

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

J.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Syosset, NY, Employer**

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**Docket No. 12-1348
Issued: February 25, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 7, 2012 appellant filed a timely appeal from the January 11, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 disability due to her October 24, 2007 work injury on or after December 10, 2007.

FACTUAL HISTORY

On October 26, 2007 appellant, then a 48-year-old distribution clerk, filed a claim alleging that she sustained a traumatic injury to her low back and left leg on October 24, 2007 after bending and lifting while dumping and breaking down mail. She felt a pulling strain in her lower back and a shooting pain down her left leg. On the form, appellant's supervisor noted that

¹ 5 U.S.C. §§ 8101-8193.

appellant advised him on October 25, 2007 that the claimed injury occurred on October 24, 2007. Appellant stopped work on October 24, 2007.

In an October 25, 2007 note, Dr. Joseph Gigante, an attending Board-certified family practitioner, stated that appellant reported experiencing back and leg pain after lifting, squatting and bending over while breaking down mail the prior day. On examination, appellant had decreased back motion and diagnosed low back strain/sprain. Dr. Gigante arranged for appellant to undergo magnetic resonance imaging (MRI) scan testing. The findings of a November 5, 2007 MRI scan of appellant's back showed bulging discs at L3-4 and L5-S1 and slight anterior spondylolisthesis of L4 upon L5.²

In a December 2, 2007 form report, Dr. Gigante listed the date of injury as October 27, 2007 and the history of injury as "lifting heavy objects."³ He diagnosed low back sprain and checked a "yes" box indicating that appellant's condition was caused or aggravated by the reported employment activity. Dr. Gigante stated that appellant had been totally disabled since the time of the injury.

In a December 20, 2007 report, Dr. Kevin J. Mullins, an attending Board-certified neurosurgeon, stated that appellant reported hurting her back on October 27, 2007 due to repetitive heavy lifting. He stated that she "presents following a work-related injury with significant myofascial back pain." Dr. Mullins recommended that appellant participate in an outpatient spinal rehabilitation program.

In an undated report submitted with a January 8, 2008 letter, Dr. Jamie P. Skurka, an attending chiropractor, stated that appellant reported that she injured her lumbar spine on October 27, 2007 and that her job required repetitive lifting, twisting and turning. He noted that November 5, 2007 MRI scan testing showed bulging discs at L3-4 and L5-S1 and slight anterior spondylolisthesis of L4 upon L5 and listed these conditions in the diagnosis portion of his report. Dr. Skurka obtained x-ray testing and also diagnosed lumbar facet syndrome, lumbar radiculitis and myofascial pain syndrome. He stated that appellant's lumbar condition was "resultant from the repetitive lifting, twisting and bending event that occurred on October 27, 2007."

In a February 20, 2008 decision, OWCP denied appellant's claim that she sustained an employment-related traumatic injury on the grounds that she did not establish the occurrence of an employment incident. It noted that there were inconsistencies in the factual aspects of appellant's claim.

Appellant submitted a January 12, 2008 report from Dr. Skurka, who advised that x-ray testing of her lumbar spine was obtained on January 11, 2008 from four views -- anteroposterior, lateral, flexion and extension. Regarding the testing results, Dr. Skurka stated:

"All views were of diagnostic quality. There is no evidence of instability. There is a transitional segment at the lumbosacral junction. At L4 there is grade 1

² The record contains an October 25, 2001 note indicating that appellant could return to work on October 29, 2007 in a job that did not require heavy lifting. The note contained an address stamp from Dr. Gigante's office but was not signed by a physician.

³ Dr. Gigante's listing of the date of injury as October 27, 2007 would appear to be inadvertent as he previously listed the proper date of October 24, 2007 when he examined appellant on October 25, 2007.

spondylolisthesis, anterior subluxation upon L5. There is no change upon flexion/extension views. There is soft tissue calcification within the region of the abdominal aorta. There is decreased intervertebral disc spacing at L4-5. The lumbar spine is hyperlordotic. There is no evidence of fracture. The osseous structures are of normal size, shape and density.”

