United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 16-1303**
	)	**Issued: December 2, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Waukesha, WI, 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 6, 2016 appellant filed a timely appeal from a December 7, 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 this case.[2]

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a back injury causally related to the November 18, 2014 employment incident; and (2) whether an OWCP hearing representative properly denied his request for a subpoena.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that on appeal appellant submitted new evidence. However, the Board is precluded from reviewing evidence which was not before OWCP at the time of its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, appellant contends that a letter from his attending chiropractor submitted in support of his appeal is sufficient to establish that he sustained a spinal subluxation causally related to the November 18, 2014 employment incident.

FACTUAL HISTORY

On November 18, 2014 appellant, then a 47-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that his back locked up while he was carrying buckets down a ramp at work on that date. He also experienced difficulty with talking and breathing.

In a November 18, 2014 work/school excuse note, Dr. Laura C. Sukowaty, an attending family practitioner, excused appellant from work through November 24, 2014.

In a November 20, 2014 Family and Medical Leave Act (FMLA) medical certification report, Dr. Michelle Stamm, an attending chiropractor, diagnosed disc and nerve irritation complicated by a muscle sprain/strain. She advised that appellant would be incapacitated for three to four months. Dr. Stamm also advised that he was unable to lift, bend, or twist.

By letter dated December 30, 2014, OWCP advised appellant of the deficiencies of his claim and afforded him 30 days to submit additional evidence and respond to its inquiries.

In urgent care medical notes dated November 18, 2014, Megan M. Hollis, a medical assistant, and Dave Gay, a registered nurse, examined appellant and provided a history of injury that he had experienced back pain for two weeks, that on the date of his examination he was carrying an empty bucket down a ramp, and that he had developed spasms in his back and numbness and tingling in his hands and feet. Ms. Hollis and Nurse Gay also provided a history of appellant's medical background. They diagnosed lumbago and provided discharge instructions and a list of medications prescribed by Dr. Sukowaty.

In a January 13, 2015 narrative statement, appellant related that he had already unloaded and parked his vehicle in its assigned place in the employing establishment's icy and untreated parking lot when his supervisor asked him to go look for N.H., a coworker, on her route because she was running very late. He then reloaded his postal vehicle with two white square buckets that contained needed supplies. While carrying the buckets down a ramp, appellant felt a big spasm in his middle to lower back. Once he arrived at the parking lot, he had to shuffle his feet because of the snow and ice in the lot which worsened his back pain. Appellant contended that the snow and ice covered ramp probably contributed to his claimed injury. He found N.H. on her route and helped deliver her route despite his throbbing back pain. When appellant returned to the employing establishment his back condition had worsened and breathing had become difficult for him. He finished his work duties and went home. Appellant subsequently sought medical treatment from Dr. Sukowaty who placed him off work for four days. He had not received any prior mid-back treatment. Appellant noted that he previously had whiplash as a result of a 2013 motor vehicle accident for which he received chiropractic treatment for his neck and lower back injuries.

In a January 29, 2015 decision, OWCP accepted that the November 18, 2014 incident occurred as alleged. However, it denied appellant's claim as the medical evidence of record did

not establish a causal relationship between his back condition and the accepted employment incident.

On an appeal request form dated February 15, 2015 and in a letter dated February 16, 2015, appellant requested a telephone hearing with an OWCP hearing representative. The hearing was held on October 6, 2015.

In progress notes dated November 20, 2014 to March 6, 2015, Dr. Stamm provided a history of the accepted November 18, 2014 employment incident and reported findings on physical and x-ray of the cervical, thoracic, and lumbar spines. She assessed acute symptoms which improved over time. Dr. Stamm later noted that appellant's condition had entered an intermediate stage that was subacute in nature and he had shown acceptable progress.

In a note dated November 18, 2014, Dr. Sukowaty provided a history of the accepted employment incident and appellant's medical background. She reported physical examination findings and diagnosed lumbago.

