

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

M.D., Appellant)	
)	
and)	Docket No. 23-0411
)	Issued: September 11, 2023
U.S. POSTAL SERVICE, WILMETTE POST)	
OFFICE, Wilmette, IL, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 31, 2023 appellant filed a timely appeal from an October 6, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On September 9, 2020 appellant, then a 30-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging neck, back, and neurological conditions due to factors of his federal employment. He indicated that long hours, physically demanding and repetitive job duties

¹ 5 U.S.C. § 8101 *et seq.*

caused his medical conditions. Appellant noted that he first became aware of his conditions and their relation to his federal employment on December 12, 2019.

A work status note dated December 13, 2019 and signed by Daniel J. Sweeney, a chiropractic physician, indicated that appellant was being treated for low back and neck conditions and was experiencing daily pain. Appellant was allowed to return to full duty on December 14, 2019.

Appellant submitted a narrative statement dated August 31, 2020 as a supplement to his Form CA-2. He indicated that he had experienced neck and back pain since December 12, 2019. Appellant reiterated that 10 years of repetitive lifting, bending, carrying, stooping, twisting, and walking are the work duties that caused his conditions. He also indicated that he had no prior history of similar physical conditions.

In a letter dated September 9, 2020, the employing establishment controverted appellant's claim, contending that he had worked less than 10 years on the job and that the maximum weight he lifted was 70 pounds.

In a development letter dated September 11, 2020, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed to establish the claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

In a completed development questionnaire dated October 6, 2020, appellant reiterated his work duties of lifting mail and packages and his alleged history of neck and back conditions.

By decision dated November 9, 2020, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish a diagnosed medical condition in connection with the accepted employment factors. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On October 28, 2021 appellant, through then-counsel, requested reconsideration. In support of his reconsideration request, appellant submitted a treatment note from Dr. David Barnes, a family medicine osteopathic specialist, dated October 21, 2021. Dr. Barnes diagnosed cervical degenerative disc disease, cervical radiculopathy, cervical spondylosis with myelopathy, lumbar spondylosis, lumbar radiculopathy, bilateral sciatica, and aggravation of fibromyalgia. Dr. Barnes later included spasm of cervical paraspinal muscle in his list of diagnosed conditions. Dr. Barnes opined that appellant's repetitive and physically demanding work duties caused his conditions.

Dr. Barnes explained that the cervical degenerative disc disease was accelerated by appellant's repetitive and physically demanding duties placing extreme pressure on his spine, as this pressure caused the cervical disc to collapse and the resulting herniated disc to impinge on his spinal canal and surrounding nerves. The subsequent compression on appellant's nerve root led to cervical radiculopathy with the pain radiating in his upper extremities. Dr. Barnes noted that, while degenerative changes were natural over time, the level of damage to appellant's cervical spine was more than expected for appellant's age, weight, and height. He opined that appellant's

cervical degenerative disc disease and resulting cervical radiculopathy were caused by work-related duties.

Further, Dr. Barnes indicated that appellant's cervical spondylosis with myelopathy, which causes degenerative changes in the cervical spine, worsened with excessive pressure on appellant's cervical spine from the aforementioned work duties and led to additional damage to the hard and soft tissue of his spine. He again noted that the extent of damage to appellant's cervical spine from the compression and his symptomology are more than expected for someone of appellant's age, weight, and height. Dr. Barnes opined that appellant's cervical spondylosis with myelopathy was caused by the compression on his cervical spinal cord as a result of his work duties.

Regarding the lumbar spondylosis and subsequent development of lumbar radiculopathy, Dr. Barnes reiterated his explanation that appellant's repetitive and physically demanding work duties accelerated his conditions. The extreme pressure on his spine caused his lumbar disc to collapse and impinge on his spinal canal and surrounding nerves. The subsequent compression on his nerve root led to lumbar radiculopathy with the pain radiating in appellant's lower extremities. Dr. Barnes noted that, while degenerative changes were natural over time, the level of damage to appellant's cervical spine was more than expected for appellant's age, weight, and height. He opined that appellant's repetitive and physically demanding work duties caused the lumbar spondylosis and lumbar radiculopathy. Further, Dr. Barnes noted that lumbar spondylosis is a common cause of sciatica, indicating that appellant's symptoms of pain radiating down his legs and tingling in his feet is consistent with bilateral sciatica. He believed that this was also a result of appellant's work duties.

Lastly, Dr. Barnes explained that fibromyalgia, which causes soft tissue pain or myofascial pain, can result after a physical trauma and can be aggravated by physical or psychological stress. He believed that appellant's repetitive and physically demanding duties led to physical stress, which worsened his preexisting symptoms of musculoskeletal pain, fatigue, migraines, and cognitive issues. Dr. Barnes indicated that appellant's work duties caused the fibromyalgia over time. He indicated later in the report that the fibromyalgia was a preexisting condition aggravated by appellant's work duties.