Appellant submitted form reports of Dr. Skurka, dated from February to May 2008, that contained the diagnoses of lumbosacral spondylolisthesis, lumbar facet syndrome, disc bulging at L3, L4, L5 and S1 and lumbar radiculopathy. Dr. Skurka indicated that appellant currently was totally disabled and that her first date of disability was January 8, 2008.

In a May 29, 2008 decision, OWCP denied appellant’s request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

In a January 27, 2009 decision,⁴ the Board modified OWCP’s February 20, 2008 decision to reflect that an employment incident occurred on October 24, 2007 when appellant engaged in bending and lifting while dumping and breaking down mail. The Board further found that Dr. Gigante’s reports raised an uncontroverted inference between appellant’s claimed back condition and the October 24, 2007 incident. The Board remanded the case to OWCP for further development of the medical evidence.

OWCP referred appellant to Dr. Sanford R. Wert, a Board-certified orthopedic surgeon, for a second opinion examination. In a March 26, 2009 report, Dr. Wert reported the findings from examination of March 24, 2009. He diagnosed lumbosacral spine sprain, related to the incident of October 24, 2007. Dr. Wert stated that appellant’s lumbosacral spine sprain was related by direct cause and noted that her preexisting degenerative disease was related by temporary aggravation. He found that the aggravation should have ceased following the four-month course of physical therapy. On examination, appellant complained of pain and exhibited diminished range of motion, but her complaints were not corroborated by objective findings and that the examination of her left leg was entirely within normal limits. He found no objective evidence of any ongoing disability and indicated that appellant was capable of resuming the regular duties of a distribution clerk. Dr. Wert did not provide an opinion that appellant had work-related disability for any period in the past.

On May 6, 2009 OWCP accepted that appellant sustained a lumbar sprain and temporary aggravation of preexisting degenerative disc disease of the lumbar spine, resolved.

Appellant filed claims alleging that she had disability due to her October 24, 2007 work injury beginning December 10, 2007 and continuing.

In a May 13, 2009 form report, Dr. Skurka listed the date of injury as October 24, 2007 and diagnosed grade 1 spondylolisthesis at L4, lumbar radiculopathy, lumbar facet syndrome, disc bulging at L3, L4, L5 and S1 and spinal intersegmental joint dysfunction. He checked a “yes” box indicating that these conditions were caused or aggravated by an employment activity and indicated that appellant was totally disabled from January 8, 2008 to the present. In another May 13, 2009 form report, Dr. Skurka indicated that appellant was temporarily totally disabled “due to lumbar spine condition.”

⁴ Docket No. 08-1879 (issued January 27, 2009).

In a May 18, 2009 report, Dr. Steven J. Litman, an attending Board-certified anesthesiologist, stated that appellant had bilateral back pain and bilateral lumbosacral radiculopathy secondary to a lumbar spine injury sustained at work.⁵ He also indicated that appellant had spondylolisthesis. Dr. Litman noted that appellant would undergo an L4-5 epidural steroid injection for treatment of bilateral lumbosacral radiculopathy “causally related to a workers’ compensation injury.”⁶

In a May 19, 2009 report, Dr. Andrew D. Rogove, an attending Board-certified neurologist, stated that appellant was injured at work while distributing mail on October 24, 2007 and noted that she came in for evaluation of back pain. He indicated that appellant had a normal neurologic examination with a negative straight leg raise (highly doubtful for profound herniated disc), but stated that she did have radicular pain intermittently in her right leg. Dr. Rogove recommended that she continue with conservative therapy, including chiropractic and pain management therapy. On June 29, 2009 he indicated that appellant needed an MRI scan study to rule out a back pathology.⁷

OWCP requested that Dr. Wert provide a supplemental report on the question of whether appellant had any disability following her October 24, 2007 work injury. On August 5, 2009 Dr. Wert advised that the opinion he expressed in his March 24, 2009 report remained unchanged and stated, “As I examined the claimant on March 24, 2009, one year and five months post injury, I am unable to comment on whether or not the claimant was totally disabled at any time following the March 24, 2007 injury.”

In an October 16, 2009 decision, OWCP denied appellant’s claim on the grounds that she did not submit sufficient medical evidence to establish that she had disability due to her October 24, 2007 work injury on or after December 10, 2007. It indicated that the reports of Dr. Skurka did not constitute medical evidence.

