United States Department of Labor
Employees' Compensation Appeals Board

J.J., Appellant	)	
and	)	**Docket No. 19-0789**
	)	**Issued: November 22, 2019**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Fort Worth, TX, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 27, 2019 appellant filed a timely appeal from an October 2, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant has met his burden of proof to establish lumbar spine conditions causally related to the accepted factors of his federal employment.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence while the case was on appeal. 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 evidence for the first time on appeal. *Id*.

FACTUAL HISTORY

On February 17, 2016 appellant, then a 54-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that he had developed a lower lumbar condition due to factors of his federal employment. He noted that he first became aware of his claimed condition on February 10, 2014 and related it to his federal employment on February 9, 2016.

In a February 29, 2016 development letter, OWCP advised appellant of the deficiencies of his claim. It requested additional factual and medical evidence and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

On February 20, 2016 appellant underwent a lumbar magnetic resonance imaging scan which demonstrated a metallic fusion at L5-S1, mild facet arthropathy from L1 through L3, and L4-5 mild retrolisthesis and diffuse disc bulge at L3-4, and mild scoliotic curvature of the lumbar spine.

On March 28, 2016 appellant responded to OWCP's questionnaire and noted on February 10, 2014 while at work, he was bending forward and sweeping the lower bins of mail into the tray in automation and was unable to stand up straight due to pain. He left work and sought medical treatment. Appellant noted that his back problems began in the military and that he underwent back surgery in 1992 with insertion of hardware. He attempted to have the hardware removed on April 9, 2014, but was unsuccessful.

In a separate narrative statement, appellant described his work history and current job duties. He noted that his work as a machine operator required him to stand for eight hours a day with repetitious and continuous lifting and grasping trays full of mail and loading them into a console. Appellant was also required to repetitively reach above the shoulders as well as continuously having to bend, stoop, twist, and walk. He noted that he was currently walking with a limp and dragging his left leg while walking. Appellant reported that on February 10, 2014 he was bending forward to sweep mail from the lower bins to put the mail pieces into the trays when he was unable to stand up straight.

In a February 9, 2016 note, Dr. Les Benson, an emergency medicine physician, reported that appellant believed that he had an aggravation of a his preexisting lumbar fusion. He listed appellant's job duties and diagnosed lumbar intervertebral disc disease and lumbar radiculopathy. Dr. Benson opined that appellant's diagnosed conditions were the result of his job duties as the constant standing, twisting, pushing and pulling, bending, lifting, and reaching above the shoulder exceed the tissue limits in his back and aggravated his service-connected condition of lumbar fusion. He opined that being a clerk for 21 years and the continuous and repetitive motions required by appellant's job had aggravated appellant's lumbar spine.

By decision dated March 31, 2016, OWCP denied appellant's occupational disease claim. It accepted the employment duties as described, but denied his claim as the medical evidence of record was insufficient to establish causal relationship between his diagnosed condition and his accepted employment duties.

On April 28, 2016 appellant requested a review of the written record from an OWCP hearing representative.

By decision dated September 29, 2016, OWCP's hearing representative affirmed the March 31, 2016 OWCP decision, finding that the medical evidence of record did not include medical rationale supporting that appellant's diagnosed lumbar intervertebral disc disorder and lumbar radiculopathy were caused or aggravated by his accepted job duties.

On April 1, 2017 appellant requested reconsideration of the September 29, 2016 decision, alleging that his preexisting condition was aggravated due to his physically-demanding federal job duties. He submitted additional medical evidence in support of his claim.

In reports dated February 3 and 21, 2014, Dr. Shawn Henry, an osteopath, diagnosed low back pain due to hardware from appellant's prior back surgery. He noted that on April 9, 2014 appellant had undergone an attempted surgical removal of hardware at L5-S1.

In June 14, July 19, and August 9 and 28, 2017 notes, Dr. Rory L. Allen, an osteopath, examined appellant due to an alleged work-related aggravation of his preexisting back condition. He described appellant's job duties. Dr. Allen noted that appellant had undergone a lumbar open-reduction and internal fixation with hardware insertion and diagnosed lumbar strain with radiculopathy and history of disc disease. He also reviewed appellant's electromyogram and nerve conduction velocity (EMG/NCV) testing on August 15, 2017 and found severe bilateral peroneal and tibial motor neuropathies as well as bilateral sural and saphenous sensory neuropathies.

By decision dated September 6, 2017, OWCP denied modification of its September 29, 2016 decision.

On May 10, 2018 appellant requested reconsideration of the September 6, 2017 OWCP decision and submitted additional medical evidence.

In a report dated May 18, 2017, Dr. Christopher Happ, an osteopath, noted appellant's 1992 back surgery and the subsequent attempted removal of hardware. He diagnosed spondylosis with radiculopathy, lumbar region; pain due to internal orthopedic prosthetic devices and painful hardware lumbar spine; lumbar spondylosis; and lumbar degenerative disc disease.

