

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

C.W., Appellant

and

U.S. POSTAL SERVICE, ALTON POST
OFFICE, Alton, NH, Employer

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**Docket No. 14-730
Issued: January 8, 2015**

Appearances:

James G. Noucas, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 12, 2014 appellant, through his attorney, filed a timely appeal of a September 19, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 the case.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty casually related to factors of his federal employment.

On appeal, appellant, through counsel, contests the facts as set forth by the postmaster in his letter controverting the claim. He also argues that the medical evidence was sufficient to establish appellant's claim or in the alternative, was sufficient to require further development of the evidence.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 16, 2012 appellant, then a 49-year-old rural mail carrier, filed a traumatic injury claim alleging that as a result of the repetitive actions with his right shoulder, hand, arm, and neck during the course of his federal employment, he had developed herniated bulging discs at C5, C6, and C7 and an occupational disease in his neck, shoulders, arm, hand, and fingers. He noted that he opens about 500 mailboxes a day and loaded and unloaded a thousand pieces of mail per day. Although appellant filed a traumatic injury claim, he indicated on the claim form that his claim was actually for an occupational disease.

The employing establishment, through Lisa M. Gallagher, controverted appellant's claim and noted that appellant had been on unpaid leave pending removal since December 3, 2011 and that he never reported being injured on the job. It noted that appellant filed his claim almost seven months after he was taken out of work on December 3, 2011. The employing establishment also contended that appellant left his last employing establishment, Federal Express (FedEx), due to a back and neck injury for which he needed major surgery and that it was not clear to what extent his prior injury at FedEx impacted his current condition.

In response to questions from OWCP, appellant contended that his injuries occurred over a period of time and that he started noticing discomfort and pain in August 2011 but did not realize that it was work related at that time. He contended that his injuries were not related to his prior injury with FedEx.

By decision dated August 21, 2012, OWCP denied appellant's claim because appellant had not submitted any evidence containing a medical diagnosis. It also administratively converted his claim to one for an occupational disease.

On September 6, 2012 OWCP requested reconsideration. On November 29, 2012 counsel entered an appearance in the case and requested that appellant's claim be expanded to include a right shoulder medical condition.

In a June 15, 2012 report, Dr. Anthony A. Salerni, a Board-certified neurosurgeon, diagnosed appellant with cervical radiculopathy. He noted that appellant had an anterior cervical discectomy and fusion at C5-6 and C6-7 approximately 10 days ago. Dr. Salerini noted that appellant was complaining of increased pain in the last couple of days. He noted that there was no neurologic evidence of any problems, but that a small hematoma could be present, and recommended a computerized tomography scan to try to rule this out. Appellant also submitted the report of the June 8, 2012 operation, wherein Dr. Salerini noted that he conducted a C5-6 and C6-7 anterior cervical discectomy and fusion with Osteocel and insertion of PEEK interbody devices. In addition, he submitted Dr. Salerni's progress notes dated from May 10 through September 19, 2012. In the initial note of May 10, 2012, Dr. Salerni noted that appellant reported daily neck pain worsened September or October 2011. He noted that appellant attributed this to his rural mail carrier duties. At that time, Dr. Salerni noted his impression as neck pain C5-6, C6-7, right triceps weakness. In a June 13, 2012 report, he noted that appellant reported almost complete relief of pain in the right shoulder, thumb, index, and long finger. In a July 25, 2012 note, Dr. Salerni noted that appellant appeared much better, but did note some mild

spondylitic disease at the level above the fusion. In a September 19, 2012 note, he indicated that he wrote prescriptions for therapy and also noted that chiropractic care can also help.

In an October 29, 2012 report, Dr. Barry C. Gendron, an osteopath, interpreted appellant's diagnostic study of the right shoulder as showing normal biceps, infraspinatus, and subscapularis tendons, no bicipital subluxation dynamically, and right acromioclavicular joint normal. He noted an increase hypoechoic signal with the right supraspinatus tendon consistent with a small articular surface tear. Dr. Gendron noted that a torn labrum cannot be ruled out.

