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

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| **S.W., Appellant** | ) | |
| **and** | ) | **Docket No. 18-0119** |
| | ) | **Issued: October 5, 2018** |
| **U.S. POSTAL SERVICE, POST OFFICE, Charlotte, NC, Employer** | ) | |

*Appearances:*
*Joanna Wright,* for the appellant[1]
*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 October 21, 2017 appellant, through his representative, filed a timely appeal from an August 16, 2017 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.

[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 has met his burden of proof to establish a lumbar injury causally related to the accepted December 31, 2013 employment incident.

## ***FACTUAL HISTORY***

On January 6, 2014 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on December 31, 2013, he experienced pain on the left side of his back, running down his left leg when loading his postal vehicle with mail. He reported that his pain continued throughout the day, causing him to miss work on January 2, 2014 and seek treatment at a hospital.

By letter dated January 10, 2014, the employing establishment controverted the claim.

By development letter dated January 23, 2014, OWCP informed appellant that the evidence of record was insufficient to establish his traumatic injury claim. It advised him of the type of medical and factual evidence needed and afforded him 30 days to submit additional evidence.

In a January 2, 2014 report, Rosemary V. Curry, a nurse practitioner, reported that appellant complained of left back and leg pain after grabbing a tray while working at the employing establishment. She noted a prior back injury while working for the Navy, but that his current pain was the worst he had ever experienced.

In medical and duty status reports (Form CA-17) dated January 10 through February 5, 2014, appellant sought treatment with Dr. Daniel E. Paul, a Board-certified internist at Carolina East Physicians. Dr. Paul discussed appellant's lower back pain radiating to the left leg and noted a history of L5 fracture from when appellant was in the military. He reported that, on December 31, 2013, appellant was lifting a heavy container of mail at work and twisted to place it in his truck when he immediately felt pain and burning into his left leg. Dr. Paul noted physical examination findings of tenderness around L4-5 to left paraspinally and tenderness over the left sciatic notch. X-rays and magnetic resonance imaging (MRI) scans of the lumbar spine were ordered. Dr. Paul diagnosed back pain and sciatica and restricted appellant from returning to work.

In a January 21, 2014 diagnostic report, Dr. James Lorentzen, a Board-certified diagnostic radiologist, reported that a lumbar spine MRI scan revealed normal findings other than prominent tarlov cysts in the sacrum.

In a February 20, 2014 narrative report, Dr. Paul reported that appellant sustained a traumatic injury on December 31, 2013 while moving a heavy container. Appellant was first evaluated by his nurse practitioner on January 2, 2014 for severe pain. Dr. Paul reported that appellant's January 21, 2014 lumbar MRI scan did not reveal any significant disc disease. He opined that the employment incident described most certainly led to exacerbation of appellant's back pain which required time off work, prescription medication, and physical therapy. Dr. Paul noted that there was definitely a causal relationship between this injury and his back condition. He noted submission of his progress reports which outlined the exacerbation of back pain and sciatica related to the work-related incident.

By decision dated February 26, 2014, OWCP denied appellant's claim, finding that the December 31, 2013 incident occurred as alleged, but that the evidence of record did not contain a firm medical diagnosis which could be reasonably attributed to the accepted employment incident.

On March 7, 2014 appellant requested an oral hearing before an OWCP hearing representative.

In a March 4, 2014 medical report, Dr. Paul opined that there was clear causality between appellant's diagnosed condition and the December 31, 2013 employment incident. He opined that appellant had a sciatic nerve injury and referred him for evaluation by a neurosurgeon.

In a March 6, 2014 medical report, Dr. Stephen Dalrymple, a Board-certified neurological surgeon, reported that appellant was evaluated for back and left hip pain. He reported that appellant was loading a truck and flexing forward to place packages in a shoot on December 31, 2013 when he felt a pull in his back. Appellant had back and left leg pain ever since, as well as numbness and tingling in the leg. Dr. Dalrymple noted an unremarkable medical history and unremarkable MRI scan findings. However, he reported that plain x-rays performed in January 2014 showed evidence of a grade 1 anterolisthesis of L5 on S1 and L5 spondylolysis. Dr. Dalrymple ordered flexion and extension lumbar spine x-rays to determine if appellant had spondylolisthesis and spondylolysis, in which case there could be an etiology for a work-related injury.