Dr. Mullins reported the findings of June 22, 2010 electromyogram (EMG) and nerve conduction velocity (NCV) testing on appellant’s legs. He indicated that EMG testing revealed unremarkable findings with no support for the presence of a lumbar radiculopathy.⁸ NCV testing revealed a normal study with unremarkable findings.

In a January 5, 2011 decision, OWCP affirmed its October 16, 2009 decision denying appellant’s claim for disability due to her October 24, 2007 work injury.

Appellant submitted a June 7, 2010 report in which Dr. Erlinda D. Austria, an attending Board-certified surgeon, diagnosed injury to lower back at work in 2007 and herniated and bulging lumbar disc with subluxation. Dr. Austria stated that appellant had mild-to-moderate

⁵ Dr. Litman mentioned an October 24, 2007 injury but did not provide any description of it.

⁶ On August 21, 2009 Dr. Litman indicated that appellant would follow up with him for another epidural steroid injection.

⁷ On August 17, 2009 Dr. Rogove indicated that appellant would be referred to a neurosurgical consult if she failed conservative treatment.

⁸ It was noted that, if a radiculopathy was present, it had not resulted in a significant degree of motor axonal degeneration.

restrictions for squatting, bending, prolonged sitting, standing and walking and moderate restriction and limited range of motion for activities involving both knees, greater on the left.

In a January 14, 2011 report, Dr. Skurka diagnosed lumbar spinal subluxation at L4, lumbar spondylolisthesis/anterolisthesis at L4, lumbar radiculopathy, lumbar facet syndrome, and multilevel lumbar disc bulging from L3-4 to L5-S1 with foraminal canal stenosis. He stated:

“In my professional opinion, [appellant’s] present clinical status pertaining to her lumbar spine is directly correlated to her work-related injury occurring on October 24, 2007. Although the patient did have a prior lumbar spine disorder for which she was out of work for approximately one year, the patient eventually returned to full-duty employment and was working on a full[-]time basis as a clerk for the U.S. Postal Service. In review of the medical records that I had available, there were no indications that[,] prior to October 24, 2007, there were no indications for discussions of spinal surgery. There were no indications for any pain management procedures. There was no prolonged chiropractic treatment as indicated by the patient and there was no indication that the patient required a dorsal column pain stimulator that she does require at the present time, to aid with managing of the present status of her lumbar spine.”

In an October 13, 2011 letter, appellant requested reconsideration of his claim and argued that the reports of Dr. Skurka should be considered as relevant medical evidence.

In a January 11, 2012 decision, OWCP affirmed its January 5, 2011 decision finding that appellant submit probative medical evidence relating the claimed periods of disability to the October 24, 2007 work injury.

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.⁹ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury 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 compensable 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.¹⁰

⁹ *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

¹⁰ *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

The Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, that opinion has little probative value and is insufficient to establish causation with respect to a medical question. Appellant's burden includes the necessity of furnishing an affirmative opinion from a physician who supports his conclusion with sound medical reasoning.¹¹

Under section 8101(2) of FECA, chiropractors are only considered physicians, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.¹² OWCP's regulations at 20 C.F.R. § 10.5(bb) have defined subluxation as 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.¹³

ANALYSIS

OWCP accepted that on October 24, 2007 appellant sustained a lumbar sprain and temporary aggravation of preexisting degenerative disc disease of the lumbar spine, resolved. She filed claims alleging disability due to her October 24, 2007 work injury commencing December 10, 2007.

The Board finds that appellant did not submit sufficient medical evidence to establish that she sustained disability due to her October 24, 2007 work injury on or after December 10, 2007.

Appellant submitted reports beginning in January 2008 for Dr. Skurka, an attending chiropractor. The Board finds that these reports constitute medical evidence because Dr. Skurka diagnosed a spinal subluxation as demonstrated by x-ray testing.¹⁴ In a January 12, 2008 report, Dr. Skurka stated that x-ray testing of appellant's lumbar spine was obtained on January 11, 2008 and showed grade 1 spondylolisthesis at L4, with anterior subluxation upon L5.

The Board finds that, although Dr. Skurka provided an opinion of appellant's disability, he did not provide a rationalized medical opinion explaining that appellant sustained disability due to her October 24, 2007 work injury for specific periods on or after December 10, 2007.

