United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 11-1886**
	)	**Issued: April 17, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Bloomfield Hills, MI, Employer	)	

Appearances:
Paul H. Kullen, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 15, 2011 appellant, through her attorney, filed a timely appeal from the April 26, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which found that she failed to establish her claim of occupational disease. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 sustained an occupational disease in the performance of duty.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] In a May 19, 2009 decision, the Board affirmed the April 1 and September 3, 2008 OWCP decisions, which found that the medical evidence was not sufficient to establish that appellant's low back condition was causally related to factors of her employment. The facts and history contained in the prior appeal are incorporated by reference.[3]

On October 2, 2009 appellant's representative requested reconsideration and provided new medical evidence. In a September 15, 2009 report, Dr. Michael J. Kenneson, Board-certified in family medicine, noted that appellant was diagnosed with spondylolisthesis of L5 on S1. He explained that, in this condition, the upper vertebra slips forward of the lower vertebra which causes narrowing of bony canals that carry nerve roots. Dr. Kenneson noted that the narrowing resulted in compression of the nerves and caused pain which was due to the resultant stretching of soft tissue structures. He stated that magnetic resonance imaging (MRI) scan results compared between 2006 and 2008 revealed a worsening in appellant's condition. Dr. Kenneson noted that repetitive lifting, pushing and pulling created increased pressure on the spinal column which increased the forces that ultimately resulted in worsening of the slippage between the two affected vertebrae. He opined that appellant's "work duties aggravated, accelerated and contributed to the progression of her spondylolisthesis. My opinion is based upon a reasonable degree of medical certainty."

On November 4, 2009 OWCP referred appellant for a second opinion, examination, together with a statement of accepted facts, a set of questions and the medical record to Dr. Michael Holda, a Board-certified orthopedic surgeon.

In a December 9, 2009 report, Dr. Holda reviewed appellant's medical history and set further findings on examination. Appellant ambulated normally; was able to stand on her toes and heels; and had no scoliosis and normal lumbar lordosis. She had pain with lumbar motion. Flexion was to 80 degrees with pain; extension to 15 degrees with pain; and 50 degrees of side bending to the right and left with pain. There was no tenderness to palpation of the lumbar paravertebral musculature. There were no localizing neurological deficits in the legs and reflexes were "2+" and symmetrical at the knees and ankles with sensation to light touch was maintained. The extensor hallucis longus musculature was strong bilaterally. Dr. Holda noted that straight leg raising performed in a seated position showed that appellant had 90 degrees of elevation of the both legs with no complaints of back or leg pain. Additionally, he observed 90 degrees of elevation of both legs at the same time with no complaints of back or leg pain. Dr. Holda diagnosed chronic low back pain and spondylolisthesis at L5-S1 Grade 1 to 2 and degenerative arthritis of the lumbar spine. He opined that the spondylolisthesis was developmental and preexisted her employment. Dr. Holda opined that appellant's work exposure as a distribution clerk beginning in 2005 temporarily aggravated the underlying condition of

[2] Docket No. 08-2474 (issued May 19, 2009).

[3] The record reflects that, on November 30, 2006, appellant worked in a restricted capacity. She stopped working on September 11, 2008 and has not returned. Appellant elected disability retirement. She has preexisting spondylolisthesis at L5-S1.

spondylolisthesis. He explained that spondylolisthesis could cause back pain, which could be aggravated by bending and lifting; but it was not a permanent aggravation. Dr. Holda further advised that appellant's work exposure did not cause or contribute to the development of her spondylolisthesis, but rather it had temporarily aggravated it symptomatically. Additionally, he explained that the ongoing pain was due to the spondylolisthesis, which was preexisting. Dr. Holda stated that he did not believe that appellant had residuals of her work-related back condition as this would have been a temporary symptomatic aggravation of the preexisting spondylolisthesis. He opined that the ongoing and chronic back pain was due to the condition of spondylolisthesis which was preexisting. Dr. Holda provided restrictions to include no repetitive bending and twisting at the waist or lifting over 15 pounds. He opined that he did not believe that appellant was capable of performing the duties of her previous employment as a distribution clerk. Dr. Holda opined that she reached maximum medical improvement concerning any work injury sustained.

In a letter dated December 29, 2009, OWCP requested clarification from Dr. Holda with regard to whether appellant's duties as a distribution clerk affected her preexisting condition of spondylolisthesis. It also requested clarification with regard to when her work-related condition had ceased.

