United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 16-0887**
	)	**Issued: November 4, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Boston, MA, Employer	)	

Appearances:
Jacqueline Shanahan, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 25, 2016 appellant, through counsel, filed a timely appeal of a February 10, 2016 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 to consider the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish a lower back injury causally related to the accepted July 1, 2014 employment incident.

[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.*

On appeal counsel alleges that the reports of appellant's treating physicians establish that his lumbar condition is causally related to the accepted employment incident.

FACTUAL HISTORY

Appellant, a 55-year-old truck driver, filed a traumatic injury claim (Form CA-1) on August 13, 2014, alleging that he experienced severe pain in his lower back while placing a chock block under the rear tire of his vehicle on July 1, 2014. He stopped work on July 1, 2014.[3]

In a disability note dated July 29 2014, Dr. William P. Docken, Board-certified in internal medicine, advised that appellant was still disabled due to lower back pain.

By letter to appellant dated August 26, 2014, OWCP advised him that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits. It asked him to submit a comprehensive medical report from his treating physician describing his symptoms and an opinion as to whether his claimed condition was causally related to his federal employment. Appellant was afforded 30 days to submit the additional evidence.

In a September 9, 2014 report, Dr. Bahige Asaker, an osteopath, related that appellant originally felt severe pain on July 1, 2014 while putting a chock block under the wheel of his truck at work and that he had been out of work since that time. He noted that appellant had a history of low back pain dating back to 2012. Dr. Asaker reported that he saw appellant on August 6, 2014 for a follow up of a magnetic resonance imaging (MRI) scan that showed a disc protrusion at the L5-S1 level and spondylosis at the T-11 and T-12 levels with some neural impingement. Appellant related that he still had intermittent pain and sometimes had problems moving from a sitting to a standing position. Dr. Asaker diagnosed left-sided radiculopathy and noted that his MRI scan also showed an L2-3 mild disc bulging and congenital narrowing of the spinal canal, resulting in a mild central stenosis at the L3-4 levels. He reported an asymmetric disc bulge with moderate to marked central spinal stenosis and moderate right L3 neural stenosis and right L3 neural impingement; a moderate asymmetric disc bulge at L4-5, greater posterior on the left, showing bilateral L4 neural impingement; a nerve root sheath arising from the thecal sac at L5-S1; bilateral mild L5 neural foraminal stenosis, L11 and L12 spondylosis with a mild disc bulge; and stenosis of the back with some disc spurring, joint disease and old trauma. Dr. Asaker noted that appellant underwent x-ray testing on July 3, 2014 which showed degenerative joint disease and old trauma. He advised that he was unable to work due to the lifting, continuous sitting, and standing involved in his work, which aggravated his lower back condition.

By decision dated September 26, 2014, OWCP denied appellant's claim, finding that he failed to meet his burden of proof to establish a lower back injury causally related to the accepted July 1, 2014 employment incident.

In a form dated and postmarked October 22, 2014, appellant, though counsel, requested an oral hearing before an OWCP hearing representative. On February 17, 2015 appellant, through counsel, requested review of the written record instead of an oral hearing.

[3] OWCP accepted a traumatic injury claim (Form CA-1), which appellant filed on May 30, 2012 under case number xxxxxx891. The claim was accepted for lumbar strain.

In a report dated July 10, 2014, received by OWCP on February 17, 2015, Dr. Asaker noted that appellant hurt his back at work in May 2012 and had recently sustained another injury to his lower back. He reported that appellant worked at the employing establishment and frequently lifted boxes. Dr. Asaker advised that his back pain radiated into his left leg. He diagnosed back strain, L3-4 disc spurring and degenerative disc disease. Dr. Asaker advised that appellant underwent x-ray testing on July 3, 2014 which showed narrowing of the L4-5 disc with spurring and spurring at the L3-4 levels. He opined that he had degenerative joint disease and old trauma. Dr. Asaker noted that the 2012 back injury intermittently flared up and that appellant was afraid that if he returned to work the employing establishment might not have light duty available; he was concerned that he might have to return to lifting heavy boxes, which could cause permanent injury to his back.

