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

| | | |
|---|---|---|
| **W.P., Appellant** | ) | |
| **and** | ) | **Docket No. 15-1354** |
| | ) | **Issued: October 20, 2015** |
| **U.S. POSTAL SERVICE, POST OFFICE, Page, AZ, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On June 1, 2015 appellant filed a timely appeal from a May 8, 2015 merit 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 the case.[2]

### ***ISSUE***

The issue is whether appellant met his burden of proof to establish an occupational disease causally related to factors of his federal employment.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant submitted new evidence on appeal. However, the Board cannot consider evidence that was not before OWCP at the time of its final decision. *See* 20 C.F.R. § 501.2(c)(1).

## ***FACTUAL HISTORY***

On April 14, 2014 appellant, then a 55-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that he strained his lower right back by lifting parcels and trays of mail. He stated that he had a slight pain worsened over time. Appellant noted becoming aware of his condition on April 4, 2014. He stopped work on April 7, 2014 and returned on April 10, 2014. The employing establishment challenged the claim, stating that the medical evidence indicated that appellant's injury occurred at home.

In April 15 and 17, 2014 letters, the employing establishment alleged that appellant had a preexisting low back condition that was reinjured in a nonwork-related incident occurring at his home.

In an April 23, 2014 letter, OWCP informed appellant that the evidence of record was insufficient to establish that he actually experienced the alleged employment factors. It advised him to provide medical evidence including a physician's opinion, supported by a medical explanation, as to how work factors caused or aggravated a diagnosed condition.

OWCP received an April 7, 2014 report from Dr. Raymond Holsten, Board-certified in family and geriatric medicine.[3] Dr. Holsten noted that appellant presented with lower back pain and sciatica symptoms "over a month ago." Although appellant's condition had improved, he "twisted [it] again while working around his house." His current complaints included right-sided back pain with radiation into the posterior thigh and calf. Physical examination revealed posterior tenderness to palpation bilaterally from L3 to L5. X-rays revealed no fracture. Dr. Holsten diagnosed sciatica and recommended physical therapy.

An April 15, 2014 employing establishment incident report reflects that appellant was lifting 11- to 20-pound trays of mail and tubs of flats on April 4, 2014. Appellant felt a twinge in his back, but continued to work throughout the day. He sought medical attention on April 7, 2014 for lower back strain.

Appellant provided an April 16, 2014 physical therapy report indicating that he began experiencing lower back and right leg pain on April 4, 2014. He noted a history of back pain from a work-related injury in 1991 and another incident "some years later." Other physical therapy reports dated April 17 to May 1, 2014 documented appellant's progression through physical therapy.

On April 28, 2014 appellant presented for a follow-up examination with Dr. Holsten for continued right lumbar and radicular pain. Dr. Holsten reported that appellant reinjured his lower back on April 17, 2014. Physical examination revealed posterior tenderness with palpation of the bilateral lumbar spine from L2 to L5. Dr. Holsten diagnosed consistent lumbago and ordered a magnetic resonance imaging (MRI) scan. In an April 28, 2014 Family and Medical Leave Act (FMLA) form, appellant's duties were described as distributing mail and packages to customers. Dr. Holsten recorded April 4, 2014 as the date of injury and noted that appellant required intermittent time off to complete a course in physical therapy.

[3] OWCP had previously received an incomplete copy of the report.

By report dated April 30, 2014, Dr. Robert Aizenstein, a Board-certified diagnostic radiologist, noted findings from a lumbar MRI scan. His impressions included moderate bilateral neural foraminal stenosis at L4-5 secondary to a small disc bulge and facet arthrosis, and mild degenerative disc disease and facet arthrosis at several additional levels, but with no other significant canal or foraminal compromise.

In a May 5, 2014 report, Dr. Holsten related that appellant was seen on February 24 and April 7, 17, and 28, 2014 for continued lumbar midline pain and paraspinous, with radiation on occasion to the right thigh/calf and foot. An April 8, 2014 x-ray revealed significant facet arthropathy at L5-S1. Dr. Holsten noted that appellant's pain was recently exacerbated by lifting and prolonged standing at work. He diagnosed degenerative disc disease and right-sided sciatica, opining that the conditions were "likely exacerbated by work activities."

A May 29, 2014 work status note bearing an illegible signature provided that appellant could return to duty on June 2, 2014.

In a July 9, 2014 decision, OWCP denied appellant's claim finding the medical evidence insufficient to establish that appellant's condition was causally related to his employment.[4]

On July 15, 2014 appellant requested an oral hearing before an OWCP hearing representative. A hearing was held on February 13, 2015. Appellant testified that he was lifting trays of mail in April 2014, and felt a twinge in his back. The pain progressively worsened and appellant was placed in a light-duty position. According to appellant, on April 17, 2014, he bent down to pick up a package and "hurt [his] back even worse."

