

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

R.S., Appellant)	
)	
and)	Docket No. 22-1333
)	Issued: July 7, 2023
U.S. POSTAL SERVICE, POST OFFICE,)	
Chicago, IL, Employer)	
)	

Appearances:
Andrew Douglas, Esq., for the appellant¹
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 September 20, 2022 appellant, through counsel, filed a timely appeal from an August 3, 2022 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 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 lower back condition causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On April 14, 2022 appellant, then a 32-year-old city carrier,³ filed an occupational disease claim (Form CA-2) alleging that he developed an L5-S1 protrusion with radiculopathy due to factors of his federal employment, including repetitive lifting, twisting, and walking through heavy snow.⁴ He indicated that he first became aware of his conditions on November 25, 2020⁵ and realized their relation to factors of his federal employment on January 27, 2021. Appellant did not stop work.

Along with his claim, appellant submitted an April 14, 2022 statement noting that he had previously developed a lumbar strain after lifting a package onto a cart on November 25, 2020. He explained that his condition had resolved and he accepted a light-duty work assignment on December 10, 2020 after which he was cleared for full duty on December 15, 2020. Appellant related that he subsequently experienced a twisting injury on December 26, 2020 when he turned while loading an 8- to 10-pound tray of cased mail onto his cart, causing a sharp, shooting pain in his back. The pain spread to his right thigh by December 31, 2020 and he was provided work restrictions and began physical therapy on January 11, 2021. Appellant noted that he returned to work on January 25, 2021 and walked extensively on a route with knee-high snow, which aggravated his symptoms and caused pain to radiate into his right buttocks. He recounted that on January 27, 2021 he performed a longer route through heavy snow while carrying a 15- to 20-pound bag, which put pressure on his lower back and caused pain in his right lower back and sciatica radiating into his right leg. Appellant further related that he was held off work and underwent a June 15, 2021 magnetic resonance imaging (MRI) scan, which indicated a L5-S1 protrusion close to the right S1 nerve root. He asserted that on November 25, 2020 he experienced a minor back injury that he believed had resolved, but when he turned quickly on December 26, 2020 his symptoms returned and then worsened when he walked through heavy snow on January 25 and 27, 2021. Appellant noted that he had no lumbar incidents prior to November 25, 2020.

In an April 28, 2022 development letter, OWCP informed appellant of the deficiencies of his claim and advised him of the type of factual and medical evidence needed to establish his claim. In a separate development letter of even date, it requested that the employing establishment provide

³ In an April 14, 2022 note, appellant related that his Form CA-2 contained an incorrect entry indicating that his occupation was a human relations clerk, when in fact he is a mail carrier.

⁴ OWCP assigned the present claim OWCP File No. xxxxxx457. The record reflects that appellant has a prior accepted November 25, 2020 traumatic injury claim (Form CA-1) under OWCP File No. xxxxxx440 for a sprain of ligaments of the lumbar spine (resolved). OWCP has administratively combined OWCP File Nos. xxxxxx457 and xxxxxx440, with the latter serving as the master file.

⁵ In a June 6, 2020 statement, appellant indicated that the date he first became aware of his conditions was actually November 25, 2020, rather than the December 25, 2020 date indicated on his Form CA-1.

additional information, including comments from a knowledgeable supervisor. OWCP afforded both parties 30 days to respond.

Thereafter, appellant submitted December 5 and 9, 2020 progress notes from Dr. Eberechukwu O. Ibe, an internal medicine specialist, noting complaints of back pain beginning on November 25, 2020 at work. Dr. Ibe returned appellant to light-duty work with restrictions of alternate sitting and standing. In a December 9, 2020 work status report, an unknown healthcare provider diagnosed a lumbar sprain and provided work restrictions.

On December 10, 2020 appellant accepted an offer of modified assignment (limited duty) as a city carrier technician, with physical restrictions of standing up to two hours, sitting up to six hours, walking up to half an hour, and lifting up to 10 pounds.

