

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

D.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Chatham, NJ, Employer**

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**Docket No. 15-0948
Issued: February 10, 2016**

Appearances:
James D. Muirhead, Esq., for the appellant
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 March 11, 2015 appellant, through counsel, filed a timely appeal of an October 23, 2014 merit decision and a January 23, 2015 nonmerit 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 this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a lumbar condition causally related to an August 27, 2012 incident; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal counsel argues that the medical evidence establishes that appellant's diagnosed condition is causally related to accepted August 27, 2012 incident.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 1, 2012 appellant, then a 57-year-old city carrier, filed a recurrence claim (Form CA-2a) alleging that on August 27, 2012 he sustained a recurrence of muscle spasms from an accepted September 2, 2010 work-related injury under File No. xxxxxx868.² On August 27, 2012 he alleged that he had increased muscle spasms and was unable to walk and stand by the end of the day due to lifting trays from the rack during the day. OWCP converted the recurrence claim into a new traumatic injury claim as appellant was alleging new employment factors. Appellant stopped work on August 28, 2012, returned on September 25, 2012 and then stopped work again on September 27, 2012.

Evidence pertaining to the August 27, 2012 work incident is set forth below.

A September 29, 2012 magnetic resonance imaging (MRI) scan contained diagnoses of L3-4 degenerative disc disease, L4-5 herniated disc with impingement, and degenerative disc disease with loss of hydration.

In a November 2, 2012 prescription note, Dr. Toros S. Shaninian, a treating physician, noted that appellant has suffered from aggravated discogenic lumbar disease since January 21, 2012.

In a disability certificate dated November 25, 2012, Dr. Joseph M. Koziol, a treating Board-certified neurologist, noted that appellant was totally incapacitated for the period November 5, 2012 to January 2, 2013.

In a November 13, 2012 report, Dr. Boqing Chen, an examining Board-certified physiatrist with certifications in pain and sports medicine, noted that appellant was seen for complaints of low back pain and referred pain into his legs. He noted that appellant was injured at the end of August or beginning of September. Under history of current illness, Dr. Chen noted that appellant had been diagnosed with a pinched nerve as the result of a work-related lifting injury two years prior. The current employment incident occurred when appellant found that he could not stand erect and sustained severe pain as the result of carrying his bag and getting into and out of his truck.

A physical examination of the lumbar spine revealed muscle spasms, markedly decreased range of motion, and tenderness on palpation of the right and paraspinal muscles, posterior elements, sacroiliac joint, piriformis, greater trochanter, and gluteus medius. Diagnoses included persistent and severe radicular low back which was likely due to lumbar radiculopathy and persistent and significant low pain likely from discogenic pain versus facet pain and/or strain/sprain. Dr. Chen noted that appellant has had intermittent low back pain for the past two years with a recent exacerbation occurring in September/October 2012.

Dr. Chen, in a follow-up report dated November 20, 2012, noted that the most recent back condition flare-up occurred in late August 2012 as the result of carrying his bag and getting

² Under File No. xxxxxx868, OWCP accepted that appellant sustained an aggravation of discogenic lumbar disease as the result of twisting his back while loading his mail vehicle on September 2, 2010.

into and out of his truck. Diagnoses and physical findings remained unchanged from his prior November 12, 2012 report.

Dr. Shaninian, in a November 24, 2012 prescription note, provided dates appellant was seen by him in 2012 which included August 27, September 27, November 2 and 24, 2012.

In December 4, 18, and 31, 2012 reports, Dr. Chen reiterated findings and history noted in his November 13 and 20, 2012 reports. A review of a September 29, 2012 MRI scan revealed an L4-5 herniated disc with anterior thecal sac impingement with degenerative disc disease and loss of disc space hydration and L5-S1 disc herniation with anterior thecal sac impingement.

On December 18, 2012 Dr. Chen released appellant to return to modified work with restrictions. He diagnosed degenerative disc disease and lumbar radiculopathy due to disc herniations. The record also contains a December 31, 2012 statement from Dr. Chen releasing appellant to modified duty with a diagnosis of lower back pain.

In a January 10, 2013 note, Dr. Manpreet S. Sahota, a treating Board-certified anesthesiologist, reported that appellant has been seen for pain management for his low back pain and associated radiculopathy due to a lumbar herniated disc. He noted that appellant received lumbar epidural injections on September 5 and 15, 2012.

Dr. Chen, in reports dated January 15, 22, and 29, 2013, diagnosed severe and persistent radicular low back pain likely due to lumbar radiculopathy and significant and persistent low back pain likely due to discogenic pain versus facet joint pain and/or strain/sprain. Physical examination findings for the January 15, 2013 report included bilateral lumbar spasms, normal range of motion, except for markedly decreased flexion and axial pain on bilateral side bending, and right paraspinals tenderness on palpation. In the January 22 and 19, 2013 reports, Dr. Chen noted similar physical examination findings but also reported tenderness in the left paraspinals, posterior elements, sacroiliac joint piriformis, greater trochanter, and gluteus medius on palpation.

