

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

J.K., Appellant)	
)	
and)	Docket No. 19-0095
)	Issued: June 18, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Milwaukee, WI, Employer)	
)	

Appearances: Case Submitted on the Record
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 16, 2018 appellant, through counsel, filed a timely appeal from an August 10, 2018 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 to consider 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 back conditions causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On January 30, 2017 appellant, then a 70-year-old retired dispatcher, filed an occupational disease claim (Form CA-2) alleging that he developed a back condition at work as he sat in a worn-out chair for eight years. He first became aware of his condition on “December 2, 2014” and first attributed the condition to his office chair on “November 15, 2014.” Appellant last used this chair on April 3, 2016 when he retired due to back pain.

Appellant provided a narrative statement and noted that he first sought treatment for his lower back pain in December 2012. He requested a new chair from the employing establishment, but never received it. Appellant asserted that he submitted a CA-2 form regarding this condition to his supervisor in December 2015, but that his supervisor did not file the claim. He filed an Equal Employment Opportunity complaint regarding this failure and retired. Appellant sought treatment from a chiropractor and was then scheduled for back surgery.

In support of his claim, appellant submitted a report dated June 1, 2015 from Dr. Sarah A. Smasal, a chiropractor, noting that he had progressive lumbar pain. Dr. Smasal requested x-rays and provided a potential diagnosis of lumbar degenerative disc disease and spondylolisthesis. In additional reports of June 1 and December 2, 2015, she requested that appellant’s office chair be replaced. Dr. Smasal opined that his work chair was directly affecting his back condition. On June 8, 2015 the employing establishment indicated that it had requested a new chair for appellant. The employing establishment terminated his employment, effective March 31, 2016.

In a development letter dated April 3, 2017, OWCP requested additional factual and medical information necessary to establish appellant’s occupational disease claim. It informed him that a chiropractor was only a physician for the purposes of FECA to the extent that he or she diagnosed a subluxation of the spine as demonstrated by x-ray to exist. OWCP afforded appellant 30 days for response.

On April 4, 2017 the employing establishment reported that it had provided appellant with an appropriate functional chair which he chose not to use.

On December 16, 2016 Dr. Clay J. Frank, a Board-certified orthopedic surgeon, examined appellant and diagnosed lumbar degenerative disc disease, spondylolysis at L4-5, and lumbar spondylolisthesis.

In a report dated April 13, 2017, Dr. Smasal noted that she first examined appellant on August 20, 2009. Appellant submitted Dr. Smasal’s December 1, 2014 request for a new work chair.

By decision dated May 8, 2017, OWCP denied appellant’s occupational disease claim, finding that he had not met his burden of proof to establish fact of injury as he failed to provide medical evidence diagnosing a medical condition causally related to the accepted employment

exposures. It concluded, therefore, that he had not met the requirements for establishing an injury as defined by FECA.

On May 15, 2017 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. He testified before the hearing representative on October 16, 2017. Appellant alleged that he worked as a dispatcher for seven years. He noted that his chair was a “typical office chair,” but that one side of the chair had approximately four inches of cushioning, while the other side had none after he continuously leaned on it for seven years. Appellant’s regular work shift was 8 to 10 hours, seven days a week. Beginning in 2012, he sought chiropractic treatment for a sciatic nerve condition. Appellant noted that he weighed approximately 300 pounds and used the chair seven days a week. He requested a new chair, but never received it.

By decision dated November 29, 2016, OWCP’s hearing representative found that there was no medical evidence of record to establish appellant’s occupational disease claim.

On October 23, 2017 the employing establishment provided a photograph of appellant’s chair and asserted that the cushioning was padded to be ergonomically correct.

In a letter dated January 17, 2018, appellant, through counsel, requested reconsideration of the November 29, 2016 decision. In support of this request, counsel provided a witness statement from a coworker, M.E., who worked near appellant. M.E. disputed that the employing establishment’s photograph of appellant’s chair was accurate. He asserted that he was present in appellant’s work area on a nightly basis and was familiar with his work chair. M.E. asserted that appellant’s chair had no arms and was in poor condition.

By decision dated March 28, 2018, OWCP modified the November 29, 2016 decision. It found that Dr. Frank’s December 16, 2016 note constituted medical evidence of a diagnosed condition; however, it denied the claim, finding that appellant had not met his burden of proof as he had not provided a causal relationship between appellant’s diagnosed condition and his accepted employment exposure.

On May 21, 2018 appellant, through counsel, requested reconsideration of the March 28, 2018 OWCP decision. Counsel submitted a May 8, 2018 report from Dr. Mushir B. Hassan, a Board-certified internist, finding that appellant was capable of working without restriction until 2014. At that time appellant reported back pain limiting his physical activities. He attributed his condition to an imbalance in his work chair which caused poor posture. Dr. Hassan found that appellant’s back pain progressed due to the chair. He noted that appellant required back surgery in 2017. Dr. Hassan opined, “To be clear, it is my medical opinion that the poor chair situation at [appellant’s] workplace directly contributed to the degenerative lumbar disc disease and lumbar spondylosis causing [his] back pain and subsequent back surgery in February 2017.”

