United States Department of Labor
Employees' Compensation Appeals Board

E.R., Appellant	)	
and	)	**Docket No. 15-1655**
	)	**Issued: December 18, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Coppell, TX, Employer	)	

Appearances:
Tim Egbuchunam, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 27, 2015 appellant, through counsel, filed a timely appeal from a February 27, 2015 merit decision and an April 13, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that his diagnosed conditions were caused or aggravated by his federal employment; and (2) whether

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence following the April 13, 2015 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt,* 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP along with a request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b).

OWCP properly denied appellant's March 15, 2015 request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 18, 2014 appellant, then a 56-year-old custodian laborer, filed an occupational disease claim (Form CA-2) alleging that he experienced severe pain in his neck, low back, both shoulders, both wrists, and both knees as a result of his employment.[3] He first became aware of his conditions and realized that they resulted from his employment on December 23, 2013. Appellant stopped work on December 29, 2013.

Appellant explained in an August 14, 2014 statement that he had been employed as a custodian laborer for the last 20 years and worked a minimum of 40 hours a week. He related that he had been on military deployment for nine years during which time he sustained injuries to his low back, neck, both shoulders, both wrists, and both knees. Appellant explained that he returned to work at the employing establishment on November 3, 2013 and experienced aggravation of his previous injuries, which made it difficult for him to perform his job duties. He noted that his work duties required him to stay on his feet as he cleaned the office building. Appellant asserted that the repetitive motion of prolonged standing, constant walking, stooping, reaching, twisting, and lifting had aggravated his preexisting injuries. He reported that the aggravation limited his ability to perform his job duties and that after December 23, 2013 the pain became so severe that he was unable to fully perform his duties.

On January 15, 2014 appellant was examined by Dr. Charles Willis, a Board-certified anesthesiologist and pain management specialist. Dr. Willis reported that appellant was totally disabled from January 15 to February 15, 2014. In February 19, March 30, and April 11, 2014 work status notes, he reported that appellant was totally disabled from February 19 to May 11, 2014 based on the results of the most recent Functional Capacity Evaluation (FCE).

In a May 30, 2014 report, Dr. Willis indicated that appellant was totally disabled from May 30 to June 30, 2014 based on appellant's most recent FCE. He reported that appellant was post-lumbosacral facet injections on May 9, 2014.

Appellant continued to be treated by Dr. Willis who noted in a June 27, 2014 work capacity evaluation that appellant was capable of working full time with restrictions. Dr. Willis restricted appellant to walking and standing for one hour, reaching above the shoulder, pushing, pulling, and lifting 10 pounds for two hours, and no kneeling, and climbing.

On August 1, 2014 Gabriela Neale, a health and resource management specialist for the employing establishment, controverted appellant's claim alleging that he did not establish fact of injury, causal relationship, and performance of duty. She stated that appellant previously filed an occupational disease claim on January 21, 2014 for the same conditions. Ms. Neale also reported that appellant had just returned from military duty on November 3, 2013 and did not provide any medical documentation alleging any disability or work restrictions. She noted that appellant

[3] The record reveals that appellant had a previously accepted traumatic injury claim (File No. xxxxxx634) and a denied occupational disease claim (File No. xxxxxx743).

worked for the employing establishment except for the dates when he was on military leave. The employing establishment reported that from May 6, 2004 to November 15, 2009 appellant was on extended military leave. From November 16, 2009 to March 25, 2010 appellant returned to work. From March 26, 2010 to November 2, 2013 he was again on extended military leave. On November 3, 2013 appellant returned to work before stopping work again on December 30, 2013. Ms. Neale also asserted that it was questionable that appellant was capable of performing his military duties for many years, but was now claiming an aggravation of his conditions after working only 32 days.

By letter dated August 27, 2014, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested additional factual evidence to substantiate the factual elements of his claim and additional medical evidence to demonstrate that he sustained a diagnosed medical condition causally related to his employment. A similar development letter was sent to the employing establishment.

Appellant resubmitted his August 4, 2014 statement.

In an August 28, 2014 report, Dr. Ed Wolski, a Board-certified family practitioner and pain management specialist, related appellant's complaints of moderate pain to the neck, back, bilateral knees, shoulders, and wrists. He noted that appellant was involved in a work-related injury while performing work duties as a labor custodian for approximately 22 years. Dr. Wolski explained that the work injury occurred while performing repetitive work duties when lifting and carrying 50-pound, 5-gallon buckets filled with wax, pushing and pulling, bending, and stooping. He reviewed appellant's history and conducted an examination. Dr. Wolski observed moderate paravertebral tenderness and spasms of the thoracic spine. Examination of the lumbar spine demonstrated tenderness and palpable spasms and diminished range of motion. Straight leg raise testing was positive. Dr. Wolski also reported four well-healed surgical scars over the right shoulder and diffuse tenderness over the anterior deltoid. Range of motion was diminished at 80 degrees abduction. Dr. Wolski further observed diminished range of motion and tenderness over the carpals of the bilateral wrists. Examination of the bilateral knees revealed tenderness over the lateral joint lines and diminished flexion. Dr. Wolski diagnosed bilateral knee strain, thoracic strain, and lumbar strain.

