United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 17-1977**
	)	**Issued: January 29, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Pompano, FL, Employer	)	

Appearances:
Joanne Marie Wright, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 25, 2017 appellant, through his representative, filed a timely appeal from an April 21, 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.[3]

[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.*

[3] The Board notes that following the April 21, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

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

FACTUAL HISTORY

On September 28, 2015 appellant, then a 66-year-old modified letter carrier, filed an occupational disease claim (Form CA-2), alleging that he sustained an aggravation of his cervical disc degeneration, sciatica, thoracic, and lumbar conditions in the performance of duty. He indicated that he first became aware of his claimed conditions on June 25, 2015 and realized their relation to his federal employment on September 4, 2015, the date that he stopped work.

In a September 27, 2015 statement, appellant explained that he had been working for several years within his restrictions pertaining to a May 2004 motor vehicle accident.[4] In June 2015 his supervisor requested clarification of his medical restrictions. Appellant's treating physician, Dr. Alan Gruskin, Board-certified in physical medicine and rehabilitation, restricted him to driving for no more than one hour a day in a vehicle with power steering, and adjustable wheel and lumbar support. Appellant explained that, on June 11, 2015, the employing establishment offered him a limited-duty job, which he accepted under protest because he believed the job offer was in conflict with his driving restrictions and because it did not list all of the physical requirements and hours of the duties he would be required to perform. He explained that he reported for work from June 15 through 25, 2015, but by June 25, 2015, he could no longer make the drive due to the exacerbation of his May 29, 2004 accepted injury. Appellant noted that he filed claims for compensation (CA-7 forms) for the period June 29 to August 7, 2015 under OWCP File No. No. xxxxxx428, which OWCP denied. He was then advised to file a new occupational disease claim as he was informed that it was a new injury because he had identified new occupational factors of spending two hours driving to/from his home.

Appellant provided medical reports from Dr. Gruskin from June 11 to August 5, 2015. In a June 4, 2015 report, Dr. Gruskin noted that appellant complained of cervical disc degeneration which began due to a May 26, 2004 workers' compensation injury. Appellant indicated to him that it was of severe intensity and was aggravated by movement from walking and prolonged sitting. Dr. Gruskin also noted that appellant had complaints of numbness which he attributed to movement from walking and prolonged sitting. He diagnosed low back pain, cervical disc degeneration, and numbness. In a duty status report of even date, Dr. Gruskin diagnosed a herniated disc and noted that appellant should be working indoors for 8 hours per day with a 15-minute break every 2 hours and to change positions. In a June 11, 2015 report, he noted that appellant related that the employing establishment offered him a job within a 50-mile radius. Dr. Gruskin explained that this did not meet his medical restriction because appellant could drive "at most, one hour per day, total." He diagnosed low back pain, cervical disc degeneration and numbness. Dr. Gruskin treated appellant on June 22, 2015.

[4] Appellant has a prior claim concerning a May 29, 2004 employment-related motor vehicle accident that OWCP accepted for cervical and lumbar strains, and displaced cervical intervertebral disc at C6-7. By decision dated December 1, 2005, OWCP reduced his entitlement to wage-loss compensation to zero, as his actual earnings in a modified letter carrier position fairly and reasonably represented his wage-earning capacity.

In a June 25, 2015 report, Dr. Gruskin explained that he was clarifying his earlier duty status reports. He indicated that the main issue for appellant was that he could not work outside delivering mail without worsening his orthopedic condition. Dr. Gruskin noted that appellant suffered from degenerative disc disease of the cervical, thoracic and lumbar spine and had cervical disc herniation which continued worsening over time. He opined that appellant reached maximum medical improvement from his work-related motor vehicle accident on August 20, 2005. Dr. Gruskin explained, however, that the accident aggravated appellant's spine pathology and subsequently led to specific work restrictions. He noted that working outdoors for appellant did not just mean tolerating Florida temperatures and humidity, it also meant repetitive lifting of heavy mailbags or boxes and repetitive exit and entry of his mail truck. Dr. Gruskin noted that all of these activities exacerbated his spine condition and made his condition worse. He explained that with regard to appellant's ability to drive, he was allowed to drive to and from work; however, the maximum he could drive was 30 minutes each way. Dr. Gruskin noted that anything above this level would exacerbate his condition. He completed a duty status report (Form CA-17) on July 7, 2015 and indicated that appellant could work for 8 hours indoors, with 15-minute breaks and a maximum driving time of 1 hour per day, total. Dr. Gruskin also completed a report dated July 7, 2015 and filled in exacerbation of low back pain, and new leg pains, in increased activity. He saw appellant on August 6 and September 27, 2015 and repeated his prior opinions and diagnoses. Dr. Gruskin continued to treat appellant.

By development letter dated November 13, 2015, OWCP informed appellant that additional evidence was needed to establish his occupational disease claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit additional evidence.