By letter dated March 15, 2015, appellant requested that the Branch of Hearings and Review subpoena T.L., an acting supervisor who was in charge at the time of his November 18, 2014 work incident, L.S., a supervisor who completed the employing establishment's portion of his Form CA-1, J.A., a coworker who was the only other person on the dock with appellant on the date of injury, N.H., and various documents regarding the work incident. He explained that the subpoenas were necessary because the postmaster did not allow information to flow freely. T.L. had denied appellant's request for information regarding his coworkers who were involved in events similar and subsequent to his November 18, 2014 work incident. M.B., a supervisor, and T.L. did not respond to his request for L.S.'s report concerning this employment incident.

In progress notes dated May 11 and 21, 2015, Dr. David K. Dedianous, a physiatrist, noted a history of the accepted November 18, 2014 employment incident and a history that appellant had a new job driving a mail truck, which caused mid-back pain. He diagnosed mechanical back pain, lumbar strain, and myofascial syndrome. In letters also dated May 11 and June 11, 2015, Dr. Dedianous reiterated his diagnoses of mechanical back pain, lumbar strain, and myofascial syndrome. He released appellant to return to work with restrictions on May 12 and June 11, 2015.

In progress notes dated June 8 to 25, 2015, appellant's occupational therapist and physical therapists addressed the treatment of his back condition.

By letter dated September 18, 2015, an OWCP hearing representative denied appellant's request for the issuance of subpoenas. She found that the attendance and testimony from employing establishment personnel would not assist in his claim as the issue in the case was medical in nature and the record did not reflect a dispute regarding the reported cause of his claimed injury. The hearing representative further found that a subpoena was not the best way to obtain the requested documents and recommended that appellant request a copy of his case record from OWCP.

In a December 7, 2015 decision, the same OWCP hearing representative affirmed the January 29, 2015 decision. She found that the medical evidence of record was insufficient to

establish a causal relationship between appellant's back condition and the accepted November 18, 2014 employment incident. The hearing representative also found that appellant's subpoena request was properly denied as the issue under consideration was medical in nature and OWCP had accepted that the November 18, 2014 incident occurred as alleged.

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[3] including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which compensation is claimed is causally related to that employment injury.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.[5] There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged.[6]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[7] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[8] The belief of the claimant that a condition was caused or aggravated by the employment incident is insufficient to establish a causal relationship.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish that he sustained a traumatic injury causally related to the accepted November 18, 2014 employment incident. Appellant failed to submit sufficient medical evidence to establish that he sustained a back injury causally related to the accepted employment incident.

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

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

[5] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[6] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

[7] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

[8] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[9] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

Dr. Sukowaty's November 18, 2014 note reported a history of the accepted employment incident and appellant's medical background. She reported findings on physical examination and diagnosed lumbago. Dr. Sukowaty did not provide a medical opinion addressing whether the accepted November 18, 2014 employment incident caused or aggravated appellant's diagnosed condition. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value.[10] Dr. Sukowaty's November 18, 2014 work/school excuse note addressed appellant's total disability for work through November 24, 2014, but is of limited probative value as it did not provide a firm diagnosis of a particular medical condition[11] or offer a specific opinion as to whether the accepted employment incident caused or aggravated his claimed condition and resultant disability.[12]

Similarly, Dr. Dedianous' May 11 and 21, and June 11, 2015 progress notes and reports are of limited probative value. He provided a history of appellant's injury, examination findings, and a diagnosis of mechanical back pain, lumbar strain, and myofascial syndrome. Dr. Dedianous also addressed appellant's work capacity and restrictions. However, he did not offer any medical opinion addressing whether the diagnosed conditions and prior disability from work were caused or aggravated by the accepted November 18, 2014 employment incident.[13]

The remaining reports of record are of no probative value on the issue of causal relationship. The FMLA medical certification report dated November 20, 2014 and progress notes dated November 20, 2014 to March 6, 2015 from Dr. Stamm, an attending chiropractor, addressed appellant's history of injury, spinal condition, disability from work, and physical restrictions. Although she obtained x-rays, Dr. Stamm did not diagnose a spinal subluxation based upon x-ray evidence.[14] Without a diagnosis of a subluxation from x-ray, Dr. Stamm is not considered a physician as defined under FECA and, thus, her report and progress notes do not have any probative medical value.

