

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

I.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer**

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**Docket No. 14-1109
Issued: October 6, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 14, 2014 appellant filed a timely appeal from a March 18, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim and a March 31, 2014 nonmerit decision denying his request for reconsideration. 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.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a left shoulder, left arm and low back injury in the performance of duty on November 27, 2013; and (2) whether OWCP properly denied appellant's request for further merit review under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 27, 2014 appellant, then a 41-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 27, 2013 he sustained a left shoulder, left arm and lower back injury in a motor vehicle accident when his postal vehicle was rear ended when standing still at a traffic light. He stopped work on November 29, 2013.

Appellant's supervisor, Rich Thompson, controverted the claim. Mr. Thompson stated that, on the evening of November 27, 2013, appellant complained of pain in his shoulder and arm and did not notify Mr. Thompson that he had injured his back. Appellant did not seek medical treatment on the date of the accident and wanted to wait to see how he felt. He returned to work two days later on his next scheduled shift. Appellant informed Mr. Thompson that he could not work due to his back injury. Mr. Thompson speculated that appellant's injury was due to a November 6, 2013 accident at the employing establishment and not a result of the November 27, 2013 motor vehicle accident. He further controverted the case stating that appellant request a Form CA-1 until January 27, 2014, more than 30 days after the date of injury.

By letter dated February 11, 2014, OWCP requested additional evidence from appellant and asked that he respond within 30 days. In a separate letter dated February 11, 2014, it requested that the employing establishment provide additional factual information pertaining to the motor vehicle accident.

In a February 14, 2014 narrative statement, appellant reported that on November 27, 2013 he was completing his mail route in his long life vehicle when it was struck from behind by another vehicle. He called his supervisor and the police at the time of the accident. Mr. Thompson arrived at the scene and appellant told him of tightness in his lower back and pain in his left shoulder and arm. Appellant noted that he had a prior work-related back injury on November 6, 2013 for which he filed a Form CA-1.² He stated that Mr. Thompson related his back injury to the November 6, 2013 injury and not to the motor vehicle accident. Appellant attempted to work on November 29, 2013 his next scheduled work date, but was unable to stand and case mail due to pain. He stopped work and made an appointment with his physician. Mr. Thompson interviewed appellant on the date of the motor vehicle accident and he thought his supervisor filed a Form CA-1 regarding the incident. In January 2014, appellant was informed by his claims examiner in claim File No. xxxxxx787, that there was no Form CA-1 filed for the November 27, 2013 accident. She further informed him that all of the medical reports he submitted in that claim referenced the November 27, 2013 injury. Appellant then filed a claim, File No. xxxxxx691.³

In support of his claim, appellant submitted a November 27, 2013 Florida Traffic Crash Report. The Officer investigating the scene noted that appellant was struck from the rear by a motor vehicle. Appellant complained of left arm, shoulder and elbow pain but declined emergency medical services.

² Claim File No. xxxxxx787. The Board notes that this claim was not accepted by OWCP.

³ Claim File No. xxxxxx787 was subsequently cancelled and all documents were transferred to this new claim, File No. xxxxxx691.

In a February 14, 2014 statement, Israel Castro, a city carrier and fellow employee, reported that appellant sustained injury on November 6 and 27, 2013. He noted that appellant informed him on November 27, 2013 that he was involved in a motor vehicle accident. Appellant complained of left shoulder pain and tightness in his lower back.

In a February 21, 2014 statement, Mr. Thompson reported that appellant was returning from his assigned duty when he was struck by a motor vehicle on November 27, 2013. A police report was filed.

In medical reports dated December 3, 2013 to January 6, 2014, Dr. Joseph Slattery, Board-certified in internal medicine, obtained a history that appellant was involved in a work-related injury on November 6, 2013 when he was moving a tray of mail into his truck and felt the onset of low back pain. No x-rays were taken and appellant returned to work, complaining of continued low back pain. On November 27, 2013 he was involved in a motor vehicle accident when struck in the rear while his hands were on the steering wheel. Appellant complained of pain to his low back left shoulder, arm and elbow. Dr. Slattery noted intermittent numbness in the right leg running posteriorly since the November 6, 2013 injury and intermittent pain and tingling in the posterior legs bilaterally since November 27, 2013. He noted a prior history of strained a back in 2007, which resolved with chiropractic treatment and reported no neck or back problems at the time of the recent accident. Dr. Slattery reviewed x-rays of the cervical spine, lumbar spine and left shoulder as well as magnetic resonance imaging (MRI) scans of the cervical and lumbar spine. He diagnosed cervical sprain/strain with left radiculopathy causally related to the November 27, 2013 motor vehicle accident, lumbar sprain/strain with bilateral radiculopathy causally related to the November 6, 2013 employment incident with right radicular symptoms, which were aggravated by the November 27, 2013 motor vehicle accident and probable left shoulder sprain/strain, which was causally related to the November 27, 2013 accident.

