United States Department of Labor
Employees' Compensation Appeals Board

A.G., Appellant	)	
and	)	**Docket No. 12-659**
	)	**Issued: August 22, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Islandia, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 31, 2012 appellant filed a timely appeal from a September 14, 2011 merit decision of the Office of Workers' Compensation Programs' (OWCP) hearing representative which denied his traumatic injury claim. 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.[2]

ISSUE

The issue is whether appellant sustained a back injury in the performance of duty on January 29, 2011.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence following the September 14, 2011 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP along with a request for reconsideration.

FACTUAL HISTORY

On January 29, 2011 appellant, then a 59-year-old letter carrier, filed a traumatic injury claim alleging that that day he sustained an injury to his back and experienced difficulty breathing when he slipped on ice and fell on his back as he walked down stairs at work. He stopped work on January 30, 2011.

A January 29, 2011 hospital discharge sheet reflected that Dr. Robert Rajkumar, a Board-certified internist, examined appellant and authorized him to return to work on February 3, 2011. He indicated that appellant sustained a contusion of the back.

Dr. Robert Fisch, a Board-certified orthopedic surgeon, related in a February 3, 2011 progress report that on January 29, 2011 appellant slipped on ice when he walked down the stairs on his route and fell on his lower back. He experienced sudden pain but was able to walk back to the employing establishment and was treated in the emergency room. Dr. Fisch reviewed appellant's history and noted that diagnostic imaging reports of the thoracolumbar spine revealed severe degenerative disease in the lower thoracic upper lumbar spine area with osteophyte formation. He did not find any evidence of acute fracture or subluxation. Upon examination, Dr. Fisch observed tenderness along appellant's thoracolumbar spine and the lower thoracic upper lumbar area and less severe tenderness in the paraspinal region. Forward flexion at 50 degrees produced pain and extension was limited to 15 degrees. Lower extremities deep tendon reflexes were 1+ bilaterally. Straight leg raise testing was negative bilaterally but produced back pain. Dr. Fisch reviewed x-rays and stated there appeared to be wedge compression fractures of L1 and T2. He also observed extensive osteophytic formation at the anterior vertebral bodies and disc degenerative disease. Dr. Fisch diagnosed acute L1 and T12 compression fracture.

In an attached duty status report, Dr. Fisch diagnosed spine pain and tenderness and T12 compression fracture and advised that appellant was unable to resume work.

On February 25, 2011 OWCP advised appellant that his claim was initially accepted as a minor injury but it was now reopened for consideration. It informed him that the evidence submitted was insufficient to establish his claim and requested additional medical evidence to establish that he sustained a diagnosed condition as a result of the January 29, 2011 employment incident.

Appellant submitted handwritten January 29, 2011 emergency room records indicating he was seen for back pain. In a triage nursing assessment form, an unknown provider indicated that appellant fell on ice and experienced lower and mid-back pain.

Dr. Fisch noted that he reexamined appellant on February 17, 2011 for T12 and L1 compression fractures sustained after a January 29, 2011 fall at work. Appellant stated that he experienced less pain with movement but was still out of work as a mail carrier. Examination of the lumbar spine revealed less overall tenderness to overall palpation at the lower thoracic and upper lumbar spine. No radicular symptoms were noted.

In a March 3, 2011 report, Dr. Fisch related that appellant's pain had improved but he still complained of pain in his mid to lower back when he carried his laundry basket.

Examination of the thoracolumbar spine revealed much less tenderness to palpation of the midline and better range of motion forward. Extension and forward bending at 50 degrees produced lower thoracic upper lumbar pain. Dr. Fisch diagnosed improvement of overall pain status post work injury with acute T12 and L1 compression fractures. He authorized appellant to return to light duty on March 7, 2011 and included a duty status report.

In a decision dated April 11, 2011, OWCP denied appellant's claim finding insufficient medical evidence to establish that he sustained an injury on January 29, 2011 in the performance of duty. It noted that the record did not contain copies of his x-rays or MRI scan reports to support the diagnoses of L1 and T12 fractures.