In December 15, 2020 progress notes, Dr. Roy Horras, Board-certified in emergency medicine, diagnosed a lumbar sprain, noted that appellant's condition had resolved, and released him to work with no restrictions.

December 28, 2020 progress notes from Dr. Natalie Kostinsky, a Board-certified family practitioner, noted that appellant reported reinjuring his back on December 26, 2020 after turning too quickly. She diagnosed a lumbar strain. In a duty status report (Form CA-17) of even date Dr. Kostinsky provided work restrictions.

In December 31, 2020 progress notes, Dr. Edythe Lotharius, a Board-certified internist, noted appellant's report of injuring his back in November 2020 and then experiencing recurrent pain in December 2020 due to a twisting motion. She diagnosed a lumbar sprain and right-sided sciatica.

From January 11 through February 1, 2021, Ashley Fauth and Jordan Ruedt, physical therapists, treated appellant and noted that appellant demonstrated a reduction in pain with improvements in lumbar mobility and lifting capability.

On January 21, 2021 Dr. Kostinsky treated appellant and diagnosed a lumbar strain and right-side sciatica. In a January 26, 2021 work status report, she released him to limited-duty work with restrictions.

In January 30, 2021 progress notes, Dr. Ibe noted that appellant reported that he returned to work that week and experienced low back pain radiating to his right buttocks after prolonged walking and working. In a Form CA-17 of even date, an unknown medical provider diagnosed a lumbar sprain with sciatica and provided work restrictions.

In a February 2, 2021 work status report, an unknown medical provider diagnosed a right lumbar sprain with sciatica and provided work restrictions.

OWCP received therapy notes from Ms. Fauth and Mr. Ruedt dated February 3 through 19, 2021.

In a February 18, 2021 work status report and progress note, Dr. Bradley Bagan, a Board-certified neurosurgeon, diagnosed lumbar pain and low back pain with sciatica and held appellant

off work. He noted that appellant reported injuring his back in November 2021 by lifting a heavy object and subsequently reinjuring his back on December 26, 2021 with a recurrence of symptoms.

A June 15, 2021 MRI scan report of appellant's lumbar spine noted an impression of mild lower lumbar degenerative disc change with greatest severity at L4-5 and L5-S1, a small right central disc protrusion at L5-S1 in close proximity to the traveling right S1 nerve without impingement, and a small right foraminal endplate spur at L4-5.

Progress notes dated June 29, 2021 from Dr. Gregory Brebach, a Board-certified orthopedic surgeon, diagnosed other intervertebral disc degeneration of the lumbosacral region and lumbar radiculopathy, and noted that appellant reported injuring himself at work on November 25, 2020.

In August 20, 2021 progress notes, Dr. Brebach reiterated his above diagnoses and indicated that appellant has a broad-based right side disc protrusion at L5-S1 and had reached maximum medical improvement (MMI) from his injuries.

In an April 7, 2022 report, Dr. Brebach related that appellant reported injuring himself on November 25, 2020 when he lifted a package onto a cart at work, causing low back and right leg pain. He released appellant to full-duty work on December 15, 2020, however, appellant was reinjured on December 26, 2020 when appellant twisted his back and felt sharp pain while loading an 8- to 10-pound tray onto his cart. On January 25 and 27, 2021 appellant was required to walk through significant snowfall at work and developed back and right buttock pain. Dr. Brebach diagnosed lumbosacral disc protrusion and lumbosacral radiculopathy, noted that he examined appellant on June 29 and August 20, 2021 and found that appellant had reached MMI. He opined that the disc protrusion resulted from the combination of the November 25, 2020 lifting incident, the subsequent December 26, 2020 twisting incident, and the January 25 and 27, 2021 walking incidents. Dr. Brebach asserted that the November 25 and December 26, 2020 injuries caused inflammation and stress to the lumbar spine, making appellant more susceptible to injury. He noted that when appellant returned to work and walked in heavy snow on January 25 and 27, 2021 appellant put additional strain and pressure on his spine, which was still weak from the prior injury. Dr. Brebach indicated that age did not play a role in his condition as appellant had no previous back issues and the MRI scan results correlated with his right-side low back pain and right leg radiculopathy. He concluded that, with a reasonable degree of medical certainty, the repeated strain and stress to the lumbar spine and the significant pressure placed on the disc caused the disc protrusion at L5-S1.

