United States Department of Labor
Employees' Compensation Appeals Board

G.K., Appellant	)	
and	)	**Docket No. 16-1119**
	)	**Issued: March 16, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Bellflower, 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 May 5, 2016 appellant filed a timely appeal from a January 27, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees'

[1] The record provided the Board includes evidence received after OWCP issued its January 27, 2016 decision. The Board's jurisdiction is limited to the evidence that was in the case record at the time of OWCP's final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.[3]

ISSUE

The issue is whether appellant met his burden of proof to establish a lumbar condition causally related to factors of his federal employment.

FACTUAL HISTORY

On December 1, 2014 appellant, then a 41-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging a low back injury due to continual work in the performance of duty. He indicated that he first became aware of the injury and its relation to factors of his federal employment on September 2, 2014. Appellant did not stop work.

In a separate statement dated November 5, 2014, appellant indicated that he had been experiencing low back pain for a few years. He noted that sometimes he would feel the pain during work and the pain would be bad after work. Appellant explained that whenever he felt pain, "it would be during work…." He indicated that "the only remedy for me would be to rest." Appellant explained that gradually over the past few years, it worsened.

OWCP received duty status reports (CA-17 forms) dated November 4 and 7, 2014 from Dr. Hosea Brown, III, Board-certified in internal medicine. Dr. Brown diagnosed lumbar stenosis and indicated that appellant could return to work on November 7, 2014 with restrictions.

By letter dated December 24, 2014, OWCP informed appellant of the type of evidence needed to support his claim and afforded him 30 days to submit such evidence. It particularly requested that he have his physician provide an opinion, supported by a reasoned medical explanation, as to how work activities caused or aggravated his claimed condition.

In a January 6, 2015 response, appellant indicated that his employment-related activities included: walking uphill at an angle over long periods of time, at least 30 minutes; bending into a gurney from the rear of the vehicle, for at least two hours; lifting and carrying heavy mail parcels for long periods of time, at least five hours; and standing for long periods of time, at least four and a half hours. He explained that, over the past two years, he had discontinued most of his activities outside his federal employment other than swimming for two hours once a month.

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that during the pendency of this appeal, OWCP issued an October 4, 2016 decision which granted appellant's July 12, 2016 request for reconsideration of the merits of his claim and found the evidence submitted sufficient to warrant modification of the January 27, 2016 decision currently on appeal. OWCP vacated the January 27, 2016 decision as the weight of the medical evidence rested with an impartial medical examiner, who found that appellant's claimed back conditions were causally related to factors of his federal employment. By separate October 4, 2016 decision, it accepted appellant's claim for strain of muscle, fascia and tendon of lower back, initial encounter, and temporary aggravation of other intervertebral disc degeneration, lumbar. These October 4, 2016 OWCP decisions, however, are null and void as the Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s). 20 C.F.R. §§ 501.2(c)(3), 10.626; *see also Douglas E. Billings*, 41 ECAB 880 (1990) *and Lawrence Sherman*, 55 ECAB 359, 360 n.4 (2004).

A September 9, 2014 magnetic resonance imaging (MRI) scan of the lumbar spine read by Dr. Vikram Hatti, a Board-certified diagnostic radiologist, revealed an abnormal signal at the conus and distal spinal cord suspicious for a spinal cord lesion or inflammatory disease. Dr. Hatti recommended dedicated imaging through the region, pre and post contrast, and correlation with clinical scenario. He also detected disc herniations at L1-2, L4-5, and L5-S1. Additionally, he found an annular tear at L4-5.

