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

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| **L.T., Appellant** | ) | |
| **and** | ) | **Docket No. 15-1922** |
| | ) | **Issued: August 23, 2016** |
| **U.S. POSTAL SERVICE, POST OFFICE, Tustin, CA, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant[1]
*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
COLLEEN DUFFY KIKO, Judge

### ***JURISDICTION***

On September 22, 2015 appellant filed a timely appeal from a May 7, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id*. An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id*.; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, during the pendency of this appeal, OWCP issued a September 30, 2015 decision denying modification of the May 7, 2015 decision. The September 30, 2015 decision, however, is null and void as the Board and OWCP may not simultaneously have jurisdiction over the same issue. *See Terry L. Smith*, 51 ECAB 182 (1999); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

## ***ISSUE***

The issue is whether appellant has established a back injury in the performance of duty on March 22, 2014.

## ***FACTUAL HISTORY***

On March 27, 2014 appellant, then a 50-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on March 22, 2014 he sustained a back injury while delivering mail on a route. He alleged that he felt back pain radiating to both legs, and he could not walk. The reverse of the claim form indicated that appellant stopped work on March 22, 2014 and returned to work March 27, 2014. Appellant submitted a duty status report (Form CA-17) dated March 25, 2014 from Dr. Hosea Brown, III, a Board-certified internist, indicating that appellant was disabled for work. The record also contains a note dated March 22, 2014 from a physician indicating that appellant should be off work until March 27, 2014.[4]

The record indicates that on August 27, 2013 appellant had previously filed an occupational disease claim (Form CA-2) for compensation alleging a low back injury from job duties, including bending, lifting, and carrying mail.[5] On October 29, 2013 OWCP accepted that claim for permanent aggravation of lumbosacral degenerative disc disease at multiple levels, and L4-5 and L5-S1 disc bulge with right radiculopathy. According to that case file, appellant accepted a modified job at two hours per day on November 8, 2013. On January 6, 2014 he accepted a full-time modified carrier job offer "under protest," with two hours casing mail, four hours on a walking route, and two hours answering telephones. Appellant filed CA-7 claims for intermittent hours of compensation. For the period March 8 to 21, 2014, he indicated that he worked four hours per day. The occupational claim remains under continuing development.

An employing establishment supervisor submitted an April 3, 2014 letter indicating that the employing establishment was controverting the traumatic injury claim. The supervisor reported that on March 21, 2014 appellant had been given a new job offer, which he had accepted under protest.[6] Appellant inquired as to what would happen if he were to have an accident, and as such the supervisor felt appellant was already planning to have an accident on March 22, 2014.

By letter dated April 4, 2014, OWCP discussed evidence from the occupational claim and advised appellant to submit additional evidence with respect to the traumatic injury claim. Appellant submitted an April 24, 2014 statement that he was delivering his route when he felt a pop and severe pain in his back and legs. He indicated that he called 911 and was transported to the emergency room.

[4] The signature of the physician is illegible.

[5] To date, this claim has not been administratively combined with the current claim.

[6] The record does not contain a March 21, 2014 job offer. The occupational claim did contain a job offer accepted by appellant on January 6, 2014, as discussed above.

Appellant submitted a narrative report from Dr. Brown, dated March 25, 2014, who reported that appellant sustained an acute injury on March 22, 2014 at approximately 12:30 p.m. while performing business mail delivery. Dr. Brown reported that appellant had a previously accepted an occupational disease claim. He indicated that on March 22, 2014 appellant was bending down to place mail in a slot when he developed an acute onset of low back pain with radiation into both legs. According to Dr. Brown, appellant was treated on that date at a medical center and released with pain medication. Dr. Brown provided results on examination and reported x-rays showed multilevel lumbar vertebral lipping and joint space loss consistent with degenerative joint disease. The diagnoses were permanent aggravation of lumbosacral radiculopathy, permanent aggravation of lumbosacral degenerative disc disease, and lumbar intervertebral disc syndrome with myelopathy. Dr. Brown opined:

> "[Appellant's] medical injuries to his low back occurred as a direct result of the incident, which occurred on [March 22, 2014]. Clearly, on the aforementioned date in question, [he] was engaged in performing business mail delivery when, while bending down to place mail into the appropriate slot, he noted the acute onset of severe paroxysmal low back pain with radiation of his pain into the posterior aspects of both legs and associated with sudden bilateral lower extremity weakness. The biomechanical maneuver associated with bending over and placing the mail into the slot clearly precipitated an acute lumbosacral radiculopathy and permanently aggravated the patient's lumbosacral spine degenerative disc disease as well as the intervertebral lumbar disc herniations that had previously been noted at L4-L5 and L5-S1 by prior MRI [magnetic resonance imaging] [scan] studies."

