United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 16-1056**
	)	**Issued: November 17, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 21, 2016 appellant, through counsel, filed a timely appeal from a March 7, 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 over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish a cervical injury causally related to factors of his federal employment.

[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 contends that OWCP's decision construed the evidence of record against appellant. He further contends that appellant was not given the benefit of the doubt.

FACTUAL HISTORY

On April 15, 2014 appellant, then a 46-year-old full-time mail handler, filed an occupational disease claim (Form CA-2) alleging that on June 1, 2013 he first became aware of a pinched nerve and pain in his entire spine. He further alleged that on January 24, 2014 he first realized that his conditions were caused or aggravated by turning around while operating a forklift at work. Appellant stopped work on this date and returned to work on April 15, 2014.

In a narrative statement dated April 15, 2014 accompanying his Form CA-2, appellant related that he noted something wrong with his right shoulder and right arm in June 2013. He mentioned to a physician that his condition could be a pulled or strained muscle. Appellant's condition continued for a few months. In August 2013, he experienced increased pain and was evaluated by Dr. William D. Tobler, an attending Board-certified neurologist, who performed neck surgery on February 21, 2014. Appellant returned to work on April 15, 2014 with restrictions from Dr. Tobler.

By letter dated April 23, 2014, OWCP notified appellant of the deficiencies of his claim and afforded him 30 days to submit additional medical and factual evidence.

In an undated statement, appellant related that he was driving a forklift and when he stood up he experienced pain, numbness, and tingling. He performed this duty 8 to 10 hours a day, five days a week. Appellant related that the majority of his driving was done in reverse and it required him to twist 180 degrees to see behind him. He had to twist his back and neck which caused extreme pain. Appellant started working at the employing establishment in November 1986 and worked as a mail handler for the majority of time.

Medical evidence received included a July 9, 2013 cervical x-ray report, which noted degenerative changes that were most severe at C5-6. In a November 20, 2013 report, Dr. David J. Kissel, a Board-certified physiatrist, related that an electromyogram and nerve conduction velocity study of the left upper limb and cervical paraspinal muscles showed a left nerve root injury at C6 and some possible C7 involvement that was at least chronic in part. He further found that the electrical studies were otherwise normal. Lumbar and cervical x-ray reports dated January 21, 2014, listed an impression of status post posterior fusion at L5-S1 without hardware complication and mild/moderate degenerative disc disease of the thoracolumbar junction.

In office notes dated January 21 to July 15, 2014, Dr. Tobler provided a history of appellant's medical treatment and family and social background. He reported findings on physical examination and diagnostic test findings. Dr. Tobler advised that appellant had arthrodesis status and cervical radiculopathy. In an operative report dated February 21, 2014, he related that appellant underwent a posterior cervical decompressive laminectomy at C5-6 levels with a medial facetectomy and foraminotomy at the C6 root on the left side, with microdissection on that date. In an April 22, 2014 letter, Dr. Tobler noted that appellant presented to him in January 2014 for an evaluation of left upper extremity radiculopathy. He had symptoms since

June 2013. Dr. Tobler noted a history of his medical treatment and referenced his prior findings from an April 8, 2014 examination. He provided an impression that appellant was better, but he was not at the expected point six weeks after surgery. Dr. Tobler diagnosed ongoing C6 radiculopathy on the left. He recommended a new computerized tomography (CT) myelogram of the cervical spine to assess recurrent herniation or inflammation. Dr. Tobler concluded that appellant could return to work in one week with restrictions.

In a March 11, 2014 office note, a nurse practitioner examined appellant and advised that he had problems of arthrodesis status and cervical radiculopathy.

In an April 25, 2014 cervical CT scan report, Dr. Matthew J. Moore, a Board-certified radiologist, provided an impression of no high-grade central stenosis, C3-4 severe left neural foramen stenosis and impingement of the left C4 nerve, C4-5 small left subarticular osteophyte that mildly encroached on the thecal sac at the left C5 nerve root entry zone and no high-grade impingement, and C5-6 mild left neural foramen stenosis and asymmetric partial truncation of the left C6 opacification that may reflect mild impingement. In another report of even date, he related that appellant underwent a cervical myelogram on that date to treat his cervical radiculopathy.

By decision dated November 7, 2014, OWCP denied appellant's occupational disease claim. It found that the medical evidence was insufficient to establish that he sustained an injury or a medical condition causally related to the established work events.

In a November 14, 2014 letter, appellant, through counsel, requested a telephone hearing with an OWCP hearing representative.

