United States Department of Labor
Employees' Compensation Appeals Board

E.G., Appellant	)	
	)	
and	)	**Docket No. 20-1184**
	)	**Issued: March 1, 2021**
U.S. POSTAL SERVICE, HAMBURG POST OFFICE, Hamburg, NY, Employer	)	
	)	

Appearances:
Douglas J. Lawrence, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On May 21, 2020 appellant, through his representative, filed a timely appeal from a November 26, 2019 nonmerit decision and April 17, 2020 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.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant had abandoned his request for an oral hearing before an OWCP hearing representative; and (2) whether appellant has met his burden of proof to establish a medical condition causally related to the accepted May 7, 2019 employment incident.

FACTUAL HISTORY

On May 10, 2019 appellant, then a 46-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 7, 2019 he developed an upper back condition and muscle spasms as a result of performing repetitive turning, reaching, and bending when delivering mail while in the performance of duty.[3] He stopped work on May 9, 2019. OWCP assigned this claim, OWCP File No. xxxxxx802.

Previously, OWCP had accepted a January 19, 2007 traumatic injury claim for aggravation of a preexisting sprain of the back/thoracic region under OWCP File No. xxxxxx428. Appellant indicated that he lifted a bucket of mail and experienced an upper back ache. OWCP later expanded the acceptance of his claim to include other intervertebral disc displacement of the lumbar region, sprain of the ligaments of the thoracic spine, initial encounter, radiculopathy of the cervical region, dislocation of unspecified parts of the neck, and acquired deformity of the neck. Appellant underwent an anterior cervical discectomy with decompression of the spinal cord C4-6 on December 18, 2008.[4]

In a May 9, 2019 note, Dr. Michael Cicchetti, Board-certified in physical medicine and rehabilitation, noted that appellant was totally disabled until May 24, 2019.

On May 10, 2019 the employing establishment properly executed an authorization for examination and/or treatment (Form CA-16). The Form CA-16 listed the date of injury as May 7, 2019 and alleged traumatic injury, back, upper back, and neck pain and authorized appellant to seek medical care at an area hospital.

In a May 20, 2019 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of medical and factual evidence necessary to support his claim and provided a questionnaire for his completion. In a separate letter dated May 24, 2019, OWCP requested additional information from the employing establishment. It afforded both parties 30 days to submit the requested information.

Appellant was treated in the emergency room by Todd Thomas, a physician assistant, on May 7, 2019 for back pain radiating into his left leg. He reported a history of chronic cervical,

[3] On May 7, 2019 appellant returned to work under restrictions pertaining to separate traumatic injury claim that occurred on January 19, 2007, OWCP File No. xxxxxx428.

[4] OWCP paid appellant wage-loss compensation on the supplemental rolls from January 29 to April 12, 2008 and May 14 to June 7, 2008, July 7 to December 20, 2018, and April 12, 2009 to June 23, 2018 and on the periodic rolls from April 13 to May 10, 2008, June 8 to July 5, 2008, December 21, 2008 to April 11, 2009 and June 24, 2018 to April 27, 2019.

thoracic, and lumbar pain secondary to disc herniations, discectomy, and fusions of the cervical and thoracic spine. Mr. Thomas diagnosed low back pain.

A May 8, 2019 magnetic resonance imaging (MRI) scan report of the thoracic spine revealed scattered degenerative changes of the thoracic spine without mass effect or displacement of neural structure, slight exaggerated thoracic minor scoliosis, and no masses or abnormal enhancement. A May 8, 2019 MRI scan report of the lumbar spine revealed multilevel foraminal narrowing most marked bilaterally at L3-4 and L4-5 with mild displacement exiting nerve roots, scattered degenerative change elsewhere in the lower thoracic lumbar spine, probable focal tear posterior lateral annulus bilaterally L3-4, slight loss of lordosis, and minor scoliosis.

In a report dated May 10, 2019, Dr. Cicchetti noted last treating appellant on March 21, 2019 for chronic widespread musculoskeletal pain involving the cervical, thoracic, and lumbar spine. He indicated that appellant reported to work on May 7, 2019 and was unable to tolerate appellant's duties and was treated in the emergency room that evening. An MRI scan of the lumbar and thoracic spine performed on May 8, 2019 revealed preexisting degenerative changes to thoracic and lumbar discs with facet arthropathy and lumbar foraminal stenosis. Dr. Cicchetti noted that appellant was diagnosed with acute sprain/strain/exacerbation of spinal pain and taken out of work by the emergency room physician. Findings on examination revealed restricted range of motion of the cervical, lumbar, and thoracic spines, diffuse tenderness to light touch throughout the cervical, thoracic and lumbar spine, decreased sensation to light touch in the left L4 and L5 dermatomes, and mild weakness in the bilateral knee extensors. Dr. Cicchetti opined that repetitive bending, lifting, rotating/twisting directly related to appellant's job resulted in the severe worsening of appellant's spinal condition, pain, and loss of function. He further noted that returning to work on May 7, 2019 was the competent cause of the aggravation of preexisting neck, mid back, and low back pain.

