

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

J.C., Appellant

and

**U.S. POSTAL SERVICE, NETWORK
DISTRIBUTION CENTER, Philadelphia, PA,
Employer**

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**Docket No. 15-0765
Issued: September 2, 2016**

Appearances:

*Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 20, 2015 appellant, through counsel, filed a timely appeal from a December 2, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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.*

ISSUE

The issue is whether appellant sustained an injury on July 17, 2012 in the performance of duty.

FACTUAL HISTORY

On July 17, 2012 appellant, then a 56-year-old mail handler, filed a traumatic injury claim alleging that on that date he injured his legs and back while “resting on [a] guardrail when a tug slammed into [the] other side.” He stopped work on the date of injury. The employing establishment did not controvert the claim.

In a statement dated July 17, 2012, appellant related that he was sitting on a wooden bench in front of a guardrail entering data into a scanner when Sharon Scelso, a coworker, slammed into the guardrail driving a tug used to pull equipment. He indicated that he was “going to [the] hospital at this time.”³

In an undated statement, TeAuthor Drennon, a supervisor, related that appellant advised that Ms. Scelso struck a guardrail by a tow motor against which he was resting. Mr. Drennon stated, “After identifying the guardrail in question it was determined that there was evidence that the guardrail had been damaged. When questioned about the incident Ms. Scelso admitted to hitting the guardrail.”

In an emergency room report dated July 17, 2012, Dr. Chad E. Richmond, an osteopath, noted that appellant was struck by a guardrail/safety rail when a motorized vehicle struck the other side of the rail. He complained of pain in the left leg and lower back. On examination Dr. Richmond found tenderness of the midline to lower back with a negative straight leg raise. He diagnosed a lumbar contusion.

In an initial evaluation dated July 31, 2012, Dr. Michael Greene, an osteopath, related, “[Appellant] was resting up against a guardrail and was struck by a vehicle operated by another employee. He states that he was jarred substantially but did not go to the ground. [Appellant] had noted immediate pain and was taken to the emergency room at that time.” Dr. Greene discussed appellant’s complaints of back pain and tingling in the left foot and his history of a fusion at L4 and L5 in 1986. On examination he found trace tenderness, a slight loss of sensation in the lateral lower extremity on the left side, and a slightly positive left straight leg raise. Dr. Greene referred appellant for a magnetic resonance imaging (MRI) scan. In a form report dated July 31, 2012, he found that appellant should not work. Also on July 31, 2012 Dr. Greene noted that a computerized tomography (CT) scan obtained at the emergency room on July 17, 2012 revealed a disc bulge at L3-4, mild-to-moderate foraminal narrowing bilaterally, and moderate central stenosis. He stated, “On physical exam there were signs of left lower extremity radicular pain including straight leg raise and a slight decrease of pin prick sensation to the medial distal lower extremity.”

³ In a statement dated July 17, 2012, Ms. Scelso related that appellant was sleeping on the bench and stated that he was “okay” after the incident and went back to sleep.

By letter dated August 8, 2012, OWCP advised appellant that any injury initially appeared to be minor and uncontroverted and thus it had approved payment of limited medical expenses. It informed him that it was now formally adjudicating his claim and requested that he submit additional evidence, including a detailed report from his attending physician addressing the relationship between any diagnosed condition and the identified work incident.

In a statement dated August 20, 2012, appellant related that Ms. Scelso hit the guardrail “hard enough to cause a serious size bend into the railing. It was by no means a small accidental bump...” He indicated that he was sitting on a bench and his back was against a steel pole logging information into a scanner, which was verified by his supervisor. Appellant related that he had a preexisting back injury from military service and a history of a fusion over 30 years ago.

In a progress report dated August 21, 2012, Dr. Greene evaluated appellant for complaints of pain in his bilateral lower extremities. He found a left positive straight leg test with intact sensation and strength and no edema or tenderness of the spine to palpation. Dr. Greene again recommended an MRI scan.

