

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

S.S., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, White Plains, NY,
Employer**

)
)
)
)
)
)

**Docket No. 16-1760
Issued: January 23, 2018**

Appearances:

James D. Muirhead, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 1, 2016 appellant, through counsel, filed a timely appeal from a March 11, 2016 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 claim.

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 met his burden of proof to establish a low back condition causally related to the accepted January 2, 2013 employment incident.

FACTUAL HISTORY

On January 7, 2013 appellant, then a 40-year-old mail handler/equipment operator, filed a traumatic injury claim (Form CA-1) alleging that he injured his lower back on January 2, 2013 at 4:45 p.m. while connecting a postal container (post-con) to a cart. The post-con was reportedly overloaded. Appellant's regular tour was from 3:30 p.m. to 12:00 a.m. He stopped work on January 7, 2013.

In a January 11, 2013 note, Dr. Young Don Oh, an orthopedic surgeon, diagnosed lumbar disc herniations and noted that appellant was totally disabled from work from January 7 to February 11, 2013.

In a January 23, 2013 letter, the employing establishment controverted the claim as appellant continued to work for the remainder of his work shift, did not report the injury for another five days, was off work on Family and Medical Leave Act five days prior to the reported date of injury, and the present claim was identical to a September 26, 2010 work injury under OWCP File No. xxxxxx366.³

In a letter dated January 29, 2013, OWCP requested that appellant provide additional factual and medical evidence in support of his claim.

In a February 6, 2013 statement, appellant indicated that he told his supervisor on January 2, 2013 that he had been injured. He noted that his injury occurred when he pulled on a post-con to connect it to a cart and that he was unable to get an appointment to see Dr. Oh prior to January 7, 2013.

In a February 7, 2013 note, a physician assistant placed appellant off work through March 11, 2013.

In a January 7, 2013 report, Dr. Oh noted that appellant returned to his office after being seen more than two years prior for lower back pain, which he experienced that week. He noted a July 9, 2012 magnetic resonance imaging (MRI) scan showed degenerative disc disease, including disc bulging/herniations at L4-5 and L5-S1. An assessment was made of herniated lumbar disc and lumbar degenerative disc disease. In a January 11, 2013 report, Dr. Oh indicated that appellant was scheduled for a repeat MRI scan of his lumbosacral spine. An assessment of continuing low back pain with underlying bulging/herniated discs was provided. On February 20, 2013 Dr. Oh referred appellant to physical therapy for reevaluation of herniated lumbar disc and lumbar radiculopathy.

³ The claim date of injury, September 26, 2010, was accepted for lumbar sprain, aggravation of spondylolisthesis, and aggravation of lumbosacral spondylosis without myelopathy. Under File No. xxxxxx366 OWCP terminated appellant's wage-loss compensation and medical benefits, effective November 3, 2011.

In a January 8, 2013 note, Dr. Chang Kang, a Board-certified anesthesiologist and pain management specialist, provided an assessment of acute lumbar radiculopathy.

A January 14, 2013 lumbar spine MRI scan report contained an impression of disc bulge at L4-5 and L5-S1 disc herniation. An October 20, 2010 lumbar spine MRI scan contained an impression of spondylolisthesis and spondylosis at L5-S1 and disc herniation at L5-S1 with no nerve impingement.

By decision dated March 4, 2013, OWCP denied the claim, finding that the medical evidence of record did not establish causal relationship between the accepted January 2, 2013 work incident and a diagnosed back condition. It found that the medical evidence of record failed to provide rationale necessary to establish causal relationship.

On March 8, 2013 appellant requested an oral hearing before OWCP's Branch of Hearings and Review. The hearing was held on July 15, 2013. Appellant testified that, on January 2, 2013, he felt back pain when he pulled a post-con to attach it to a cart and that he had also felt back pain while driving the motorized cart prior to making the connection between the cart and the post-con. He testified that he had returned to full-duty work on April 15, 2013 per Dr. Kang's opinion.

