees' Compensation Act. 5 U.S.C. § 8101(2). *But cf D.D.,* 57 ECAB 734 (2006) (medical reports lacking proper identification cannot be considered as probative evidence in support of a claim).

said that while at home she sneezed and the action was enough to aggravate the condition to the point she had to go into her [physician] to seek relief."

In a March 3, 2009 note, appellant described her history of injury, her employment duties and explained how they caused her condition. She stated:

"I work in what the USPS calls SWYB (Scan where you band)…. There are rollers that we have to load big orange sacks of mail onto. They weigh up to 70 lbs in weight. Once they are loaded onto the rollers they are scanned by the Clerks. WE the Mail Handlers then have to push them down the rollers to the appropriate BMC's that they need to be put into. Then we pick the sacks up and place them into the BMC's. This is done from the time we come into work until the time we leave most of the time."

Appellant submitted notes, dated March 13 and April 3, 2009, in which Dr. Wittenberg reported she could return to full-time light-duty work and provided work restrictions.

By letter dated March 20, 2009, the employing establishment contacted Dr. Wittenberg concerning his January 13, 2009 report seeking an opinion concerning whether appellant's condition was solely due to her workload.

On March 21, 2009 appellant described her history of injury and the employment tasks she performed. She stated:

"What finally made me go to the Dr.s was that the lower back was bothering me more than usual…. I noticed this on the night of 12-25-09 into the early morning of 12-26-09

"Then on 12-28-08 I sneezed and when I did I almost fell to my knees. The pain was excruciating. It was then even hard to walk at all. I didn't know what to do and really what it was."

By decision dated April 1, 2009, the Office denied the claim because the evidence of record did not demonstrate that appellant's alleged condition was caused by her employment duties.

Appellant submitted unsigned hospital records that diagnosed sciatica.

By handwritten note, faxed to the employing establishment on April 2, 2009, Dr. Wittenberg stated that, while appellant's work history contributed to her lower back pain, it was not the "primary" cause. He stated that she has a history of lower back pain, but not left lower extremity pain. Dr. Wittenberg stated that appellant's lower back condition began in August 2008 but "worsened" after a "sneezing" incident at home on December 28, 2008.

Appellant submitted notes, dated April 8, 2009, in which Dr. Wittenberg reported she could return to full-time light-duty work and provided work restrictions.

On April 10, 2009 Dr. Kahen presented findings on examination and diagnosed "disc bulging" at the "L5/S1" vertebrae and "mild diffuse bulging of the L3/4 disc."

Appellant continued to submit progress notes, dated from April 8 through May 12, 2009, signed by Dr. Wittenberg.

On April 29, 2009 appellant, through her attorney, requested an oral hearing.

During a hearing conducted on August 13, 2009, at which appellant and her attorney were present, she offered testimony concerning her history of injury and course of treatment.

By decision dated November 25, 2009, the Office affirmed its April 1, 2009 decision because the medical evidence of record did not demonstrate that appellant's condition was caused by the accepted employment factors.

LEGAL PRECEDENT

An employee seeking benefits under the Act[2] has the burden of proof to establish the essential elements of her claim by the weight of the evidence,[3] including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.[4] As part of her burden, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.[5] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[6]

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[7]

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 which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the

[2] 5 U.S.C. §§ 8101-8193.

[3] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[4] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *Id.*; *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

[6] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[7] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.

ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish that employment factors caused a medically diagnosed condition.

Appellant submitted reports from Drs. Kahen and Wittenberg. The reports signed by Dr. Kahen have little probative value regarding the issue of causal relationship because they lack an opinion that explains how the accepted employment factors caused the medically diagnosed condition.[8] Although he diagnosed "disc bulging" at the "L5/S1" vertebrae and "mild diffuse bulging" of the "L3/4 disc," he did not offer any medical explanation regarding causal relationship as to how any of these conditions were caused by the accepted employment factors.

Dr. Wittenberg stated that appellant's "… back condition is likely due to her workload." However, use of the word "likely" indicates that his opinion is speculative and, therefore, of limited probative value.[9] Moreover, the value of Dr. Wittenberg's opinion on causal relationship is significantly undermined by the lack of history, both medical and employment, related in his reports. He noted that appellant had previously experienced back complaints, but he did not offer any detail regarding the development of her back condition. Also while Dr. Wittenberg opined that her employment duties contributed to her current condition, he did not provide a detailed description of her employment duties and how long she had performed these duties. Without adequate history, he was unable to provide a rationalized medical opinion which effectively described how her low back disc conditions were caused by her employment duties. Consequently, this evidence does not establish the required causal relationship.

Appellant also submitted a report from a nurse. 5 U.S.C. § 8101(2) of the Act provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. As nurses, physician's assistants, physical and occupational therapists are not "physicians" as defined by the Act, their opinions regarding diagnosis and causal relationship are of no probative medical value.[10]

An award of compensation may not be based on surmise, conjecture or speculation.[11] Neither the fact that appellant's claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by her employment is sufficient to

[8] *See Mary E. Marshall*, 56 ECAB 420 (2005) (medical reports that do not contain rationale on causal relationship have little probative value).

[9] *Id.*

[10] *See Roy L. Humphrey*, *supra* note 7 at 238 (2005).

[11] *Edgar G. Maiscott,* 4 ECAB 558 (1952).

establish causal relationship.[12] The fact that a condition manifests itself or worsens during a period of employment[13] or that work activities produce symptoms revelatory of an underlying condition[14] does not raise an inference of causal relationship between a claimed condition and accepted employment factors.

Because appellant has not submitted medical opinion evidence that explains how her employment duties caused or aggravated a firmly diagnosed medical condition, the Board finds that she has not established the essential element of causal relationship.

CONCLUSION

The Board finds that appellant has not established that she sustained an injury in the performance of duty, causally related to her employment.

ORDER

IT IS HEREBY ORDERED THAT the November 25, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 18, 2011
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

[12] *D.I.*, 59 ECAB 158 (2007)*; Ruth R. Price,* 16 ECAB 688, 691 (1965).

[13] *E.A.*, 58 ECAB 677 (2007); *Albert C. Haygard*, 11 ECAB 393, 395 (1960).

[14] *D.E.*, 58 ECAB 448 (2007); *Fabian Nelson,* 12 ECAB 155,157 (1960).