By decision dated September 12, 2012, OWCP denied appellant’s claim after finding that the medical evidence was insufficient to show that he sustained a diagnosed condition as a result of the accepted July 17, 2012 work incident.

On September 20, 2012 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

On October 2, 2012 Dr. Greene noted that appellant continued to experience “complaints of low back and bilateral lower extremity radicular symptoms. [His] symptoms have been present since an injury at the workplace.” He found that appellant should not work pending reevaluation.⁴

In a progress report dated October 16, 2012, Dr. Greene indicated that an October 11, 2012 MRI scan revealed “[d]isc space obliteration [at] L4-5 as described with mild disc protrusion and marginal osteophytosis resulting in mild bilateral neuroforaminal narrowing with full intensity collection at laminectomy site presumably aseptic postoperative scroma” He further found degeneration of the L3-4 disc with stenosis due to a disc protrusion, ligamentous thickening and overgrowth of the facet joint.⁵

On November 14, 2012 Dr. Greene found a bilateral positive straight leg raise and noted that appellant was trying to obtain approval for steroid injections.

A hearing was held on January 28, 2013. By decision dated June 12, 2013, an OWCP hearing representative set aside the September 12, 2012 decision. He found that appellant had

⁴ In a progress report dated September 10, 2012, Dr. Green noted that appellant was waiting for authorization for a lumbar MRI scan.

⁵ In a progress report dated September 10, 2012, Dr. Greene noted that appellant had unchanged symptoms of lower radiculopathy and was waiting authorization for an MRI scan.

established that he was leaning against a guardrail that was struck by a vehicle. The hearing representative determined that the medical reports of Dr. Greene, while not adequately rationalized, were sufficient to warrant further development of the evidence. He remanded the case for OWCP to refer appellant for a second opinion examination.

On July 2, 2013 OWCP referred appellant, together with a statement of accepted facts, to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion examination.⁶ In a report dated July 19, 2013, Dr. Askin reviewed the evidence of record and discussed appellant's complaints of radiculopathy of the lower extremities after being knocked off a bench after a tow motor struck a guardrail. He noted that Dr. Greene's initial evaluation did not provide any findings of bruising or other trauma. Dr. Askin also indicated that appellant's symptoms increased over time, which he found did not "generally make sense if the etiology is supposed to have been trauma as opposed to a disease...." On examination he found no objective findings other than a surgical scar on the lumbar spine. Dr. Askin advised that appellant reported pain during straight leg raising and loss of sensation of the left foot. He reviewed the October 11, 2012 MRI scan and found no disc herniation or "changes suggestive of acute trauma...." Dr. Askin diagnosed "a baseline degenerative disc disease, lumbosacral spine, with a history of lumbar discectomy and fusion." He stated:

"I am not provided with any documentation that [appellant] had been materially altered by the incident as described. I certainly would not dispute the possibility of some discomfort with any mishap, but there was no[t] even a black and blue mark noted on his skin, and there was nothing on the imaging studies that suggest any significant musculoskeletal alteration. As such, there is no specific diagnostic label that is deserved for the July 17, 2012 incident."

Dr. Askin further advised, "Again, I would not dispute the possibility of some discomfort, but to have unyielding pain that is actually getting worse with the passage of time despite not having worked does not make sense in context." He stated, "Regarding total disability, I had not seen [appellant] prior to July 19, 2013. I have no personal knowledge of any reason why [he] should be considered disabled as of the date I saw him."

By decision dated August 1, 2013, OWCP denied appellant's traumatic injury claim. It found that the opinion of Dr. Askin represented the weight of the medical evidence and established that he had no diagnosed condition as a result of the accepted work incident.

On August 6, 2013 appellant, through counsel, requested an oral hearing. On November 12, 2013 counsel requested a review of the written record in lieu of an oral hearing. He submitted an October 4, 2013 report from Dr. Greene in support of his request. Counsel also contended that Dr. Askin's report was insufficiently rationalized and further noted that the physician found that appellant experienced discomfort after the work incident.