In a March 7, 2013 report, Dr. Kang noted that he saw appellant on January 8, 2013 for complaints of moderate-to-severe low back pain. Appellant reported that he was injured at work on January 2, 2013 while he was working on an electric cart. He felt acute pain when he was trying to connect a hook to the cart. Appellant could not straighten himself up because of pulling pain on his back. Dr. Kang noted appellant's physical examination findings when appellant saw him on January 8 and March 7, 2013. He indicated that appellant has a history of back pain and MRI scan findings on July 9, 2012 reported L5 spondylosis and mild bulging discs at L4-5 and L5-S1. The MRI scan of lumbar spine, which was taken after the incident on January 14, 2013, reported L4-5 bulging annulus with annual tear and L5-S1 posterolateral disc herniation to the left side. Dr. Kang indicated that the MRI scan reports needed to be compared for further evaluation. He advised that appellant continue with physical therapy, prescription drugs, and recommended an epidural injection.

In an April 11, 2013 report, Dr. Kang diagnosed lumbar radiculopathy and lumbar disc displacement. He released appellant to full-duty work.

An April 1, 2013 note from a physical therapist indicated that appellant had been undergoing physical therapy treatment for back pain since January 3, 2013.

By decision dated August 15, 2013, an OWCP hearing representative affirmed OWCP's March 4, 2013 decision. He found that the medical evidence of record was insufficient to establish causal relation.

On March 7, 2014 appellant, through counsel, requested reconsideration.

In a February 28, 2014 report, Dr. Kang indicated that he first saw appellant on June 7, 2012 for complaints of low back pain when operating heavy equipment at work. He indicated that appellant went through physical therapy, acupuncture, and an epidural injection. Dr. Kang

reported that on January 2, 2013 appellant complained of pain and went to his local physician, who prescribed physical therapy. Appellant saw him on January 8, 2013 and his pain had worsened. He reported low back pain worse due to acute injury during work on January 2, 2013 after he had pulled a heavy object. Dr. Kang diagnosed lumbar radiculopathy and acute exacerbation of back pain and scheduled appellant for a lumbar spine MRI scan. He reported the January 14, 2013 MRI scan findings. Dr. Kang noted that, on the January 18, 2013 follow-up visit, appellant reported that the pain was better, but had spread to the lower extremities. He diagnosed lumbar radiculopathy and lumbar disc displacement. Dr. Kang reported appellant's examination findings and working diagnoses of lumbar radiculopathy at subsequent office visits from March 7, 2013 through January 30, 2014. He opined that appellant had an aggravation of his degenerative lumbar spine disorder with radiculopathy, most probably related to the January 2, 2013 job injury. Dr. Kang indicated that appellant had no sharp pain associated with his usual daily activities such as walking, sitting, or standing prior to January 2, 2013 and that appellant's pain level reached new highs for 10 months after January 2, 2013. Appellant also complained of radiating pain and paresthesia to his right hip and right posterior thigh. Dr. Kang also reported that the MRI scan of the lumbar spine taken after January 2, 2014 showed a greater degree of bulging and herniation at the L4-5 and L5-S1 level.

By decision dated May 13, 2015, OWCP denied modification of the August 15, 2013 decision. It found Dr. Kang's February 28, 2014 report insufficient to establish appellant's claim because the physician provided no objective evidence or medical rationale to support or establish a change in his baseline condition, or that any possible changes were in fact connected to the claimed work incident of January 2, 2013.

On June 19, 2015 counsel requested reconsideration.

In a June 8, 2015 note, Dr. Kang indicated that appellant was known to have a low back problem in the past for which he provided treatment. He indicated that there were significant differences in MRI scan findings between the prior July 9, 2012 and January 14, 2013 MRI scans of the lumbar spine, such as an annulus tear at L4-5, a disc herniation instead of a bulge at L5-S1, and the fact that appellant sought medical care right after he felt pain at work while pulling a post-con to an electric cart. For those reasons, Dr. Kang opined that appellant injured his back at work.