In a March 6, 2014 diagnostic report, Dr. Vishal Khiatani, a Board-certified diagnostic radiologist, reported that a lumbar spine flexion and extension x-ray revealed bilateral L5 spondylolysis with mild anterolisthesis of L5 upon S1 in the extension position of approximately one centimeter.

In a March 27, 2014 medical report, Dr. Dalrymple reported that appellant's flexion and extension x-rays revealed a one centimeter subluxation of L5 on S1 with flexion. He noted that appellant's injury was related to bending over into a mail hamper with a tray of mail when he felt pain in his back. Dr. Dalrymple reported that this type of flexion injury fit exactly with the instability that was demonstrated on the plain lumbar spine flexion extension x-rays from the known spondylolisthesis and spondylolysis which was demonstrated on the MRI scan. He opined that appellant's current pain symptoms were a direct result of the work-related injury based on the above findings. Dr. Dalrymple further noted that this type of spinal pathology would require surgical correction *via* a lumbar fusion of L5 on S1.

In an April 15, 2014 medical report, Dr. Paul noted that he had been treating appellant since December 2009. He diagnosed one centimeter subluxation of L5 on S1 with flexion which he opined was a direct result of the December 31, 2013 injury when appellant was bending over a mail hamper at work. Dr. Paul further noted that the condition would require surgical correction.

Appellant requested a hearing, which was held before an OWCP hearing representative on September 12, 2014. He testified that he had a preexisting fracture at the L5 vertebra due to his prior military service. Appellant was advised of the evidence needed in support of his claim and the record was held open for 30 days.

In a September 18, 2014 medical report, Dr. Paul reported that appellant had been his patient since December 2009 and had been doing quite well pertaining to his back pain. However, that abruptly changed after an injury appellant sustained at the employing establishment on December 31, 2013 while loading a tray from a hamper into his vehicle. Dr. Paul opined that appellant's back pain was out of proportion to what he had experienced before. He noted that this severe back pain was not a preexisting condition, but a new problem which began at work on December 31, 2013. Dr. Paul reported that appellant was evaluated by Dr. Dalrymple, a neurosurgeon, who concurred that appellant's subluxation of L5-S1 was a result of the injury he sustained at work.

By decision dated November 3, 2014, an OWCP hearing representative affirmed the February 26, 2014 decision, finding that the evidence of record was insufficient to establish a diagnosed condition causally related to the accepted December 31, 2013 employment incident. The hearing representative noted that appellant's preexisting vertebral fracture at the same L5-S1 region was the cause of his current diagnosis, and not the alleged work-related injury.

On February 6, 2015 appellant requested reconsideration of OWCP's November 3, 2014 decision. He noted the submission of additional medical reports which would provide clarification regarding the history of his low back injury.

In an October 29, 2014 medical report, Dr. Dalrymple related that appellant had worsening leg pain and symptoms, and recommended a decompression and fusion at L5-S1.

In a January 21, 2015 medical narrative report, Dr. Carrie L. Sun, Board-certified in internal medicine, reported that appellant was a patient of Greenville Veterans Affairs (VA) Health Center. She noted review of his medical reports stemming back to 1991 when appellant fell off a ladder during his service in the U.S. Navy. Dr. Sun reported that appellant was diagnosed with L5 spondylolysis with secondary mechanical lower back pain and arachnoid cyst of the sacrum with secondary right lower extremity radiculitis. She noted that the spondylolysis could be defined as a fracture in the pars interarticularis where the vertebral body and the posterior elements protecting the nerves are joined, and that in a small percent of the adult population, there is a developmental crack in one of the vertebrae, usually at L5, and arachnoid cyst were recognized as congenital or developmental defects that could predispose to the development of back pain and radicular pain. Dr. Sun reported that because appellant had no pain complaints prior to his fall, it was recognized that these preservice conditions were considered "service aggravated."