The urgent care reports dated November 18, 2014 from Ms. Hollis, a medical assistant, and Mr. Gay, a registered nurse, and progress notes dated June 8 to 25, 2015 from appellant's occupational and physical therapists are of no probative medical value. Medical assistants,

[10] *See C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

[11] *See Deborah L. Beatty*, 54 ECAB 340 (2003) (where the Board found that, in the absence of a medical report providing a diagnosed condition and a reasoned opinion on causal relationship with the employment incident, appellant did not meet her burden of proof).

[12] *See* cases cited *supra* note 10.

[13] *Id.*

[14] 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See Roy L. Humphrey*, 57 ECAB 238 (2005). The term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. *See Mary A. Ceglia*, 55 ECAB 626 (2004) (in assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician as defined under 5 U.S.C. § 8101(2); a chiropractor is not considered a physician under FECA unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist).

registered nurses, physical therapists, and occupational therapists are not considered physicians as defined under FECA.[15]

Therefore, the Board finds that the medical evidence of record is insufficient to establish that appellant sustained a back injury causally related to the accepted November 18, 2014 employment incident.

On appeal, appellant contends that a letter from his attending chiropractor submitted in support of his appeal is sufficient to establish that he sustained a spinal subluxation causally related to the November 18, 2014 work incident. However, as stated, the Board cannot consider new evidence on appeal as its jurisdiction is limited to the evidence that was before OWCP at the time it issued its final decision.[16]

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of FECA provides that the Secretary of Labor, on any matter within his jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[17] The implementing regulations provide that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers, or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.[18] In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[19] Section 10.619(a) of the implementing regulations provide that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process.

[15] 5 U.S.C. § 8101(2); *J.J.*, Docket No. 15-0727 (issued July 16, 2015) (reports from an occupational therapist have no probative medical value as an occupational therapist is not a physician as defined under FECA); *see also G.A.*, Docket No. 09-2153 (issued June 10, 2010) (evidence from a registered nurse has no probative medical value as a nurse is not a physician as defined under FECA); *A.C.*, Docket No. 08-1453 (issued November 18, 2008) (records from a physical therapist has no probative medical value as a physical therapist is not physician as defined under FECA).

[16] *Supra* note 2.

[17] 5 U.S.C. § 8126(1).

[18] 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

[19] *Id.*

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[20] The hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.[21] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.[22]

ANALYSIS -- ISSUE 2

In the present case, appellant requested that OWCP's hearing representative issue a subpoena to obtain testimony from supervisors and a coworker and various documents regarding the accepted November 18, 2014 employment incident. The hearing representative denied the request, finding that the attendance and testimony from employing establishment personnel were not relevant to the medical issue in his case and the record did not reflect a dispute regarding the reported cause of his claimed back injury. Further, she found that the best way for appellant to obtain the requested documents was by requesting a copy of his case record from the district office.

The Board finds that OWCP's hearing representative did not abuse her discretion in denying appellant's subpoena request. Appellant argued that the testimony from his supervisors and coworker and requested that documents were necessary because the postmaster did not allow T.L. to provide him with information regarding his coworkers who were involved in events similar and subsequent to his November 18, 2014 work incident or M.B. and T.L. to provide him with L.S's report concerning this incident. However, he did not clearly explain why a subpoena was the best method to obtain further evidence concerning the November 18, 2014 work incident, particularly since OWCP had accepted that the incident occurred as alleged. Moreover, the hearing representative reasonably determined that testimony regarding the occurrence of the November 18, 2014 incident was irrelevant to the medical issue of causal relationship in this case and that the requested documents could be obtained from the district office. There was no evidence presented that subpoenas were necessary with respect to the development of the relevant evidence in this case. The Board therefore finds no abuse of discretion related to the denial of a subpoena request.[23]

CONCLUSION

The Board finds that appellant has failed to meet his burden of proof to establish a back injury causally related to the November 18, 2014 employment incident. The Board further finds that an OWCP hearing representative properly denied appellant's request for a subpoena.

[20] 20 C.F.R. § 10.619(a)(1).

[21] *See Gregorio E. Conde*, *supra* note 18.

[22] *Claudio Vazquez*, 52 ECAB 496 (2001).

[23] *D.O.*, Docket No. 15-1368 (issued October 22, 2015).

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 2, 2016
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