

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

_____)	
R.O., Appellant)	
)	
and)	Docket No. 13-626
)	Issued: June 18, 2013
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 22, 2013 appellant filed a timely appeal from a November 27, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim. 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 claim.

ISSUE

The issue is whether appellant established that he sustained a back condition causally related to factors of his federal employment.

FACTUAL HISTORY

On December 8, 2010 appellant, then a 39-year-old sales/distribution clerk, filed a recurrence of disability claim for a prior back injury from June 19, 1992 under claim number xxxxxx967. He stated that his back condition at the L3, L4 and L5 levels worsened due to prolonged standing and lifting while at work.

¹ 5 U.S.C. § 8101 *et seq.*

In a November 5, 2010 report, Dr. Michael T. Rohmiller, a Board-certified orthopedic surgeon, reported that appellant worked for the postal service and had low back pain for many years. He noted that x-rays demonstrated severe collapse of L4-5 and L5-S1 as well as osteophytes noted with retrolisthesis at L3-4. An impression of chronic low back pain was provided and a magnetic resonance imaging (MRI) scan was provided.

OWCP adjudicated the claim as an occupational disease as new employment activities were implicated in the present low back condition. Appellant was advised in a February 4, 2011 letter that the evidence received was insufficient to support his claim. OWCP requested that he submit additional evidence within 30 days including a comprehensive narrative medical report from his physician which provided an opinion supported by medical rationale as to how his work activities caused, contributed to or aggravated his back condition.

OWCP received a February 23, 2011 occupational disease claim form from appellant. Appellant stated that his pain had progressed and back surgery was recommended. He noted that he filed parcels, distributed letters and flats and pushed and pulled containers. No medical evidence was submitted.

By decision dated March 3, 2011, OWCP denied appellant's claim on the basis that there was no medical evidence to establish that his back condition was related to his work activities.

On April 2, 2011 appellant requested an oral hearing before an OWCP hearing representative, which was held on September 30, 2011. He noted a prior discectomy in June 1992 and being off work for six weeks before returning to full duty as a letter carrier. Appellant accepted a limited-duty window clerk position and worked in that position until he was transferred to another station in March 2010. In October 2010, he performed heavy lifting which he did not have to do before. On or about October 25, 2010 appellant was bending inside of a large Gaylords cardboard box to remove big plastic bundles of second class magazines which weighed approximately five pounds per bundle. Later that evening his back went into spasms. Appellant noted that he was back doing window work at a different station. The hearing representative held the record open for 30 days for submission of medical evidence to establish a low back condition causally related to his work activity.

In an April 25, 2011 report, Dr. Rohmiller noted that appellant wanted spinal fusion surgery. He advised that he would proceed with surgery following insurance approval. Appellant also indicated that he recently twisted his knee.

By decision dated December 14, 2011, an OWCP hearing representative affirmed the March 3, 2011 decision.

In a July 1, 2012 letter, appellant requested reconsideration. He recounted that around October 25, 2010 he was lifting repeatedly for hours and he started to have severe back spasms and extreme pain. Appellant stated that additional medical reports were submitted. He provided a letter from an attorney, who was not authorized to represent him. In a November 18, 2011 progress report, Dr. Rohmiller listed an impression of central stenosis, L3-4; severe loss of disc height, L4-5, L5-S1 with foraminal stenosis and chronic low back pain; and noted possible spinal surgery and an October 8, 2012 request for authorization.

In an April 4, 2012 report, Dr. William D. Tobler, a Board-certified neurological surgeon, stated that appellant had been followed for many years with ongoing back issues. Appellant had lumbar surgery in the 1990s and again in 2001. He also had cervical surgery. Dr. Tobler noted that appellant had a period of back pain in 2006, which was treated conservatively and resolved on its own. Appellant did well managing his back issues until October 2010, when he relocated and took a new job which required bending, twisting and lifting. On October 26, 2010 he had an incident of extreme low back pain that gradually resolved, but continued to have increased soreness in the left side of his low back. Appellant was presently a window clerk at the postal service. Two weeks after the October 26, 2010 incident, he woke in the morning with severe pain in the left side of his back radiating into the anterior lateral thigh and across to the medial knee. Dr. Tobler stated that appellant came into the office on January 13, 2012 and was given a course of tapering steroids. A March 2011 MRI scan indicated some leftward prominent bulging of the disc and a February 2012 MRI scan showed evidence of disc herniation at L3-4, which caused radiculopathy on the left side. On April 13, 2012 appellant underwent an L3 microdiscectomy on the left and was overall improved but with some radicular pain in the leg, which Dr. Tobler opined was secondary to postoperative neuritis. He reported that he worked 10 hours on October 26, 2010 unloading bundles of magazines and catalogs from cardboard Gaylords for about three to four hours scanning packages for two hours, putting up postal service box mailings and then working the window for approximately five hours. That night appellant noted excruciating back pain and some leg symptoms. He continued to have progressive left lower extremity symptoms following the L3-4 distribution. Dr. Tobler opined that the pattern of back pain followed by increasing radicular symptoms was common for a lumbar disc scenario. He opined that the activities appellant engaged in on October 26, 2010 while at the postal service led to the development of back pain and left lower extremity pain secondary to a herniated lumbar disc. Dr. Tobler opined that it was more likely than not that appellant suffered the herniated lumbar disc on October 26, 2010. A copy of the April 13, 2012 surgical report was provided.

By decision dated October 10, 2012, OWCP denied modification of the December 14, 2011 decision.

