

FACTUAL HISTORY

On August 23, 2012 appellant, then a 62-year-old painter decorator, filed an occupational disease claim alleging that, as a result of his federal duties, he suffered from pseudoarthrosis, spinal fusion failure, lumbar disc herniation, chronic disc pain syndrome and degenerative piriformic syndrome. He alleged that he had a spinal fusion L5-S1 in 1993 and returned to work, but that he reinjured his back when lifting a heavy partition at work on November 14, 2007.² Appellant indicated that stress on his back was a factor in the failure of his fusion.

In a July 15, 2011 report, Dr. Robert L. Lyles, a pain management specialist who is Board-certified in anesthesiology and critical care medicine, completed a certification of health care provider for the Family and Medical Leave Act (FMLA) indicating that he treated appellant on multiple specific dates from January 10, 2008 through June 21, 2011, and that appellant had chronic pain syndrome, degenerative disc disease, lumbar disc herniation, piriformic syndrome and pseudoarthrosis. He placed restrictions on appellant, indicating that he was unable to twist, stand on a ladder, lift more than 10 pounds, stand for long periods of time, walk longer than ½ mile in a day, bend, kneel or climb. Dr. Lyles noted that pain and symptoms related to appellant's condition are constantly causing impairment in activities of daily living and job functions.

On July 14, 2011 Dr. Leonid Selya, a Board-certified orthopedic surgeon, also completed a certification of health care provider under the FMLA, and indicated that appellant had chronic L5-S1 pseudoarthrosis and that he was disabled and unable to walk, sit, stand, bend or climb. He indicated that appellant will receive a revision spinal fusion.

By letter dated November 15, 2012, OWCP asked that appellant submit further evidence in support of his claim. In response, appellant submitted an undated and unsigned statement indicating that his outside activities have been curtailed drastically to minimal family visits, as his physical impairment restricts travel and sitting for prolonged periods. He noted that his inability to bend, kneel and sit in one position too long limits most of his activities.

In response to OWCP's letter, appellant submitted a January 31, 2008 report wherein Dr. Selya noted that around 1994 appellant underwent an uneventful L5-S1 fusion of the treatment of a low back injury sustained at work. He indicated that, at that time, the injury was recognized by workmen's compensation, and appellant was compensated for his injury. Dr. Selya stated that appellant recovered and was able to return to productive employment, but was treated for occasional episodes of low back discomfort and was seen on as per needed basis. However, he noted that appellant's condition deteriorated on November 14, 2007 when he lifted a heavy partition at work and that, since that time, appellant has had intermittent occasional low back pain which became chronic severe narcotic dependent agonizing discomfort. Dr. Selya noted that at that time he evaluated appellant and confirmed the diagnosis of decompensation of pseudoarthrosis and discussed surgery, but he elected nonsurgical treatment and was referred to chronic pain management. He noted that appellant undergoes multiple injections, pain management and narcotic management. Dr. Selya noted that appellant's case was a classic

² The record reveals that, under OWCP File No. xxxxxx184, OWCP accepted appellant's claim for an aggravation of a preexisting, nonwork-related lumbar sprain.

example of decompensation of pseudoarthrosis secondary to trauma. In a June 2, 2011 note, he stated that appellant suffers from pseudoarthrosis at L5-S1 after unilateral fusion in 1994. Dr. Selya indicated that appellant will consider surgery after he recovers from his bypass surgery.

In a February 5, 2008 report, Dr. Lyles indicated that appellant's had recurrence of lumbar injury that per patient history was caused or aggravated by employment activity.

In a decision dated December 20, 2012, OWCP denied appellant's claim, as it found that the evidence is insufficient to establish that the event occurred as alleged, noting that appellant had not provided sufficient medical evidence to establish what ongoing work activities caused or contributed to his injury.

On January 19, 2013 appellant requested an oral hearing before an OWCP hearing representative. However, on April 29, 2013, appellant's attorney elected to proceed with a review of the written record.