By decision dated March 18, 2014, OWCP denied appellant's claim. It found that the medical evidence of record failed to establish that his diagnosed conditions were causally related to the accepted November 27, 2013 employment incident.

On March 24, 2014 appellant requested reconsideration of OWCP's decision.

In a December 12, 2013 report, Dr. Marlon Adler, a Board-certified diagnostic radiologist, reported that an x-ray of the cervical spine revealed straightening of the cervical lordosis which could reflect muscular spasm. An x-ray of the lumbar spine revealed mild disc space narrowing at L5-S1 with mild to moderate degenerative endplate changes and facet arthropathy. An x-ray of the left shoulder revealed no acute osseous pathology with mild myopertrophic degenerative changes at the acromioclavicular joint and mild degenerative arthrosis of the glenohumeral joint consistent with calcific tendinopathy.

In a December 12, 2013 report, Dr. Thomas H. Magee, a Board-certified diagnostic radiologist, reported that an MRI scan of the lumbar spine revealed L4-5 posterocentral disc herniation of the protrusion type and annular tear, as well as an L5-S1 broad based posterocentral disc herniation of the protrusion type.

Physical therapy notes dated December 19, 2013 to February 14, 2014 were submitted from Cora Rehabilitation Clinics.

In a March 27, 2014 treatment note, Beth DiGiorgio, a registered nurse, reported that appellant was involved in a November 27, 2013 motor vehicle accident. She listed bilateral radiculopathy, disc herniations at L4-5 and L5-S1, a left shoulder injury and cervical radiculopathy.

In a March 27, 2014 note, Dr. Slattery reported that appellant was placed on temporary total disability from November 29, 2013 through May 22, 2014 for injuries sustained in the November 27, 2013 accident.

By decision dated March 31, 2014, OWCP denied appellant's request for reconsideration. It found that he did not raise any substantive legal questions or included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

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 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 on a traumatic injury or occupational disease.⁵

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁶ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.⁷ 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

⁴ Gary J. Watling, 52 ECAB 278 (2001); Elaine Pendleton, 40 ECAB 1143, 1154 (1989).

⁵ Michael E. Smith, 50 ECAB 313 (1999).

⁶ Elaine Pendleton, *supra* note 4 at 1143.

⁷ See 20 C.F.R. § 10.110(a); John M. Tornello, 35 ECAB 234 (1983).

condition and the specific employment factors identified by the claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁸

ANALYSIS -- ISSUE 1

OWCP accepted that the November 27, 2013 incident occurred as alleged. The issue, however, is whether appellant established that the incident caused him a low back, left shoulder and left arm injury. The Board finds that he did not submit sufficient medical evidence to support that his low back, left shoulder and left arm injury is causally related to the November 27, 2013 employment incident.⁹

In medical reports dated December 3, 2013 to January 6, 2014, Dr. Slattery reported that appellant was involved in a work-related injury on November 6, 2013 when he was moving a tray of mail into his truck and felt the onset of low back pain. No x-rays were taken and appellant returned to work complaining of continued back pain. On November 27, 2013 he was involved in a motor vehicle accident when he was struck in the rear while his hands were on the steering wheel. Appellant complained of low back pain and pain in his left shoulder, arm and elbow. Dr. Slattery noted a history of strained back in 2007, which resolved with chiropractic treatment. He reviewed diagnostic testing and provided findings on physical examination. Dr. Slattery diagnosed cervical sprain/strain with left radiculopathy causally related to the November 27, 2013 motor vehicle accident. Further, he discussed lumbar sprain/strain with bilateral radiculopathy causally related to the November 6, 2013 employment incident with right radicular symptoms, which were aggravated by the November 27, 2013 motor vehicle accident and probable left shoulder sprain/strain, which was causally related to the November 27, 2013 motor vehicle accident.

