

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

_____)
D.M., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Jersey City, NJ, Employer)
_____)

Docket No. 13-367
Issued: June 4, 2013

Appearances:

Thomas R. Uliase, Esq. for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 6, 2012 appellant, through his attorney, filed a timely appeal from a decision of the Office of Workers' Compensation Programs' (OWCP) dated August 29, 2012. 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 sustained lumbar or cervical injuries in the performance of duty on August 8, 2010.

FACTUAL HISTORY

On January 4, 2011 appellant, a 35-year-old mail keyer, filed an occupational disease claim alleging that he sustained lumbar and cervical conditions causally related to employment factors. He stated that continued work on the sack sorting machine (SSM) for many

¹5 U.S.C. § 8101 *et seq.*

months caused increasing cervical and lumbar pain. Appellant alleged that he became aware of this condition on August 8, 2010 and that it was caused or aggravated by his employment on August 18, 2010.

By letter to appellant dated February 1, 2011, OWCP advised appellant that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits. It asked him to submit a comprehensive medical report from his treating physician describing his symptoms and the medical reasons for his condition and an opinion as to whether his claimed conditions were causally related to the alleged August 8, 2010 work incident. OWCP asked appellant to submit this additional evidence within 30 days. Appellant did not submit any evidence within 30 days.

By decision dated March 11, 2011, OWCP denied appellant's claim, finding that he failed to submit sufficient factual and medical evidence in support of his claim that he sustained lumbar and cervical conditions in the performance of duty. It found that he failed to establish fact of injury, stating that the evidence was not sufficient to establish that the claimed August 8, 2010 event occurred as he alleged. OWCP also found that appellant failed to submit medical evidence in support of his claim.

On March 14, 2011 OWCP received a supplemental statement from appellant wherein he described his job duties. Appellant stated that he started working on the SSM machine in May 2009, with restrictions. He described his duties which included keying parcels weighing up to 70 pounds, scanning an average of 300 big parcels per hour. Appellant further stated that he was given a modified job offer in March 2010 for keying/scanning sacks. However, in July 2010 he had to scan and lift heavier parcels, during the third week of July until the first week in August 2010 he had to perform his regular work duties, without restriction or be sent home.

By letter dated March 23, 2011, appellant, through his attorney, requested an oral hearing.

In a report dated February 3, 2011, Dr. Mark A. Filippone, Board-certified in physical medicine and rehabilitation, stated that he had been treating appellant since November 25, 2008 for cervical, thoracic and lumbar spine conditions. He advised that appellant had been totally disabled from work from February 9 through March 8, 2010 despite mid back and low back pain; he allowed appellant to return to work with restrictions on March 9, 2010; he stated that appellant continued working with those restrictions until his mid and low back symptoms worsened due to an increased workload. Dr. Filippone advised that appellant was sent home on two occasions in July 2010 and also in August 2010. He found based on his examination that appellant's injuries caused him to be totally disabled as of August 18, 2010. Dr. Filippone stated that appellant's injury "is deemed August 8, 2010."

Dr. Filippone diagnosed cervical radiculitis, lumbosacral radiculitis and thoracic radiculitis. He opined that these conditions were all work related and were partially aggravated by a January 2008 motor vehicle accident; however, they preexisted this accident and had gotten worse due to his being required to do work exceeding his restrictions at the employing establishment. Dr. Filippone concluded that appellant has been totally disabled as of August 18, 2010.

By decision dated June 6, 2011, OWCP set aside the March 11, 2011 decision and remanded for further development on the issue of fact of injury.

By decision dated October 3, 2011, OWCP denied the claim. It found that appellant submitted sufficient factual evidence to establish the factual component of fact of injury; however, he failed to submit medical evidence sufficient to establish a diagnosed condition connected to the accepted August 8, 2010 work activities.

By letter dated October 7, 2011, appellant's attorney requested an oral hearing, which was held on January 4, 2012.

In reports dated April 1 and December 28, 2010, Dr. Thomas R. Peterson, a Board-certified neurosurgeon, indicated that appellant had lower back and bilateral leg pain.