Dr. Cicchetti described appellant's typical day as a mail carrier consisted of managing case mail for one to two hours in the morning, which required repetitive lifting of trays, buckets, and bundles of mail weighing between 10 and 40 pounds. He advised that appellant was required to repetitively twist, turn, and reach above appellant's head and below his waist, he pulled down mail, which required repetitive reaching and turning, and held bundles of mail in his arms and placed a rubber band around the bundle before placing it on the tray. Appellant used a cart to transport the mail to his truck and then loaded the mail into his truck and delivered hundreds of pieces of mail and parcels weighing between 1 to 2 ounces up to 70 pounds. Dr. Cicchetti indicated that when driving his mail truck appellant repeatedly rotated his head left and right to check for people, cars, or obstacles in his path. He noted that appellant's mail route was six to seven hours on the street and involved walking and repeatedly entering and exiting appellant's mail truck during his shift. Dr. Cicchetti further noted that when delivering curbside appellant twisted his body all the way around to his left to get mail and then all the way to his right to deliver it to the box. He noted that appellant's job was very taxing on his cervical, thoracic, and lumbar spine as a result of the repetitive bending, twisting, lifting, carrying, pushing/pulling, and long hours sitting, and driving.

In a May 24, 2019 follow-up visit, Dr. Cicchetti noted appellant's symptoms improved from the May 9, 2019 visit, but appellant continued to experience pain in the neck, periscapular thoracic region, and lumbar spine with increased radicular symptoms in the left leg. Findings on examination revealed restricted lumbar and cervical range of motion in all planes, normal reflexes

and motor examination, and intact sensory examination. Dr. Cicchetti diagnosed thoracic spine pain, herniated lumbar disc, and cervical postlaminectomy syndrome. He opined that given the severe exacerbation of pain experienced by appellant after appellant returned to work on May 7, 2019 he could not return to work as a letter carrier in any capacity. Dr. Cicchetti also affirmatively replied "Yes" that in his opinion the May 7, 2019 employment incident was the competent medical cause of the appellant's injury/illness. In a separate note dated May 24, 2019, he indicated that appellant could not return to work until August 1, 2019.

In an addendum narrative report dated May 24, 2019, Dr. Cicchetti opined that appellant's return to work on May 7, 2019 directly exposed him to repetitive activities including bending, twisting, and carrying that directly resulted in traumatic exacerbation of appellant's preexisting neck pain, (postlaminectomy syndrome), mid-back pain (thoracic sprain/strain), low back pain (disc herniation at L5-S1, degenerative disc disease and bulging L3-4 and L4-5) and left leg radicular symptoms. He based his opinion on historical and clinical findings on May 9 and May 24, 2019, MRI scan images, and hospital discharge notes from May 8, 2019.

By decision dated June 28, 2019, OWCP denied appellant's traumatic injury claim, finding that he had not submitted medical evidence containing a medical diagnosis in connection with his accepted employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On July 12, 2019 appellant timely requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In an September 9, 2019 notice, OWCP's hearing representative informed appellant that his oral hearing was scheduled for November 15, 2019 at 8:30 a.m. Eastern Standard Time (EST). She instructed him to "call the toll-free number listed below and when prompted, enter the pass code also listed below." OWCP's hearing representative mailed the notice to appellant at his last known address of record and also to his representative. Neither appellant nor his representative made an appearance and no request for postponement of the hearing was made.

On October 31, 2019 Dr. Cicchetti treated appellant for lumbar pain with recurrence of left leg radicular symptoms. He diagnosed lumbar radiculitis and herniated lumbar disc. Dr. Cicchetti responded "Yes" to the inquiry whether it was his opinion the May 7, 2019 employment incident was the competent medical cause of the appellant's injury/illness.

By decision dated November 26, 2019, OWCP's hearing representative found that appellant had failed to appear at the oral hearing and had abandoned his request. The hearing representative indicated that appellant received a 30-day advance notice of the hearing scheduled for November 15, 2019, and found that there was no evidence that he had contacted OWCP either prior to or subsequent to the scheduled hearing to request a postponement or explain his failure to appear.