Denise C. Pineau, a physical therapist, stated in her March 10, 2011 physical therapy report that on January 29, 2011 appellant was walking his mail route when he slipped on icy steps and fell on his buttocks. Appellant complained of severe pain in the lower back region and was unable to continue working. Ms. Pineau noted that appellant received treatment at the hospital and underwent x-rays which were unremarkable. Appellant presently complained of a constant dull ache in the right lumbar region and frequent throbbing-type pain across the thoracic region. The examination revealed increased thoracic spine kyphosis and flattening of the lumbar spine lordosis. No evidence of myotome weakness of the lower extremities and hypesthesia of the lower extremities were present. Ms. Pineau diagnosed thoracolumbar sprain associated with compression fractures of T12 and L1. Appellant submitted physical therapy notes dated March 10 to April 11, 2011.

In an April 7, 2011 report, Dr. Fisch noted appellant's complaints that his first two days of office work were tolerable but he continued to experience mid and lower back pain throughout the day. Examination of the thoracolumbar spine revealed mild upper lumbar paralumbar tenderness not at the midline. Appellant's range of motion was good and seemed to improve in flexion extension rotation and lateral side bending.

Appellant, through his representative, requested an oral hearing, which was held on August 2, 2011. He was represented by Bruce Didriksen of the National Association of Letter Carriers. Appellant related that on January 29, 2011 he walked down a couple of steps, slipped on a patch of black ice, and landed on his backside very hard. He was treated in the emergency room. The hearing representative noted that OWCP was confused about whether he underwent x-rays at the hospital and appellant explained that he submitted the x-rays to OWCP. He advised appellant that he needed a diagnostic report to confirm that he sustained fractures.

Appellant resubmitted hospital records, physical therapy reports dated from March 10 to May 18, 2011 and duty status reports.

A January 29, 2011 lumbar spine x-ray report, read by Dr. Alan Zakheim, a Board-certified radiologist, revealed severe degenerative disease in the lower thoracic and upper lumbar spine with flowing anterior osteophytes. Disc spaces and vertebral body heights were maintained. No evidence of acute fracture or subluxation was found. Dr. Zakheim diagnosed severe degenerative disease and no fracture.

In an April 28, 2011 report, Dr. Fisch related that appellant described improvement in his overall lower back and mid back pain and felt that he could return to full duty. Upon examination, he observed good range of motion and much less pain at the endpoints. No overall tenderness to palpation of the paraspinal muscles or midline thoracolumbar spine. Dr. Fisch authorized appellant to return to full duty on May 2, 2011 and on May 23, 2011 prescribed continued physical therapy.

In a June 1, 2011 report, Dr. Fisch noted that appellant continued to improve and that on days when he took pain medicine he did not have back pain. Examination revealed normal gait, good overall range of motion and rotation and flexion extension. No overall tenderness to palpation of the paraspinal muscles or midline was observed. Dr. Fisch diagnosed pain to range of motion status T12 and L1 compression fractures and thoracolumbar strain.

Dr. Fisch related, in his August 31, 2011 report, that appellant was doing very well although he complained of pain when he woke up in the mornings. Appellant was able to return to work. The examination revealed relatively good range of motion with flexion, extension, rotation and lateral side bending. No overall tenderness to palpation and muscle spasms were found. Dr. Fisch diagnosed status post-traumatic T12 and L1 compression fractures of the thoracolumbar spine.

By decision dated September 14, 2011, an OWCP hearing representative affirmed the April 11, 2011 denial decision. It found that the medical evidence failed to demonstrate that appellant sustained any diagnosed condition on January 29, 2011 in the performance of duty.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of her claim by the weight of the reliable, probative, and substantial evidence[4] 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.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether "fact of injury" has been established.[6] There are two components involved in establishing the fact of injury. 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.[7] Second, the employee must submit

[3] 5 U.S.C. §§ 8101-8193.

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

[5] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989); *M.M.*, Docket No. 08-1510 (issued November 25, 2010).