In a September 30, 2014 report, Dr. Brown noted that appellant was employed with the employing establishment from 1995 to the present. He described appellant's duties, which included: walking; carrying; and sorting, casing, and preparing mail for delivery. Dr. Brown indicated that the process required constant standing and repetitively bending, twisting, reaching, and grabbing while performing the activity. He advised that appellant attributed his low back injury to his repetitive occupational duties of lifting, bending, and stooping. Dr. Brown explained that appellant related that he had a section on his route that included steep driveways that he had to walk up and down to make his deliveries. He noted that appellant believed that this was the cause of his stress on his low back along with carrying the heavy satchel while performing his duties. Dr. Brown noted that appellant could not pinpoint an exact date when his low back became symptomatic, but he estimated that his initial symptoms began at the end of 2010 and beginning of 2011. He explained that appellant initially experienced pain and stiffness every day after work between three to three and half years ago. Dr. Brown also related that appellant indicated that he did not do anything after work because his low back was bothering him so much. He noted that appellant's private physician prescribed a muscle relaxant and naproxen and provided work restrictions for one week.

Dr. Brown examined appellant and found that he had: lumbar spine range of motion of flexion of 80 to 90 degrees; extension of 25 to 30 degrees; lateral flexion of 25 to 30 degrees; and lateral rotation of 40 to 45 degrees. He indicated that appellant's physical examination was significantly improved compared to his examination of September 16, 2014. Dr. Brown noted that a September 9, 2014 MRI scan of the lumbosacral spine revealed evidence of disc desiccation as well as broad-based paracentral disc herniation at L4-5 of approximately three millimeters and significant spondylolisthesis. He further determined that plain x-rays of appellant's lumbosacral spine taken on September 2, 2014 revealed significant degenerative joint disease of the lumbar spine and significant multilevel vertebral body lipping consistent with degenerative joint disease. Dr. Brown noted subjective complaints which included: inhibition of his ability to play basketball due to pain and discomfort in his low back; inability to stand for prolonged periods of time while at home preparing to cook; inhibition of sexual intimacy due to significant pain and discomfort in his low back; inability to lift heavy packages; inhibition of his ability to enjoy outings to Disneyland or shopping due to his inability to ambulate and stand for long periods of time; and severe inhibition of his ability to perform the basic duties of his occupation due to an inability to lift on a repetitive basis heavy packages, including his satchel and the duties of his position, such as bending, stooping, or reaching. He indicated that objective factors included: decreased range of motion of the lumbosacral spine; significant spasm in the paraspinal lumbosacral musculature; evidence of significant degenerative joint disease; and lumbar disc herniation at L4-5.

Dr. Brown diagnosed degenerative joint disease of the lumbosacral spine, lumbar intervertebral disc syndrome without myelopathy, and low back pain syndrome. He opined that

appellant's injuries to his low back arose as a direct result of the performance of his duties as a city letter carrier throughout his 19-year employment history. Dr. Brown advised that appellant described several work-related duties, which had unfortunately contributed to his current medical dilemma. He indicated that appellant performed mail delivery with a street time of approximately six and a half hours daily, five days a week throughout the majority of his extensive career. Additionally, prolonged walking up steep terrain such as hills, steps and uneven grass and surfaces, while carrying a satchel during the time period performing prolonged walking. Dr. Brown explained that the action of carrying a satchel while walking for prolonged periods on uneven or steep terrain increased the mechanical load to appellant's lumbar spine with a result of causing progressive dessication, deterioration, degeneration, inflammation, and agitation of the structures of the lumbar spine including, but not limited to the ligaments, tendons and muscles thereby causing degenerative joint disease of the lumbosacral spine, and lumbar disc herniations. He explained that these findings ultimately lead to degenerative joint disease of the lumbosacral spine "in direct response to the performance of his occupation as a city letter carrier throughout his 19-year employment history. Dr. Brown opined that it was "clear that the patient has developed this condition by both precipitation and aggravation in response to the performance of his aforementioned duties." He reiterated appellant's duties and opined that the "process of casing involves prolonged standing while concomitantly twisting and turning his lumbar spine while placing mail into the appropriate levels at elevated positions. It is a well-established medical fact that such employment-related duties increase the biomechanical load to the patient's lumbar spine, thereby augmenting and agitating the aforementioned medical conditions." Dr. Brown also explained that the repetitive bending and flexing of the lumbar spine, mandated by his processing and transferring of heavy bundles of mail, weakened the annular fibers responsible for maintaining the normal alignment of the intervertebral discs within the lumbar spine. He opined that, as a result, an indirect response to his bending while picking up approximately 30 pounds of mail, appellant had progressive intervertebral lumbar disc herniation at multiple levels, which was consistent with appellant's plain x-rays of the lumbar spine and his MRI scan study.