In multiple reports dated February 1, 2013, Dr. Koziol noted that appellant was seen on November 5, December 5, 2012, January 9 and 30, 2013. In one report, he noted that appellant was seen on December 5, 2012 and that he was having more symptoms following his trip and fall at his aunt's funeral. Dr. Koziol opined that appellant could return to light-duty work, if he desired, on December 12, 2012. In another February 1, 2013 report, he noted that appellant was seen for a follow-up visit on November 5, 2012 for an injury sustained on September 17, 2010 due to lifting heavy trays and a recurrence of symptoms in September 2012. Appellant related that the pain was so severe that he was unable to complete his mail route. A physical examination revealed lumbar paraspinal muscle spasm, diminished upper extremity deep tendon reflexes, and negative sciatic notch tenderness with positive straight leg raising. Dr. Koziol diagnosed L4-5 degenerative spinal disease with disc herniation, later recess stenosis, and L5-S1 lateral recess stenosis.

A March 12, 2013 report by Dr. Marc A. Cohen, an examining Board-certified orthopedic surgeon, noted that appellant had been referred for pain management. Appellant related an employment injury history and persistent on and off pain for the past two and one-half

years. A review of a September 10, 2010 MRI scan revealed L3-4 large herniated disc and L4-5 central herniated disc. Dr. Cohen reviewed medical records, provided physical findings, and diagnosed L3-4 lumbar herniated disc, lumbar degenerative disc disease, and lumbosacral radiculopathy.

An April 22, 2013 MRI scan revealed L4-5 degenerative disc disease with concurrent disc protrusion, mild spinal canal stenosis, and moderate right foraminal stenosis.

In an April 30, 2013 report, Dr. Daveed Frazier, an examining Board-certified orthopedic surgeon, noted an employment injury date of September 2, 2010. He provided physical examination findings and diagnosed spondylolisthesis, radiculopathy, and spinal stenosis.

On May 14, June 11 and 25, 2013 Dr. Chen reported appellant was seen for a follow-up visit for his complaints of low back and leg pain. Physical examination findings and diagnoses were similar to those findings found in prior reports.

By letter dated September 18, 2013, OWCP informed appellant that the evidence of record was insufficient to establish his claim. Appellant was advised as to the medical and factual evidence required to support his claim and afforded 30 days to provide this information.

In response to OWCP's September 18, 2013 letter, appellant submitted the following evidence.

In reports dated May 10 and August 23, 2013,³ Dr. Koziol noted that appellant was seen for follow-up visits on May 8 and July 10, 2013. In his August 23, 2013 report, Dr. Koziol related that appellant stated that he continued to have right back, knee, calf, posterior thigh and buttock pain and left lower lumbar spine spasms. A review of an April 22, 2013 MRI scan showed L5-S1 marked disc space collapse and bridging osteophytes with no flexion extension motion; small L5-S1 disc herniation; bilateral neural foraminal stenosis greater on the right side; L4-5 central disc protrusion with right-sided neural foraminal stenosis; and some right-sided L3-4 neural foraminal stenosis.

Dr. Cohen, in an August 8, 2013 report, reviewed medical evidence, provided physical examination findings, and diagnosed L4-5 lumbar stenosis and mild instability, L4-5 and L5-S1 spinal stenosis with disc herniation and radiculopathy, and lumbar degenerative disc disease.

By decision dated October 21, 2013, OWCP denied appellant's claim. It accepted that the August 27, 2012 incident occurred as alleged, but denied the claim as it found that the medical evidence was insufficient to establish causal relationship. OWCP found that the medical evidence failed to explain how lifting racks on August 27, 2012 caused or aggravated the diagnosed conditions of disc herniation, lumbar degenerative disc disease, lumbar stenosis, and lumbar radiculopathy.

In a letter dated November 4, 2013, appellant's counsel requested a telephonic hearing before an OWCP hearing representative, which was held on August 25, 2014.

³ The August 23, 2013 report was not signed by Dr. Koziol, but was signed for him by his secretary.

In a November 17, 2013 report, Dr. Cohen noted that appellant had sustained an employment-related injury involving his lower back. He reported that appellant has had lower back and right leg pain for the past two and one-half years since the work injury. Dr. Cohen summarized the physical examination findings and objective testing reviewed. In concluding, he opined that appellant's symptoms and complaints appeared work-related based on a worsening and aggravation of his preexisting lumbar disc disease and was supported by the MRI scans and x-ray interpretations.

Dr. Shaninian, in a prescription note, reported seeing appellant on August 28, 2012 for lumbosacral pain.