⁶ In a progress report dated June 5, 2013, Dr. Greene noted that appellant continued to experience radiculopathy of the lower extremities and back pain and was waiting for a decision regarding his workers' compensation claim.

On October 4, 2013 Dr. Greene noted findings of back tenderness and hypoesthesia of the left postlateral lower extremity.⁷ He diagnosed low back pain, foot pain, postlaminectomy syndrome of the lumbar spine, and radicular symptoms. Dr. Greene stated:

“[Appellant] has been under my care since July 2012. Prior to that time, he was working at full capacity. [Appellant] was injured while at work and since that time, has complained of low back and left greater than right[-]sided lower extremity pain complaints. I have reviewed the opinion [of] Dr. Askin and do not agree with his conclusions. I feel that based on [appellant’s] presentation and time of onset, it is my opinion within a reasonable degree of medical certainty there is a direct causation of the symptoms with the work[-]related injury on July 17, 2012.”

Dr. Greene identified the condition which he found related to the employment incident as radicular symptoms in the lower extremities.

By decision dated January 15, 2014, an OWCP hearing representative affirmed the August 1, 2013 decision. He found that Dr. Greene did not provide a specific diagnosis or sufficient medical rationale to outweigh the opinion of Dr. Askin.

In a report dated February 18, 2014, Dr. Greene related that he was treating appellant for pain in his low back with radiculopathy after a July 17, 2012 employment injury. He noted that he had a history of a laminectomy and fusion at L4-5 and L5-S1, but was working without problems prior to July 17, 2012.

On February 27, 2014 appellant, through counsel, requested reconsideration.

By decision dated May 21, 2014, OWCP denied modification of its January 15, 2014 decision.

In a report dated September 5, 2014, Dr. Greene indicated that he had reviewed in detail appellant’s medical records, including those prior to July 17, 2012. He further compared MRI scans of the lumbar spine from 2010 and 2012. Dr. Greene stated, “Following the traumatic work injury in which [appellant] was thrown to the ground by the impact of a vehicle striking a support rail that [he] was leaning against, [he] had significant aggravation of his low back and lower extremity symptoms, making his previously tolerated work duties impossible to tolerate.” He also found that appellant’s MRI scan dated after the July 17, 2012 incident showed pronounced changes at the dural sac at L3-4. Dr. Green concluded, “This objective structural change on MRI [scan] and significant change in the presentation and severity of his symptoms following the injury further supports my confident medical opinion that [his] symptoms are directly related to the work injury incurred on July 17, 2012.”

On September 11, 2014 appellant, through counsel, requested reconsideration.

⁷ In a progress report dated August 7, 2013, Dr. Greene provided examination findings and noted that he was waiting authorization for additional treatment.

By decision dated December 2, 2014, OWCP denied modification of its May 21, 2014 decision. It found that Dr. Greene provided an inaccurate history of injury, that of appellant being thrown to the ground on July 17, 2012, and did not explain how the claimed incident aggravated his back condition.

On appeal counsel argues that Dr. Greene's initial report and addendum on September 5, 2014 discussed the mechanism of injury and provided medical rationale. He contends that Dr. Askin did not provide medical rationale and maintains that at a minimum there exists a conflict in medical opinion.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing 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.⁸ 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.⁹

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence.¹⁰ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.¹¹ An employee may establish that the employment incident occurred as alleged, but fail to show that his disability and/or condition relates to the employment incident.¹²

ANALYSIS

Appellant alleged that he injured his back and legs on July 17, 2012 when he was resting against a guardrail that was struck by a tow motor. He sought treatment at the emergency room on that date and the employing establishment did not controvert his claim. OWCP accepted the occurrence of the July 17, 2012 work incident but denied the claim after finding that the medical evidence was not sufficient to establish a diagnosed condition causally related to the identified employment factor.

