United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant	)	
and	)	**Docket No. 18-0832**
	)	**Issued: December 4, 2018**
U.S. POSTAL SERVICE, POST OFFICE, West Sacramento, CA, Employer	)	

Appearances:
Appellant, pro se
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 12, 2018 appellant filed a timely appeal from an October 13, 2017 merit decision and a February 2, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).[1] 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.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a lumbar injury causally related to the accepted factors of his federal employment; and (2) whether OWCP

[1] Appellant filed a timely request for oral argument in this case. By order dated August 24, 2018, the Board exercised its discretion and denied appellant's request as oral argument as the case could be adequately decided based on the case record and oral arguments would further delay issuance of a Board decision and not serve a useful purpose. *Order Denying Request for Oral Argument*, Docket No. 18-0832 (issued August 24, 2018).

[2] 5 U.S.C. § 8101 *et seq.*

properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 15, 2016 appellant, then a 58-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a degenerative spine condition as a result of his repetitive federal employment duties which entailed constant turning, swiveling, bending, and lifting of packages over the years. He stated that on a Saturday in 2012 he was casing mail and experienced extreme pain in his lower back. Appellant did not realize that he had a pinched nerve which had caused pain for several years. He noted that he first became aware of his claimed condition and of its relationship to his federal employment in September 2012. The employing establishment reported that appellant most recently stopped work on November 12, 2016.

In an accompanying November 16, 2016 narrative statement, appellant reported that the stress from constant turning, swiveling, bending, and lifting packages of all sizes, shapes, and weights had destroyed his lower spine. He stated that the pain had become intense and unbearable at times, noting that his back was in great condition prior to starting his career at the employing establishment. Appellant reported that around 2006 he was diagnosed with a degenerative spine condition and had been taking pain medication since that time. He discussed his course of medical treatment which included surgery two years prior. However, by November 5, 2016 appellant's back was hurting so badly with associated left leg numbness that he had to stop work.

In support of his claim, appellant submitted a March 6, 2006 cervical spine x-ray, an October 4, 2012 magnetic resonance imaging (MRI) scan of the lumbar spine, and a January 8, 2014 MRI scan of the lumbar spine. The diagnostic reports revealed disc bulges at L1-2, L2-3, and L3-4, as well as an L5-S1 disc protrusion.

In an April 5, 2009 medical report, Dr. Leslie McLean, Board-certified in family medicine, noted appellant's complaints of severe lower back pain radiating to his left leg, worse in the morning when attempting to work. Dr. McLean diagnosed severe back pain and recommended epidural steroid injections.

In a November 18, 2016 medical report, Dr. Dwain Rickertsen, a family medicine physician, reported that appellant was under his care and could return to work on February 18, 2017.

By development letter dated November 30, 2016, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the medical and factual evidence necessary. OWCP afforded appellant 30 days to submit the necessary evidence.

In support of his claim, appellant submitted an October 3, 2014 medical report from Dr. Jesse D. Babbitz, a Board-certified neurological surgeon. Dr. Babbitz reported that appellant presented for evaluation of back pain which was present for over seven years. He noted that the pain was unbearable and radiating to his lower extremities, rendering him unable to perform most activities. Until two weeks prior, appellant was working as a rural postal carrier and intermittently lifting 50 to 60 pound boxes of mail over short distances. Dr. Babbitz discussed his diagnostic and

physical examination findings. He diagnosed diffuse thoracolumbar disc degeneration, lumbar spondylosis with chronic low back pain, and left greater than right lumbosacral radiculopathy, most likely L5. Dr. Babbitz noted that this was likely in part due to his L4-5 stenosis, but may also be due to his L5-S1 foraminal stenosis. He discussed treatment options *via* L4-S1 decompression.

Hospital notes dated October 27 through 30, 2014 document appellant's pre- and postoperative treatment for L4-S1 decompression, bilateral L4-5 laminectomies, bilateral L4-5 and L5-S1 medial facetectomies and foraminotomies, resection of ligamentum, and microdissection. On October 29, 2014 Dr. Babbitz performed the L4-S1 decompression and noted a discharge diagnosis of lumbar stenosis L4-S1 with neurogenic claudication, lumbar radiculopathy, chronic low back pain, and spondylosis.

In a December 1, 2016 diagnostic report, Dr. Alka Thakran, a Board-certified diagnostic radiologist, reported that a lumbar spine MRI scan revealed L2-3 increased narrowing of the left neuroforamen and left lateral recess with moderate central canal narrowing, L3-4 severe narrowing of the central canal which had progressed since his prior study, and severe narrowing of the left neuroforamen, L4-5 widening of the central canal secondary to posterior decompression, moderate-to-severe narrowing of multiple neuroforamen, and interval progression of degenerative changes.

By decision dated February 17 2017, OWCP denied appellant's claim finding that the medical evidence of record was insufficient to establish that his diagnosed disc bulges and protrusions of the lumbar spine were causally related to the accepted factors of federal employment.

