United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 17-0491**
	)	**Issued: August 25, 2017**
U.S. POSTAL SERVICE, POST OFFICE, State College, PA, 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 January 4, 2017 appellant, through counsel, filed a timely appeal of a December 5, 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 an occupational disease causally related to the accepted 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.*

FACTUAL HISTORY

On September 7, 2014 appellant then a 48-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed two herniated discs and degenerative disc disease as a result of lifting and bending all day at work. He initially became aware of his disease or illness on November 23, 2011 and realized it was causally related to factors of his federal employment on August 10, 2014. Appellant stopped work on July 24, 2014.

In an undated statement, appellant indicated that in November 2011 he was diagnosed with degenerative disc disease and two herniated discs. He underwent injections into the spine from November 2011 to the present time without relief and indicated that his right leg becomes numb. Appellant indicated that his job required him to bend and lift constantly, carry a mail sack up to 75 pounds at a time, for beyond eight hours a day. He submitted a November 23, 2011 lumbosacral spine x-ray which revealed mild-to-moderate degenerative changes without evidence of instability. Appellant submitted a note from a nurse dated November 23, 2011 excusing him from work from November 23 to December 1, 2011. Also provided was a January 18, 2012 report from a physician assistant who treated appellant for left-sided low back pain with radiation of paresthesias to the left leg and diagnosed herniated lumbar disc at L4-5, lumbar radiculitis, and lumbago.

Appellant was treated by Dr. Upendra Thaker, Board-certified in anesthesiology and pain medicine, who provided L4-5 intralaminar epidural steroid injections on January 30 and March 5, 2012 and diagnosed herniated lumbar disc and lumbar radiculitis. On March 20, 2012 he saw appellant for a follow-up after the epidural injection for herniated lumbar disc. Appellant's history was significant for herniated disc with left leg radicular pain and low back pain. He reported complete resolution of his leg and lower extremity pain and numbness with only intermittent episodes of mild numbness which resolved spontaneously. Dr. Thaker noted findings of slight loss of lumbar lordosis and trigger point with myofascial pain radiating into the left iliac crest region. He diagnosed herniated lumbar disc, lumbar radiculitis improved, and myofascial pain. Dr. Thaker recommended physical therapy.

Dr. Jennifer L. Gilbert, an osteopath, treated appellant on February 27, 2012, for follow-up after the initial L4-5 epidural steroid injection. She noted that appellant had temporary relief from the injection, but continued to experience low back pain and intermittent paresthesias in the left lower extremity. Dr. Gilbert noted findings and diagnosed herniated lumbar disc L4-5, lumbar radiculitis, axial low back pain/lumbago, lumbar facet syndrome, and myofascial pain. She recommended physical therapy, repeat epidural steroid injection, and possible medial branch block.

Appellant was seen by Dr. Shane D. Newhouser, an osteopath, on July 25, 2014, who indicated that appellant had back pain due to spinal stenosis and was disabled from work on July 28 and 29, 2014. Dr. Newhouser treated him on July 29, 2014, for right leg numbness. Appellant reported back pain that started two weeks earlier in his hip and moved to his tailbone and then the other hip. He reported spasms, cramping in his right hip, and bilateral leg numbness. Dr. Newhouser noted that appellant had two herniated discs, L3-4 foraminal stenosis, and L4-5 canal stenosis. Steroid injections and pain medications did not help the symptoms.

Findings included negative straight leg raising, no tenderness to percussion or palpation of the back, and numbness throughout appellant's right leg and part of his left leg. Dr. Newhouser diagnosed lumbar spinal stenosis and foraminal stenosis. On September 5, 2014 he saw appellant for his back and leg pain due to lumbar stenosis. Dr. Newhouser advised that there was reason to think that this injury stems from older injuries. However, he opined that the recent aggravation of his injury appeared to be due to his job which required walking distances while carrying a heavy mailbag. Dr. Newhouser indicated that he could not say there was a specific incident that caused the worsening of appellant's back pain, but his day-to-day work may have exacerbated his symptoms over time. In a note dated September 5, 2014, he indicated that appellant could not work full duty for the next month due to back pain from lumbar spinal stenosis. Dr. Newhouser noted that appellant could perform light-duty work.

The employing establishment submitted a statement from K.B., supervisor of customer service, who indicated that appellant never informed her that he had an accident at work or that his back problems were aggravated by being a mail carrier. In an undated statement, C.D., another supervisor, indicated that appellant never reported an accident or injury at work or that he had back problems related to his employment. A September 11, 2012 statement from D.T., postmaster, noted speaking to appellant on August 15, 2014 regarding advancement of sick leave so that he could undergo back surgery, but he did not mention that the condition was work related.

By letter dated November 10, 2014, OWCP advised appellant of the type of evidence needed to establish his claim, particularly requesting that he submit a physician's reasoned opinion addressing the relationship of his claimed condition to his specific employment factors.