By decision dated December 12, 2012, OWCP found that the evidence submitted to support the reconsideration request was not sufficient to warrant modification of the prior decision.

On January 28, 2013 appellant requested reconsideration. In a January 22, 2013 statement, he indicated that he worked for the employing establishment starting in 2004 as a rural route carrier and that in August 2011, he started to notice pain and numbness in his right hand, thumb, index and middle finger and soreness radiating down the right side of his neck, and his shoulder, and collar bone. Appellant noted that his hand, neck, and shoulder pain got progressively worse starting in August 2011. He stated that the numbness in his hand went away after surgery for two herniated discs, and a fusion in his neck in June 2012. Appellant noted that the neck and shoulder pain persisted and that he was now being treated for myofascial pain syndrome (cervical), and a right rotator cuff tear. He discussed the details of his federal duties and indicated that he believed that his neck, shoulder and hand injuries were caused by his work as a rural route carrier. Appellant also noted a work-related injury in 1998 while working for FedEx, for which he had three surgeries from 1999 to 2000 when they tried to fuse his vertebrae at L4-5 and L5-S1. He indicated that this injury occurred while he was carrying a cooler from a customer pickup and slipped on a snowy and icy driveway. Appellant stated that his feet came out from under him and he landed on his lower back, blowing out his disc. He noted that he did not suffer any injury to his neck or shoulder as a result of the injury with FedEx.

In a November 6, 2012 unsigned report Seacoast Area Physiatry indicated that appellant was treated for neck and shoulder pain.

In a January 11, 2013 report, Dr. John J. Walsh, Jr., a Board-certified orthopedic surgeon, noted that appellant stated that he started working for the employing establishment in 2004 as a rural route carrier and that he continues to hold that position. Appellant told Dr. Walsh that in August 2011 he began to notice pain and numbness in his right hand and soreness radiating down the right side of his neck and into his shoulder, and that his hand, neck, and shoulder pain became progressively worse in August 2011. Dr. Walsh reviewed appellant's medical records and conducted a physical examination. He assessed appellant with cervical disc herniations C5-6 and C6-7 with radiculopathy/radiculitis; status post anterior cervical discectomy and fusion C5-6 and C6-7; cervical myofascial pain syndrome secondary to the above; and possible torn glenoid labrum right shoulder. Dr. Walsh opined that the above diagnoses and resultant disability are the result of a cumulative trauma disorder which is a direct result of appellant's work activities involving repetitive use of his neck and upper right extremity as outlined in his statement. He noted that these activities include turning and twisting of the neck and reaching over a thousand times a day in the process of sorting, casing, and delivering mail as a rural route letter carrier.

Dr. Walsh noted that as the result of this cumulative trauma disorder appellant was restricted in his ability to perform tasks which involve or require repetitive, sustained or exertional use of his neck and/or right upper extremity. He further opined that the medical treatment appellant received was directly related to his employment-related injury.

By decision dated May 2, 2013, OWCP determined that the elements of fact of injury in the performance of duty had been met, but that there was still insufficient evidence to establish the requirement of causal relationship for coverage under FECA.

