

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

L.S., Appellant

and

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

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**Docket No. 11-210
Issued: September 12, 2011**

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, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 1, 2010 appellant, through his attorney, filed a timely appeal from a September 30, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision denying his claim for an employment-related injury. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant met his burden of proof to establish that his back and leg condition is causally related to a December 21, 2009 employment incident, as alleged.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the September 30, 2010 OWCP decision and on appeal, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, appellant's attorney contends that the September 30, 2010 OWCP decision was contrary to fact and law.

FACTUAL HISTORY

On December 21, 2009 appellant, then a 43-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on December 21, 2009 he sustained a leg and back injury while lifting a 70-pound military trunk in the performance of duty. He was released to full-duty work on December 28, 2009 by an emergency room physician. In a December 28, 2009 work excuse note, Dr. Frank P. Matrone, a Board-certified family practitioner, advised appellant to return to work on January 4, 2010.

In a January 1 and 4, 2010 work capacity evaluation report, Dr. Matrone opined that appellant was not capable of performing his usual job due to low back pain and placed restrictions on him until he was evaluated and cleared by a back specialist. In a January 4, 2010 medical report, he reported a history of fibromyalgia and diagnosed persistent low back pain.

In a January 11, 2010 report, Dr. Rajesh Rai, a radiologist, indicated that an x-ray of the lumbar spine revealed no evidence of significant disc disease or joint disease and no spondylolysis or spondylolisthesis.

In a January 11, 2010 report, Dr. Nancy K. Spangler, an internist, diagnosed lumbago upon review of an x-ray of the lumbar spine and noted that there was no definite acute fracture. She advised appellant not to return to work until the next appointment.

On January 22, 2010 Dr. Rai compared radiographs dated January 11, 2010 to a magnetic resonance imaging (MRI) scan of the lumbar spine and diagnosed slight central degeneration and partial annular tear at L5-S1 without evidence for significant spinal stenosis or foraminal stenosis and annular bulging of the L4-5 disc.

In a January 26, 2010 work excuse note, Dr. Spangler advised appellant not to return to work until the next appointment.

In a February 3, 2010 medical report, Dr. Robert Wilson, Board-certified in pain medicine and anesthesiology, diagnosed back and leg pain secondary to L4-5 disc bulge with L5-S1 disc protrusion and administered epidural steroid injection.

By letter dated February 12, 2010, OWCP requested additional factual and medical information from appellant. It allotted appellant 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted a January 26, 2010 report, from Dr. Spangler who diagnosed lumbago and thoracic or lumbosacral neuritis or radiculitis, unspecified. On February 15, 2010 Dr. Spangler reiterated her diagnoses and recommended bilateral electromyograms (EMGs). In a February 10 and 15, 2010 work excuse note, she advised appellant not to return to work until the next appointment.

In a February 19, 2010 progress report, Dr. Wilson reiterated his diagnoses and administered another epidural steroid injection.

Appellant submitted an October 8, 2008 Department of Veterans Affairs rating decision granting him service connection for lumbar myositis, degenerative disc disease at L5-S1 and cervical myositis, small central protrusion of C3-4.

In a May 22, 2008 report, Dr. Manuel R. Prats, a Board-certified radiologist, reviewed an MRI scan of the lumbosacral spine and diagnosed discogenic disease with associated narrowing present at the L5-S1 disc with a small centrally protruded.

On March 1, 2005 Dr. Fernando Zalduondo, a Board-certified radiologist, reviewed an MRI scan of the lumbar spine and diagnosed no focal soft disc herniation, small posterior L5-S1 disc bulge and mild degenerative disc disease without nerve root impingement or spinal stenosis and mild anterior wedging compression fracture deformity of the superior endplate of T12 without retropulsion.

In a March 1, 2010 report, Dr. Thomas C. Hurlbutt, a Board-certified neurologist, performed an EMG and nerve conduction study of the lower extremities and indicated that they were both normal. He reported that it failed to reveal electrodiagnostic evidence to suggest neuropathy or radiculopathy.