By decision dated August 20, 2015, OWCP denied modification of its May 13, 2015 decision. It found that Dr. Kang failed to provide any medical rationale in his June 8, 2015 report which explained how pulling a hook to connect to the post-con caused, aggravated, or contributed to the diagnosed conditions.

On December 16, 2015 counsel again requested reconsideration.

In a December 16, 2015 report, Dr. Kang reiterated the contents of his prior report dated February 28, 2014. The only change in that report from the February 28, 2014 report was the following paragraph wherein Dr. Kang indicated:

"On Jan[uary 2,] 2013 [appellant] was pulling a post[-]con to an electric cart using his right hand, he felt sudden onset of severe back pain which radiated to his

right leg. Although the post-cons were on wheels, each of them weighed about 1000 [pounds] and he had to use enough force to hook them up to an electric cart. While [appellant] was performing his duty as usual, he heard popping in his body and he could not stand up because of pain on his right leg. He experienced severe pain in low back and numbness/tingling and weakness noted in the low extremities. [Appellant] went to the local [physician] who recommended physical therapy and MRI [scan] of lumbar spine.”

Dr. Kang indicated that appellant had no sharp pain associated with his usual daily activities such as walking, sitting, or standing prior to January 2, 2013, and that his pain level reached new highs after January 2, 2013 for 10 months. Appellant also complained of radiating pain and paresthesia to his right hip and right posterior thigh. He also reported that the lumbar spine MRI scan taken after January 2, 2013 showed a greater degree of bulging and herniation at the L4-5 and L5-S1 levels. Dr. Kang concluded, as he did in his prior report, that appellant had a definite aggravation of his degenerative lumbar spine disorder with radiculopathy, most likely related to the January 2, 2013 job injury.

By decision dated March 11, 2016, OWCP denied modification of its August 20, 2015 decision. It found that Dr. Kang’s December 16, 2015 report was the same as his February 28, 2014 report and the only new information provided was the mechanism of injury of the January 2, 2013 work incident. OWCP found that he failed to provide a discussion or rationale on causality between the preexisting conditions and the January 2, 2013 work incident.

LEGAL PRECEDENT

A claimant seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.⁵

To determine if an employee sustained a traumatic 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 that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.⁶ The second component is whether the employment incident caused a

⁴ See *supra* note 2.

⁵ 20 C.F.R. § 10.115(e), (f); see *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁶ *Elaine Pendleton*, 40 ECAB 1143 (1989).

personal injury.⁷ An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.⁸

In any case where a preexisting condition involving the same part of the body is present, and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.⁹

ANALYSIS

Appellant claimed that he sustained a low back injury as a result of connecting a post-con on January 2, 2013. OWCP accepted that the claimed incident occurred as alleged. It found, however, that the medical evidence of record is insufficient to establish a diagnosed lumbar condition causally related to the accepted January 2, 2013 work incident.

Appellant submitted several reports from Dr. Kang. Progress notes from Dr. Kang indicated that appellant's diagnosed medical condition was sustained at work. The Board has found that the mere fact that a condition manifests itself or is worsened during an employment period does not raise an inference of causal relationship between the two.¹⁰ In a March 7, 2013 report, Dr. Kang noted the history of injury and indicated that appellant had a history of back pain. He noted MRI scan findings of July 9, 2012, taken prior to the January 2, 2013 incident, and MRI scan findings of January 14, 2013, taken after, and noted that the MRI scan reports showed significant changes. Dr. Kang, however, failed to provide a rationalized medical opinion supporting causal relationship. The record reflects that appellant has preexisting lumbar disc conditions disclosed by a previous MRI scan. The prior claim was accepted for lumbar sprain, aggravation of spondylolisthesis, and aggravation of lumbosacral spondylosis without myelopathy, and these accepted conditions were deemed to have resolved as of November 2011. While Dr. Kang noted significant changes between the two MRI scans, he did not opine how new conditions were due to the accepted incident as opposed to the effects of the preexisting conditions. The Board has held that a physician's opinion regarding causal relationship that is primarily based on appellant's own representations rather than on objective medical findings is