Dr. Wolski opined that appellant sustained his work-related injuries while in the performance of his duties as a custodian for the employing establishment. He explained that the work injury occurred while he performed repetitive work duties of lifting and carrying 50-pound, 5-gallon buckets filled with wax, pushing and pulling, bending and stooping maneuvers to relocate chairs, desks, and tables. Dr. Wolski reported that repetitive bending, lifting, and twisting caused excessive strain to appellant's thoracic and lumbar paraspinal muscles and ligaments and that prolonged standing and squatting caused bilateral knee sprains. He noted that the medical evidence was supported by subjective complaints of reported pain, reported difficulty performing work duties, and objective findings of tenderness, limited mobility, and decreased strength. Dr. Wolski also reported that there were radiographic findings of spondylosis, loss of lumbar curvature, knee joint space, and osteoarthritis.

In a decision dated September 29, 2014, OWCP denied appellant's occupational disease claim. It found that he had failed to establish how his federal employment duties caused his diagnosed conditions.

On December 1, 2014 OWCP received appellant's reconsideration request through counsel. Counsel pointed out that appellant was alleging an aggravation of his preexisting injuries. He also noted that updated medical evidence was being submitted to support aggravation of preexisting injuries.

Appellant resubmitted the August 4, 2014 statement and Dr. Wolski's August 28, 2014 report.

By decision dated February 27, 2015, OWCP denied modification of the September 29, 2014 denial decision.

On March 15, 2015 OWCP received appellant's reconsideration request through counsel.

On April 10, 2015 OWCP received additional medical evidence. Appellant submitted various diagnostic reports by Dr. Julian Crutchfield, a chiropractor. In an August 28, 2014 x-ray of the right knee, Dr. Crutchfield observed some degenerative arthritic changes in the anterior superior aspect of the patella and some mild degenerative arthritic changes of the patella on the anterior superior aspect.

An August 28, 2014 x-ray of the left wrist demonstrated no evidence of fractures, dislocations, or gross pathology.

In an August 28, 2014 x-ray of the left knee, Dr. Crutchfield observed moderate loss of the medial and lateral joint space and mild-to-moderate degenerative arthritic changes of the distal femur, proximal tibia with the lateral aspect more than the medial aspect. He also noted mild formation of osteophyte on the lateral aspect of the femur and tibia and on the medial aspect of the femur.

Dr. Crutchfield also reviewed an August 28, 2014 x-ray of the lumbar spine. He found moderate loss of lordosis of the lumbar spine on the lateral view and osteophyte formation on the anterior aspect of L1, L2, L3, and L4. Dr. Crutchfield also noted sclerosing of the L5 vertebral body and part of the lower half of the L4 vertebral body.

In an August 28, 2014 x-ray of both shoulders, Dr. Crutchfield reported that the acromioclavicular joint space appeared slightly reduced due to some degenerative arthritic changes of the acromion and the distal clavicle. He noted that the glenohumeral joint space appeared abnormal in the internal and external rotation views.

Appellant was also examined by Ryan Stepinoff, a physician assistant, on October 14, November 20, and December 17, 2014, for complaints of severe left knee, neck, and low back pain. Mr. Stepinoff noted a date of injury of December 23, 2013. Upon examination, he indicated muscle spasm and decreased range of motion of the back. Mr. Stepinoff indicated that appellant sustained an aggravation of a preexisting back, bilateral knee, and bilateral shoulder injury.

On October 21, 2014 appellant underwent an electromyography (EMG) and nerve conduction velocity (NCV) examination by Dr. Robert Helsten, a family practitioner and pain management specialist, who related appellant's complaints of pain, numbness, and tingling in the lower extremities. Dr. Helsten indicated that appellant injured his lower back due to repetitive requirements of his job. He observed decreased NCV and amplitude of the right and left tibial. Dr. Helsten also indicated that appellant had prolonged bilateral peroneal F waves.

In a decision dated April 13, 2015, OWCP denied appellant's request for reconsideration. This decision found that, while appellant's counsel had stated that he had submitted new medical evidence, no new evidence was received. OWCP noted that the last medical report submitted was received on December 1, 2014 and was a duplicate copy of Dr. Wolski's August 28, 2014 report.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence[4] including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.[5] In an occupational disease claim, appellant's burden requires submission of the following: (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]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[7] The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical 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.[8]

ANALYSIS -- ISSUE 1

Appellant has alleged that he developed various low back, neck, shoulder, wrists, and knee conditions while serving in the military. On July 18, 2014 he filed an occupational disease claim alleging that his duties as a custodian laborer aggravated these various conditions. OWCP

[4] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[5] *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

[7] *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

[8] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

accepted that appellant's job required prolonged standing and walking and repetitive stooping, reaching, twisting, and lifting. It denied his claim finding insufficient medical evidence to establish that his diagnosed conditions were caused by factors of his employment. The Board finds that appellant did not meet his burden of proof to establish his occupational disease claim.