In a report dated November 4, 2014, Dr. Docken advised that appellant was experiencing ongoing low back pain, which was increased by bending, stooping, and lifting. He advised that, due to the persistence of his back pain, appellant was no longer able to perform the duties of his job. Dr. Docken reported that his current symptoms could have an element of local, myofascial pain, with underlying degenerative disease of the lumbar spine. He further asserted that appellant had lumbar spinal stenosis, which was of degenerative origin and probably not related to the 2012 injury.

In a November 17, 2014 report, received by OWCP on February 17, 2015, Dr. Christopher M. Bono, Board-certified in orthopedic surgery, advised that appellant had left lower back pain which began in 2012 while at work. He then returned to work and reinjured his back in 2014, when he experienced an acute onset of severe lower back pain. Dr. Bono advised that appellant's pain increased when he transitioned from sitting to standing, bending, and sitting for long or standing for too long.

In an April 28, 2015 decision, OWCP's hearing representative affirmed the September 26, 2014 decision as modified. She found that the reports from Drs. Docken, Asaker, and Bono, did diagnose medical conditions, but that they were insufficient to establish causal relationship.

On July 7, 2015 OWCP received a July 2, 2014 report, in which Dr. Docken noted that appellant incurred acute low back pain while working on July 1, 2014. He noted that he was experiencing persistent low back pain due to a post-traumatic low back strain syndrome and underlying degenerative disease of the lumbar spine. Dr. Docken advised that appellant had moderate-to-marked central canal stenosis at the L3-5 levels and right paracentral disc protrusion at L5-S1, with contact of exiting right S1 nerve root.

In a July 2, 2015 report, Dr. Joseph S. Barr, a specialist in orthopedic surgery, advised that he examined appellant on May 14, 2015. He related that appellant injured his back on July 1, 2014 while working as a truck driver; appellant placed a block wedge under the wheel of his truck when he experienced sudden, acute lower back pain. Appellant noted his history of having a back injury in 2012 and being out of work for two and one half months, and that he had not been able to work since July 1, 2014. Dr. Barr reported that appellant underwent an MRI scan on August 1, 2014 that showed degenerative changes throughout the lumbar spine, with moderate to marked spinal stenosis at L3-4 and L4-5. He advised that the radiologist who

performed the MRI scan considered the stenosis to be congenital. Dr. Barr opined that appellant's status was post-lumbar sprain, work connected. He noted preexisting lumbar spine problems, with one episode of lumbar problems in 2012 causing him to be out of work. Dr. Barr opined that the July 2014 work incident caused a permanent aggravation in the underlying process, as evidenced by the MRI scan findings of lumbar stenosis.

By decision dated August 12, 2015, OWCP denied appellant's claim, finding that he failed to meet his burden of proof to establish a lower back injury causally related to the July 1, 2014 work incident. It found that none of the medical reports provided a sufficiently rationalized explanation as to how the diagnosed medical conditions were related to the claimed July 1, 2014 work incident.

By letter dated and reconsidered on October 21, 2015 appellant, through counsel, requested reconsideration of the August 12, 2015 decision.

In a September 9, 2014 report, Dr. Barr essentially reiterated his previous findings and conclusions. He asserted that he was not implying in his July 2, 2015 report that appellant's spinal stenosis was traumatically induced. Dr. Barr advised that his conditions of lumbar degenerative changes and spinal stenosis were preexisting and were permanently aggravated by the July 1, 2014 work incident. He reported that the July 1, 2014 work incident of bending and twisting "could cause" slight increased swelling of the disc as well as swelling in the lumbar facet joints. Dr. Barr reiterated that there was a permanent aggravation of a preexisting condition, which rendered appellant incapable of doing his former work pushing heavy containers of mail.