⁷ *John J. Carbone*, 41 ECAB 354 (1989). Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue. *Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s). *Id.*

⁸ *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

¹⁰ *Daniel O. Vasquez*, 57 ECAB 559 (2006).

of limited probative value.¹¹ Additionally, a well-rationalized opinion is particularly warranted when there is a history of preexisting condition.¹²

In his February 28, 2014 report, Dr. Kang opined that appellant had an aggravation of his degenerative lumbar spine disorder with radiculopathy, most probably related to the January 2, 2013 job injury. He rationalized that appellant had no sharp pain associated with his usual daily activities such as walking, sitting, or standing prior to January 2, 2013 and that his pain level reached new highs after January 2, 2013 for 10 months. Appellant also complained of radiating pain and paresthesia to his right hip and right posterior thigh and the MRI scan of lumbar spine taken after January 14, 2013 showed greater degree of bulging and herniation at the L4-5 and L5-S1 level. In his December 16, 2015 report, Dr. Kang reiterated that the contents of his prior report dated February 28, 2014 and added a paragraph on the mechanism of injury. He continued to opine, as he did in his prior report, that appellant had an aggravation of his degenerative lumbar spine disorder with radiculopathy, “most likely” related to the January 2, 2013 job injury.

In his reports of February 28, 2014 and December 16, 2015, Dr. Kang presented an equivocal and speculative opinion that appellant’s medical conditions were “most probably” related to the January 2, 2013 employment incident. 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.¹³ Additionally, Dr. Kang offered no objective evidence and rationale to support that appellant’s condition was causally related to the work injury and not activities of daily living. He noted that appellant had an increase in his usual activities such as walking, sitting, and standing in addition to the pain he felt when performing the work duty. However, activities such as walking, sitting, or standing are elements of daily living and not activities solely related to appellant’s federal employment. Other than noting that appellant had an increase in the severity of his pain, Dr. Kang did not explain how appellant’s work incident exacerbated his underlying lumbar condition. While he noted a greater degree of bulging and herniation at the affected levels on MRI scan before and after the January 2, 2013 employment incident, it is unclear how he was able to distinguish appellant’s preexisting lumbar condition from the aggravating effects of the January 2, 2013 employment incident. Dr. Kang provided no objective evidence to support that there has been a change in appellant’s baseline condition or medical rationale to establish that any changes were connected to the January 2, 2013 work incident. His opinion on causal relationship must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant’s specific employment factor(s).¹⁴ While Dr. Kang noted that the January 2, 2013 employment incident “most likely” aggravated appellant’s preexisting conditions, for the above reasons, he has not adequately explained the

¹¹ C.M., Docket No. 14-0088 (issued April 18, 2014).

¹² T.M., Docket No. 08-0975 (issued February 6, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

¹³ *Ricky S. Storms*, 52 ECAB 349 (2001).

¹⁴ *Victor J. Woodhams*, *supra* note 7.

basis for his opinion on causal relationship. Thus, his opinion is insufficient to establish causal relationship.