In a September 6, 2017 note, Dr. Andrew Indresano, a Board-certified orthopedic surgeon, noted appellant's surgical history, and described his repetitive work duties. He found on review of appellant's computerized tomography scan that appellant's left L5 and S1 pedicle screws were breaching the respective foramen and that appellant had displacement of the S1 nerve root due to the S1 screw. Dr. Indresano diagnosed lower back pain, lumbar radiculopathy, and complication of internal orthopedic prosthetic device. He recommended surgery to remove the hardware.

On September 25, 2017 Dr. Nathaniel Kho, a Board-certified neurologist, examined appellant and diagnosed lumbar radiculopathy and possible coexisting diabetic polyneuropathy. He described appellant's February 10, 2014 work injury and diagnosed persistent low back pain.

In September 27, November 29, and December 29, 2017 notes, Dr. Allen diagnosed lumbar radiculopathy, lumbar bulging disc disease, and severe bilateral tibial, sural, and saphenous neuropathies. He noted that appellant was beginning to experience left thigh numbness. Dr. Allen found progressive radiculopathy. On January 30, 2018 he attributed appellant's current condition to his spinal hardware. In a note dated February 21, 2018, Dr. Allen noted that appellant wished to undergo surgical removal of the metal hardware inserted during his 1992 back surgery. He

noted that appellant had previously undergone unsuccessful surgery in an attempt to remove the hardware. Dr. Allen repeated his prior diagnoses from reports dated March 21 and 28, 2018.

On March 28, 2018 Dr. Allen completed a form report diagnosing lumbar strain and hardware malfunction. He indicated by checking a box marked "yes" indicating his opinion that appellant's condition was caused or aggravated by his employment and noted that appellant had spasms and pain while performing his work duties.

In a letter dated April 16, 2018, Dr. Allen noted appellant's history of spine fusion in 1992 and the attempted hardware removal on April 9, 2014. He diagnosed failed lumbar fusion, lumbar intervertebral disc disease, and lumbar radiculopathy. Dr. Allen described appellant's job duties of repetitive twisting to transfer mail, weighing up to 30 pounds, from a table into a sorter. He opined that the repetitive twisting nature of appellant's job duties applied sufficient torsional/rotational forces to accelerate and aggravate a degradation of the preexisting hardware to its current failed condition. Dr. Allen further opined that the biomechanics involved in constant weight-loaded rotation over appellant's 20-year career at the employing establishment exceeded the internal integrity of his lumbar spine. He found that appellant's work duties had resulted in direct acceleration and aggravation of the failed lumbar fusion, lumbar intervertebral disc disease, and lumbar radiculopathy. Dr. Allen submitted an additional letter dated May 22, 2018 repeating these findings and opinions.

On May 15, June 15, and July 9, 2018 Dr. Allen completed treatment notes reporting that appellant had returned to light duty after a month of total disability and was continuing to experience back symptoms due to lumbar strain, sacral impingement syndrome, disc disease with severe bilateral motor and sensory neuropathies, as well as lumbar radiculopathy. He opined that appellant sustained a work-related injury while performing his normal automation clerk duties of sweeping from the machine to the tray rack. Dr. Allen noted that appellant's back injury occurred due to repetitive bending, twisting, and lifting boxes and packages of mail that weighed approximately 20 to 25 pounds, five days a week, eight hours a day. He also noted that appellant sustained a prior back injury in 1989 while in the military resulting in surgery at the L4-5 level in 1992. Dr. Allen opined that appellant sustained an aggravation of this condition due to his work injury.

In a July 9, 2018 letter, Dr. Allen repeated the work history, medical history, physical examination findings, and conclusions in his treatment note of even date. He opined that appellant sustained an occupational disease in the performance of duty as a result of repetitive activities of transporting mail from machines to trays which required him to perform repetitive bending, twisting, lifting, and carrying of mail weighing up to 30 pounds for eight hours a day, five days a week since 1994. Dr. Allen explained that injury occurred to the lumbar spine due to repetitive compression, torsion, and rotational force which caused an aggravation of the preexisting injury. He diagnosed lumbar sprain, lumbar radiculitis, sacral impingement syndrome following the 1992 surgery, lumbar disc displacement, lumbar facet syndrome, lumbar spondylolisthesis, and failed removal of hardware in 2014. Dr. Allen also completed treatment notes on August 10 and September 10, 2018.

By decision dated October 2, 2018, OWCP denied modification of the September 6, 2017 decision.