In a February 27, 2015 report, Dr. Holsten reported that appellant suffered from low back pain for months prior to filing his claim. He opined that appellant's condition was exacerbated by lifting heavy objects at work on April 17, 2014. This, in turn, caused evidence of sciatic nerve irritation. Dr. Holsten opined that appellant's worsening lower back pain and "nerve compression symptoms [were] a direct result of a work[-]related injury on" April 17, 2014.

In a March 17, 2015 letter, the employing establishment reiterated its controversion of the claim.

On May 8, 2015 an OWCP hearing representative affirmed the July 9, 2014 decision.

## ***LEGAL PRECEDENT***

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence,[5] including that he or she is an employee within the meaning of FECA[6] and that a claim

[4] The employing establishment, in a July 15, 2014 letter, advised appellant to return to full duty as OWCP denied his claim.

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

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

was filed within the applicable time limitation.[7] The employee must also establish that he or she sustained an injury in the performance of duty as alleged and that his or her disability for work, if any, was causally related to the employment injury.[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 issue[10] and the medical evidence generally required to establish causal relationship is rationalized medical evidence. 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 condition and the specific employment factors identified by the employee.[11]

## ***ANALYSIS***

The record supports that appellant's duties included lifting parcels and trays of mail. The Board, however, finds that appellant failed to submit medical evidence sufficient to establish a causal relationship between his federal employment duties and his lower back condition.

Appellant submitted multiple reports from Dr. Holsten dated April 7, 2014 to February 27, 2015. In these reports, Dr. Holsten diagnosed degenerative disc disease, right-sided sciatica, and lumbago. His most contemporaneous report, his April 7, 2014 report, attributed appellant's symptoms to a nonwork-related incident when he twisted his back at home. Dr. Holsten did not indicate that work factors contributed to appellant's condition in any way. In his May 5, 2014 report, Dr. Holsten noted that appellant's sciatica was "likely" exacerbated by work activities, such as prolonged standing and lifting. The Board notes that this report is vague[12] and failed to medically explain the pathophysiological process by which such duties would have caused or aggravated appellant's condition.[13] In his February 27, 2015 statement,

[7] *R.C.*, 59 ECAB 427 (2008); *see* 5 U.S.C. § 8122.

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

[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] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[12] *See T.H.*, Docket No. 15-311 (issued June 2, 2015) (physician's opinion that employee's injury was "most likely" attributable to work factors was considered speculative and insufficient to establish claim); *Ricky E. Storms*, 52 ECAB 349 (2001) (medical opinions which are speculative or equivocal in character have little probative value).

[13] *Solomon Polen*, 51 ECAB 341 (2000) (rationalized medical evidence must relate specific employment factors identified by the claimant to the claimant's condition, with stated reasons by a physician).

Dr. Holsten opined that appellant's lower back pain with nerve compression symptoms was a direct result of lifting heavy objects on April 17, 2014. Dr. Holsten attributed appellant's lower back injury to a traumatic incident from a single occurrence on April 17, 2014, rather than an occupational injury, as alleged by appellant in his claim.[14] Moreover, Dr. Holsten again failed to explain how heavy lifting would have caused or contributed to the diagnosed condition. The need for a clear rationale is particularly important in this case considering the preexisting lower back injuries, degenerative disc disease, and the nonwork-related incident.[15] Dr. Holsten also did not attempt to clarify the inconsistency in his initial April 7, 2014 report which attributed appellant's condition to a twisting incident at home and his later reports which suggested that work activities contributed to his condition.[16]

Other medical reports of record are of limited probative value as they do not provide an opinion on the causal relationship between appellant's work duties and his injury.[17] The physical therapy reports do not constitute competent medical evidence as physical therapists are not considered physicians as defined in 5 U.S.C. § 8101(2).[18]

On appeal, appellant refers to an OWCP-developed back injury incurred in 2000, evidence of which is not before the Board on appeal. The Board notes that the issue on appeal is whether appellant sustained a new occupational disease in the performance of duty. For the reasons stated above, the Board finds that appellant did not meet his burden of proof.

Appellant may submit new evidence or argument as part of a formal 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 meet his burden of proof to establish an occupational disease causally related to factors of his federal employment.

[14] A traumatic injury means a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

[15] *See M.W.*, Docket No. 15-15 (issued February 24, 2015).

[16] *See S.S.*, 59 ECAB 315 (2008) (the Board has held that contemporaneous evidence is entitled to greater probative value than later evidence).

[17] *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not provide any opinion regarding the cause of an employee's condition is of limited probative value).

[18] The term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); *L.B.*, Docket No. 13-1253 (issued September 18, 2013) (physical therapists do not qualify as physicians under FECA and, therefore, their medical reports do not qualify as probative medical evidence, unless such medical reports are countersigned by a physician).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the May 8, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 20, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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