On August 1, 2019 Dr. Cicchetti provided an addendum report and indicated that prior to appellant's May 7, 2019 return to work he experienced chronic pain in the neck, thoracic, and lumbar spine and sciatica in the left leg. He indicated that appellant underwent cervical decompression surgery and experienced severe restriction of active and passive range of motion

in the cervical and lumbar spine as a direct result of the neck surgery and appellant's prior work injury. Dr. Cicchetti opined that appellant's diagnoses of cervical postlaminectomy syndrome, thoracic pain secondary to thoracic sprain/strain, low back pain and left leg radicular symptoms were directly exacerbated by repetitive bending, twisting, carrying, and excessive cervical range of motion that occurred while at work on May 7, 2019. He evaluated appellant on May 9, 2019 and his examination demonstrated decreased cervical, thoracic, and lumbar range of motion, diffuse muscular spasm in the cervical, thoracic, and lumbar regions, mild weakness in the left knee extensors and left ankle dorsiflexors, and decreased sensation to light touch in the left L3 and L6 dermatomes. Dr. Cicchetti indicated that these findings were essentially unchanged on August 1, 2019.

Appellant was seen again by Dr. Cicchetti on January 10, 2020 who reiterated his opinion that appellant's return to work on May 7, 2019 directly caused a severe flare-up in postlaminectomy syndrome, thoracic sprain/strain, lumbar disc herniation at L5-S1, degenerative disc disease and disc bulging at L3-4 and L4-5, and left leg radicular pain. Dr. Cicchetti opined that by exposing appellant to repetitive bending, lifting, twisting, and carrying as defined in his job description directly resulted in a traumatic exacerbation of the above diagnoses.

On March 17, 2020 appellant requested reconsideration.

In a March 27, 2020 addendum to the reconsideration request, appellant through his representative, contended that he did not abandon his request for a telephonic hearing, rather, he and his representative never received notice of the hearing. In an undated statement received on March 27, 2020 appellant reiterated that he never received the notice of hearing.

By decision dated April 17, 2020, OWCP modified the June 28, 2019 decision, finding that the medical evidence contained a medical diagnosis in connection with his accepted employment incident as alleged, but affirmed the denial of the claim, finding that the medical evidence of record was insufficient to establish a causal relationship between appellant's diagnosed conditions and the accepted May 7, 2019 employment incident.

LEGAL PRECEDENT -- ISSUE 1

A claimant who has received a final adverse decision by OWCP may obtain a hearing by writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.[5] Unless otherwise directed in writing by the claimant, OWCP's hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.[6] OWCP has the burden of proof to establish that it properly mailed to a claimant and any representative of record a notice of a scheduled hearing.[7]

[5] 20 C.F.R. § 10.616(a).

[6] *Id.* at § 10.617(b).

[7] *T.R.*, Docket No. 19-1952 (issued April 24, 2020); *M.R.*, Docket No. 18-1643 (issued March 1, 2019); *T.P.*, Docket No. 15-0806 (issued September 11, 2015); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

A claimant who fails to appear at a scheduled hearing may request in writing, within 10 days after the date set for the hearing, that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.[8]

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing before an OWCP hearing representative.

The record establishes that appellant filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review following its June 28, 2019 decision. In a September 9, 2019 letter, a hearing representative notified appellant that she had scheduled a telephonic hearing to be held on November 15, 2019, at 8:30 a.m., EST. The hearing representative properly mailed the hearing notice to appellant's last known address of record and also to his representative, and provided instructions on how to participate, and the notice was not returned as undeliverable. Absent evidence to the contrary, a notice mailed in the ordinary course of business is presumed to have been received by the intended recipient.[9] The presumption is commonly referred to as the "mailbox rule." It arises when the record reflects that the notice was properly addressed and duly mailed. The current record is devoid of evidence to rebut the presumption that appellant received OWCP's September 9, 2019 notice of hearing. The hearing notice was properly addressed to appellant's last known address. Neither appellant nor his representative called in as instructed for the November 15, 2019 scheduled telephonic hearing and there is no indication that he requested postponement of the telephonic hearing. Moreover, they did not submit a written request within the 10 days after the date set for the telephonic hearing and request that another telephonic hearing be scheduled. Under the circumstances, the Board finds that appellant abandoned his telephonic hearing request.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA[10] 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 of FECA,[11] that an injury was sustained in the performance of duty as alleged, and that

[8] 20 C.F.R. § 10.622(f); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6(g) (October 2011); *A.J.*, Docket No. 18-0830 (issued January 10, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

[9] *R.L.*, Docket No. 20-0186 (issued September 14, 2020); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *Claudia J. Whitten*, 52 ECAB 483 (2001).