On March 11, 2010 Dr. Spangler reiterated her diagnoses and indicated that the MRI scan and EMG were negative. She did not recommend any more epidural steroid injections, recommended physical therapy and released appellant to light-duty sedentary work, with the following restrictions: no lifting over 10 pounds, mostly sitting while changing positions, standing as needed for comfort and no work on days of physical therapy.

By decision dated March 29, 2010, OWCP denied appellant's claim finding that the medical evidence was insufficient to establish fact of injury. It found that the December 21, 2009 lifting incident occurred as alleged, but the medical evidence did not establish causal relationship.

On April 6, 2010 appellant, through his attorney, requested an oral hearing and submitted additional evidence. He submitted physical therapy notes by Annie Verghese, a physical therapist, and Milina D. Slavejkov, a physical therapist assistant.

In an April 1, 2010 medical report, Dr. Spangler reiterated her diagnoses and reported that appellant showed no improvement with physical therapy. She noted that no light-duty work was available and recommended a surgical evaluation.

In an April 8, 2010 report, Dr. Stephen P. Falatyn, a Board-certified orthopedic surgeon, found inconsistencies on appellant's physical examination, markedly positive Waddell testing and pain complaints that were far out of proportion to the MRI scan findings, which in the physician's opinion were normal. He opined that appellant was not disabled and saw no reason why he should not return to work at his regular job as it was unclear if any significant injury was sustained. Dr. Falatyn concluded that the only diagnosis for appellant's low back pain was lumbar strain and that surgery was not an option for his lumbar spine.

In an April 23, 2010 progress report, Dr. Spangler indicated that appellant was embellishing his physical examination and his multiple complaints could not be explained by his rather minor findings on his MRI scan. She opined that she could no longer justify keeping him out of work based on his reported work injury and released him to full-duty work with no restrictions on April 23, 2010.

Appellant submitted a Social Security Administration notice of award for disability benefits effective June 2010.

On July 12, 2010 a telephonic hearing was held before OWCP's hearing representative. Appellant testified that Drs. Waldman and Goldbery could provide a firm diagnosis and rationalized medical opinion evidence establishing causal relationship between the December 21, 2009 employment incident and his condition. However, he did not submit any medical evidence from Dr. Waldman or Dr. Goldbery.

By decision dated September 30, 2010, OWCP's hearing representative affirmed the March 29, 2010 decision, finding that appellant did not submit sufficient rationalized medical opinion evidence addressing how his back condition was related to the December 21, 2009 employment incident. It found that the medical evidence did not provide a diagnosis that was causally related to the employment incident.³

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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 FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury⁵ was sustained in the performance of duty, as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. A fact of injury determination is based on two elements. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit sufficient

³ Appellant filed claims for compensation (Form CA-7) for the periods February 5 to 12 and 18 to 26, February 27 to March 12 and March 13 to 26, 2010. OWCP notified appellant that his claims would remain under development until his traumatic injury claim was adjudicated.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

⁶ *T.H.*, 59 ECAB 388 (2008). See *Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.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 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.⁸

ANALYSIS

OWCP has accepted that the employment incident of December 21, 2009 occurred at the time, place and in the manner alleged. The issue is whether appellant's back and leg injury resulted from the December 21, 2009 employment incident. The Board finds that appellant did not meet his burden of proof to establish a causal relationship between the condition for which compensation is claimed and the December 21, 2009 employment incident.

In an April 8, 2010 medical report, Dr. Falatyn indicated that he found inconsistencies on his physical examination, markedly positive Waddell testing and pain complaints that were far out of proportion to the normal MRI scan findings. He stated that it was unclear if any significant injury was sustained, but diagnosed lumbar strain. Dr. Falatyn opined that appellant was not disabled and released him to work at his regular job. In a January 11, 2010 medical report, Dr. Spangler diagnosed lumbago. In a January 26, 2010 medical report, she diagnosed thoracic or lumbosacral neuritis or radiculitis, unspecified. On March 11 and April 1, 2010 medical reports, Dr. Spangler released appellant to light-duty sedentary work. In an April 23, 2010 progress report, she indicated that appellant was embellishing his physical examination and his multiple complaints could not be explained by his rather minor findings on his MRI scan. Dr. Spangler opined that she could no longer justify keeping appellant out of work based on his reported work injury and released appellant to full-duty work with no restrictions on April 23, 2010. Although Drs. Falatyn and Spangler provided firm diagnoses, they failed to directly address the issue of causal relationship as they did not explain how the mechanism of the December 21, 2009 employment incident caused or aggravated appellant's back and leg condition. Therefore, appellant did not meet his burden of proof as Drs. Falatyn and Spangler's reports are not sufficient to establish that he sustained an employment-related injury on December 21, 2009.