In a January 5, 2010 response, Dr. Holda noted that there were "no objective findings to support the fact that [appellant's] work activities temporarily aggravated her preexisting condition of spondylolisthesis; only herself reported history." He explained that it was "known that heavy lifting and repetitive bending will aggravate this condition, however." Dr. Holda opined that, "if [appellant's] work activities aggravated the preexisting spondylolisthesis, it would most likely cease approximately six weeks after her exposure to bending and lifting ceased."

By decision dated February 2, 2010, OWCP denied modification of the prior decisions.

On June 7, 2010 appellant requested reconsideration. On July 12, 2010 appellant's representative submitted new medical evidence. He alleged that Dr. Holda's report was not well reasoned and it was "legal error" to accept the report as it was "poorly considered," overlooked "key facts" and "ignored" the well written opinions of Dr. Robert A. Krasnick, Board-certified in physical medicine and rehabilitation.[4]

In a March 8, 2010 report, Dr. Krasnick noted appellant's history of injury and treatment. He advised that she had Grade 2 spondylolisthesis at the L5-S1 level; constant low back pain, which was rated a 7 out of 10 with aching and occasional shooting pain; intermittent pain down into the legs mainly in the thighs, occasionally into the feet; and worse with any bending or twisting. Examination findings included flexion of 40 to 50 percent of normal; extension of 50 percent of normal with more pain with flexion than extension. Dr. Krasnick determined that appellant was tender across the lumbosacral junction, straight leg raising was negative; motion of the hips and knees were full and pain free. He also indicated that she had normal strength, sensation and reflexes and could walk on her heels and toes. Dr. Krasnick diagnosed, chronic

[4] Although appellant's representative indicated that he was submitting two reports from Dr. Krasnick, only one was received.

back and intermittent leg pain secondary to Grade 2 spondylolisthesis; underlying pars defect, spondylolysis and intermittent leg pain secondary to foraminal stenosis and radiculitis. He advised that, currently, appellant had no neurological dysfunction on examination. Dr. Krasnick noted that daily activities were restricted due to pain. He indicated that appellant would not be able to work at the employing establishment as she was already retired. Dr. Krasnick opined that the work at the employing establishment "certainly aggravated and likely accelerated this condition to the point that she was unable to work."

By decision dated October 19, 2010, OWCP denied modification of its prior decisions.

On January 14, 2011 appellant's representative requested reconsideration. He contended that appellant's back condition was permanently aggravated.

In an October 25, 2010 report, Dr. John Pispidikis, a chiropractor, diagnosed a lumbar nerve root injury, anterolisthesis of L5-S1, Grade 2, myalgia and restricted motion. He noted that appellant related that she was transferring flats of mail into cases causing injuries to her low back. Dr. Pispidikis explained that the mechanism of her accident where she was lifting, twisting and reaching combined with the competitive nature of her job over the past eight years correlated to her MRI scan findings for Grade 1 anterolisthesis with degenerative disc disease and accounted for her inability to perform lower extremity movements, especially walking, standing, bending, lifting and twisting for a long period of time. He noted that appellant initially injured her low back on November 4, 1998 and since that date her low back condition worsened. Dr. Pispidikis opined that it was with high medical probability that her work materially aggravated her low back condition. He advised that computerized muscle testing revealed that appellant was unable to utilize her legs in the way she did prior to the accident as a normally functioning person. Dr. Pispidikis provided work restrictions and opined that, within a reasonable degree of medical certainty, the permanent limitations were a direct result of the injury caused on November 4, 1998.

By decision dated April 26, 2011, OWCP denied modification of its prior decisions.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 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.[5] 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.[6]

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

[5] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *Victor J. Woodhams*, 41 ECAB 345 (1989).

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 employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. 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. 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.[7]

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.[8]

ANALYSIS

Appellant was diagnosed with spondylolisthesis, which she attributed to her job as a distribution clerk that required standing, bending, twisting, lifting, pushing and pulling heavy equipment. However, she has not provided sufficient medical evidence to establish that her diagnosed low back condition is causally related to these identified employment factors.

In support of her claim, appellant submitted a September 15, 2009 report from Dr. Kenneson, who diagnosed spondylolisthesis of L5 on S1. He noted that MRI scan results compared between 2006 and 2008 revealed a worsening in her condition. Dr. Kenneson advised that repetitive lifting, pushing and pulling created increased pressure on the spinal column, which increased the forces that ultimately resulted in worsening of the slippage between the two affected vertebrae. He opined that appellant's "work duties aggravated, accelerated and contributed to the progression of her spondylolisthesis." However, Dr. Kenneson did not explain how he arrived at this conclusion. The Board notes that, in prior reports, he noted that appellant sustained an injury to her neck on February 5, 2002 when a car hood fell on her neck causing severe headaches and severe neck and low back pain. However, Dr. Kenneson does not discuss the effect of this injury on her current condition. Additionally, while he indicated that MRI scan