Dr. Brown indicated that the MRI scan study revealed evidence of significant lumbar disc herniation of three millimeters at L4-5. He further explained that appellant bent in a repetitive fashion with his lumbar spine when transferring mail in and out of gurneys as well as transporting them to appropriate locations in the employing establishment and in the field. Dr. Brown opined that "this activity clearly involves repetitive extending and flexing of the lumbar spine, which augments and accelerates the pathological changes…." He further indicated that "it is medically reasonable to infer a relationship of reasonable medical probability between [appellant's] medical injuries to his back and the performance of the duties of his occupation as a city letter carrier throughout his 19-year employment history." Dr. Brown indicated that appellant was previously placed on temporary partial disability with restrictions to include no heavy lifting, or prolonged walking or standing; however, he was currently working full duty for eight hours a day. He completed a January 6, 2015 duty status report recommending full-duty work with a 25-pound continuous lifting restriction and a 35-pound intermittent lifting restriction.

OWCP continued to develop the claim, and by letter dated March 16, 2015, referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Steven M. Ma, a Board-certified orthopedic surgeon.

In an April 20, 2015 report, Dr. Ma noted appellant's history of injury and treatment. He examined appellant and provided findings which included 60 degrees of flexion, 25 degrees of extension, 25 degrees of lateral bend on the right and left, and 30 degrees of rotation on the right and left. Dr. Ma determined that x-rays of the lumbar spine and pelvis revealed: no fracture or dislocation; a pars defect at L5 with 10 percent spondylolisthesis of L5 on S1. He opined that appellant had a nonindustrial L5 pars defect with a resultant L5-S1 spondylolistheses and arthritis and a nonindustrial spinal cord lesion. Dr. Ma diagnosed a congenital pars defect of the L5-S1 spondylolisthesis on a congenital basis and nonindustrial arthritis. He also explained that appellant had another abnormality, an edematous change of the spinal cord, which was not industrially related. Dr. Ma indicated that it may be due to a "spinal cord lesion or inflammatory disease." He further explained that it "may be due to cancer, infectious causes, *etc.* However, he concluded none of this has to do with his employment." Dr. Ma noted that the diagnosis was not known until further work up and evaluation. He proffered that there "may be a lesion such as cancer, infection, *etc.*, causing these findings and resulting in his symptoms." Dr. Ma opined that the diagnosed symptoms were not medically connected to factors of employment by direct cause, aggravation, precipitation or acceleration. He explained that appellant's condition was "at least congenital in nature with his congenital pars defect of his lumbar spine causing slippage of one vertebra over the other resulting in the congenital anomaly." Dr. Ma also explained that there were some changes which were not fully evaluated and not due to anything related to his employment. He opined that the "only objective findings are findings that cannot be related to his employment." Regarding the nonindustrial or preexisting disability, Dr. Ma explained that appellant had a long preexisting history of back pain dating back to 2009, due to a slipped disc in his low back. Furthermore, he noted that appellant received treatment on and off over the years for his back on a preexisting nonindustrial basis. Dr. Ma also indicated that appellant received chiropractic treatment from two different chiropractors in the past, dating to 2009. He also explained that the abnormal spinal cord changes suggested some kind of tumor or infections of the spinal cord, which needed further evaluation and would not be work related. Dr. Ma further found that appellant had a congenital spondylolisthesis due to his pars defect of the bone of L5, which was a chronic long-term basis since he was born with it and obviously it would be present continuously in the future. He advised that any work restrictions would be nonwork related. Dr. Ma further noted that appellant was working his original position with restrictions.