On October 25, 2012 appellant requested reconsideration. He contended that his injury was sustained due to his employment. He had a discectomy for an L3-4 herniated disc and a recurrence of a herniated disc at the L3-4 level due to his work-related activities.

In an October 18, 2012 report, Dr. Tobler reiterated that appellant presented to his office with complaints of back pain and left lower extremity pain. He had a leftward bulging of the disc at L3-4 from an MRI scan. Ultimately it was determined that this was the source of appellant's pain. He underwent a decompression and discectomy on the left side on April 13, 2012. Appellant was doing very well at his three-month postoperative visit and returned to work. However, he suffered a setback with recurrence of lumbar radiculopathy when he was moving a large package at the postal service where he worked. Dr. Tobler indicated that appellant was unable to return to work and a new MRI scan showed a recurrent disc herniation at L3-4 on the left. He recommended a repeat discectomy at L3-4, which appellant underwent on August 10, 2012. Dr. Tobler concluded that appellant had two disc herniations at L3-4, one after returning to work which ultimately required a second operation in a four-month period. He opined that appellant was not ready to return to his laborious job at the postal service that involves a lot of bending, twisting and lifting. Outpatient physical therapy was recommended.

By decision dated November 27, 2012, OWCP denied modification of its prior decision.

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 filed within the applicable time limitation; that an injury was sustained while 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.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.³

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 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 a causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable 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.⁴ Neither the fact that appellant's condition became apparent during a period of employment nor his or her belief that, the condition was caused by his or her employment is sufficient to establish a causal relationship.⁵

ANALYSIS

Appellant indicated that after a June 1992 lumbar discectomy he returned to full-duty work as a letter carrier. In 2010, he worked in a limited-duty window clerk position. In March 2010, appellant was transferred to a new station, following which he performed heavy lifting, bending and twisting activities. On or about October 25, 2010, he engaged in repeated lifting activities at work. Appellant underwent a decompression and discectomy on the left side at L3-4 on April 13, 2012.⁶ As he began a new position in 2010 and he was exposed to

² C.S., Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *supra* note 3 at 351-52.

⁵ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

⁶ The record indicates that appellant underwent a repeat discectomy at L3-4 on August 10, 2012. Dr. Tobler indicated in his October 18, 2012 report that the recurrence of lumbar radiculopathy occurred when appellant was moving a large package at the postal service. As this denotes a new event, appellant should file a new claim. *See* 20 C.F.R. § 10.404.

additional work duties, his claim was properly adjudicated as a new occupational disease.⁷ Appellant attributed his current back condition to new duties of heavy lifting, bending and twisting, pushing and pulling containers in addition to prolonged standing.

The medical reports of Dr. Rohmiller provided an impression of chronic low back pain, chronic stenosis at L3-4, severe loss of disc height at L4-5 and L5-S1 with foraminal stenosis. He noted that appellant worked for the postal service and recommended a spinal fusion. Dr. Rohmiller did not provide a history of appellant's back condition or work duties⁸ or offer an opinion on how appellant's employment caused or aggravated his lumbar condition.⁹ Consequently his reports are of diminished probative value on causal relation.

In an April 4, 2012 report, Dr. Tobler opined that the activities appellant engaged in on October 26, 2010 while at work led to the development of back and left lower extremity pain secondary to a herniated lumbar disc. He provided a detailed history of appellant's back condition and noted that he was doing well managing his back issues until October 2010 when he took a new job at the postal office doing a lot of bending, twisting and lifting. Dr. Tobler noted the activities appellant reported to have done on October 26, 2010, including three to four hours of lifting and bending and that appellant stated that he had excruciating back pain and some leg symptoms that night. He explained that appellant's pattern of back pain followed by increasing radicular symptoms was common for a lumbar disc scenario and opined that it was more likely than not that appellant suffered the herniated lumbar disc on October 26, 2010. While Dr. Tobler was generally supportive of appellant's claim, he did not provide a fully-rationalized medical opinion on causal relationship, explaining how the activities on October 26, 2010 aggravated or caused the herniated lumbar disc.

While this report is not sufficient to meet appellant's burden of proof to establish his claim, it raises an inference between his L3-4 disc herniation and L3-4 radiculopathy on the left side with the identified employment factors identified by him of bending, twisting and lifting which he felt caused or contributed to his condition and is sufficient to require OWCP to further develop the medical evidence and the case record.¹⁰ The employing establishment was provided an opportunity to respond to appellant's claim, but they did not dispute he performed the duties he alleged.

On remand, OWCP should prepare a statement of accepted facts and refer appellant to an appropriate physician for a detailed opinion on the causal relationship between his diagnosed

⁷ Section 10.104 of OWCP's regulations provide that a notice of recurrence should not be filed when a new injury, new occupational disease, or a new event contributing to an already existing occupational disease has occurred. In these instances, the employee should file Form CA-1 or CA-2. 20 C.F.R. § 10.104.

⁸ *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history have little probative value).

⁹ *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹⁰ *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *Virginia Richard (Lionel F. Richard)*, 53 ECAB 430 (2002); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

back condition and need for the April 13, 2012 surgery and his new employment duties. After this and such other development as it deems necessary, OWCP should issue a *de novo* decision.¹¹

CONCLUSION

The Board finds that this case is not in posture for decision and requires additional development of the medical evidence by OWCP.

ORDER

IT IS HEREBY ORDERED THAT the November 27, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: June 18, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹¹ The Board notes that Dr. Tobler discusses in his October 18, 2012 report, a recurrence of lumbar radiculopathy and a repeat discectomy at L3-4 after appellant was moving a large package at work. This denotes a separate new event and, thus, is irrelevant to the present claim. *See also supra* note 7.