In a February 25, 2015 letter, Dr. Tobler reiterated his history of treating appellant since January 21, 2014. He believed that appellant's repetitive job duties of sorting and carrying mail which involved repetitive movement likely directly led to his cervical problems. Dr. Tobler noted that appellant had a previous lumbar spine injury, but he did not have a previous cervical spine injury. Appellant initially improved after his decompression surgery, but his pain returned and new cervical spine imaging showed a progression of the disease. Dr. Tobler recommended a two-level anterior cervical discectomy and fusion as appellant had narrowing of the canal and cord compression at C4-5 and C5-6. There was also a new C6 foraminal disc herniation on the right that was likely a flow-through-type injury from his original problem. Dr. Tobler again opined that appellant's work activities were a direct cause of his continued cervical spine problems. He had a neurological deficit, paresthesias, and diagnostic evidence of cord compression. Dr. Tobler concluded that appellant needed to undergo cervical fusion surgery as soon as possible.

During the June 1, 2015 telephone hearing, appellant noted that in his last employing establishment he worked as a carrier for four years. He also noted that in his current mail handler position he mainly worked as a forklift driver. As such, appellant also loaded and unloaded containers and mail items from trailers. He contended that his neck problems were probably due to a combination of operating a forklift and performing his other work duties.

By decision dated July 24, 2015, an OWCP hearing representative affirmed the November 7, 2014 decision. He found that the medical evidence of record was insufficient to establish a causal relationship between appellant's diagnosed cervical conditions and the established employment factor.

On September 14, 2015 counsel requested reconsideration and submitted additional medical evidence. In a July 20, 2015 letter, Dr. Tobler noted that appellant worked as a mail carrier at the employing establishment. He believed that the significant degenerative changes in appellant's cervical spine were likely related to the repetitive movement of looking down, bending, twisting, and carrying boxes and mail. Dr. Tobler related that these work duties caused a degenerative ongoing change in the spine, specifically at the C5-6 and C6-7 levels, which led to foraminal compromise and ultimately nerve root impingement.

In a March 7, 2016 decision, OWCP denied modification of the July 24, 2015 decision. It found that the medical evidence was insufficient to establish a medical connection between appellant's diagnosed cervical conditions and the established work factor.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish 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 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 injury.[3] 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.[4]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable 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.[5] Neither the fact that appellant's

[3] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *id.* at 351-52.

condition became apparent during a period of employment nor, his belief that the condition was caused by his employment is sufficient to establish a causal relationship.[6]

ANALYSIS

OWCP accepted the work factor that appellant operated a forklift while working as a mail handler. The Board finds, however, that the medical evidence of record is insufficient to establish that he sustained a cervical injury caused or aggravated by the accepted work factor.

Dr. Tobler's February 25, 2015 report found that appellant had a neurological deficit, paresthesias, and diagnostic evidence of cord compression which required cervical fusion surgery. He opined that appellant's repetitive job duties, which included sorting and carrying mail likely directly led to his cervical condition. The Board finds that this opinion is speculative in nature.[7] Dr. Tobler's only rationale for causal relationship was that appellant had no cervical spine injury before his current cervical injury. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury is insufficient, without supporting rationale, to support a causal relationship.[8] Dr. Tobler did not adequately explain how sorting and carrying mail caused or contributed to appellant's diagnosed cervical conditions and need for surgery.

In his July 20, 2015 report, Dr. Tobler opined that significant degenerative changes at the C5-6 and C6-7 levels, which led to foraminal compromise and nerve root impingement were likely related to appellant's repetitive movement of looking down, bending, twisting, and carrying boxes and mail at work. His opinion is speculative in nature.[9] Dr. Tobler did not explain how the diagnosed condition was caused or aggravated by operating a forklift.

Other reports from Dr. Tobler did not provide an opinion supporting that the diagnosed cervical conditions were caused or aggravated by the established employment factors. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value.[10]

Similarly, other medical evidence of record, including diagnostic test reports, did not specifically relate the diagnosed conditions to the established employment factor.[11]

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

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

[8] *See John F. Glynn*, 53 ECAB 562 (2002); *Michael Hughes*, 52 ECAB 387 (2001); *Kimper Lee*, 45 ECAB 565 (1994); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

[9] *Supra* note 7.

[10] *See K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

[11] *Id.*

OWCP also received evidence from a nurse practitioner. This is of no probative medical value on the issue of causal relationship as a nurse practitioner is not considered a physician as defined under FECA.[12]

On appeal, counsel contends that OWCP's decision construed the evidence of record against appellant. He further contends that appellant was not given the benefit of the doubt. As the Board found above, appellant did not submit any rationalized probative medical evidence supporting a causal relationship between his diagnosed cervical conditions and the established employment factor.

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 cervical injury causally related to factors of his federal employment.

[12] 5 U.S.C. § 8101(2); *L.D.*, 59 ECAB 648 (2008). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 17, 2016
Washington, DC

Christopher J. Godfrey, 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