In a January 4, 2010 medical report, Dr. Matrone reported a history of fibromyalgia and diagnosed persistent low back pain. In a January 11, 2010 medical report, Dr. Rai indicated that an x-ray of the lumbar spine revealed no evidence of significant disc disease or joint disease and

⁷ *Id.* Shirley A. Temple, 48 ECAB 404 (1997); see John J. Carlone, 41 ECAB 354 (1989).

⁸ *Id.* See Gary J. Watling, 52 ECAB 278 (2001).

no spondylolysis or spondylolisthesis. On January 22, 2010 he diagnosed slight central degeneration and partial annular tear at L5-S1 and annular bulging of the L4-5 disc. On February 3 and 19, 2010 Dr. Wilson diagnosed back and leg pain secondary to L4-5 disc bulge with L5-S1 disc protrusion. In a March 1, 2005 medical report, Dr. Zalduondo diagnosed small posterior L5-S1 disc bulge, mild degenerative disc disease and mild anterior wedging compression fracture deformity of the superior endplate of T12. In a March 1, 2010 medical report, Dr. Hurlbutt reported that an EMG and nerve conduction study of the lower extremities was normal and failed to suggest neuropathy or radiculopathy. In a May 22, 2008 medical report, Dr. Prats diagnosed discogenic disease with associated narrowing present at the L5-S1 disc with a small centrally protruded. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.⁹ The medical reports of Drs. Matrone, Rai, Wilson, Zalduondo, Hurlbutt and Prats do not provide a firm diagnosis or medical rationale explaining how appellant's back and leg condition was caused or aggravated by the December 21, 2009 employment incident. Lacking thorough medical rationale on the issue of causal relationship, the reports are of limited probative value and not sufficient to establish that appellant sustained an employment-related injury in the performance of duty on December 21, 2009.

The physical therapy notes from Ms. Verghese, a physical therapist, and Ms. Slavejkov, a physical therapist assistant, are of no probative value as they are not physicians under FECA.¹⁰ Additionally, the October 8, 2008 Department of Veterans Affairs rating decision and the June 2010 Social Security Administration disability benefits award are not probative as they do not constitute medical opinion evidence on the issue of causal relationship from a physician. Moreover, the Board notes that determinations of other administrative agencies are not binding on OWCP or this Board regarding questions arising under FECA. In this case, the rating and award are not relevant to the issue of whether appellant sustained an employment-related injury.¹¹ As such, the Board finds that he did not meet his burden of proof with these submissions.

As appellant has not submitted any rationalized medical evidence to support his allegation that he sustained an injury causally related to the indicated employment factors, he has failed to meet his burden of proof.

On appeal, appellant's attorney contends that the September 30, 2010 OWCP decision was contrary to fact and law. For the reasons stated above, the Board finds the attorney's argument to be without merit.

⁹ See *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

¹⁰ 5 U.S.C. § 8101(2). Section 8101(2) of FECA 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 also *Paul Foster*, 56 ECAB 208, 212 n.12 (2004); *Joseph N. Fassi*, 42 ECAB 677 (1991); *Barbara J. Williams*, 40 ECAB 649 (1989).

¹¹ See also *James E. Norris*, 52 ECAB 93 (2000); see *S.S.*, Docket No. 10-42 (issued December 17, 2010).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not submitted sufficient rationalized medical opinion evidence to establish that the December 21, 2009 employment incident was causally related to the back and leg condition. Therefore, appellant failed to meet his burden of proof to establish a claim.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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