In a February 21, 2012 report, Dr. Filippone stated that he had reexamined appellant and noted that there had been no interval or "intercurrent" history of trauma or injury. He advised that appellant's medical history was unchanged and that he continued to complain of low back pain which he rated as a seven. Appellant also had cervical pain which he rated as a 4 or 5 on a scale of 1 to 10 despite the fact that he was not working. Dr. Filippone stated that appellant remained totally disabled.

By decision dated March 21, 2012, an OWCP hearing representative affirmed the October 3, 2011 decision.

On March 21, 2012 OWCP received a second report from Dr. Filippone dated February 21, 2012. In this report, Dr. Filippone stated: appellant continued to have persistent cervical and thoracic radiculitis as a direct result of his August 8, 2010 work injuries. He explained "as a result of that injury and substituting normal anatomical physiologic movement to protect the lumbar spine" Dr. Filippone opined that appellant's low back and neck conditions worsened while performing light SSM. He advised that appellant had lumbosacral radiculopathy with signs and symptoms of thoracic and cervical radiculopathy as well.

By letter dated April 4, 2012, appellant's attorney requested reconsideration.

On April 4, 2012 OWCP received numerous progress reports from Dr. Peterson dated February 2010 to March 19, 2012, which indicated that appellant had chronic low back pain. In a report dated February 25, 2010, Dr. Peterson stated that appellant had a history of chronic low back pain and bilateral leg paresthesias in the left buttocks, posterior thigh and calf and right buttocks; he advised that these symptoms started in 2003 when appellant was injured at work and that he had another injury in 2010.² He advised that appellant's condition improved and that from 2006 until February 2010 he was able to work full duty with mild chronic low back pain.

² The Board notes that appellant filed a separate claim, case number xxxxxx367, in 2003, which OWCP accepted for lumbosacral radiculopathy and lumbar disc herniation. Appellant filed a claim for recurrence of disability on September 20, 2010, claiming that he sustained a recurrence of these conditions on August 7, 2010. OWCP denied this claim by decisions dated June 15 and December 23, 2010 and June 27, 2011. In a decision dated August 15, 2011, the Board affirmed the June 27, 2011 OWCP decision denying appellant's claim for a recurrence of disability. Docket No. 11-2086 (issued August 15, 2011).

In an August 18, 2011 report, Dr. Peterson stated that appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine on July 19, 2011. The results of this test showed L4-5 disc space degeneration and buckling of the ligamentum flavum, producing moderate to severe lumbar spinal stenosis. Dr. Peterson recommended that appellant undergo lumbar spinal fusion surgery at L4-5, with pedicle screws.

In a March 19, 2012 report, Dr. Peterson advised that appellant was suffering from chronic low back pain and bilateral leg pain due to 2003 and 2010 work injuries. He noted that appellant underwent two surgeries; a L4-5 percutaneous discectomy in 2006 and L4-5 Intradiscal Electrothermal Annuloplasty in 2011, but had not obtained relief. Dr. Peterson advised that appellant's lower extremity examination was normal. He requested authorization for lumbar spinal fusion surgery.

By decision dated August 29, 2012, OWCP denied modification of the October 3, 2011 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of establishing that 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.⁴ 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.⁵

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.⁶

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.⁷

³ 5 U.S.C. §§ 8101-8193.

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁷ *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

An award of compensation may not be based on surmise, conjecture or speculation. Neither, the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.⁸ Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

ANALYSIS

OWCP has accepted appellant's alleged factors of employment. It is also uncontested that appellant experienced lumbar and cervical pain on August 8, 2010.⁹ The question of whether employment factors caused a personal injury can only be established by probative medical evidence.¹⁰ Appellant has not submitted rationalized, probative medical evidence to establish that his SSM keying duties caused a personal injury.