In a November 23, 2014 statement, appellant described his job duties that included bending, lifting up to 75 pounds, twisting and turning continuously, loading/unloading trucks, and making customer pick-ups. He noted performing these duties for nine years, eight hours a day, six days a week. Appellant indicated that he did not have any activities outside of work. He also provided a March 5, 2012 report from Dr. Thaker, previously of record.

Appellant submitted a report from Dr. David Andreychik, a Board-certified orthopedist, dated November 19, 2014, who noted that appellant was status post L4-5 discectomy and laminectomy on September 15, 2014.[3] On October 16, 2014 he was noted to be doing well and was instructed to remain off work and gradually increase his activities. Dr. Andreychik anticipated that appellant would be cleared to return to full duty on December 16, 2014.

By decision dated December 11, 2014, OWCP denied appellant's claim for compensation because he failed to submit sufficient medical evidence to establish that the medical condition was causally related to the accepted work factors.

[3] The complete surgical report is not in the case record before the Board. Portions of the report are set forth in Dr. Maxin's September 6, 2016 report, *infra*.

On January 5, 2015 appellant requested an oral hearing which was held before an OWCP hearing representative on September 9, 2015.[4] In a statement dated January 5, 2014, he indicated that prior to the injury on November 23, 2011 he participated in softball and bowling, but since that time he has had to minimize those activities. Appellant noted that before the work incident he did not have problems with his back. In an undated statement, he reiterated his office duties and street and delivery duties that he believed caused his back injury.

Appellant submitted a December 14, 2014 statement from R.S., a letter carrier, who indicated that appellant had a bad back since starting the job and he believed management was aware of his condition as he was granted leave due to his back. In a December 16, 2014 statement, J.M., a letter carrier, indicated that appellant injured his back on November 23, 2011 on a dock loading his truck. He was loading his truck nearby when he heard appellant groan in pain after loading mail trays. In a December 27, 2014 statement, S.Y., a sales and service associate, indicated that a year or so earlier she noticed appellant was having back trouble and he had reported that he injured it earlier that week.

Appellant submitted notes from April A. Rine, a physician assistant, dated November 23, 2011, who treated him for left leg numbness and tingling which began three weeks earlier. He reported throwing out his back. On December 5, 2011 Ms. Rine diagnosed degenerative disc disease and disc herniation at L4-5 pressing on the nerve root. In a December 29, 2014 report, appellant reported bending over to pick up mail trays to load his truck and felt a popping sensation in his back. He had pain and radiation of pain down his leg.

On July 7, 2015 Dr. Andreychik noted that appellant had spinal surgery in September 2014 to remove a herniated disc that caused right leg sciatic pain. Appellant still had leg numbness and tingling since the surgery and was not back to normal. Dr. Andreychik recommended that appellant's workweek include two consecutive days off. He treated appellant on July 28, 2015 for right foot numbness. Dr. Andreychik opined that the numbness was permanent and it would be very difficult for him to return to his mail carrier job. He opined that the 2011 work injury was related to "[appellant's] subsequent surgeries" including the September 2014 surgery.[5] Dr. Andreychik recommended a functional capacity evaluation (FCE). On August 18, 2015 he noted an FCE showed that appellant could work eight hours daily at a medium level. Dr. Andreychik advised that from an orthopedic standpoint appellant had back and lower extremity issues for over a year and required surgery in 2014. He was functionally limited since the surgery. Dr. Andreychik noted that appellant had not received pay from July 2014 until he returned to light-duty work in May 2015. He opined that, based on appellant's symptoms, need for surgery, and recovery, he could not have worked in any useful

[4] At the hearing, appellant testified that he had previously filed a traumatic injury claim for a November 23, 2011 incident in which he claimed a low back injury when he bent over to pick up a tray of mail. The record before the Board does not include any claim filed for this alleged traumatic incident and there is no indication as to whether this claim was ever received or developed by OWCP. Appellant also testified that on July 8 or 9, 2014 he fell while delivering mail. He noted that he did not file a traumatic injury claim, but instead later filed the present occupational disease claim. When questioned whether he was claiming that his back was due to the July 2014 fall or whether it was due to his regular daily activities, appellant indicated that, while the July 2014 fall was a contributing factor, he attributed his condition to his work factors from 2011 to 2014.

[5] Dr. Andreychik did not specify any particular surgical procedures other than the September 2014 surgery.

capacity. Dr. Andreychik indicated that, because appellant's original injury was work related, he thought appellant was entitled to compensation during that period of time.