Dr. Sun noted that in 1998 appellant underwent a lumbar spine x-ray showing grade 1 spondylolisthesis of LS-S1 and spondylolysis at L5. Appellant's primary care notes showed that he continued to experience low back pain through 2007 and in 2009, and experienced a worsening of symptoms. A lumbar spine MRI scan ordered at that time showed the previously known arachnoid cyst and a lumbar spine flexion/extension x-ray did not show any signs of instability. Appellant's condition improved somewhat, but in 2013 primary care notes indicated increased spinal pain in the neck and upper back, his last visit being on September 25, 2013. He was not evaluated by his VA primary care physician until August 11, 2014, having sought treatment elsewhere following his December 31, 2013 injury. Appellant further reported that his back pain had worsened significantly after the December 31, 2013 incident. On November 15, 2014 he was evaluated by the neurosurgery department at the Durham VA Medical Center where he reported

increased back pain for about one year with burning pain and numbness into his legs. At that juncture, review of diagnostic testing revealed no compressive lesion on the MRI scan, but the presence of a cyst at L5-S1. Appellant's physicians also noted an L5 pars fracture (spondylolysis) that was present on plain x-rays since 2009.

Dr. Sun noted that in regards to the present injury, appellant reported that on December 31, 2013 he was bending forward to lift a tray of mail weighing approximately 40 pounds when he felt a sudden severe pain in the lower back which radiated to the left leg. By the following day he had radiating pain in both legs. Lumbar spine x-rays revealed a grade 1 anterolisthesis of L5 on S1, which had been present since 1998, and L5 spondylolysis. An additional lumbar spine MRI scan was done which revealed normal findings. Appellant also underwent flexion/extension x-rays of the lumbar spine which showed a one centimeter subluxation of L5 on S1 with flexion of the spine. Dr. Sun reported that this was a new injury since 2009, and his neurosurgeon had also provided a statement that he believed the flexion/lifting injury that appellant suffered when bending forward to lift the mail tray "fits exactly with the instability that we see demonstrated" on the x-rays and was the cause of appellant's pain.

Dr. Sun reported that the medical diagnosis for appellant's condition was lumbar spondylolisthesis at L5-S1 with instability. She reported that the lifting of a heavy weight (40 pounds) with the lumbar spine in a flexed position likely caused tearing or micro-tearing of the supportive structures of appellant's spine, allowing for the components of the spine to shift to a greater degree than normal depending on position. For appellant, his shifting (subluxation) of the L5 vertebra on top of the S1 vertebra occurred when he flexed (bent forward) his lower back. Dr. Sun noted that understandably, the repetitive shifting of one vertebra on top of another can cause pain due to intermittent pressure on nerve roots and surrounding tissues.

Dr. Sun reported that spondylolysis could be asymptomatic or symptomatic (*i.e.*, causing back pain). She noted that appellant's spondylolysis may have been congenital, but it became symptomatic after his injury in 1991. Dr. Sun further explained that spondylolisthesis even without evidence of instability is a well-known cause of back pain, noting that appellant had evidence of grade 1 spondylolisthesis on imaging since at least 1998. While this could have developed as a consequence of his preexisting spondylolysis, she reported that it could also predispose him to developing additional instability of his spine. However, his back pain had been more or less stable since he has been a patient at the Durham VA Medical Center since 1997 and did not affect his ability to perform work as a letter carrier. Dr. Sun noted that there was a clear sudden change in his condition on December 31, 2013 with the lifting incident described, and his imaging at the time showed clinically significant subluxation or slippage of LS on S1 with spine flexion which was not present on past imaging and most likely developed on December 31, 2013.

In a January 27, 2015 nerve conduction velocity (NCV) and electromyography (EMG) study of the lower extremities, Dr. J. Griffith Steel, a Board-certified neurologist, noted evidence for chronic denervation/reinnervation in some L5 innervated muscle bilaterally, slightly more evident on the right than the left, as well as evidence of peroneal motor neuropathies bilaterally. He further noted that these findings supported the presence of bilateral L5 radiculopathies.

By decision dated March 9, 2015, OWCP modified the November 3, 2014 decision to find that the evidence of record was sufficient to establish diagnosed medical conditions; but the claim

remained denied as the evidence was insufficient to establish that the diagnosed medical conditions were causally related to the accepted December 31, 2013 employment incident.