Appellant submitted multiple reports from Drs. Filippone and Peterson. Dr. Filippone stated in his February 3, 2011 report that he had been treating appellant since November 25, 2008 for cervical, thoracic and lumbar spine conditions and that he had been totally disabled from work from February 9 through March 8, 2010 due to mid back and low back pain. While he released appellant to return to work with restrictions in March 2010 he was sent home on two occasions in July 2010 and also in August 2010. Dr. Filippone stated that appellant's injuries caused him to be totally disabled as of August 18, 2010; however, he indicated that appellant's injury occurred on August 8, 2010. He diagnosed cervical radiculitis, lumbosacral radiculitis and thoracic radiculitis, all of which he believed were work related. Dr. Filippone opined that these conditions had worsened because appellant was required to perform duties exceeding his work restrictions. In his February 21, 2012 report, he stated that appellant had sustained no additional traumatic injuries since his previous examination of appellant and opined that he had continued complaints of moderate low back pain and mild cervical pain and remained totally disabled.

Although Dr. Filippone diagnosed cervical and lumbosacral radiculitis and generally attributed these conditions to his employment, he did not provide a report containing a probative, rationalized opinion regarding as to how the accepted employment factors caused a personal injury. His opinion on causal relationship is of limited probative value in that he did not provide adequate history of injury or medical rationale in support of his conclusions.¹¹ Dr. Filippone explained in his February 21, 2012 report that appellant had substituted normal physiologic movement to protect his lumbar spine, but he did not provide specific detail of what this entailed. He did not provide a history which incorporated an understanding of appellant's work duties prior to August 8, 2010. Dr. Filippone did not explain how and why this work would have required appellant to substitute normal physiologic movement and how this caused injury to appellant's

⁸*Id.*

⁹ The Board notes that, although appellant filed a Form CA-2 claim for occupational disease, OWCP ultimately adjudicated this claim as one for traumatic injury. OWCP accepted that an incident had occurred on August 8, 2010 but did not provide a description of this incident.

¹⁰ *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *William C. Thomas*, 45 ECAB 591 (1994).

cervical and lumbar spines. He also did not explain the frequency of appellant's specific work duties. While appellant has alleged that he was required to work outside his work restrictions, Dr. Filippone also did not describe appellant's work restrictions and explain the work appellant performed outside these restrictions.¹²

Appellant also submitted numerous progress reports from 2010 to 2012 from Dr. Peterson, which documented that appellant experienced chronic low back pain during this period. In his report dated February 25, 2010, he related symptoms of chronic low back pain and bilateral leg paresthesias in the left buttocks, posterior thigh and calf and right buttocks. Dr. Peterson related that appellant had experienced these symptoms since his 2003 employment injury. He stated in an August 18, 2011 report that the results of July 19, 2011 MRI scan demonstrated L4-5 disc space degeneration moderate to severe lumbar spinal stenosis. In Dr. Peterson's March 19, 2012 report, he indicated that appellant had chronic low back pain and bilateral leg pain due to 2003 and 2010 work injuries. Dr. Peterson requested authorization for lumbar spinal fusion surgery despite the fact that appellant's two prior surgeries had not ameliorated his lower back condition. He offered no medical explanation, however, as to how appellant's employment factors would have caused the diagnosed conditions.

The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.¹³ Appellant did not provide a report from a physician which presented a diagnosis of his conditions and sufficiently addressed how these conditions were causally related to his employment duties. There is, therefore, no rationalized evidence in the record that his cervical or lower back conditions were work related.

On appeal, appellant's attorney contends that he presented *prima facie* factual and medical evidence to establish that he developed cervical and lumbar conditions as a result of performing his work. The Board disagrees. OWCP advised appellant of the evidence required to establish his claim; however, he failed to submit such evidence. Appellant did not provide a medical opinion which describes or explains the medical process through which his specific employment duties would have caused the claimed injuries. Accordingly, he did not establish that he sustained a cervical or lower back injury in the performance of duty. OWCP properly denied appellant's claim for compensation.

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 failed to establish that he sustained lumbar or cervical injuries in the performance of duty on August 8, 2010.

¹²See *Geraldine H. Johnson*, 44 ECAB 745 (1993).

¹³See *Anna C. Leanza*, 48 ECAB 115 (1996).

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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