On March 2, 2017 appellant requested an oral hearing before an OWCP hearing representative. In support of his claim, he provided a narrative statement describing his injury and course of medical treatment. Appellant noted that despite his surgery, he suffered from continued pain and asserted that the only factor which could have caused his injury was his employment-related work duties.

In an April 17, 2017 neurosurgical consultation report, Dr. Babbitz noted that appellant had severe degeneration and facet arthropathy associated with moderate degenerative lumbar scoliosis with neurogenic claudication, and that his chronic low back pain was multifactorial and not likely to improve with surgery. He reported that the surprisingly advanced degree of severity of degeneration in the appellant's lumbar spine at his young age suggested that there had been a great deal of vocational contribution to his condition from his repetitive twisting and lifting motions over the years.

A hearing was held on August 14, 2017 during which appellant testified regarding his employment duties and course of medical treatment, further denying any prior injuries to his back. Appellant reported that issues with his back began while working for the employing establishment, having started his career as a rural carrier on May 9, 1998. He first noticed symptoms involving his lumbar spine after 2004, but did not pay much attention until 2006 when the pain continued to worsen. Appellant indicated that he first received treatment with Dr. McLean in 2006 who identified a degenerative spine based on MRI scan. He underwent spinal decompression with

Dr. Babbitz on October 29, 2014 and returned to work despite the physician's recommendation to remain off duty. Appellant reported that he stopped work on November 12, 2016 when the pain became unbearable, forcing him into retirement. Following his retirement, he had a lumbar spine MRI scan and computerized tomography (CT) scan performed which revealed scoliosis, degenerative spine, and two fused discs, and was informed that another operation would not rectify his lumbar issue. Appellant discussed how the rural carrier position was physically demanding and he could not think of anything else that could have caused this problem. He was advised of the evidence needed in support of his claim and the record was held open for 30 days. No additional evidence was received.

By decision dated October 13, 2017, OWCP's hearing representative affirmed the February 17, 2017 decision finding that the evidence of record was insufficient to establish that his diagnosed lumbar disc bulges and herniations were causally related to the accepted factors of his federal employment.

On December 14, 2017 appellant requested reconsideration of OWCP's October 13, 2017 decision. In his narrative statement, appellant repeated his prior assertions discussing the course of his medical treatment and argued that his injury was employment related.

In support of his claim, appellant submitted a November 22, 2017 medical report from Dr. Babbitz, who reported that appellant had severe disc degeneration and facet arthropathy associated with moderate degenerative lumbar scoliosis. Dr. Babbitz reiterated that appellant would likely not improve with surgery. He opined that the surprisingly advanced degree of severity of degeneration in appellant's lumbar spine at his young age suggested that there had been a great deal of vocational contribution to his condition from his repetitive twisting and lifting motions over the years.

In a November 22, 2017 attending physician's report (Form CA-20), Dr. Babbitz diagnosed degenerative lumbar stenosis, lumbar disc desiccation, and lumbar radiculopathy. He reported the history of injury as seven years of progressive low back pain radiating to the lower extremities. When asked whether he believed the condition was caused or aggravated by an employment activity, Dr. Babbitz checked the box marked "yes," noting that twisting, lifting, carrying, and driving all exacerbated appellant's lumbar degenerative disc disease.

By decision dated February 2, 2018, OWCP denied appellant's request for reconsideration, finding that he neither raised substantive legal questions nor submitted relevant and pertinent new evidence.

LEGAL PRECEDENT -- ISSUE 1

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 or specific condition for which compensation is claimed is causally related to the

employment injury.[3] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[5] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, 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.[6]

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence supporting such causal relationship.[7] 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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[8]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a lumbar injury causally related to the accepted factors of his federal employment.[9]

[3] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[4] *Michael E. Smith*, 50 ECAB 313 (1999).

[5] *Elaine Pendleton*, *supra* note 3.

[6] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

[7] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[8] *K.V.*, Docket No. 18-0723 (issued November 9, 2018); *James Mack*, 43 ECAB 321 (1991).

[9] *S.Y.*, Docket No. 11-1816 (issued March 16, 2012).

In support of his claim, appellant submitted medical reports dated October 3, 2014 through April 17, 2017 from Dr. Babbitz documenting treatment for his lumbar injury and L4-S1 decompression. The Board finds that the opinion of Dr. Babbitz is not well rationalized. While Dr. Babbitz provided a firm medical diagnosis of lumbar disc degeneration, lumbar spondylosis, and lumbosacral radiculopathy, he failed to provide a fully-rationalized opinion on the cause of appellant's condition. In his April 17, 2017 report, Dr. Babbitz reported that the surprisingly advanced degree of severity of degeneration in appellant's lumbar spine at his young age suggested that there had been a great deal of vocational contribution to his condition from his repetitive twisting and lifting motions over the years. However, he did not address why appellant's complaints were not caused by his preexisting degenerative condition nor did he discuss whether his preexisting injury had progressed beyond what might be expected from the natural progression of that condition.[10] It is unclear whether appellant's injury was caused by his federal employment duties, a result of a preexisting condition, or due to degenerative changes. A well-rationalized opinion is particularly warranted when there is a history of a preexisting condition.[11]