By decision dated June 2, 2022, OWCP denied appellant's claim, finding that he had not submitted sufficient evidence to establish the claimed employment factors. Consequently, it found that he had not met the requirements to establish an injury as defined by FECA.

On June 6, 2022 appellant, through counsel, requested reconsideration of the June 2, 2022 decision and submitted a duplicate copy of Dr. Brebach's April 7, 2022 report.

By decision dated August 3, 2022, OWCP modified its June 2, 2022 decision to find that the evidence of record was sufficient to establish the implicated employment factors. The claim remained denied, however, because the medical evidence of record was insufficient to establish

causal relationship between appellant's diagnosed conditions and the accepted factors of his federal employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ has the burden of proof to establish the essential elements of his or her claim, including 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,⁷ 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.⁸ 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.⁹

To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee 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; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.¹⁰

To establish causal relationship, the employee must submit rationalized medical opinion evidence.¹¹ The opinion of the physician must be based on a complete factual and medical background of the employee, 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 factor(s) identified by the employee.¹² The weight of the medical evidence is 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.¹³

⁶ *Supra* note 2.

⁷ *F.H.*, Docket No.18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁸ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁹ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

¹⁰ *T.D.*, Docket No. 20-0921 (issued November 12, 2020); *M.S.*, Docket No. 18-1554 (issued February 8, 2019). See also *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹¹ *S.A.*, Docket No. 18-0399 (issued October 16, 2018); *Robert G. Morris*, 48 ECAB 238 (1996).

¹² *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *supra* note 10.

¹³ *D.R.*, Docket No. 19-0954 (issued October 25, 2019); *James Mack*, 43 ECAB 321 (1991).

ANALYSIS

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

In his April 7, 2022 report, Dr. Brebach diagnosed lumbosacral disc protrusion and lumbosacral radiculopathy and noted that appellant initially injured his back on November 25, 2020 when he lifted a package onto a cart at work, then subsequently reinjured his back on December 26, 2020 when he twisted while loading an 8- to 10-pound tray onto his cart. He indicated that on January 25 and 27, 2021 appellant returned to work and walked through significant snowfall, causing additional symptoms. Dr. Brebach opined that the diagnosed disc protrusion was causally related to and resulted from a combination of the detailed employment incidents. He explained that the November 25 and December 26, 2020 injuries caused inflammation and stress to the lumbar spine, making appellant susceptible to injury, such that, when appellant walked in heavy snow on January 25 and 27, 2021, appellant put additional repeated strain and stress on his lumbar spine and significant pressure on the disc, which was still weak from the prior injury, thereby causing the disc protrusion at L5-S1.

The Board finds that Dr. Brebach's April 7, 2022 report is sufficient to require further development of the medical evidence. Dr. Brebach's report provided a pathophysiological explanation as to how the accepted factors of employment caused the diagnosed lower back conditions. While his report is not completely rationalized to meet appellant's burden of proof to establish his claim, it raises an uncontroverted inference between his diagnosed medical conditions and the accepted factors of appellant's employment and is, therefore, sufficient to require further development of his claim.¹⁴

The Board notes that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While it is appellant's burden of proof to establish the claim, OWCP shares responsibility in the development of the evidence.¹⁵ It has an obligation to see that justice is done.¹⁶

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

¹⁴ *D.V.*, Docket No. 21-0383 (issued October 4, 2021); *K.S.*, Docket No. 19-0506 (issued July 23, 2019); *H.T.*, Docket No. 18-0979 (issued February 4, 2019); *D.W.*, Docket No. 17-1884 (issued November 8, 2018); *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

¹⁵ *Id.*

¹⁶ *Id.*

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 3, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 7, 2023
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