On March 9, 2016 appellant, through his representative, requested reconsideration of the March 9, 2015 OWCP decision. Appellant's representative noted submission of new medical evidence and argued that the reports of Dr. Sun, Dr. Paul, and Dr. Dalrymple established appellant's traumatic injury claim.

In a September 25, 2013 progress note, Dr. Jeffrey McCallum, Board-certified in internal medicine, reported that appellant complained of neck and back pain. He noted that appellant had x-rays taken one year prior which were not before him for review.

On August 11, 2014 Dr. James Byrd, Board-certified in internal medicine, reported that appellant complained of back and bilateral leg pain following a December 2013 injury when lifting a tray of mail at work. In a February 29, 2016 report, he reported that he had been treating appellant at a VA Health Center since August 2014. Dr. Byrd reported that appellant was hospitalized from June 29 to July 2, 2015 and underwent lumbar surgery performed by Dr. Darymple. Appellant's January 27, 2015 EMG study and subsequent surgery confirmed the diagnosis of lumbar spondylolisthesis with instability at L5-S1. Dr. Byrd opined that appellant's sudden change in back symptoms on December 31, 2013 aggravated his preexisting condition, which resulted in subluxation and slippage of L5 and S1.

By decision dated June 1, 2016, OWCP denied modification of the March 9, 2015 decision, finding that the evidence of record was insufficient to establish that the diagnosed medical conditions were causally related to the accepted December 31, 2013 employment incident. It noted that appellant's March 6, 2014 x-ray could not be probative of a new injury as reported by his physicians unless he produced an x-ray of the spine more recent than that of 2009 to show that the one centimeter subluxation of L5 on S1 did not previously exist.

On May 25, 2017 appellant requested reconsideration of OWCP's decision. In support of his request, his representative submitted a brief, summarizing the medical reports which supported his claim for a new traumatic injury.

Appellant also submitted x-rays of the cervical and thoracic spine from VA Medical Center dated July 12, 2012 from Dr. Thomas Stohrer, a Board-certified radiologist, who reported findings of scoliosis.

In progress notes dated June 14, 2012 through October 14, 2013, Dr. McCallum noted appellant's complaints of upper back and neck pain. He reported that x-rays of the neck and spine revealed scoliosis.

In a May 22, 2017 report, Dr. Paul reported that appellant had a history of L5 fracture which occurred when he fell down a ladder while he was in the Navy, but had been doing quite well and was fully able to function in his employment until he sustained an injury on December 31, 2013 while lifting a heavy container of mail. He opined that appellant's disability and surgery were directly related to the employment incident. Dr. Paul further reported that, since 1994, appellant had been performing repetitive jobs, routinely lifting things that weighed over 75 pounds, ascending and descending stairs, and sometimes walking 10 miles on a route, which exacerbated

his previous injury. He further noted that appellant's December 31, 2013 episode was the direct cause of his requirement to be out of work and need for surgical repair.

In an April 25, 2017 medical report, Dr. McCallum discussed the July 12, 2012 x-rays of the cervical and thoracic spine and reporting findings of scoliosis which were stable with minimal degenerative changes.

By decision dated August 16, 2017, OWCP denied modification of the June 1, 2016 decision finding that the evidence of record failed to establish that the diagnosed medical conditions were causally related to the accepted December 31, 2013 employment incident.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[3] 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.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

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.[6] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

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

[3] *Id*.

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

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

[6] *Elaine Pendleton*, *supra* note 4.

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

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***

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

It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden of establishing entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[9]

The record reflects that appellant sought treatment on January 2, 2014, soon after his claimed December 31, 2013 injury, due to complaints of left back and leg pain after lifting a heavy tray of mail to load into his truck, in the performance of his federal employment. On March 27, 2014 Dr. Dalrymple noted that appellant's injury was related to bending over into a mail hamper with a tray of mail when he felt pain in his back, and that this type of flexion injury fit exactly with the instability that was demonstrated on the plain lumbar spine flexion extension x-rays from the known spondylolisthesis and spondylolysis demonstrated on the MRI scan. In medical reports dated April 15 and September 18, 2014, Dr. Paul diagnosed one centimeter subluxation of L5 on S1 with flexion which he opined was a new injury and a direct result of the December 31, 2013 injury when appellant was bending over a mail hamper at work.