Furthermore, while Dr. Babbitz had some understanding of appellant's employment duties, he failed to detail the number of hours per day spent performing each task and the frequency of the physical movements which appellant attributes to his injury. His statement on causation failed to provide a sufficient explanation as to the mechanism of injury pertaining to this occupational disease claim as alleged by appellant, namely, how repetitive turning, swiveling, bending, and lifting of packages would cause or aggravate his lumbar injury.[12] Without explaining how physiologically the movements involved in appellant's employment duties caused or contributed to his diagnosed conditions, Dr. Babbitz's opinion on causal relationship is equivocal in nature and of limited probative value.[13]

The remaining medical evidence of record is also insufficient to establish appellant's occupational disease claim. The medical reports submitted identify treatment to the lumbar spine dating back to 2006. The reports of Dr. McLean and Dr. Rickertsen document treatment for these lumbar conditions, but fail to provide an opinion on the cause of appellant's injuries. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value.[14]

The diagnostic reports of record dated March 6, 2006 to December 1, 2016 are also insufficient to establish appellant's claim as the physicians only interpreted imaging studies and provided no opinion on the cause of appellant's injury.[15] The Board has held that reports of

[10] *R.E.*, Docket No. 14-0868 (issued September 24, 2014).

[11] *T.M.*, Docket No. 08-0975 (issued February 6, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

[12] *S.W.*, Docket 08-2538 (issued May 21, 2009).

[13] *See L.M.*, Docket No. 14-0973 (issued August 25, 2014); *R.G.*, Docket No. 14-0113 (issued April 25, 2014); *K.M.*, Docket No. 13-1459 (issued December 5, 2013); *A.J.*, Docket No. 12-0548 (issued November 16, 2012).

[14] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[15] *D.H.*, Docket No. 11-1739 (issued April 18, 2012).

diagnostic tests lack probative value as they do not provide an opinion on causal relationship between appellant's employment duties and the diagnosed conditions.[16]

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference of causal relationship.[17] An award of compensation may not be based on surmise, conjecture, speculation, or on the employee's own belief of causal relation.[18] Appellant's honest belief that his occupational employment duties caused his injury, however sincerely held, does not constitute medical evidence necessary to establish causal relationship.[19] Herein, the record lacks rationalized medical evidence establishing causal relationship between appellant's federal employment duties as a rural carrier and his diagnosed lumbar conditions. Thus, appellant has not met his burden of proof.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.[20] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[21] One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.[22] If the request is timely, but fails to meet certain requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[23]

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by 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.[24] Section 10.608(b) of OWCP regulations provides

[16] *See L.M.*, Docket No. 18-0473 (issued October 22, 2018).

[17] *Daniel O. Vasquez*, 57 ECAB 559 (2006).

[18] *D.D.*, 57 ECAB 734 (2006).

[19] *D.A.*, Docket No. 18-0783 (issued November 8, 2018); *H.H.*, Docket No. 16-0897 (issued September 21, 2016).

[20] 5 U.S.C. § 8128(a).

[21] 20 C.F.R. § 10.607.

[22] *Id.* at § 10.607(a).

[23] *Id.* § 10.608(b); *see also E.R.*, Docket No. 09-1655 (issued March 18, 2010).

[24] *Id.* at § 10.606(b)(3); *see also D.K.*, 59 ECAB 141 (2007).

that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[25]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

The issue presented on appeal was whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, and he did not advance a new and relevant legal argument not previously considered. Appellant argued that he sustained a work-related lumbar injury and described his course of treatment.[26] The Board finds that the arguments made by appellant on reconsideration are cumulative, duplicative, or repetitive in nature and are insufficient to warrant reopening a claim for merit review.[27] Consequently, he is not entitled to review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The underlying issue in this case was whether appellant sustained a lumbar injury causally related to the accepted factors of his federal employment. That is a medical issue which must be addressed by relevant and pertinent new medical evidence.[28] The only medical evidence received with his reconsideration request was Dr. Babbitz's November 22, 2017 report and Form CA-20. While the November 22, 2017 report was new, the report was essentially duplicative of his previously submitted April 17, 2017 report in the case record. Dr. Babbitz's opinion on causation was substantially similar to the previously submitted medical evidence which was addressed in the Board's October 13, 2017 merit decision for failing to establish his occupational injury. The November 22, 2017 Form CA-20 is also cumulative and repeats the physician's prior assertion that appellant sustained a work-related injury without any explanation pertaining to the mechanism of injury. Material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.[29]

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

[25] *K.H.*, 59 ECAB 495 (2008).

[26] *Sherry A. Hunt*, 49 ECAB 467 (1998).

[27] *See T.B.*, Docket No. 16-1130 (issued September 11, 2017).

[28] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[29] *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a lumbar injury causally related to the accepted factors of his federal employment. The Board also finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2018 and October 13, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 4, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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