The Board finds the opinion of Dr. Slattery insufficiently rationalized. Dr. Slattery provided a limited medical history, which only generally noted a 2007 back injury without details pertaining to the preexisting condition. He diagnosed cervical sprain/strain with left radiculopathy, which he opined was causally related to the November 27, 2013 motor vehicle accident. Dr. Slattery further diagnosed lumbar sprain/strain with bilateral radiculopathy causally related to the November 6, 2013 employment incident with right radicular symptoms, which were aggravated by the November 27, 2013 accident. While he provided a firm medical diagnosis of cervical sprain/strain with left radiculopathy and lumbar sprain/strain with bilateral radiculopathy, he failed to adequately address how the November 27, 2013 incident caused or contributed to appellant's low back condition. Dr. Slattery noted that appellant did not submit to diagnostic testing after his November 6, 2013 injury. While appellant underwent diagnostic testing on December 13, 2013 following the November 27, 2013 incident, Dr. Slattery was not clear as to whether the diagnosed conditions were caused or aggravated by the motor vehicle accident or a result of the prior November 6, 2013 incident. Moreover, his opinion on causation

⁸ *James Mack*, 43 ECAB 321 (1991).

⁹ *See Robert Broome*, 55 ECAB 339 (2004).

failed to explain the mechanism of injury with a physiological description of how the acknowledged accident caused a low back injury.¹⁰

The Board further notes that Dr. Slattery's diagnosis of probable left shoulder sprain/strain is speculative and fails to establish a firm medical diagnosis.¹¹ Medical reports without adequate rationale on causal relationship are of diminished probative value and do not meet an employee's burden of proof.¹² The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the relationship between the diagnosed condition and the established incident or factor of employment.¹³ Dr. Slattery's reports are insufficient to meet appellant's burden of proof.¹⁴

In the instant case, the record lacks sufficient medical evidence to establish a causal relationship between the November 27, 2013 motor vehicle accident and appellant's injury. Thus, appellant has failed to meet his burden of proof.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁵ Section 10.608(b) of OWCP regulations provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁶

¹⁰ *B.D.*, Docket No. 11-464 (issued September 19, 2011).

¹¹ *K.W.*, Docket No. 12-1467 (issued April 5, 2013).

¹² *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

¹³ *See Lee R. Haywood*, 48 ECAB 145 (1996).

¹⁴ *Supra* note 10.

¹⁵ *D.K.*, 59 ECAB 141 (2007).

¹⁶ *K.H.*, 59 ECAB 495 (2008).

ANALYSIS -- ISSUE 2

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his March 24, 2014 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. Appellant's argument was that his injury was employment related. The underlying issue in this case was whether his injury was causally related to the accepted November 27, 2013 motor vehicle accident. That is a medical issue which must be addressed by relevant medical evidence.¹⁷

While appellant submitted new medical evidence, the reports are not relevant to establishing causal relationship between his diagnosed conditions and the November 27, 2013 motor vehicle accident. The December 12, 2013 reports from Dr. Adler and Dr. Magee provided diagnostic findings yet failed to state an opinion regarding the cause of appellant's injury. Dr. Slattery's March 27, 2014 note only stated that appellant was disabled as a result of injuries sustained from the November 27, 2013 motor vehicle accident and failed to provide any opinion regarding the cause of his injuries. While these reports were not previously of record, they are irrelevant to the grounds upon which OWCP denied appellant's claim. Appellant's claim was denied because the medical evidence lacked a rationalized opinion from a physician, with a physiological description of how his claimed injury resulted from the November 27, 2013 employment incident and a full and accurate factual and medical history, on the issue of causal relationship. As the reports of Dr. Slattery, Dr. Adler and Dr. Magee do not contain such an opinion, they are not relevant and insufficient to require a merit review of his claim.¹⁸

The Board also notes that the physical therapy notes and treatment notes from a registered nurse Ms. DiGiorgio are also insufficient to require merit review. Registered nurses, licensed practical nurses, physician's assistants, physical and occupational therapists, they are not "physicians" as defined under FECA, their opinions are of no probative value.¹⁹ The underlying issue in this case was whether appellant's injury was causally related to the accepted November 27, 2013 employment incident. That is a medical issue which must be addressed by relevant medical evidence.²⁰ A claimant may obtain a merit review of an OWCP decision by submitting new and relevant evidence. In this case, appellant failed to submit any new and relevant evidence addressing causal relationship.

¹⁷ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹⁸ *M.N.*, Docket No. 14-245 (issued May 2, 2014).

¹⁹ 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.

²⁰ See *Bobbie F. Cowart*, *supra* note 17.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a traumatic injury on November 27, 2013 in the performance of duty, as alleged. OWCP properly denied his request for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated March 31 and 18, 2014 are affirmed.

Issued: October 6, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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