On June 20, 2013 appellant again requested reconsideration. Appellant, through counsel, submitted a June 7, 2013 addendum by Dr. Walsh, who noted that there was a fundamental difference between appellant's work at FedEx and his work for the employing establishment in that at FedEx he would need to pick up larger packages and boxes and carry them. Dr. Walsh found that the structure stress of this work activity was to the lumbosacral spine not the cervical spine and it did, in fact, result in herniation of the intervertebral discs at L5-S1 and L4-5 in the lower back. He concluded that the lumbosacral disc herniation was unrelated to the disc herniation in appellant's cervical spine which occurred over 10 years later and which was the result of a completely different mechanism of injury. Dr. Walsh described appellant's work as a rural letter carrier as requiring repetitive twisting of the cervical spine as he sorted mail into address slots for the over 500 postal customers on his route. He noted that the act of placing letter mail in the slots required continuous twisting of appellant's head to the right, lift up or down to locate the correct slot in his cubicle and then place the letter into the slot on the right, left or directly in front of him. Dr. Walsh noted that after all the mail was slotted appellant would have to repeat the process to remove the mail from the individual slots and bundle it in preparation for the actual delivery to mail customers. He stated that the repetitive twisting of his cervical spine would then need to be repeated using the actual delivery of the mail to the postbox. Dr. Walsh indicated that appellant was required to repeat the twisting of the cervical spine thousands of times daily. He opined that the twisting of the neck, thousands of times daily, led to the structural deterioration of the intervertebral discs in the lower cervical spine and was the cause of the pain and numbness in the right arm and hand which he noted in August 2011. Dr. Walsh indicated that the pain and numbness was identified through objective imaging studies to be the result of disc herniation in the lower cervical spine at C5-6 and C6-7, causing pressure on the cervical nerve roots. He opined that the disc herniations required the anterior cervical discectomy and fusion of June 8, 2012. Dr. Walsh concluded that it was his opinion, "within a reasonable degree of medical certainty, it is more probable than not, that the torsional stress on the cervical spine produced by [appellant's] work-related activity during the course of his employment with the [employing establishment] was the direct cause of this cervical disc herniation."

By letter dated August 29, 2013, Joseph Perry, the postmaster for appellant's branch of the employing establishment, controverted appellant's claim. He noted that appellant came to his branch as a part-time flexible carrier working two days a week and began working full time on January 14, 2011. Mr. Perry noted that on December 2, 2011 appellant was placed on emergency administrative leave without pay. He noted that at no time did appellant ever come to him to report any injury or pains in his neck, shoulders or hands, yet appellant was aware that he must report an injury to his postmaster immediately. Mr. Perry noted that it was suspicious that appellant put in his claim two years after the supposed injury and a few months after his

termination. He questioned how he could have worked nine hours and five minutes a day from August to December 2, 2011 if he was in that much pain.

In a September 12, 2013 response to Mr. Perry's statement, counsel contended that the postmaster was biased as he was controverting appellant's claim, but that it was his role to develop claims. He indicated that Mr. Perry misrepresented appellant's employment status as appellant had just separated from the employing establishment a few months ago. Counsel contended that appellant did not report his injury as he was trying to work through the pain and because he did not initially believe that it was employment related. It was not until appellant's condition worsened in 2012 when he required surgery did he realize that it was employment related. He argued that appellant did not know that he had cervical disc herniations at C5-6 and C6-7 until the medical care he received in spring and summer of 2012.

By decision dated September 19, 2013, OWCP denied modification of the May 2, 2013 decision.

LEGAL PRECEDENT

An employee seeking compensation under FECA² has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence,³ including that he or she is an "employee" within the meaning of FECA⁴ and that he or she filed his or her claim within the applicable time limitation.⁵ 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.⁶ 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.⁷

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.⁸

² *Id.* at §§ 8101-8193.

³ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

⁴ *See M.H.*, 59 ECAB 461 (2008); *see also* 5 U.S.C. § 8101(1).

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

⁶ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁷ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁸ *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

Causal relationship is a medical issue⁹ 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,¹⁰ must be one of reasonable medical certainty,¹¹ 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.¹²

ANALYSIS

OWCP determined that appellant had established that he was exposed to the alleged employment conditions. However, it denied his claim for failure to establish a medical condition that was causally related to his federal employment.