Appellant submitted a report from Dr. Charles W. Maxin, a Board-certified family practitioner, dated August 20, 2015, who treated appellant for back pain and sciatica and diagnosed lumbar spinal stenosis due to degenerative disc disease and spondylolysis with lumbar radiculopathy. He opined that appellant was disabled from work beginning July 28, 2014 and had returned to limited work on May 12, 2015. Dr. Maxin noted the September 15, 2014 L4-5 lumbar disc surgery for left radiculopathy from a degenerated lumbar disc. He indicated that appellant's original injury was in November 2011 when he injured his back while loading mail onto a truck and experienced sudden and severe back pain. Appellant was treated with epidural injections which were of minimal help. He reported falling at work while delivering mail in July 2014. Appellant was treated by Dr. Newhouser for sciatica and Dr. Andreychik performed surgery on September 15, 2014. He remained on light duty with a 40-pound lifting restriction with work limited to six hours a day. Dr. Maxim opined that appellant's workday activities between 2011 and 2014 aggravated the injury suffered in 2011 and resulted in the 2014 back surgery.

In a decision dated November 23, 2015, an OWCP hearing representative affirmed the December 11, 2014 decision.

On September 6, 2016 appellant requested reconsideration. He submitted an August 30, 2016 report from Dr. Maxin who reiterated the findings from his August 20, 2015 report. Dr. Maxin diagnosed lumbar spinal stenosis due to degenerative disc disease and spondylolysis with lumbar radiculopathy. He quoted findings from an August 8, 2014 MRI scan report which noted multilevel degenerative changes, worst at L4-5, where appellant had a right-sided disc protrusion with extension into the lateral recess. Comparison to a prior study from 2011 indicated some regression of disc material at this level. Also noted were endplate degenerative changes, most prominent at L2-3, but stable since 2011. Dr. Maxin also quoted from a September 15, 2014 surgical report indicating that Dr. Andreychik performed a lamina foraminotomy at L4-5 with decompression of the right L5 nerve root. He noted appellant's postoperative course, advising that he was off work until May 12, 2015, and that he remained on light duty with a 40-pound lifting restriction with work limited to six hours a day. Dr. Maxin opined that his symptoms were the direct result of "his November 2011 injury at work while lifting a mailbag." He advised that the "injury was aggravated by the fall while working delivering mail to the local school in July 2014." Dr. Maxin indicated that appellant's "workday activities between 2011 and 2014 permanently aggravated the injury suffered in 2011 and resulted in the back surgery of September 15, 2014."

On December 5, 2016 OWCP denied modification of the decision dated November 23, 2015.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim. When an employee claims an injury in the performance of duty, he or she must submit sufficient evidence to establish a specific event, incident, or

exposure occurring at the time, place, and in the manner alleged. The employee must also establish that such event, incident, or exposure caused an injury.[6]

Whether an employee actually sustained an injury in the performance of duty begins with an analysis of whether fact of injury has been established.[7] To establish fact of injury in an occupational disease claim, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[8]

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 claimant.[9]

ANALYSIS

It is undisputed that appellant's daily work duties as a city letter carrier included bending, lifting up to 75 pounds, twisting and turning, loading and unloading trucks, and making customer pickups. The Board finds, however, that appellant failed to submit sufficient medical evidence to establish that his diagnosed medical conditions are causally related to the accepted factors of his federal employment.

The majority of the medical evidence of record pertains to whether appellant had a traumatic injury on November 23, 2011 or in July 2014.[10] However, the claim before the Board

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[6] *See Walter D. Morehead,* 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury). *See generally John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[7] *S.P.*, 59 ECAB 184, 188 (2007).

[8] *R.R.*, Docket No. 08-2010 (issued April 3, 2009); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005).

[9] *Solomon Polen*, 51 ECAB 341 (2000).

[10] OWCP regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

is for an occupational disease[11] as previously considered in the December 5, 2016 decision. Consequently, matters regarding any traumatic injury claim are not presently before the Board.[12]

In an August 20, 2015 report, Dr. Maxin diagnosed lumbar spinal stenosis due to degenerative disc disease and spondylolysis of the spine with lumbar radiculopathy. He noted appellant's medical history as well as his disability status. Dr. Maxin advised that appellant's original injury occurred in November 2011 when he experienced sudden and severe back pain while loading mail onto a truck. He reported that appellant sustained a second injury when he fell at work in July 2014. Dr. Maxim opined that appellant's workday activities between 2011 and 2014 aggravated the injury suffered in 2011 and resulted in the need for back surgery on September 15, 2014. In an August 30, 2016 report, he noted appellant's diagnosed conditions and opined that his symptoms were a direct result of his November 2011 injury at work while lifting a mailbag. Dr. Maxim again advised that the injury was aggravated by the fall while delivering mail to the local school in July 2014, but that appellant's workday activities between 2011 and 2014 permanently aggravated the injury suffered in 2011 and resulted in the back surgery of September 15, 2014.