In a decision dated February 10, 2016, OWCP denied modification of the August 12, 2014 decision. It found that none of the medical reports provided a sufficiently rationalized explanation as to how the diagnosed medical conditions were related to the claimed August 29, 2015 work incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of establishing that the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained 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 injury.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

[4] 5 U.S.C. §§ 8101-8193.

[5] *Joe D. Cameron,* 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

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

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. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.[7] 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.[8]

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[9]

An award of compensation may not be based on surmise, conjecture or speculation. Neither, the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.[10] Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

ANALYSIS

It is uncontroverted that appellant placed a chock block under the rear tire of his vehicle on July 1, 2014 while in the performance of duty. The question of whether an employment incident caused a personal injury can only be established by probative medical evidence.[11] The Board finds that appellant has not submitted rationalized, probative medical evidence to establish that the July 1, 2014 employment incident caused a personal injury.

Counsel argues that OWCP erred by making subjective conclusions regarding Dr. Barr's opinion and by failing to find that his opinion constituted medical evidence sufficient to establish that appellant's accepted, preexisting lower back condition was aggravated by his July 1, 2014 work incident. She contends that Dr. Barr asserted that, prior to the July 1, 2014 work incident, appellant was well enough to perform his work duties despite his prior discomfort; however, he sustained an injury to his lower back on July 1, 2014 which rendered him unable to perform his duty, which established that he had an aggravation of his underlying condition on that date. The Board does not accept counsel's contention.

The Board notes that OWCP accepted a traumatic injury claim, which appellant filed on May 30, 2012, under case number xxxxxx891. The claim was accepted for lumbar strain. The instant claim, however, is for a separate injury which allegedly occurred on July 1, 2014.

[7] *John J. Carlone*, 41 ECAB 354 (1989).

[8] *Id.* For a definition of the term "injury," *see* 20 C.F.R. § 10.5(ee).

[9] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[10] *Id.*

[11] *Supra* note 7.

Dr. Barr submitted reports dated July 2 and September 9, 2015. In his July 2, 2015 report, he advised that appellant injured his lower back in 2012 and was out of work for two and one-half months; he opined that appellant reinjured his lower back on July 1, 2014. Dr. Barr noted that the results of the MRI scan he underwent on August 1, 2014 showed degenerative changes throughout the lumbar spine, with moderate to marked spinal stenosis at L3-4 and L4-5. He, however, advised that the radiologist who performed the MRI scan considered the stenosis to be congenital. Dr. Barr opined that appellant's lumbar degenerative changes and spinal stenosis were preexisting conditions which were permanently aggravated by the July 1, 2014 work incident. He advised that the July 1, 2014 work incident of bending and twisting could cause slight increased swelling of the disc as well as swelling in the lumbar facet joints. Although Dr. Barr indicated that bending and twisting "could cause" the disc and lumbar swelling described, his opinion was not expressed in terms of a reasonable degree of medical certainty. The Board has held that while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.[12] Dr. Barr noted that there was a permanent aggravation of a preexisting condition which rendered appellant incapable of doing his former work pushing heavy containers of mail. His opinion regarding causal relationship is of limited probative value because he did not explain how slight increased swelling of the disc and lumbar facet joints would cause a permanent aggravation of the preexisting condition. The Board has found that medical evidence is of limited probative value if it contains a conclusion regarding causal relationship, but does not offer any rationalized medical explanation.[13]