In an August 10, 2015 report, Dr. Gruskin further opined that the May 29, 2004 work-related motor vehicle accident produced an aggravation of underlying degenerative joint disease of the spine, and that working outdoors would substantially worsen his underlying problems as the high Florida ambient temperature and humidity could exacerbate his arthritis pain and stiffness. He explained that delivering mail also meant repetitive lifting of heavy mailbags or boxes and repetitive exit and entry of the mail truck, which would exacerbate his spinal condition. Regarding driving, Dr. Gruskin explained that appellant was initially able to drive up to one to three hours a day. However, in the last few months, this was revised to a maximum of one hour per day.[5] Dr. Gruskin indicated that these requirements would accommodate appellant's current work restrictions. Furthermore, he explained that appellant was offered a new job, which required at least two to four hours a day of driving from his home to work, depending upon the time of day and traffic conditions. Dr. Gruskin indicated that the extended time sitting behind the wheel exacerbated his original spinal pathology and the aggravation sustained in the May 29, 2014 work-related motor vehicle accident. He noted that it was not a new injury due to traveling to or from, or working in Miami.

In a September 15, 2015 report, Dr. Gruskin reported that appellant had not begun his new job because of the long drive and his anticipation of the travel. He explained that appellant was not taking pain medications while driving as he was concerned about any cognitive impairment

[5] Dr. Gruskin explained that the vehicle he is asked to drive should have a multi-position power seat, power lumbar support, adjustable pedals and adjustable steering wheel.

and he did not have approval for therapy. Dr. Gruskin examined appellant and diagnosed lower back pain and cervical disc degeneration.

In a December 8, 2015 report, Dr. Gruskin noted that there was no change in appellant's symptoms or functional status. He noted that appellant was receiving greater than a 72-hour supply of controlled medication and that he failed other conservative measures.

In a December 11, 2015 statement, appellant noted that he performed the June 11, 2015, limited-duty job offer over the period June 15 through 24, 2015 and his preexisting condition under claim OWCP File No. xxxxxx428 was aggravated because he was required to drive to and from work for up to two hours each way along with having to sit for eight hours per day. He noted that he performed these duties over the period June 15 to 24, 2015 for up to four hours driving each day and eight hours of sitting each day. Appellant noted that Dr. Gruskin confirmed that the commute and the duties of the new job over the two-week period, without breaks, caused the objective findings of palpable muscle spasms, muscle tenderness and tightened and shortened soft tissue/ligaments tendons and joint capsules.

In a letter dated March 9, 2016, an employing establishment health and resource management specialist, noted that according to www.MapQuest.com, the trip from appellant's residence to the Miami Processing and Distribution Center, was approximately 42.5 miles each way, or approximately 45 minutes each way, based on the traffic conditions at that time. She noted that appellant actually performed the duties of the job offer from June 15 through 25, 2015 from 8:00 a.m. to 5:00 p.m. Furthermore, the employing establishment indicated that he was allowed a 1 hour lunch every day and two 15-minute breaks every day.

By decision dated March 31, 2016, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the described employment factors occurred as alleged. It further found that he did not submit any medical evidence containing a firm medical diagnosis in connection with the claimed work factors or events.

On May 24, 2016 appellant, through his representative, requested reconsideration and submitted additional evidence.

In an April 17, 2016 statement, appellant indicated that, on Monday, June 15, 2015, he had to start his work assignment in Miami, after driving for approximately two hours. He explained that he could not take his medication until he was at his new station since they were pain and muscle relaxers and he could not take them while or before driving. Appellant advised that in his old job, he was casing mail two to four hours a day, constantly changing positions, walking to the hot case to return miss-sent mail and pick up new letters and flats to be cased. He indicated that his old job had him changing positions all the time. However, the new job required sitting all day, which was inflaming his pinched and herniated discs and creating leg numbness. Appellant advised that the static neck position created radiating pain that would give him severe, blinding headaches. He explained that after the training, it would be the same sitting for eight hours a day. Appellant noted that he performed the modified job until June 25, 2015.

In a May 11, 2016 report, Dr. Gruskin indicated that he was clarifying the duty status report for appellant who was his patient for many years. He explained that the main issue for appellant was that he could not work outside to deliver the mail without worsening his orthopedic conditions.

Dr. Gruskin advised that appellant has been and could continue to safely work indoors, for eight hours per day, five days per week in his capacity. He explained that appellant had been doing this for over 40 years. Dr. Gruskin explained that appellant suffered from degenerative disc disease of the cervical, thoracic, and lumber spines and cervical disc herniation. He explained that appellant reached maximum medical improvement (MMI) from his May 29, 2004 work-related motor vehicle accident on August 30, 2005 and that it aggravated his premorbid spine pathology and subsequently led to his specific work restrictions. Dr. Gruskin indicated that appellant was allowed to drive to and from work for a maximum of 30 minutes each way, or a total of 1 hour per day. He also added that any vehicle that appellant was asked to drive, should have a multiple position power seat, power lumbar adjustment adjustable pedals, and an adjustable steering wheel. Dr. Gruskin advised that these requirements accommodated his current work restrictions.