Appellant was examined by Dr. Wolski. In an August 28, 2014 report, Dr. Wolski noted that appellant sustained a work-related injury while working as a labor custodian for 22 years. He explained that appellant performed repetitive work duties of lifting and carrying 50-pound 5-gallon buckets, pushing and pulling, bending, and stooping. Dr. Wolski reviewed appellant's history and provided findings on examination. He diagnosed bilateral knee strain, thoracic strain, and lumbar strain. Dr. Wolski opined that appellant sustained his work-related injuries while in the performance of his duties as a custodian for the employing establishment. He reported that the medical evidence was supported by subjective complaints of reported pain, reported difficulty performing work duties, and objective findings of tenderness, limited mobility, and decreased strength. Dr. Wolski accurately described appellant's employment duties as a labor custodian and provided examination findings and a medical diagnosis. Although he opined that appellant's conditions were related to his duties as a labor custodian, the Board finds that he did not provide any medical rationale to support his opinion of causal relationship and failed to base his opinion on a correct history as he does not acknowledge the preexisting military-related injuries.[9] The Board has found that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale.[10] Dr. Wolski failed to relate specific employment factors to appellant's diagnosed conditions with medical rationale.[11] He also failed to premise his opinions on a correct history of injury. Accordingly, Dr. Wolski's report is insufficient to establish appellant's claim.

In work status notes dated January 15 to May 30, 2014, Dr. Willis indicated that appellant was totally disabled from January 15 to June 30, 2014 based on the results of the most recent FCE. In a June 27, 2014 work capacity evaluation, he reported that appellant was capable of working full time with restrictions of reaching above the shoulder, pushing, pulling, and lifting up to two hours, walking and standing for one hour, and no kneeling or climbing. The Board finds that Dr. Willis' reports are insufficient to establish appellant's claim as he does not provide any medical diagnosis or opinion on whether appellant sustained a medical condition causally related to his employment and he too fails to base his opinion on a correct history as he does not acknowledge the preexisting military-related injuries.

On appeal, appellant alleges that OWCP failed to properly review all the factual and medical evidence in the case record. Despite his allegations, however, the Board finds that appellant has not submitted any evidence to substantiate his claim. The issue of causal relationship is a medical question that must be established by probative medical opinion from a

[9] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[10] *T.M.*, Docket No. 08-975 (issued February 6, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[11] *See Solomon Polen*, 51 ECAB 341 (2000).

physician.[12] As appellant has not submitted such probative medical opinion evidence in this case, he has not met his burden of proof to establish his claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.[13] OWCP's regulations provide that OWCP may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his right through a request to the district office.[14]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[15]

A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.[16] A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.[17] If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[18]

ANALYSIS -- ISSUE 2

By decision dated April 13, 2015, OWCP denied appellant's request for reconsideration finding that no new medical evidence was received to warrant further merit review. The Board notes, however, that appellant submitted various medical reports including diagnostic reports by Dr. Crutchfield and Dr. Helsten and examination records by a physician assistant. These reports were received by OWCP on April 10, 2015. Although appellant submitted medical evidence along with his reconsideration request, OWCP did not review the additional evidence from Drs. Crutchfield and Helsten. OWCP received these reports three days before it issued its

[12] *W.W.*, Docket No. 09-1619 (issued June 2, 2010); *David Apgar*, 57 ECAB 137 (2005).

[13] 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

[14] 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

[15] 20 C.F.R. § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[16] 20 C.F.R. § 10.607(a).

[17] *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

[18] *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

April 13, 2015 decision. The Board has found that because its jurisdiction of a case is limited to reviewing the evidence that was before OWCP at the time of its final decision, it is critical that OWCP review all evidence relevant to that subject matter and received by OWCP prior to the issuance of its final decision.[19]

The Board finds that this case is not in posture for decision. While the Board affirms the February 27, 2015 decision, the Board will set aside OWCP's April 13, 2015 decision denying appellant's reconsideration request and remand the case to OWCP for consideration of the evidence in order to determine whether this evidence required further merit review of appellant's claim.

CONCLUSION

The Board finds that appellant has not established that his diagnosed conditions were caused or aggravated by his federal employment. The Board also finds that the claim is not in posture for decision regarding whether OWCP properly denied appellant's reconsideration request.

[19] *See William A. Couch*, 41 ECAB 548 (1990); *E.Z.*, Docket No. 14-274 (issued March 16, 2015).

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2015 merit decision is affirmed while the April 13, 2015 decision of the Office of Workers' Compensation Programs is set aside and remanded for further action consistent with this decision of the Board.

Issued: December 18, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board