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is a rationalized medical report.¹³ The Board finds that the medical evidence does not establish this causal relationship. Dr. Salerni indicated that appellant attributed his medical condition to the duties of his federal employment, he did not reach an independent medical conclusion on causal relationship. Dr. Gendron did not address the issue of causal relationship. As such, these reports are of diminished probative value. The report from Seacoast Area Psychiatry is of no probative value as it was unsigned. Thus, it does not constitute competent medical evidence as the author cannot be identified as a physician.¹⁴

Appellant also submitted medical reports wherein Dr. Walsh assessed him with cervical disc herniations at C5-6 and C6-7, cervical myofascial pain syndrome and possible torn glenoid labrum right shoulder. Dr. Walsh indicated that these medical conditions were the direct result of appellant's work activities and the turning and twisting of his neck and reaching over a thousand times a day in the process of sorting, casing and delivering mail as a rural route carrier. OWCP required further information, and in a June 7, 2013 addendum, he distinguished appellant's current injury from the injury he sustained while employed at FedEx. Dr. Walsh concluded that it was in his opinion that the torsional stress on the cervical spine produced by appellant's employment-related activities was the direct cause of his cervical disc herniation.

The Board finds that the opinions of Dr. Walsh are not sufficient to establish that appellant's injuries are causally related to his federal employment due to errors in his presentation of the facts. Initially, the Board notes that Dr. Walsh's opinion is not based on an

⁹ *Mary J. Briggs*, 37 ECAB 578 (1986).

¹⁰ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

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

¹² *See William E. Enright*, 31 ECAB 426, 430 (1980).

¹³ *A.L.*, Docket No. 14-753 (issued July 11, 2014).

¹⁴ *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

accurate description of appellant's employment. In his January 11, 2013 report, Dr. Walsh noted that appellant stated that he began working for the employing establishment in 2004 as a rural carrier and that he continues to hold that position. However, the record establishes that appellant only worked one day a week from 2004 to 2008 and two days a week from 2008 to 2011. Appellant only worked full time from January to December 2011. As of December 3, 2011, he was taken out of work by management for a reason unrelated to any injury.

Dr. Walsh does not note appellant's years of working only part time for the employing establishment or the fact that this employment ended in December 2011. Furthermore, he refers to appellant's employment-related injury at FedEx as caused by the "structural stress" of picking up, carrying and loading larger packages, and boxes into his truck and then out for delivery. However, appellant indicated in his January 22, 2013 statement that he had three two-level back fusions between 1999 and 2001 due to a traumatic injury *i.e.*, a fall wherein he landed on his lower back, while appellant was employed with FedEx.

Dr. Walsh did not discuss how such a clearly serious traumatic injury and the resultant surgeries might not have also caused the later cervical condition. Because his opinions are not based on a complete and accurate factual history or medical history, they are of limited probative value.¹⁵

The Board also notes that the medical records discussing appellant's cervical condition began around the time of his June 8, 2012 surgery. As there is no medical evidence until the May 10, 2012 progress note by Dr. Salerni, there is a lack of documentation bridging appellant's alleged symptoms in August 2011 and his surgery and cervical condition in June 2012.¹⁶ Furthermore, appellant did not mention to his supervisor that he experienced pain in his neck or radiating pain into his extremities until after his cervical surgery on June 8, 2012, which was 6 months after his last date of work with the employing establishment and 10 months after the alleged onset of symptoms.

As appellant failed to submit rationalized medical opinion evidence establishing that he sustained an injury in the performance of duty causally related to the accepted factors of federal employment, he has not established his claim.

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 has not established that he sustained an injury in the performance of duty causally related to factors of his federal employment.

¹⁵ See *J.S.*, Docket No. 14-1425 (issued October 22, 2014); *M.E.*, Docket No. 14-1064 (issued September 29, 2014).

¹⁶ See *M.K.*, Docket No. 10-866 (issued November 24, 2010); *D.S.*, Docket No. 10-161 (issued October 5, 2010).

ORDER

IT IS HEREBY ORDERED THAT the September 19, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 8, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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