In a March 16, 2007 report, Dr. Selya indicated that clinically and radiologically appellant suffers with L5-S1 pseudoarthrosis and that he recommended surgery.

Appellant also submitted a May 24, 2013 statement wherein he indicated that the November 14, 2007 traumatic injury resulted in a four months' absence. He noted that during that time he was under the care of Dr. Selya who advised revision of spinal surgical procedure and revisions of fusion front to back, but that he opted for nonsurgical chronic pain management with Dr. Lyles. Appellant noted that he returned to work in April 2008. He stated that the work load resulted in long periods of standing seven hours daily, lifting loading and unloading trucks, receiving materials and sorting inventory. Appellant alleged that not one specific incident but an accumulation of daily strenuous activities culminated into agonizing discomfort and in May 2011 he could no longer endure it and yielded to the prospect of disability.

By decision dated July 22, 2013, an OWCP hearing representative affirmed OWCP's December 20, 2012 decision. The hearing representative noted that OWCP previously accepted that appellant's November 2007 work event resulted in an aggravation of appellant's preexisting strain, however there was no discussion or rationalized medical opinion explaining that the claimant's condition was made worse or aggravated as a result of performing his duties after the November 2007 traumatic injury or upon his return to work in April 2008.

LEGAL PRECEDENT

An employee seeking compensation under FECA³ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,⁴ including that he is an "employee" within the meaning of FECA⁵ and that he filed his claim

³ 5 U.S.C. §§ 8101-8193.

⁴ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

⁵ *See M.H.*, 59 ECAB 461 (2008); *see* 5 U.S.C. § 8101(1).

within the applicable time limitation.⁶ The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.⁷ 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.⁸

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.⁹

Causal relationship is a medical issue¹⁰ and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,¹¹ must be one of reasonable medical certainty,¹² and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.¹³

Under FECA, when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.¹⁴

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury caused or aggravated by the duties of his federal employment. Although appellant established employment factors and a medical diagnosis, he did not submit medical evidence that established that his medical condition was causally related to long periods of

⁶ *R.C.*, 59 ECAB 427 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); see 5 U.S.C. § 8122.

⁷ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ See *Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁹ See *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

¹⁰ *Mary J. Briggs*, 37 ECAB 578 (1986).

¹¹ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

¹² See *Morris Scanlon*, 11 ECAB 384, 385 (1960).

¹³ See *William E. Enright*, 31 ECAB 426, 430 (1980).

¹⁴ *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *James L. Hearn*, 29 ECAB 278, 287 (1978).

standing, lifting loading and unloading trucks, receiving materials and sorting inventory. In a variety of reports, Dr. Lyles listed multiple physical problems, including chronic pain syndrome, degenerative disc disease, lumbar disc herniation, piriformic syndrome and pseudoarthrosis caused by an accumulation of daily strenuous activities. However, there was no discussion or rationalized medical opinion explaining a causal connection between his work duties and the claimant's condition.

Dr. Selya found L5 pseudoarthrosis, but never discussed the specific employment activities that caused or aggravated his back condition. He noted that appellant injured his low back sometime in 1994 which required surgical treatment, that he was diagnosed with pseudoarthrosis, and that the injury in November 2007 resulted in decompensated pseudoarthrosis. However, Dr. Selya did not discuss how appellant's specific activities of work after his return to work in April 2008 caused or aggravated his medical condition.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was caused by his employment is sufficient to establish causal relationship.¹⁵ As appellant did not submit a rationalized medical opinion establishing a causal relationship between his accepted employment activities and a diagnosed medical condition, he did not meet his burden of proof.

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 did not establish that he sustained an aggravation of a back injury causally related to factors of his federal employment.

¹⁵ *Walter D. Morehead*, 31 ECAB 188 (1986).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 22, 2013 is affirmed.

Issued: August 5, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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