In his June 8, 2015 report, Dr. Kang opined that appellant injured his back at work. He reported that there were significant differences in MRI scan findings of lumbar spine between the prior July 9, 2012 MRI scan of lumbar spine and the January 14, 2013 MRI scan of lumbar spine and the fact that appellant sought medical care right after he felt pain at work while pulling a post-con to an electric cart. However, Dr. Kang's general statement on causation does not constitute rationalized medical opinion evidence linking a medical diagnosis to the accepted employment incident. He did not provide a specific medical diagnosis indicating that the condition was either caused or aggravated by the January 2, 2013 incident, nor did he provide an explanation as to how this aggravation occurred. A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimed employment incident resulted in a diagnosed condition is insufficient to meet a claimant's burden of proof.¹⁵

In his December 16, 2015 report, Dr. Kang reiterated the contents of his prior report dated February 28, 2014 and added a paragraph relative to the mechanism of injury. He continued to opine, as he did in his prior report, that appellant had a definite aggravation of his degenerative lumbar spine disorder with radiculopathy, "most likely" related to the January 2, 2013 employment incident. As explained above, opinions that are speculative have no probative value.¹⁶

Dr. Oh provided an assessment of herniated lumbar disc and lumbar degenerative disc disease in his January and February 2013 reports. While he indicated in his January 7, 2013 report that appellant was seen for increased lower back pain he experienced the past week, Dr. Oh failed to mention the history of appellant's January 2, 2013 work injury or provide a rationalized medical opinion relating the employment incident to the medical diagnosis.¹⁷ Additionally, Dr. Oh appears to base his medical diagnosis on the results of a July 9, 2012 MRI scan, which predates appellant's work incident. The need for medical reasoning or rationale is particularly important given the fact that medical evidence of record indicates that appellant had a preexisting back condition.¹⁸ Thus, Dr. Oh's reports are insufficient to establish his claim.

The other reports of record are of no probative value on the issue of causal relationship. Dr. Oh's January 11, 2013 disability status report is also insufficient to discharge appellant's burden of proof as it does not address causal relationship.¹⁹ The diagnostic testing of record, including the lumbar MRI scan reports, are not probative to the issue of causal relationship as

¹⁵ *G.M.*, Docket No. 14-2057 (issued May 12, 2015).

¹⁶ *Victor J. Woodhams*, *supra* note 7.

¹⁷ *Solomon Polen*, 51 ECAB 341 (2000) (rationalized medical evidence must relate specific employment factors identified by the claimant to the claimant's condition, with stated reasons by a physician). *See also S.T.*, Docket No. 11-0237 (issued September 9, 2011).

¹⁸ *T.M.*, *supra* note 12.

¹⁹ *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

they do not offer any opinion regarding the cause of an employee's condition.²⁰ The reports by the physician assistant and physical therapist are also not probative to the issue of causal relationship. The Board has held that notes signed by nurses, physical therapists, or physician assistants are not considered medical evidence as these providers are not considered physicians under FECA.²¹

Consequently, appellant has failed to submit medical evidence to establish his traumatic injury claim. As noted, causal relationship is a medical question that must be established by probative medical opinion from a physician.²² The physician must accurately describe appellant's work duties and explain the pathophysiological process by which these duties would have caused or aggravated his condition.²³ The need for medical reasoning or rationale is particularly important given the fact that appellant had a preexisting back condition.²⁴

On appeal counsel asserts that Dr. Kang's reports dated February 28, 2014, June 8 and December 16, 2015 are sufficient to establish that appellant's claimed low back condition is causally related to the January 2, 2013 employment incident. For the above-noted reasons, the Board finds that the medical evidence of record, including Dr. Kang's reports, is insufficient to establish that the diagnosed low back condition is causally related to the accepted employment incident.

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 not met his burden of proof to establish that his claimed low back condition is causally related to the accepted January 2, 2013 employment incident.

²⁰ *Willie M. Miller*, 53 ECAB 697 (2002).

²¹ See *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's 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).

²² *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *supra* note 7 at 345 (1989).

²³ *Solomon Polen*, 51 ECAB 341 (2000) (rationalized medical evidence must relate specific employment factors identified by the claimant to the claimant's condition, with stated reasons by a physician). See also S.T., Docket No. 11-0237 (issued September 9, 2011).

²⁴ *T.M.*, *supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 23, 2018
Washington, DC

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

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

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