A January 3, 2014 letter from Haveron Total Health reported that appellant was treated for an August 28, 2012 employment injury for the period November 7, 2012 to May 8, 2013. Diagnoses included: lumbalgia, lumbar segmental dysfunction, herniated disc, muscle spasm, and feet and leg pain.

In a May 6, 2014 report, Dr. Koziol provided a review of objective and medical evidence, noted the employment injury and provided a summary of physical examination findings from prior visits. He reported that appellant initially sustained an employment injury on September 2, 2010 due to lifting heavy trays and that on August 27, 2012 he reinjured himself at work when he twisted his back to prevent a hamper from falling and later felt back pain due to lifting trays and delivering mail. Appellant related that on August 27, 2012 his back pain became so severe that he was unable to finish delivering mail on his route. In concluding, Dr. Koziol opined that appellant's work injuries involving lifting racks and hampers caused disc herniations and aggravation of the foraminal stenosis based on the worsening of appellant's symptoms following each employment injury.

By decision dated October 23, 2014, an OWCP hearing representative affirmed the denial of appellant's claim. She found that the medical evidence failed to explain how the August 27, 2012 incident caused or aggravated appellant's preexisting lumbar conditions.

In a letter dated January 16, 2015, counsel requested reconsideration based on a December 19, 2014 statement by Gerard Monzillo, postmaster. Mr. Monzillo stated that appellant informed him while filing claims for compensation (Form CA-7) on August 27, 2012 that he reinjured his back due to loading his postal vehicle.

By decision dated January 23, 2015, OWCP denied reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of establishing the essential elements of his claim, including the fact that the individual is an employee of the United States within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment

⁴ *Supra* note 1.

injury.⁵ 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.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a fact of injury has been established.⁷ 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.⁸ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁹

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.¹⁰ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.¹¹ 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.¹²

ANALYSIS -- ISSUE 1

On October 1, 2012 appellant filed a recurrence claim alleging that August 27, 2012 he sustained a recurrence of muscle spasms from an accepted September 2, 2010 employment injury when lifting heavy trays. OWCP determined that appellant was alleging a new injury as he identified new factors and converted his claim into a new claim. It accepted that the August 27, 2012 incident occurred, but denied the claim on the basis that appellant failed to establish that the diagnosed conditions had been caused or aggravated by the August 27, 2012 incident. The issue on appeal is whether appellant met his burden of proof to establish causal relationship. The Board finds that appellant failed to meet his burden.

In support of his claim, appellant submitted multiple reports from Dr. Chen diagnosing persistent and severe radicular low back pain, lumbar radiculopathy, L4-5 herniated disc,

⁵ C.S., Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁶ S.P., 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ B.F., Docket No. 09-60 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 5.

⁸ D.B., 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

⁹ C.B., Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 5.

¹⁰ Y.J., Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

¹¹ J.J., Docket No. 09-27 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

¹² I.J., 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

degenerative disc disease. Dr. Chen, in his November 13, 2012 report, identified the injury occurring at the end of August or September 2012 when appellant sustained severe pain due to carrying his bag and getting into and out of his truck. He opined that appellant suffered an exacerbation of his low back pain in September, or October 2012. In his November 30, 2012 report, Dr. Chen reported the incident as occurring in late August as the result of appellant carrying his bag and getting into and out of his truck. Medical opinions based on an incomplete or inaccurate history are of diminished probative value.¹³ Appellant attributed his condition to lifting trays on August 27, 2012 and did not attribute it to carrying his bag or getting into and out of his truck. Moreover, Dr. Chen has not provided an accurate injury as he vaguely notes the injury occurring at sometime in late August, September or October 2012. None of the dates mentioned by Dr. Chen specifically note the injury date of August 27, 2012 or that appellant was lifting heavy trays at the time. Thus, these reports from Dr. Chen are insufficient to establish appellant's claim.

Similarly, Dr. Chen's reports covering the period December 3 to August 18, 2013 are also insufficient to support appellant's claim. While he provided examination findings and diagnoses, Dr. Chen did not address or offer any opinion as to the cause of appellant's condition. He also provided two return to work statements dated December 18 and 31, 2012 containing diagnoses of low back pain, degenerative disc disease, and lumbar radiculopathy. These reports contain no opinion regarding the cause of appellant's condition or whether the August 27, 2012 incident aggravated a preexisting condition. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁴ For these reasons, Dr. Chen's reports and disability notes are insufficient to establish appellant's claim.