⁸ *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

⁹ *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

¹⁰ *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

¹¹ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

¹² *Id.*

The Board finds that appellant has not established that the accepted July 17, 2012 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.¹³

In an initial evaluation dated July 31, 2012, Dr. Greene discussed appellant's history of resting on a guardrail that was struck by a vehicle. He noted that the incident jarred him, but he did not fall to the ground. Dr. Greene found a slightly positive straight leg raise on examination and referred appellant for diagnostic studies. On July 31, 2012 he noted that an examination revealed radiculopathy of the left lower extremity, with a positive straight leg raise and a small loss of pin prick sensation.¹⁴ Dr. Greene, however, did not specifically attribute any diagnosed condition to the July 17, 2012 work incident. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.¹⁵

OWCP referred appellant for a second opinion examination with Dr. Askin. On July 19, 2013 Dr. Askin found no objective findings on examination, but subjective complaints of pain during straight leg raise and reduced left foot sensation. He determined that MRI scan studies did not show evidence of a traumatic injury. Dr. Askin advised that while appellant may have experienced discomfort, there was no indication that he sustained "any significant musculoskeletal alteration" as a result of the incident on July 17, 2012. He noted that his symptoms had increased over time, which he opined was inconsistent with a traumatic injury. Dr. Askin concluded that appellant did not sustain a specific diagnosed condition as a result of the accepted employment incident. He reviewed the findings on examination and reached conclusions regarding appellant's condition which comported with his findings.¹⁶ The Board thus finds that Dr. Askin's opinion, which is based on an accurate factual and medical history, is entitled to the weight of the medical evidence.

On October 4, 2013 Dr. Greene reviewed Dr. Askin's report and disagreed with his findings. He noted that appellant related that his pain began one year ago after a work injury. Dr. Greene diagnosed low back pain, foot pain, radicular symptoms, and postlaminectomy syndrome of the lumbar spine. He advised that there was a direct relationship between appellant's radiculopathy of the lower extremities and the July 17, 2012 work incident. Dr. Greene, however, failed to provide any rationale for his opinion. A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimant's accepted exposure could result in a diagnosed condition is not sufficient to meet a claimant's burden of proof.¹⁷

¹³ *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

¹⁴ Dr. Green continued to submit a series of progress reports.

¹⁵ *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Conard Hightower*, 54 ECAB 796 (2003).

¹⁶ *See Pamela K. Guesford*, 53 ECAB 726 (2002).

¹⁷ *See Beverly A. Spencer*, 55 ECAB 501 (2004).

On September 5, 2014 Dr. Greene reviewed appellant's medical records prior to July 17, 2012 and compared MRI scan studies before and after July 17, 2012. He noted that the MRI scan obtained after the injury revealed structural changes. Dr. Greene opined that the objective changes and appellant's symptoms following the incident supported a finding that his complaints related directly to the July 17, 2012 employment incident. He did not, however, otherwise explain the basis for his conclusion. Additionally, Dr. Greene relied upon a history of appellant being "thrown to the ground by the impact of a vehicle striking a support rail...." In his initial evaluation of July 31, 2012, however, the physician noted that he was leaning against a guardrail struck by a vehicle, but did not fall on the ground. Given the inaccurate history of injury, Dr. Greene's September 5, 2014 report is of diminished probative value.¹⁸

On appeal counsel contends that Dr. Greene, in his initial report and September 5, 2014 addendum, reviewed the work incident and provided a reasoned opinion. He asserts that Dr. Askin's opinion is not well rationalized. Counsel maintains that at a minimum the record contains a conflict in opinion between Dr. Askin and Dr. Greene. As discussed, however, Dr. Greene's reports are of diminished probative value and thus insufficient to constitute the weight of the medical evidence or create a conflict in medical opinion with Dr. Askin.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on July 17, 2012 in the performance of duty.

¹⁸ See *E.S.*, Docket No. 16-0267 (issued May 17, 2016); *Joseph M. Popp*, 48 ECAB 624 (1997).

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2014 decision of the Office of Workers' Compensation Programs is affirmed.¹⁹

Issued: September 2, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁹ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.