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 timely filed within the applicable time limitation of FECA,[4] 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.[5] 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.[6]

In an occupational disease claim, to establish that an injury was sustained in the performance of duty, a claimant must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[7] (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[8] and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[9]

The medical evidence required to establish causal relationship is rationalized medical opinion evidence.[10] Rationalized medical opinion evidence is medical evidence which includes 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. 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.[11]

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,

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[3] *Id.*

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

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

[6] *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).

[7] *C.C.*, Docket No. 18-1229 (issued March 8, 2019); *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[8] *R.A.*, Docket No. 16-1218 (issued November 10, 2016); *Michael R. Shaffer*, 55 ECAB 386 (2004).

[9] *T.J.*, Docket No. 17-1850 (issued February 14, 2018); *Beverly A. Spencer*, 55 ECAB 501 (2004).

[10] *M.B.*, Docket No. 17-1999 (issued November 13, 2018).

[11] *T.K.*, Docket No. 19-0074 (issued May 15, 2019); *M.L.*, Docket No. 18-1605 (issued February 26, 2019).

the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.[12]

ANALYSIS

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

In support of his claim, appellant submitted a series of medical reports from his attending physician, Dr. Allen, who consistently opined that his preexisting lumbar conditions were aggravated and accelerated by his duties as clerk. Dr. Allen noted appellant's previous back injury in the military which had resulted in surgery in 1992 and again in April 9, 2014 when an attempt to remove the 1992 hardware failed. He accurately described appellant's job duties transporting mail from machines to trays which required him to perform repetitive bending, twisting, and lifting boxes and packages of mail that weighed approximately 20 to 25 pounds, five days, a week eight hours a day. Dr. Allen opined that the repetitive twisting nature of appellant's job duties applied sufficient repetitive compression, torsion, and rotational forces to accelerate and aggravate a degradation of the preexisting hardware to its current failed condition. He further opined that the biomechanics involved in constant weight-loaded rotation over appellant's 20-year career at the employing establishment exceeded the internal integrity of the lumbar spine. Dr. Allen found that appellant's work duties had resulted in direct acceleration and aggravation of the failed lumbar fusion, lumbar intervertebral disc disease, and lumbar radiculopathy.

Accordingly, the Board finds that Dr. Allen provided an affirmative and rationalized opinion on causal relationship. Dr. Allen identified employment factors which appellant claimed caused his condition, identified findings upon examination and diagnostic testing, and explained how the identified employment factors, specifically the repetitive twisting with weights up to 30 pounds or weight-loaded rotation, aggravated appellant's preexisting back condition and surgical hardware through repetitive compression, torsion, and rotational forces. The Board thus finds that Dr. Allen's opinion is sufficient to require further development of the record.[13]

It is well established that, proceedings under FECA are not adversarial in nature, and that while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[14] OWCP has an obligation to see that justice is done.[15]

The case will therefore be remanded to OWCP for further development of the medical evidence on the issue of causal relationship, including the preparation of a statement of accepted facts (SOAF) which shall set forth all of appellant's accepted employment duties and then make a

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *R.B.*, Docket No. 18-0162 (issued July 24, 2019); *K.P.*, Docket No. 18-0041 (issued May 24, 2019).

[13] *R.B.*, *id.*; *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *A.F.*, Docket No. 15-1687 (issued June 9, 2016). *See also John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

[14] *A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[15] *R.B.*, *supra* note 12; *B.C.*, Docket No. 15-1853 (issued January 19, 2016).

referral to an appropriate medical specialist for consideration of the entire medical record. After this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 2, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: November 22, 2019
Washington, DC

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

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

Christopher J. Godfrey, Chief Judge, concurring:

I concur with the majority's findings, but write separately to differentiate the obligations, as I find them, upon remand to OWCP. Following preparation of the SOAF and selection of an appropriate medical examiner, as directed above, OWCP should obtain a rationalized medical opinion on the issue of causal relationship.[1] The specialist should provide consideration to the opinion and rationale as contained in the report by Dr. Allen[2] and should either concur with his opinion on causal relationship or provide a rationalized medical opinion which fully explains why the opinion of Dr. Allen is incorrect so that OWCP may properly weigh the evidence between their opinions.[3] Only after such further development shall issue a *de novo* decision as to causal relationship.

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

[1] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.810.9.b(1) (June 2015) (a claims examiner should refer a claim to a second opinion specialist if he or she has gathered all the medical information and evidence from the attending physician and does not have an adequately reasoned opinion about causal relationship to accept the case, but does have sufficient evidence to suggest that the claimant might be entitled to benefits).

[2] *Id*. at Chapter 2.810.9.a(3)(a)(iii) (a claims examiner should provide the second opinion specialist all medical records from a qualified physician authored within three years of the date of the second opinion referral); *id*. at Chapter 2.810.9.a(1) (a second opinion specialist should be provided a list of pertinent questions to be addressed).

[3] *Id*. at Chapter 2.810.6.a(2).