By decision dated July 9, 2015, OWCP denied appellant's claim. It found that he did not submit any medical evidence which demonstrated that the claimed medical condition was related to established work-related events.

OWCP received a January 13, 2015 duty status report from Dr. Edward Mittleman, Board-certified in family medicine, who diagnosed lumbar disc herniation and recommended regular duty.

In a November 7, 2014 report, Dr. James T. Tran, a neurosurgeon, noted appellant's history of injury and treatment and examined appellant. He diagnosed lumbar radiculitis, spinal stenosis of the lumbar region with neurogenic claudication, and lumbar disc degeneration. Dr. Tran explained that appellant had painful lumbar radiculopathy from L4-5, L3-4 stenosis. He advised that appellant had pain relief from physical therapy, and chiropractic treatment, however, the low back pain recurred. Dr. Tran indicated that appellant was working full duty with frequent lifting of up to 70 pounds at work. He explained that appellant frequently carried

mail satchels weighing up to 35 pounds on a daily basis and that these activities exerted force on his lumbar spine and lumbar discs. Dr. Tran related that the force exerted on the lumbar spine and discs caused tears in the annulus fibrosis, which allowed the nucleus pulposus to bulge through tears or herniate. He indicated that bulges of the nucleus pulposus protruded into the spinal canal and compressed the nerve roots. Furthermore, the force exerted on the lumbar spine disrupted the capsule of lumbar facet joint and caused excessive movement of facet joints. Dr. Tran explained that excessive movement of lumbar facet joints stretched the ligamentum flavum, which caused stenosis of the spinal canal and resulted in low back and leg pain.

In a November 2, 2015 report, Dr. Brown noted that he disagreed with Dr. Ma and argued that he had provided sufficient medical rationale to establish causal relationship. He explained that appellant's duties over a 20-year employment history involved prolonged walking of steep terrain as well as stepping on uneven surfaces throughout the day. Dr. Brown also reiterated that appellant carried a satchel and explained that the action of carrying a satchel while walking for prolonged periods of time on uneven terrain clearly increased the biomechanical load to appellant's lumbar spine with the result of causing progressive dessication, deterioration, degeneration, inflammation, and agitation of structures of the lumbar spine including, but not limited to the ligaments, tendons, and muscles, causing degenerative joint disease and lumbar disc herniations. He explained that in addition to a direct causal relationship, the aforementioned activities clearly both precipitate and aggravate degenerative joint disease of the lumbosacral spine as well as the lumbar intervertebral disc syndrome without myelopathy. Dr. Brown indicated that these conditions caused chronic low back pain in appellant (who was rather young) considering the fact that the degenerative process of the lumbosacral spine, caused by "mere aging, has clearly been accelerated by the performance of his employment duties." He elaborated that casing of mail for two hours a day, five days a week, involved prolonged standing, walking, and concomitantly twisting and turning his lumbar spine when placing mail in the appropriate locations at elevated positions. Dr. Brown opined that it was a "well-established medical fact that such employment-related duties clearly increase the biomechanical load to the patient's lumbar spine thereby augmenting and agitating the aforementioned medical conditions." He reiterated that it was "undeniable that the carrying of a satchel, which can weigh up to 35 pounds, will clearly increase the biomechanical load on the patient's lumbar spine thereby adding to the cumulative trauma previously described." Dr. Brown also explained that the repetitive bending and flexing of the lumbar spine, mandated by his processing and transferring of heavy bundles of mail, weakened the annular fibers responsible for maintaining the normal alignment of the intervertebral disc within the lumbar spine and caused progressive disc herniation. He explained that appellant's x-rays were also consistent with these diagnoses and opined that it was "quite clear that [appellant's] factors of employment have caused the medical conditions that have been requested to be accepted under this claim." Dr. Brown noted that Dr. Tran was in agreement that his lumbar radiculitis, lumbar spinal stenosis with neurogenic claudication and lumbar disc degeneration, were related to his employment. He requested that OWCP accept the conditions as work related. Dr. Brown argued that a referral for a referee examination might be warranted.