In several reports dated in the first half of 2008, Dr. Skurka provided diagnoses of lumbosacral spondylolisthesis, lumbar facet syndrome, disc bulging at L3, L4, L5 and S1 and lumbar radiculopathy. He noted that appellant currently was totally disabled and that her first date of disability was January 8, 2008. These reports do not establish appellant's claim because Dr. Skurka did not clearly address what conditions he believed caused appellant's disability. Dr. Skurka listed a number of diagnosed conditions which have not been accepted by OWCP as related to the October 24, 2007 work injury. His reports do not establish that the conditions were work related.

¹¹ *Lillian M. Jones*, 34 ECAB 379, 381 (1982).

¹² 5 U.S.C. § 8101(2). *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

¹³ 20 C.F.R. § 10.5(bb); *see also Bruce Chameroy*, 42 ECAB 121, 126 (1990).

¹⁴ *See supra* notes 12 and 13.

In a May 13, 2009 form report, Dr. Skurka listed the date of injury as October 24, 2007 and diagnosed grade 1 spondylolisthesis at L4, lumbar radiculopathy, lumbar facet syndrome, disc bulging at L3, L4, L5 and S1, and spinal intersegmental joint dysfunction. He checked a “yes” box indicating that these conditions were caused or aggravated by an employment activity and indicated that appellant was totally disabled from January 8, 2008 to the present. In another May 13, 2009 form report, Dr. Skurka indicated that appellant was temporarily totally disabled “due to lumbar spine condition.” He again listed a number of conditions that were not accepted by OWCP and he did not provide any explanation for his apparent belief that a work-related condition caused disability. As Dr. Skurka did no more than check “yes” to a form question, his opinion on the cause of appellant’s disability is of little probative value and is insufficient to discharge appellant’s burden of proof.¹⁵ He did not provide a complete medical history of appellant’s condition or support his conclusion with sound medical reasoning.

In a January 14, 2011 report, Dr. Skurka diagnosed lumbar spinal subluxation at L4, lumbar spondylolisthesis/anterolisthesis at L4, lumbar radiculopathy, lumbar facet syndrome, and multilevel lumbar disc bulging from L3-4 to L5-S1 with foraminal canal stenosis. He asserted that appellant had limited need for back care prior to October 24, 2007 and stated, “In my professional opinion, [appellant’s] present clinical status pertaining to her lumbar spine is directly correlated to her work-related injury occurring on October 24, 2007.” Dr. Skurka again implicated nonwork-related conditions and failed to provide adequate medical rationale for his opinion. Although he indicated that appellant’s current condition was related to the October 24, 2007 work injury, he did not provide a clear opinion that the October 24, 2007 injury caused disability for any specific periods.

Appellant received medical treatment from several attending physicians, including Dr. Litman, a Board-certified anesthesiologist, Dr. Rogove, a Board-certified neurologist, and Dr. Austria, a Board-certified surgeon. Although these physicians discussed appellant’s back condition, they provided no opinion that she sustained disability on or after December 10, 2007 due to her October 24, 2007 work injury.¹⁶ These physicians also diagnosed a number of conditions that are not accepted as work related, such as lumbar radiculopathy.¹⁷ Appellant has not submitted medical evidence establishing that she sustained disability due to her October 24, 2007 work injury on or after December 10, 2007.

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.

¹⁵ See *supra* note 11.

¹⁶ OWCP based its acceptance of appellant’s work conditions on the opinion of Dr. Wert, a Board-certified orthopedic surgeon. It explicitly asked Dr. Wert whether appellant sustained disability for any period due to her October 24, 2007 work injury and Dr. Wert responded that he could not provide such an opinion. Dr. Gigante, an attending Board-family practitioner, indicated in a brief form report that appellant had work-related disability prior to December 2, 2007, but appellant has only claimed disability for the period December 10, 2007 and continuing in the present case.

¹⁷ The findings of June 22, 2010 EMG testing of appellant’s legs revealed unremarkable findings with no support for the presence of a lumbar radiculopathy and that NCV testing revealed a normal study with unremarkable findings.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained disability due to her October 24, 2007 work injury on or after December 10, 2007.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 25, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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