[10] *Supra* note 2.

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

any disability or medical condition for which compensation is claimed is causally related to the employment injury.[12] 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.[13]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.[14] Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[15] The second component is whether the employment incident caused a personal injury.[16] An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the employment incident.[17]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[18] A physician's opinion on whether there is a causal relationship between the diagnosed condition and the accepted employment incident must be based on a complete factual and medical background.[19] 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 specific employment incident.[20]

In a case in which a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinions that differentiates between the effects of the work-related injury or disease and the preexisting condition.[21]

ANALYSIS -- ISSUE 2

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

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

[13] *K.M.*, Docket No. 15-1660 (issued September 16, 2016).

[14] *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[15] *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[16] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[17] *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[18] *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

[19] *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

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

[21] *Supra* note 8 at Chapter 2.805.3e (January 2013). *See R.D.*, Docket No. 18-1551 (issued March 1, 2019).

In his report dated May 10, 2019, Dr. Cicchetti opined that repetitive bending, lifting, rotating/twisting while in the performance of his work duties on May 7, 2019 resulted in severe worsening of appellant's spinal condition, pain, and loss of function. On August 1, 2019 he opined that appellant's diagnoses of cervical postlaminectomy syndrome, thoracic pain secondary to thoracic sprain/strain, low back pain, and left leg radicular symptoms were directly exacerbated by repetitive bending, twisting, carrying, and excessive cervical range of motion that occurred while at work on May 7, 2019. Dr. Cicchetti further noted that returning to the job on May 7, 2019 was the competent cause of the aggravation of preexisting neck, mid back and low back pain.

Dr. Cicchetti described appellant's mail carrier duties in detail, which required repetitive lifting of trays, buckets, and bundles of mail weighing between 10 and 40 pounds, appellant was required to repetitively twist, turn, and reach above his head and below his waist, he pulled down mail, which required repetitive reaching and turning, he held bundles of mail in his arms and placed a rubber band around the bundle before placing them on the tray. He explained that these duties were very taxing on appellant's cervical, thoracic and lumbar spine as a result of the repetitive bending, twisting, lifting, carrying, pushing/pulling, and long hours sitting and driving.

In conclusion Dr. Cicchetti opined that the repetitive bending, lifting, twisting, and carrying performed on May 7, 2019 directly resulted in a traumatic exacerbation of appellant's diagnosed postlaminectomy syndrome, thoracic sprain/strain, lumbar disc herniation at L5-S1, degenerative disc disease, disc bulging at L3-4 and L4-5, and left leg radicular pain.

The Board finds that the reports from Dr. Cicchetti are sufficient to require further development of the medical evidence. Dr. Cicchetti provided a pathophysiological explanation as to how appellant's repetitive bending, lifting, twisting, and carrying on May 7, 2019 resulted in his diagnosed lumbar and thoracic conditions. The Board has long held that it is unnecessary that the evidence of record in a case be so conclusive as to suggest causal connection beyond all possible doubt. Rather, the evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound, and logical.[22] Accordingly, Dr. Cicchetti's medical opinion is therefore sufficient to require further development of appellant's claim.[23]

It is well established that, proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[24] OWCP has an obligation to see that justice is done.[25]

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[22] *W.M.*, Docket No. 17-1244 (issued November 7, 2017); *E.M.*, Docket No. 11-1106 (issued December 28, 2011); *Kenneth J. Deerman*, 34 ECAB 641, 645 (1983) and cases cited therein.

[23] *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

[24] *See id. See also A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

[25] *See B.C.*, Docket No. 15-1853 (issued January 19, 2016); *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *John J. Carlone*, 41 ECAB 354 (1989).

On remand OWCP shall refer appellant, a statement of accepted facts, and the medical record to specialist in the appropriate field of medicine. The chosen physician shall provide a rationalized opinion as to whether the diagnosed conditions are causally related to the accepted factors of appellant's federal employment. If the physician opines that the diagnosed conditions are not causally related, he or she must explain, with rationale, how or why the opinion differs from that of Dr. Cicchetti. Following this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim.

CONCLUSION

The Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing before an OWCP hearing representative. The Board further finds that this case is not in posture for decision with regard to whether appellant has met his burden of proof to establish a medical condition causally related to the accepted May 7, 2019 employment incident.[26]

[26] The Board notes that the employing establishment issued a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2019 decision of the Office of Workers' Compensation Programs dated is affirmed and the April 17, 2020 decision is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 1, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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