On November 2, 2021 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a series of questions to Dr. Hythem P. Shadid, a Board-certified orthopedic surgeon, serving as second opinion physician, regarding the extent and nature of appellant's conditions.

In a January 23, 2022 report, Dr. Shadid reviewed the SOAF, appellant's history of injury, and medical course. He noted that appellant related pain from head to toe but could not localize the pain or provide a descriptive response. Dr. Shadid related that appellant sought care from a chiropractor which had not helped, but that appellant was not cooperative in providing more details regarding the nature of his injury, the origin of the symptoms, and what aggravated or relieved the pain. Dr. Shadid noted that appellant had been off work for two years. He also reviewed x-ray reports of even date of the cervical spine and lumbar spine. The cervical spine report showed a small anterior osteophyte off the interior endplate of C5.

Dr. Shadid answered the questions submitted by OWCP. He indicated that he was unable to identify any causally-connected diagnoses to appellant's job duties. Dr. Shadid explained that, while the x-rays and previous magnetic resonance imaging (MRI) scan of the cervical spine revealed degenerative changes in appellant's cervical spine, the lumbar spine was "relatively" unremarkable. Further, Dr. Shadid noted that degenerative changes were not causally connected to appellant's job duties, rather to age and genetics. There was also no evidence of any acute injuries or aggravations of these conditions.

Dr. Shadid noted that appellant's physical examination was unreliable due to his lack of cooperation. He found degenerative changes in both lumbar and cervical spines, but otherwise did not have any objective findings and noted the "subjective" nature of appellant's condition. Dr. Shadid indicated that, based on the objective findings or lack thereof, there was no need for further treatment. He further indicated that appellant was not physically disabled as of September 1, 2020 and found no evidence of a disabling neurological or musculoskeletal condition that would keep him from performing his duties.

OWCP additionally received a completed work capacity evaluation (Form OWCP-5c) dated January 17, 2022, wherein Dr. Shadid indicated that appellant was capable of working his usual job without restrictions.

On January 28, 2022 OWCP found that a conflict existed in the medical opinion evidence and referred appellant, the medical record, a SOAF, and a series of questions to Dr. Avi Bernstein, a Board-certified orthopedic surgeon, serving as an impartial medical examiner (IME), for resolution of the conflict in the medical opinion evidence.

In an April 25, 2022 report, Dr. Bernstein reviewed the SOAF, appellant's history of injury, and the medical evidence of record. He noted that appellant related his injury and treatment history and noted an injection in his cervical spine which did not bring improvement. Appellant's physical examination was indicated as normal, but appellant related low back pain and soreness throughout. Dr. Bernstein noted symptom magnification and exaggeration. He opined that, if the MRI scan findings were in keeping with the summary noted in the medical records, appellant did not suffer any injury "whatsoever" to his cervical spine as a result of work duties and that there would be no medical reason why appellant could not perform his duties without restriction. Dr. Bernstein further indicated that the findings described on the MRI scan could not explain appellant's subjective complaints. An addendum to the report dated April 28, 2022 from Dr. Bernstein indicated that appellant returned with imaging of his cervical and lumbar spine. The MRI scan dated September 2, 2020 of the lumbar spine was unremarkable. The MRI scan dated July 24, 2020 indicated degenerative changes, especially at the C5-6 level, and slight degenerative disc bulging from C3-6. Dr. Bernstein noted that the degenerative disc changes in the cervical spine were without any support for cervical myelopathy or cervical radiculopathy. He reiterated his opinion that appellant could work at full duty with no restriction and that he did not believe appellant had suffered an acute injury or repetitive use injury to his spine. Dr. Bernstein indicated that appellant was at maximum medical improvement (MMI) and had not suffered any permanent injuries.

OWCP additionally received a completed Form OWCP-5c dated April 28, 2022, wherein Dr. Bernstein indicated that appellant was capable of working his usual job without restriction.

By decision dated May 25, 2022, OWCP modified its November 9, 2020 decision to find that appellant had established diagnosed medical conditions in connection with the accepted employment factors. The claim remained denied, however, as the medical evidence of record was insufficient to establish causal relationship between the diagnosed conditions and the accepted employment factors. It accorded the special weight of the medical evidence to Dr. Bernstein's impartial medical opinion.

On August 22, 2022 appellant, through then-counsel, requested reconsideration. In support of his reconsideration request, appellant submitted an addendum to Dr. Barnes' report dated August 11, 2022. Dr. Barnes noted that he had been asked to comment on Dr. Shadid's and Dr. Bernstein's examination reports. He disagreed with their assessments and reiterated his belief that appellant's work duties, including the lifting of over 70 pounds and the repetitive sorting, bending, carrying, stooping, twisting, and walking over the course of 10 to 12 hours placed significant additional pressure on appellant's lumbar and cervical spine beyond normal wear and tear. Dr. Barnes indicated that the compression on appellant's cervical discs and pinching of the nerves, noted in the MRI scan as stenosis, also cause radicular pain, numbness, tingling, and weakness. He opined that appellant's subjective complaints were consistent with the diagnoses and objective findings. Dr. Barnes further disagreed with regard to appellant's work status, finding that he could not return to full duty.