[6] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[7] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[8] An employee may establish that the employment incident occurred as alleged but fail to show that his or her disability or condition relates to the employment incident.[9]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence providing a diagnosis or opinion as to causal relationship.[10] 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 specified employment factors or incident.[11] 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.[12] The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[13]

ANALYSIS

OWCP accepted that on January 29, 2011 appellant slipped on icy steps and fell on his back at work but found that the medical evidence failed to establish that he sustained any condition as a result of the accepted incident. The Board finds that he has failed to provide sufficient medical evidence to establish any back condition as a result of the January 29, 2011 employment incident.

Appellant submitted several medical reports by Dr. Fisch who related that appellant complained of back pain since January 29, 2011 when he slipped on icy steps and fell on his back at work. Dr. Fisch revealed appellant's history and conducted several examinations. He observed tenderness along appellant's thoracolumbar spine and the lower thoracic upper lumbar area. Forward flexion at 50 degrees produced pain and extension was limited to 15 degrees. Dr. Fisch reported that January 29, 2011 x-ray reports of the thoracolumbar spine revealed degenerative disease in the lower thoracic upper lumbar spine area with osteophyte formation. He did not observe any evidence of acute fracture or subluxation, but he stated that there appeared to be wedge compression fractures of L1 and T12. Dr. Fisch diagnosed acute L1 and T12 compression fracture. The Board finds that Dr. Fisch's opinion regarding the wedge compression fractures of L1 and T12 is speculative in nature. Dr. Fisch read x-rays but noted only that there "appeared" to be fractures. The Board has held that medical opinions that are

[8] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[9] *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[10] *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

[11] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[12] *B.B.*, 59 ECAB 234 (2007); *D.S.*, Docket No. 09-860 (issued November 2, 2009).

[13] *James Mack*, 43 ECAB 321 (1991).

speculative or equivocal in character diminish the probative value of the medical opinion.[14] In later reports, Dr. Fisch continued to refer to the post-traumatic compression fractures; yet when the January 29, 2011 x-rays were entered into the record, no evidence of compression fractures was observed.

In addition, the Board notes that, while Dr. Fisch mentions the January 29, 2011 slip and fall at work, he does not provide any opinion explaining how the accepted incident caused any back condition. 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.[15] Because Dr. Fisch's reports do not provide a rationalized medical opinion establishing that appellant sustained a back injury as a result of the January 29, 2011 employment incident, these reports are insufficient to meet appellant's burden of proof to establish his claim.

The additional medical evidence is also insufficient to establish appellant's traumatic injury claim. The diagnostic reports by Dr. Zakheim did not reveal any evidence of acute fracture or subluxation. He only noted severe degenerative disease and did not provide any opinion on whether the January 29, 2011 incident was causally related to appellant's back condition. Likewise, Dr. Rajkumar's hospital discharge instructions also did not contain a firm diagnosis or opinion on causal relationship. Thus, these records are insufficient to establish appellant's claim.

Similarly, the physical therapy reports are of no probative medical value on the issue of causal relationship because nurses, physician's assistants, physical and occupational therapists are not "physicians" as defined by FECA.[16]

On appeal, appellant contends that the hearing representative's decision was based on inaccuracies and relates that he sustained a back condition as a result of the January 29, 2011 employment incident. The Board notes, however that the evidence of record supports the hearing representative's decision. Causal relationship is a medical issue that can only be shown by reasoned medical opinion of reasonable medical certainty and supported by medical rationale.[17] Appellant has not provided such evidence in this case. Thus, the Board finds that he did not meet his burden of proof to establish his claim.

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.

[14] *D.D.*, 57 ECAB 734, 738 (2006); *Kathy A. Kelley*, 55 ECAB 206 (2004).

[15] *R.E.*, Docket No. 10-679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007).

[16] Section 8102(2) of FECA 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. 5 U.S.C. § 8101(2); *Roy L. Humphrey*, 57 ECAB 238 (2005).

[17] *Supra* note 8.

CONCLUSION

The Board finds that appellant did not establish that she sustained a back injury in the performance of duty on January 29, 2011.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 22, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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