The Board finds that although Dr. Maxin supported causal relationship he did not provide sufficient medical rationale explaining the basis of his conclusory opinion regarding the causal relationship between appellant's diagnosed lumbar conditions and the accepted employment factors.[13] He did not explain the process by which particular daily work activities from 2011 to 2014 caused or aggravated a diagnosed medical condition. Instead, Dr. Maxin largely attributed appellant's condition to two traumatic incidents instead of particular work activities from 2011 to 2014. As these reports do not contain detailed medical rationale regarding how work activities over the course of time from 2011 to 2014 caused or contributed to appellant's condition,[14] and as they appear to be premised on an inaccurate understanding of the claim,[15] they are of diminished probative value and insufficient to meet appellant's burden of proof. The Board notes that the need for medical rationale is particularly important in this case as the medical evidence from 2011 indicates that appellant had preexisting degenerative spine changes.[16]

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[11] OWCP regulations define an occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

[12] *See* 20 C.F.R. § 501.2(c).

[13] *See T.M.*, Docket No. 08-0975 (issued February 6, 2009) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

[14] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[15] *See A.D.*, 58 ECAB 149 (2006) (the opinion of a physician supporting causal relationship must be supported with affirmative medical rationale and be based upon a complete and accurate medical and factual background of the claimant). *Cowan Mullins*, 8 ECAB 155, 158 (1955) (where the Board held that a medical opinion based on an incomplete history was insufficient to establish causal relationship).

[16] *See R.R.*, Docket No. 16-1118 (issued November 7, 2016).

Dr. Andreychik treated appellant on July 28, 2015 for right foot numbness. He opined that the work-related injury that appellant sustained in 2011 was related to the September 2014 surgery. On August 18, 2015 Dr. Andreychik advised that appellant required back surgery in 2014 and that he had an extended period of disability. He indicated that, based on the fact that appellant's original injury was work related, he thought appellant was entitled to compensation during that period of time. Dr. Andreychik's opinion is of little probative value as he has an inaccurate understanding of the claim. He premises his support for causal relationship on the occurrence of a 2011 traumatic injury that is not before the Board on the present appeal.[17] Dr. Andreychik does not otherwise explain with medical reasoning how particular occupational factors from 2011 to 2014 caused or contributed to any particular diagnosed medical conditions. He did not explain the process by which particular work activities caused or aggravated the diagnosed conditions.[18] Other reports from Dr. Andreychik are of limited probative value as they do not specifically address whether appellant's employment activities had caused or aggravated a diagnosed medical condition.[19] Therefore, the reports of Dr. Andreychik are insufficient to meet appellant's burden of proof.

On September 5, 2014 Dr. Newhouser advised that there was reason to think that appellant's injury stems from older injuries. However, he opined that the recent aggravation of his injury appeared to be due to his job which required walking distances while carrying a heavy mailbag. Dr. Newhouser indicated that he could not say there was a specific incident that caused the worsening of appellant's back pain, but his day-to-day work may have exacerbated his symptoms over time. The Board notes that this report provides some support for causal relationship, but it is insufficient to establish the claimed conditions are causally related to his employment duties. Dr. Newhouser's report, at best, provides speculative support for causal relationship as he noted that he could not say there was a specific incident that caused the worsening of appellant's back pain, but his day-to-day work "may" have exacerbated his symptoms.[20] He provided no medical reasoning explaining how the particular workplace conditions caused or aggravated the diagnosed conditions. Other reports from Dr. Newhouser did not specifically support that work duties from 2011 to 2014 caused or aggravated appellant's diagnosed medical conditions.

Likewise, other medical reports of record, including diagnostic test reports, are insufficient to establish the claim as they do not specifically address how work factors from 2011 to 2014 caused or aggravated diagnosed medical conditions.[21]

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[17] *See supra* note 15.

[18] *See supra* note 13.

[19] *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[20] *See D.D.,* 57 ECAB 734 (2006) (medical opinions that are speculative or equivocal in character are of diminished probative value).

[21] *Supra* note 19.

Appellant submitted evidence from a physician assistant and a nurse. The Board has held that notes signed by a physician assistant or nurse are not considered medical evidence as they are not considered physicians under FECA.[22] Thus, these treatment records are of no probative medical value in establishing appellant's claim.

On appeal counsel asserts that OWCP imposed a higher burden of proof on appellant than required by law. He asserts that appellant provided good evidence, but that OWCP "improperly nit-picked" the evidence without proper consideration. As explained, the medical evidence submitted by appellant is insufficient to establish the claim. None of the medical evidence appellant submitted constitutes rationalized medical evidence, based upon an accurate history, which sufficiently explains why the accepted employment factors caused or aggravated his diagnosed medical conditions.

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 did not meet his burden of proof to establish an occupational disease causally related to the accepted factors of his federal employment.

[22] *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 25, 2017
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