Dr. Brown reported the fact that appellant experienced acute exacerbation of bilateral lower extremity weakness indicated he was experiencing acute neurological compromise due to the decompression and irritation of the spinal nerves as an exit from the lumbar spine at these levels. He concluded, "Therefore, in view of the aforementioned medical rationale, it is medically reasonable to infer a relationship of reasonable medical probability between Mr. Thompson's extensive medical injuries to his low back and the performance of the duties of his occupation as city letter carrier on [March 22, 2014]."

In a report dated April 22, 2014, Dr. Brown provided a history that noted appellant's job duties in detail, and provided a history of the March 22, 2014 employment incident. He reported results on examination and provided the diagnoses noted in his March 25, 2014 report. Dr. Brown reiterated his opinion that appellant sustained back injuries on March 22, 2014.

By decision dated July 2, 2014, OWCP denied appellant's claim for compensation. It found that given the severity of the preexisting conditions, and the "personnel issues" that arose under the prior claim, the evidence was insufficient to establish a new injury on March 22, 2014. OWCP found appellant had not established causal relationship between a diagnosed condition and the employment incident.

Appellant, through counsel, requested a hearing before an OWCP hearing representative on July 8, 2014. A telephonic hearing was held on February 27, 2015. During the hearing, appellant stated that the day before his injury he was given a job offer with no work limitations,

and he agreed to attempt to perform the job duties. He reported that his pain had been increasing while at work on March 22, 2014, and he had bent over to put mail in slots and latch the box, when the pain became severe and he was unable to continue working.

The record indicates that on November 10, 2014 appellant underwent back surgery. In a report of that date Dr. Terence Mayers, a Board-certified surgeon, described the surgery as "anterior spinal exposure."

In a decision dated May 7, 2015, the hearing representative affirmed the July 2, 2014 OWCP decision. The hearing representative found Dr. Brown's opinion was not sufficiently rationalized.

## ***LEGAL PRECEDENT***

FECA provides for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty."[7] The phrase "sustained while in the performance of duty" in FECA is regarded as the equivalent of the commonly found requisite in workers' compensation law of "arising out of an in the course of employment."[8] An employee seeking benefits under FECA has the burden of establishing that he or she sustained an injury while in the performance of duty.[9] 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. The second component is whether the employment incident caused a personal injury, and generally this can be established only by medical evidence.[10]

OWCP's procedures recognize that a claim may be accepted without a medical report when the condition is a minor one which can be identified on visual inspection.[11] In clear-cut traumatic injury claims, such as a fall resulting in a broken arm, a physician's affirmative statement is sufficient and no rationalized opinion on causal relationship is needed. In all other traumatic injury claims, a rationalized medical opinion supporting causal relationship is required.[12]

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty, and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the

[7] 5 U.S.C. § 8102(a).

[8] *Valerie C. Boward*, 50 ECAB 126 (1998).

[9] *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

[10] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(c) (January 2013).

[12] *Id* at Chapter 2.805.3(d) (January 2013).

specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested, and the medical rationale expressed in support of the physician's opinion.[13]

OWCP's definition of a recurrence of disability means an inability to work after an employee has returned to work, cause by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure. The term also means the inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[14]

OWCP's procedures require that in cases where recurrent disability for work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability.[15]

## ***ANALYSIS***

In the present case, appellant filed a traumatic injury claim for a back injury on March 22, 2014, his first route under a new job offer he had accepted under protest. The Board notes that appellant had an existing occupational claim for a back injury that had been accepted by OWCP. That claim was assigned OWCP File No. xxxxxx582. OWCP accepted his occupational disease claim for permanent aggravation of a lumbosacral degenerative disc disease at multiple levels and L4-5 and L5-S1 disc bulge with right radiculopathy. Both claims involve the back, the treating physician has referenced the prior occupational disease claim, and both claims involve diagnoses that include permanent aggravation of lumbar degenerative disc disease. Combining the claims will aid in review and adjudication of the medical issues.[16]

The Board finds that before a proper adjudication can be made as to the March 22, 2014 claim of injury, the occupational and traumatic injury case files must be combined.[17] After such further development as OWCP finds necessary, it should issue a *de novo* merit decision.

## ***CONCLUSION***

The Board finds that the case is not in posture for decision and is remanded to OWCP for consideration of the case records and any further development as OWCP deems appropriate.

[13] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

[14] *See John I. Echols*, 53 ECAB 481 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6(a) (September 2003).

[16] *Id*. at *File Maintenance and Management*, Chapter 2.400.8(c)(1) (February 2000); *see also J.M.*, Docket No. 13-1111 (issued July 15, 2013).

[17] A review of the occupational claim indicates that OWCP has undertaken ongoing development of the medical evidence.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 7, 2015 is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: August 23, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board