On January 21, 2015 Dr. Sun provided a comprehensive medical report discussing appellant's medical history stemming back to 1991, detailed findings on physical examination, summarized past medical reports, reviewed diagnostic testing, discussed the December 13, 2013 employment incident, and provided an opinion regarding the cause of appellant's diagnosed conditions. The Board notes that, while Dr. Sun's report is not completely rationalized, it is consistent in indicating that appellant sustained an employment-related injury and not contradicted by any substantial medical or factual evidence of record.[10]

Dr. Sun provided a thorough discussion of appellant's medical history, reporting that he was diagnosed with L5 spondylolysis with secondary mechanical lower back pain and arachnoid cyst of the sacrum with secondary right lower extremity radiculitis following a fall off a ladder in 1991 during his service with the Navy. She properly detailed the events surrounding the December 13, 2013 employment incident and subsequent course of medical treatment.[11] Dr. Sun reported that, on December 31, 2013, appellant was bending forward to lift a tray of mail weighing approximately 40 pounds when he felt a sudden severe pain in the lower back which radiated down

[8] *James Mack*, 43 ECAB 321 (1991).

[9] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

[10] *See Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

[11] *See D.S.*, Docket No. 17-0996 (issued August 16, 2017). The medical report should provide a discussion of the mechanism of injury or other explanation as to the relationship between a diagnosed condition and the employment incident.

his left leg. She provided extensive findings related to appellant's diagnostic reports and explained that this was a new injury since 2009. Dr. Sun properly discussed appellant's medical history and provided review of diagnostic testing, explaining that appellant sustained a new injury of lumbar spondylolisthesis at L5-S1 with instability. The record reflects that while appellant had preexisting lumbar conditions at L5-S1, the diagnostic testing prior to December 13, 2013 did not show evidence of L5-S1 subluxation with instability. Dr. Sun adequately discussed the mechanism of injury in this traumatic injury claim, reporting that the lifting of a heavy weight (40 pounds) with the lumbar spine in a flexed position likely caused tearing or micro-tearing of the supportive structures of appellant's spine, allowing for the components of the spine to shift to a greater degree than normal depending on position. She explained that for appellant, his shifting (subluxation) of the L5 vertebra on top of the S1 vertebra occurred when he flexed (bent forward) his lower back. Dr. Sun noted that understandably, the repetitive shifting of one vertebra on top of another could cause pain due to intermittent pressure on nerve roots and surrounding tissues. She explained that appellant's back pain had been more or less stable since 1997 and did not affect his ability to perform work as a letter carrier until December 31, 2013 when there was a clear and sudden change following his lifting injury. Dr. Sun further provided support for a work-related injury, noting that appellant's imaging at the time showed clinically significant subluxation or slippage of L5 on S1 with spine flexion, which was not present on past imaging and as such, most likely developed on December 31, 2013.

The Board finds that, while Dr. Sun's reports are not completely rationalized, they are consistent in indicating that appellant sustained a lumbar injury causally related to the accepted December 31, 2013 employment incident.[12] Although the medical reports of record are insufficient to meet appellant's burden of proof to establish his claim, they raise an uncontroverted inference between his condition and the work-related incident and are sufficient to require OWCP to further develop the medical evidence and the case record.[13]

The Board will remand the case for further development of the medical evidence. On remand, OWCP should prepare a statement of accepted facts and obtain a rationalized opinion from an appropriate Board-certified physician as to whether appellant's lumbar injuries are causally related to the December 31, 2013 employment incident, either directly or through aggravation, precipitation, or acceleration.[14] Following this and any other further development deemed necessary, OWCP shall issue a *de novo* decision on appellant's traumatic injury claim.

## ***CONCLUSION***

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

[12] *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

[13] *See Robert A. Redmond*, 40 ECAB 796, 801 (1989).

[14] *P.A.*, Docket No. 09-319 (issued November 23, 2009).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 16, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: October 5, 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