[7] *Id.*

[8] *A.C.*, Docket No. 08-1453 (issued November 18, 2008).

results compared between 2006 and 2008 showed a worsening in appellant's condition, he did not identify the specific findings or explain why he determined that the worsening would be attributed to factors of her employment. This is especially important in light of the February 5, 2002 nonwork injury, the fact that she worked in a restricted capacity since November 30, 2006 and has not worked since September 11, 2008. Dr. Kenneson did not explain how appellant's condition was accelerated by conditions of her employment. 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.[9]

In a March 8, 2010 report, Dr. Krasnick examined appellant and diagnosed chronic back and intermittent leg pain secondary to Grade 2 spondylolisthesis; underlying pars defect, spondylolysis and intermittent leg pain secondary to foraminal stenosis and radiculitis. He opined that the work at the employing establishment "certainly aggravated and likely accelerated this condition to the point that she was unable to work." Dr. Krasnick did not adequately explain how he concluded that the work at the employing establishment aggravated appellant's condition. He did not explain this conclusion in light of more than two years after the date of her last exposure to factors of her employment. This is especially important in light of the aforementioned factors that included a previous injury in 2002, the restricted-duty position and not working since 2008. 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.[10]

Appellant also provided an October 25, 2010 report from Dr. Pispidikis, a chiropractor. As defined under FECA, a physician includes a chiropractor only to the extent that his reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[11] While Dr. Pispidikis provided an opinion with regard to the mechanism of appellant's injury, he did not diagnose a spinal subluxation. Since he did not diagnose spinal subluxation based on an x-ray, he was not a physician and his opinion regarding the cause of appellant's low back condition lacked evidentiary weight.[12]

The Board further notes that OWCP referred appellant to Dr. Holda for a second opinion. In a December 9, 2009 report, Dr. Holda examined her and diagnosed spondylolisthesis at L5-S1 and degenerative arthritis of the lumbar spine. He explained that the spondylolisthesis was developmental and preexisted appellant's employment. Dr. Holda initially concluded that her work exposure as a distribution clerk beginning in 2005 temporarily aggravated the underlying

[9] *Id*.

[10] *See supra* note 6.

[11] 5 U.S.C. § 8101(2); *Merton J. Sills*, 39 ECAB 572, 575 (1988). Subluxation means an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae, which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays. 20 C.F.R. § 10.5(bb).

[12] *See Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (medical opinion, in general, can only be given by a qualified physician).

preexisting condition of spondylolisthesis and explained that it could be aggravated by bending and lifting. He opined that appellant reached maximum medical improvement and did not have residuals of her work-related back condition as this would have been a temporary symptomatic aggravation of the preexisting spondylolisthesis. The Board notes that this was speculative opinion. The Board has held that speculative and equivocal medical opinions regarding causal relationship have no probative value.[13] On December 29, 2009 OWCP requested that Dr. Holda clarify his opinion with regard to whether appellant's duties as a distribution clerk affected her preexisting spondylolisthesis and when the work-related condition had ceased. In a January 5, 2010 response, Dr. Holda explained that there were "no objective findings to support the fact that her work activities temporarily aggravated her preexisting condition of spondylolisthesis; only herself reported history." He noted that it was "known that heavy lifting and repetitive bending will aggravate this condition, however." Dr. Holda elaborated that, "if [appellant's] work activities aggravated the preexisting spondylolisthesis, it would most likely cease approximately six weeks after her exposure to bending and lifting ceased." The Board notes that this report is also insufficient to establish a causal relationship as it is speculative to the extent that it supports causal relationship and he clarified that there were no objective findings to support that appellant's preexisting condition was caused or aggravated by work factors.

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[14] Neither the fact that the condition became apparent during a period of employment nor the belief that the condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[15] Causal relationship must be substantiated by reasoned medical opinion evidence, which is appellant's responsibility to submit.

On appeal, appellant's attorney asserts that evidence from appellant's physicians is sufficient to establish the claim. However, as explained, appellant has not submitted sufficient reasoned medical evidence to establish the claim.

As there is no medical evidence explaining how appellant's employment duties caused or aggravated a low back condition, she has not met her burden of proof in establishing that she sustained a medical condition in the performance of duty causally related to factors of her employment. Appellant may submit evidence or argument with a written request for reconsideration 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 met her burden of proof in establishing that she sustained an injury in the performance of duty.

[13] *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

[14] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[15] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the April 26, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 17, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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