On November 6, 2015 appellant requested reconsideration.

On November 9, 2015 OWCP requested a supplemental opinion from Dr. Ma.

In a November 25, 2015 report, Dr. Ma provided a supplemental report. He indicated that there were no objective medical findings to support industrial causation. Dr. Ma explained that the argument that appellant's usual and customary work duties would cause the back injury would automatically indicate that all letter carriers would have a back injury by definition. He explained that appellant's physicians had not adequately explained the issue of the spinal cord lesion noted on the MRI scan. He indicated that, if this was further investigated, it would confirm that it was not industrial.

By decision dated January 27, 2016, OWCP denied modification of its July 9, 2015 decision.

LEGAL PRECEDENT

A claimant seeking benefits under FECA[4] 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 establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.[6]

Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue.[7] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.[8] 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).[9]

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,

[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] *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[7] *Robert G. Morris*, 48 ECAB 238 (1996).

[8] *Supra* note 7.

[9] *Id.*

the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.[10]

FECA provides that, if there is disagreement between an OWCP-designated physician and an employee's physician, OWCP shall appoint a third physician who shall make an examination.[11] For a conflict to arise, the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[12] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13]

ANALYSIS

The Board finds that this case is not in posture for decision as there remains an unresolved conflict in the medical evidence between appellant's treating physician, Dr. Brown, and second opinion physician Dr. Ma. Dr. Brown explained appellant's duties over a 20-year employment history and how they caused progressive dessication, deterioration, degeneration, inflammation, and agitation of structures of the lumbar spine including, but not limited to the ligaments, tendons, and muscles, causing degenerative joint disease and lumbar disc herniation. He explained work activities precipitated and aggravated appellant's degenerative joint disease of the lumbosacral spine as well as the lumbar intervertebral disc syndrome without myelopathy. Dr. Brown indicated that these conditions caused chronic low back pain in appellant (who was rather young) considering the fact that the degenerative process of the lumbosacral spine, caused by "mere aging, has clearly been accelerated by the performance of his employment duties." He explained the process of how his work activities weakened the annular fibers responsible for maintaining the normal alignment of the intervertebral disc within the lumbar spine and caused progressive disc herniation. Dr. Brown opined that it was "quite clear that [appellant's] factors of employment have caused the medical conditions that have been requested to be accepted under this claim." He also noted that Dr. Tran concurred with these findings. In contrast, Dr. Ma, the second opinion physician, found that appellant's back conditions were not work related and attributed his conditions to factors other than his work duties. He explained that appellant had a long preexisting history of back pain dating back to 2009, due to a slipped disc in his low back and that appellant received treatment on and off over the years for his back on a preexisting nonindustrial basis. Dr. Ma indicated that appellant received chiropractic treatment from two different chiropractors in the past, dating to 2009. He explained that the abnormal spinal cord changes suggested some kind of tumor or infections of the spinal cord, which needed further evaluation. Dr. Ma advised that appellant had a congenital spondylolisthesis due to his pars defect of the bone of L5, which was a chronic long-term basis since he was born with it and

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

[11] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[12] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[13] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

obviously it would be present continuously in the future and opined that any work restrictions would not be due to any work injury.

OWCP regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[14] The Board will set aside OWCP's January 27, 2016 decision and remand the case to OWCP for referral to an impartial medical examiner for further medical development pertaining to whether appellant sustained an occupational disease causally connected to his employment factors. Following this and any such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: March 16, 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

[14] *Id. See also R.H.*, 59 ECAB 382 (2008).