By decision dated October 6, 2022, OWCP denied modification of its May 25, 2022 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA² 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, 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.³ 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.⁴

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (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

² *Id.*

³ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁴ *B.H.*, Docket No. 20-0777 (issued October 21, 2020); *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).

compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors by the claimant.⁵

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁶ The opinion of the physician must be based on a complete factual and medical background, 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.⁷ Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.⁸

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁹ The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁰ In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual and medical background, must be given special weight.¹¹

ANALYSIS

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

OWCP found a conflict in the medical opinion evidence between Dr. Barnes, appellant's treating physician, who opined that the factors of appellant's employment caused cervical degenerative disc disease, cervical radiculopathy, cervical spondylosis with myelopathy, lumbar

⁵ *S.H.*, Docket No. 22-0391 (issued June 29, 2022); *T.W.*, Docket No. 20-0767 (issued January 13, 2021); *L.D.*, Docket No. 19-1301 (issued January 29, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019).

⁶ *D.S.*, Docket No. 21-1388 (issued May 12, 2022); *I.J.*, Docket No. 19-1343 (issued February 26, 2020); *T.H.*, 59 ECAB 388 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

⁷ *D.S. id.*; *D.J.*, Docket No. 19-1301 (issued January 29, 2020).

⁸ *T.M.*, Docket No. 22-0220 (issued July 29, 2022); *S.S.*, Docket No. 18-1488 (issued March 11, 2019); *see also J.L.*, Docket No. 18-1804 (issued April 12, 2019).

⁹ 5 U.S.C. § 8123(a).

¹⁰ 20 C.F.R. § 10.321.

¹¹ *M.M.*, Docket No. 22-0037 (issued October 12, 2022); *C.E.*, Docket No. 19-1923 (issued March 30, 2021); *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.C.*, 58 ECAB 238 (2006); *David W. Pickett*, 54 ECAB 272 (2002).

spondylosis, lumbar radiculopathy, bilateral sciatica, and aggravation of fibromyalgia, Dr. Shadid, OWCP's second opinion physician, who opined that he was unable to identify any causally connected diagnoses to appellant's job duties. Pursuant to section 8123(a) of FECA, OWCP properly determined that a conflict existed between Dr. Barnes and Dr. Shadid regarding whether appellant's conditions were causally related to his accepted employment factors. It referred appellant to Dr. Bernstein for an impartial medical examination.

In an April 25, 2022 report, Dr. Bernstein reviewed the SOAF, history of injury, and medical record. He related that appellant's physical examination was normal, but appellant related low back pain and soreness throughout. Dr. Bernstein noted symptom magnification and exaggeration. In an addendum to the report dated April 28, 2022, he indicated that he had reviewed MRI scans of appellant's cervical and lumbar spine. Dr. Bernstein noted that appellant's MRI scans did not explain his subjective complaints. The MRI scan dated September 2, 2020 of appellant's lumbar spine was unremarkable. The MRI scan dated July 24, 2020 indicated degenerative changes, especially at the C5-6 level, and slight degenerative disc bulging from C3-6. Dr. Bernstein noted that the degenerative disc changes in the cervical spine were without any support for cervical myelopathy or cervical radiculopathy. He reiterated his opinion that appellant could work at full duty with no restriction and that he did not believe appellant had suffered an acute injury or repetitive use injury to his spine. Dr. Bernstein indicated that appellant was at MMI and had not suffered any permanent injuries.

The Board finds that Dr. Bernstein's report represents the special weight of the medical evidence with regard to the issue of whether appellant's diagnosed conditions were causally related to his accepted employment factors. The Board finds that Dr. Bernstein had full knowledge of the relevant facts and evaluated the course of his condition. Dr. Bernstein is a specialist in the appropriate field. His opinion is based on proper factual and medical history and his report contained a detailed summary of this history. Dr. Bernstein addressed the medical records and offered his own examination findings to reach a reasoned conclusion regarding appellant's diagnosed conditions. As the IME, his opinion regarding whether appellant's diagnosed conditions were causally related to his accepted employment factors is entitled to special weight.

In an addendum dated August 11, 2022, Dr. Barnes disagreed with the assessments of Dr. Shadid and Dr. Bernstein and reiterated his belief that appellant's work duties placed significant additional pressure on appellant's lumbar and cervical spine beyond normal wear and tear. He opined that appellant's subjective complaints were consistent with the diagnoses and objective findings. Dr. Barnes further disagreed on appellant's work status and noted he could not return at full duty. However, as he was on one side of the conflict, his subsequent report is insufficient to create a new conflict in medical opinion or to overcome the special weight properly accorded to the IME.¹²

As the medical evidence of record is insufficient to establish a medical condition causally related to the accepted factors of appellant's employment, the Board finds that appellant has not met his burden of proof.

¹² A.L. Docket No. 20-0658 (issued October 5, 2022).

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 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 a medical condition causally related to the accepted factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board