The record also contains several reports from Dr. Koziol who noted treatment dates and injury dates of September 17, 2010 and September 2012. Dr. Koziol, in a May 6, 2014 report, noted an initial employment injury on September 10, 2010 and a reinjury on August 27, 2012 as the result of appellant twisting his back to prevent a hamper from falling and later lifting trays and delivering mail. Appellant attributed his condition to lifting heavy trays. While Dr. Koziol correctly identified the date of injury, he did not provide any supporting rationale explaining how the August 27, 2012 incident caused or aggravated appellant's lumbar condition. Moreover, he provided an inaccurate account of how the incident occurred, as appellant did not allege a twisting injury or an injury while delivering mail, but attributed it to lifting heavy trays. As noted above, medical opinions based on an incomplete or inaccurate history are of diminished probative value.¹⁵ Thus, the May 6, 2014 report is of diminished probative value and insufficient to support appellant's claim.

The record also contains reports dated May 10 and August 23, 2013 from Dr. Koziol. These reports are also insufficient to support appellant's claim as Dr. Koziol offered no opinion

¹³ *L.G.*, Docket No. 09-1692 (issued August 11, 2010); *M.W.*, 57 ECAB 710 (2006); *James R. Taylor*, 56 ECAB 537 (2005).

¹⁴ *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, *supra* note 10; *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹⁵ *Supra* note 13.

as to the cause of appellant's conditions. As noted above, medical reports offering no opinion on causal relationship are insufficient to meet appellant's burden of proof.¹⁶

In a report dated November 17, 2013, Dr. Cohen opined that appellant sustained an aggravation of his preexisting lumbar disease due to a work-related incident. However, he does not note the date of the employment injury or what appellant was doing at the time. Dr. Cohen's report is unsupported by rationale and is conclusory. Medical opinions which contain no rationale or explanation are of little probative value.¹⁷ Thus, this report is insufficient to establish appellant's claim.

The record also contains prescription notes from Dr. Shaninian, reports dated March 12 and August 8, 2013 from Dr. Cohen, reports dated May 14, 11, and 25, 2013 from Dr. Chen, notes from Dr. Sahota, an April 30, 2103 report by Dr. Frazier and a November 25, 2012 disability note by Dr. Koziol. However, none of the physicians offered any opinion on causation. The Board has held that medical evidence offering no opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁸ The September 29, 2012 and April 22, 2013 MRI scans, medical literature, and January 3, 2014 letter from Haverton Total Health do not constitute probative medical evidence because they do not contain rationale by a physician relating appellant's disability to the August 27, 2012 incident.¹⁹

As appellant has not submitted any rationalized medical evidence to support his allegation that he sustained injuries causally related to the August 27, 2012 incident, he failed to meet his burden of proof to establish a claim.

On appeal, counsel argues that Dr. Koziol's May 6, 2014 report is sufficient to establish appellant's claim. For the reasons discussed above, Dr. Koziol failed to provide sufficient rationale explaining how the diagnosed conditions had been caused or aggravated by the August 27, 2012 incident. Thus, the Board finds the report insufficient to support appellant's 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.

¹⁶ *Supra* note 14.

¹⁷ *F.T.*, Docket No. 09-919 (issued December 7, 2009) (medical opinions not fortified by rationale are of diminished probative value); *Sedi L. Graham*, 57 ECAB 494 (2006) (medical form reports and narrative statements merely asserting causal relationship generally do not discharge a claimant's burden of proof).

¹⁸ *Id.*

¹⁹ *See Barbara J. Williams*, 40 ECAB 649 (1989).

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,²⁰ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.²¹ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.²² When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.²³

ANALYSIS -- ISSUE 2

In the last merit decision dated October 23, 2014, an OWCP hearing representative affirmed the denial of appellant's claim. She found that the medical evidence was insufficient to establish that appellant's preexisting lumbar conditions had been caused or aggravated by the August 27, 2012 incident. Appellant's counsel requested reconsideration in a January 16, 2015 letter. The question before the Board is whether appellant's reconsideration request meets at least one of the three standards for obtaining merit review. The Board finds that appellant's request does not meet the standards for obtaining merit review.

In his reconsideration request, appellant does not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify any legal error or raise any new and relevant legal argument regarding OWCP's analysis of the medical evidence. In support of his claim, appellant submitted a December 19, 2014 statement by Mr. Monzillo who noted that appellant stated that he had reinjured his back on August 27, 2012. The Board notes that OWCP accepted the August 27, 2012 incident. The basis of OWCP's denial of appellant's claim was medical in nature. While Mr. Monzillo's statement, which addressed the factual element of the claim, was new it was irrelevant to the issue of causal relationship. The submission of evidence that does not address the relevant issue involved does not constitute a basis for reopening a case.²⁴

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or

²⁰ *Supra* note 1. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

²¹ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

²² *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

²³ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

²⁴ *M.E.*, 58 ECAB 694 (2007); *D'Wayne Avila*, *supra* note 10.

constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish an injury causally related to the August 27, 2012 incident. The Board further finds that OWCP properly denied his request to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 23, 2015 and October 23, 2014 are affirmed.

Issued: February 10, 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