Appellant also submitted reports from Drs. Docken, Asaker, and Bono. In his July 2, 2014 report, Dr. Docken noted that appellant was experiencing persistent low back pain due to a post-traumatic low back strain syndrome and underlying degenerative disease of the lumbar spine. He advised that appellant had moderate to marked central canal stenosis at the L3-5 levels and right paracentral disc protrusion at L5-S1, with contact of exiting right S1 nerve root. Dr. Docken opined that appellant's current symptoms could have an element of local, myofascial pain, with underlying degenerative disease of the lumbar spine. He further asserted that appellant had lumbar spinal stenosis, which was of degenerative origin and probably not related to the 2012 injury. Causal relationship is a medical question that must be established by probative medical opinion from a physician.[14] Dr. Docken offered no medical explanation as to how the accepted July 1, 2014 work incident would have caused appellant's diagnosed conditions. His reports therefore do not constitute rationalized medical evidence, to establish based upon an accurate history of appellant's preexisting medical conditions, how the incident in question caused or exacerbated his medical condition.[15] As such his opinion is of limited probative value.[16]

[12] *See Ricky S. Storms*, 52 ECAB 349 (2001).

[13] *See J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

[14] *W.W.*, Docket No. 09-1619 (issued June 2010); *David Apgar*, 57 ECAB 137 (2005).

[15] *See T.C.*, Docket No. 16-0586 (issued August 9, 2016).

[16] *See Patricia J. Bolleter*, 40 ECAB 373 (1988).

Dr. Asaker advised in his July 10, 2014 report that appellant hurt his back at work in May 2012 and recently sustained another injury to his lower back. He reported that appellant worked at the employing establishment and frequently lifted boxes. Dr. Asaker advised that his back pain radiated into his left leg. He diagnosed back strain, L3-4 disc spurring and degenerative disc disease. Dr. Asaker advised that appellant underwent x-ray testing on July 3, 2014 which showed narrowing of the L4-5 disc with spurring and spurring at the L3-4 levels. He opined that he had degenerative joint disease and old trauma. Dr. Asaker reiterated in his September 9, 2014 report that appellant had a history of low back pain dating back to 2012. He advised that the results of an MRI scan revealed a disc protrusion at the L5-S1 level and spondylosis at the T11 and T12 levels with some neural impingement. Dr. Asaker diagnosed left-sided radiculopathy and noted that his MRI scan also showed an L2-3 mild disc bulging and congenital narrowing of the spinal canal, resulting in a mild central stenosis at the L3-4 levels. He noted that the 2012 back injury intermittently flared up and that appellant was afraid that if he returned to work the employing establishment might not have light duty available; he was concerned that he might have to return to lifting heavy boxes, which could cause permanent injury to his back. While Dr. Asaker provided diagnoses of appellant's lumbar condition, he offered no medical explanation as to how the diagnosed conditions were caused by the accepted employment incident. The need for detailed rationale is particularly important since appellant had a preexisting history of lumbar injury and degenerative disc disease.[17]

Dr. Bono also advised in his November 17, 2014 report that appellant experienced lower back pain in 2012 while at work and reinjured his back in 2014. The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.[18] While Dr. Bono noted complaints of lower back pain, which he generally attributed to the July 1, 2014 work incident, and diagnosed lumbar radiculopathy, bulging lumbar discs by MRI scan, degenerative joint disease, and spinal stenosis, his report did not contain a probative, rationalized opinion regarding whether the July 1, 2014 work incident caused a personal injury. He did not sufficiently explain how pathophysiologically appellant would have sustained a lower back injury while placing a chock block under the rear tire of his vehicle on July 1, 2014.[19]

OWCP advised appellant of the evidence required to establish his claim; however, he failed to submit such evidence. Causal relationship must be established by rationalized medical opinion evidence. Appellant did not provide a medical opinion which describes or explains the medical process through which the July 1, 2014 work accident would have caused the diagnosed conditions. Accordingly, he did not establish that he sustained a lower back injury in the performance of duty. OWCP properly denied appellant's claim for compensation.

[17] *See L.M.*, Docket No. 16-0143 (issued February 19, 2016).

[18] *See Anna C. Leanza*, 48 ECAB 115 (1996).

[19] *Id*.

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 failed to meet his burden of proof to establish a lower back injury causally related to the July 1, 2014 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 2016
Washington, DC

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

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

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