

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

N.L., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Philadelphia, PA, Employer)

**Docket No. 13-1510
Issued: April 14, 2014**

Appearances:

Jason S. Lomax, 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
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On June 10, 2013 appellant, through her attorney,¹ filed a timely appeal of a December 12, 2012 Office of Workers' Compensation Programs' (OWCP) merit decision denying her occupational disease claim. Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. See 20 C.F.R. § 501.3(f)(2). As OWCP's merit decision was issued on December 12, 2012, the 180-day computation begins on December 13, 2012. One hundred eighty days from December 12, 2012 was June 10, 2013. Since using June 12, 2013, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of mailing contained in counsel's affidavit is considered the date of filing as the postmark is illegible. Counsel's affidavit reveals that the appeal was postmarked on June 10, 2013, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof in establishing that her lumbar disc disease was causally related to her employment duties.

On appeal counsel argued that the report of the second opinion physician, Dr. Robert Draper, Jr., a Board-certified orthopedic surgeon, was not entitled to the weight of the medical evidence.

FACTUAL HISTORY

On April 12, 2010 appellant, then a 49-year-old mail handler, filed an occupational disease claim alleging that she developed lumbar disc disease due to long hours of standing on concrete floors and lifting 70 pounds in the performance of duty. She stated that she first became aware of her condition in May 2007 and first attributed the condition to her employment at that time. Appellant stopped work on May 14, 2007. Dr. Terrence Curley, an osteopath, completed a note on April 19, 2010 and diagnosed lumbar spine disc disease and chronic bilateral radiculopathy. He stated, "It's more likely than not that her job duties have been a causative factor in her chronic condition." Dr. Curley indicated that appellant had experienced her condition since 2007.

In a letter dated July 30, 2010, OWCP requested additional factual and medical evidence in support of appellant's claim and allowed 30 days for a response. Appellant did not respond within the allotted time.

By decision dated September 7, 2010, OWCP denied appellant's claim on the basis that she had not established a causal relationship between her diagnosed condition and her accepted employment duties. Appellant requested an oral hearing before an OWCP hearing representative on October 4, 2010.

Appellant submitted an electromyogram (EMG) dated May 9, 2007 which demonstrated an acute S1-2 radiculopathy bilaterally. On September 13, 2010 Dr. Curley stated that any employment duties that require any physical strain to the lumbosacral region in a chronic fashion could be a causative factor in her condition.

Appellant testified at the oral hearing on February 14, 2011. She stated that she stopped work on May 14, 2007. Appellant submitted a magnetic resonance imaging scan dated May 21, 2008 which demonstrated a herniation of degenerated L5-S1 disc. Dr. Curley completed a report on April 14, 2011 and diagnosed lumbosacral spine strain/sprain with radiculopathy. He opined that appellant's condition was related to her job duties.

By decision dated May 6, 2011, OWCP's hearing representative remanded the case for additional development of the medical evidence.

OWCP referred appellant for a second opinion evaluation with Dr. Draper on July 25, 2011. In a report dated August 18, 2011, Dr. Draper reviewed the statement of accepted facts and the medical records and found, upon examination, that appellant had limited range of motion of the lumbar spine with a normal stance and gait. He diagnosed degenerative bulging

lumbar disc disease L4-S1 preexisting and not accident related and osteoarthritis of the facet joints bilaterally. Dr. Draper stated, “This patient has long-standing preexisting, nonaccident-related degenerative changes in the lumbar discs as well as the facet joints. This is all associated with osteoarthritis primarily and is considered an ordinary disease of life. The conditions were not caused and were not aggravated by her work activity.”

OWCP denied appellant’s claim by decision dated September 7, 2011. It found that Dr. Draper’s report was entitled to the weight of the medical opinion evidence. Appellant requested an oral hearing on October 5, 2011.

In a report dated February 4, 2012, Dr. Curley stated that appellant’s primary diagnosis was lumbosacral spine disc disease, S1-2 radiculopathy. He stated, “The chronic physical demands of her job, (*i.e.*, heavy lifting, long hours standing), and her paucity of symptoms preemployment implicate her job duties as a major causative factor in the chronic condition. Based on my serial examinations and objective medical evidence the patient’s condition is causally related to her job duties. This opinion is made with a reasonable degree of medical certainty.”

Counsel appeared at the oral hearing on February 8, 2012. By decision dated April 6, 2012, OWCP’s hearing representative found that Dr. Curley’s reports were not sufficiently well reasoned to meet appellant’s burden of proof. He further found that Dr. Draper’s report did not support appellant’s claim for a causal relationship between her employment and her back condition and affirmed OWCP’s September 7, 2011 decision.

Appellant requested reconsideration on April 6, 2012. In a report dated July 12, 2012, Dr. Curley repeated his diagnoses and stated, “The chronic physical demands of her job (*i.e.*, repeated heavy lifting, with long hours standing), and the soft tissue muscular micro trauma that these physical demands created clearly caused her ongoing symptom complex.” He opined that appellant’s condition was causally related to her job duties.

By decision dated December 12, 2012, OWCP denied modification of its prior decision finding that Dr. Curley’s report was repetitious and that Dr. Draper’s report continued to represent the weight of the medical opinion evidence.

LEGAL PRECEDENT

OWCP’s regulations define an occupational disease as “a condition produced by the work environment over a period longer than a single workday or shift.”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

³ 20 C.F.R. § 10.5(q).

employment factors identified by the claimant. The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.⁴

A medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.⁵ Medical rationale includes a physician's detailed opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment activity. The opinion of the physician must be based on a complete factual and medical background of the claim, must be one of reasonable medical certainty, and must be supported by medical reasoning explaining the nature of the relationship between the diagnosed condition and specific employment activity or factors identified by the claimant.⁶

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.⁷ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁸

ANALYSIS

The Board finds that this case is not in posture for decision. Appellant's attending physician, Dr. Curley submitted a series of reports supporting a causal relationship between appellant's diagnosed condition and her employment. In his July 12, 2012 report, Dr. Curley opined that appellant's condition was due to her employment duties. He also stated, "The chronic physical demands of her job (*i.e.*, repeated heavy lifting, with long hours standing), and the soft tissue muscular microtrauma that these physical demands created clearly caused her ongoing symptom complex."

OWCP's second opinion physician, Dr. Draper, opined that appellant's diagnosed lumbar condition was preexisting and not accident related. He opined that appellant's condition was with osteoarthritis primarily and was considered an ordinary disease of life. Dr. Draper stated, "The conditions were not caused and were not aggravated by her work activity."

⁴ *Lourdes Harris*, 45 ECAB 545, 547 (1994).

⁵ *T.F.*, 58 ECAB 128 (2006).

⁶ *A.D.*, 58 ECAB 149 (2006).

⁷ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

⁸ *R.C.*, 58 ECAB 238 (2006).

The Board finds that these reports are of equal weight and rationale. The report submitted by appellant's attending physician describes "soft tissue muscular microtrauma" resulting from appellant's accepted employment duties of standing on concrete and lifting up to 70 pounds. The second opinion physician, Dr. Draper opined that appellant's condition was an ordinary disease of life and not caused or aggravated by work activity. Due to the conflict of medical opinion evidence, OWCP must refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician, for an impartial medical examination pursuant to 5 U.S.C. § 8123(a), to determine if there is a relationship between her diagnosed back condition and her employment. After this development, OWCP should issue an appropriate *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision and must be remanded to OWCP for additional development of the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this opinion of the Board.

Issued: April 14, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board