By decision dated August 10, 2018, OWCP denied modification of its prior decision. It found that Dr. Hassan’s report was insufficiently rationalized to meet appellant’s burden of proof to establish an occupational disease claim.

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 of FECA, that the claim was timely filed within the applicable time limitation period of FECA,³ that an injury was sustained in the performance of duty as alleged, and that any disability or medical 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 upon a traumatic injury or an occupational disease.⁵

OWCP's regulations define an occupational disease as "a condition produced by the work environment over a period longer than a single workday or shift."⁶ 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 diagnosed condition is causally related to the identified employment factors.⁷

Causal relationship is a medical question, which requires rationalized medical opinion evidence to resolve the issue.⁸ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factors must be based upon a complete factual and medical background.⁹ 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 the claimant's specific employment factors.¹⁰ The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.¹¹

³ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁶ 20 C.F.R. §10.5(q).

⁷ *L.E.*, Docket No. 18-1138 (issued February 1, 2019).

⁸ *E.V.*, Docket No. 18-1617 (issued February 26, 2019).

⁹ *Id.*

¹⁰ *Id.*; *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹¹ *E.V.*, *supra* note 8; *Lourdes Harris*, 45 ECAB 545, 547 (1994).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish back conditions causally related to the accepted factors of his federal employment.

In support of his claim, appellant submitted notes dated June 1 and December 2, 2015 from Dr. Smasal, a chiropractor. Section 8101(2) of FECA¹² provides that the term physician, as used therein, includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation, as demonstrated by x-ray to exist and subject to regulations by the Secretary.¹³ While Dr. Smasal noted that she had requested lumbar x-rays, she did not report that the x-rays demonstrated subluxations of the vertebrae. Since she did not diagnose subluxation based upon x-ray evidence, she is not a qualified physician under FECA and her opinion does not constitute competent medical evidence.¹⁴ As such the notes from Dr. Smasal are of no probative value and, thus, insufficient to establish causal relationship in this claim.¹⁵

Appellant also provided a December 16, 2016 note from Dr. Frank who diagnosed lumbar degenerative disc disease, spondylolysis at L4-5, and lumbar spondylolisthesis. Dr. Frank did not offer an opinion regarding the cause of appellant's diagnosed back conditions. The Board has held that reports that do not provide an opinion on causal relationship are of no probative value in establishing causal relationship.¹⁶

Additionally, appellant provided a note from Dr. Hassan dated May 8, 2018 reporting that appellant attributed his ongoing back condition to an imbalance in his work chair which caused poor posture. Dr. Hassan opined that appellant's back pain progressed due to the chair. He noted that appellant required back surgery in 2017. Dr. Hassan concluded that appellant's work chair directly contributed to his diagnosed degenerative lumbar disc disease and lumbar spondylosis.

While Dr. Hassan opined that appellant's job duties, specifically sitting an inadequate work chair, caused or contributed to his diagnosed back condition, he did not offer medical rationale explaining how the accepted employment exposure caused the diagnosed condition.¹⁷ Dr. Hassan did not explain how the mechanism of injury would have physiologically caused the diagnosed condition.¹⁸ Furthermore, a mere conclusion without the necessary rationale explaining how and

¹² 5 U.S.C. § 8101(2).

¹³ See 20 C.F.R. § 10.311; *R.H.*, Docket No. 18-1544 (issued March 4, 2019); *M.B.*, Docket No. 17-1378 (issued December 13, 2018).

¹⁴ *R.H.*, *id.*; *M.B.*, *id.*; *R.P.*, Docket No. 18-0860 (issued December 4, 2018); *Jay K. Tomokiyo*, 51 ECAB 361, 367-68 (2000).

¹⁵ *R.P.*, *id.*

¹⁶ *R.H.*, *supra* note 16; *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁷ *E.V.*, *supra* note 8.

¹⁸ *Id.*

why the physician believes that appellant's work activities could result in the diagnosed condition is insufficient to meet appellant's burden of proof.¹⁹ Thus, Dr. Hassan's reports are insufficient to establish appellant's burden of proof.²⁰

The fact that a condition manifests itself during a period of employment is insufficient to establish causal relationship. Temporal relationship alone will not suffice. Entitlement to FECA benefits may not be based on surmise, conjecture, speculation, or on the employee's own belief of a causal relationship.²¹ The Board finds that the record lacks rationalized medical evidence establishing causal relationship between the implicated job duties and appellant's diagnosed back condition.²² Thus, appellant has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish back conditions causally related to the accepted factors of his federal employment.

¹⁹ *R.P.*, *supra* note 14.

²⁰ *L.E.*, Docket No. 18-1138 (issued February 1, 2019).

²¹ *Id.*; *D.D.*, 57 ECAB 734 (2006).

²² *L.E.*, *supra* note 20; *J.S.*, Docket No. 17-0507 (issued August 11, 2017).

ORDER

IT IS HEREBY ORDERED THAT the August 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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