Dr. Gruskin further explained that the June 2015 job offer required appellant to sit for two hours each way in traffic to get to work and from his home. He also explained that the new job required that he sit in one position for eight hours per day and that appellant could not readily change positions, nor could he get up and walk around, sit, stand, or attempt to lie down in this new job. Dr. Gruskin explained that it was counter to his continuing medical restrictions of changing positions as needed throughout the day. He explained that prolonged sitting was the worst position for patients with spinal pathology and disc herniation. However, despite appellant's attempt to perform the new job in Miami, he could not, due to the prolonged sitting and remaining in one position, which exacerbated his prior orthopedic issue, including increased neck and low back pain, radiating arm and leg pain, reduced spinal range of motion, and episodic numbness, and muscle spasm. Dr. Gruskin opined that "this change in job location and description violates [appellant's] clearly documented medically necessary work restrictions...."

By decision dated September 21, 2016, OWCP modified the March 31, 2016 initial denial of appellant's claim to find that he had established that the employment factors occurred as alleged. However, the claim remained denied as the medical evidence of record was insufficient to establish diagnosed conditions causally related to the accepted work factors.

On January 23, 2017 appellant, through his representative, requested reconsideration and submitted additional evidence.

In a December 30, 2016 report, Dr. Gruskin explained that the sitting that appellant was required to do while traveling to and from the workplace in Miami caused an increase in intra-discal pressure. He explained that many studies showed that this pressure was up to five times greater than standing or lying down. Dr. Gruskin indicated that leaning forward while driving also served to increase this pressure. He advised that appellant had degenerative disc disease as documented by prior imaging. Dr. Gruskin explained that some of these imaging findings were commensurate with normal aging; "however, tears in the fibers of the discs from the work-related motor vehicle accident (of May 29, 2004) further compromised the integrity of this 'natural shock absorption system.'" He also explained that during sitting, the neck straightened and the pelvis rotated backwards. Dr. Gruskin related that this flattened the cervical and lumbar region, which produced added pressure on the axial components. He noted that the use of a cervical collar, adjustable power seat, or ergonomic back support, would not significantly reduce intra-discal pressure when seated.

By decision dated April 21, 2017, OWCP modified the September 21, 2016 decision to find that appellant had not established a firm medical diagnosis causally related to the accepted employment factors.

LEGAL PRECEDENT

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 FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained 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.[6] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (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 employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.

Causal relationship is a medical issue and the evidence required to establish causal relationship, generally, is rationalized medical evidence.[8] This consists of a physician's rationalized opinion on the issue of whether there is causal relationship between the claimant's diagnosed condition and the implicated employment factors.[9] 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.[10]

ANALYSIS

The Board finds the case not in posture for decision.

It is undisputed that appellant had to drive more than 50 miles each way to his new light-duty position in Miami. In a December 30, 2016 report, Dr. Gruskin explained that the sitting that appellant was required to do while traveling to and from the June 2015 modified job caused an increase in intra-discal pressure. He explained that this pressure was up to five times greater than

[6] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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

[8] *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

[9] *Duane B. Harris*, 49 ECAB 170, 173 (1997).

[10] *Id.*

standing or lying down and that leaning forward while driving also served to increase this pressure. Dr. Gruskin advised that appellant had degenerative disc disease as documented by prior imaging. He explained that some of these imaging findings were commensurate with normal aging; "however, tears in the fibers of the discs from the work-related motor vehicle accident further compromised the integrity of this 'natural shock absorption system.'" Dr. Gruskin also explained that during sitting, the neck straightened and the pelvis rotated backwards. He related that this flattened the cervical and lumbar region, which produced added pressure on the axial components. Dr. Gruskin noted that the use of a cervical collar, adjustable power seat, or ergonomic back support, would not significantly reduce intra-discal pressure when seated. The Board finds that, although his opinion is not sufficiently rationalized to meet appellant's burden of proof to establish his claim, it is sufficient to require further development of the case by OWCP.[11]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation; however, OWCP shares responsibility in the development of the evidence to see that justice is done.[12] Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[13]

Therefore, the Board finds that the case must be remanded to OWCP. On remand, OWCP shall prepare an updated statement of accepted facts concerning appellant's working conditions and refer the matter to an appropriate medical specialist, consistent with OWCP procedures, to determine whether appellant's employment duties including driving to and from the new position in Miami, caused or aggravated his previously accepted medical conditions. Following this, and any other further development as deemed necessary, OWCP shall issue a *de novo* decision.[14]

CONCLUSION

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

[11] *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

[12] *William J. Cantrell*, 34 ECAB 1223 (1983).

[13] *Richard F. Williams*, 55 ECAB 343, 346 (2004).

[14] On remand OWCP should combine OWCP File Nos. xxxxxx952 and xxxxxx428.

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: January 29, 2019
Washington, DC

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

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

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