United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 07-1799**
	)	**Issued February 1, 2008**
DEPARTMENT OF DEFENSE, MCCORD AIR FORCE BASE, WA, Employer	)	

Appearances:
Howard L. Graham, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 26, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 9, 2007, which denied his claim for a lumbar condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he developed a lumbar condition due to factors of his federal employment.

FACTUAL HISTORY

On September 20, 2005 appellant, then a 50-year-old store worker leader, filed a traumatic injury claim alleging that he injured his back on July 2, 2005 while lifting watermelons

and placing them in a bin.[1] He indicated that the injury was to the top of his spine and also to his low back. Appellant stopped work on July 11, 2005 and remained off work until his retirement on December 31, 2005.

Appellant submitted reports from Dr. Marvin Y. Hayami, a Board-certified internist, dated July 15 to August 11, 2005, who noted that appellant had been treated since July 12, 2005 for back pain that occurred after he attempted to pick up a trailer hitch at work. Dr. Hayami noted examination findings of muscle spasm and decreased range of motion of the lumbar region. He advised that appellant worked in the produce department of the employing establishment and his job duties required him to lift up to 60 pounds. In a July 22, 2005 note, Dr. John R. Replogle, a Board-certified internist, advised that appellant would be excused from work on August 1, 2005.

Appellant came under the treatment of Dr. Kristie J. Lowry, a Board-certified internist, who noted in duty status reports dated September 8 and October 4, 2005, that he had a bulging disc at L5-S1 with radiculopathy but would be able to work light duty subject to restrictions. In subsequent reports, Dr. Lowry advised that appellant was totally disabled as of August 29 to November 15, 2005 due to a low back injury and extensive spinal surgery. In a September 1, 2005 report, she obtained a history that appellant injured his back when bending over at home and was diagnosed with a disc bulge at L5-S1. Dr. Lowry advised that appellant had osteoarthritis of the spine which was caused by repetitive trauma from heavy lifting over a period of years. On September 23, 2005 she diagnosed severe cervical spinal stenosis with spinal cord impingement that would require surgery. Appellant submitted an operative report from Dr. Brett A. Schlifka, an osteopath, dated September 29, 2005, who performed an anterior cervical discectomy at C5-6 and C6-7 and diagnosed cervical myeloradiculopathy secondary to a herniated nucleus pulposus at C5-6 and C6-7.

In a letter dated October 25, 2005, the Office advised appellant of the evidence needed to establish his claim.

Appellant submitted a statement noting that, while at work on July 2, 2005, he continuously lifted and carried watermelons from one bin to another in preparation for a produce sale. On July 22, 2005 Dr. Replogle noted that appellant injured his back two weeks prior while lifting a trailer onto a hitch. He stated that appellant reported developing radiating back pain with numbness and diagnosed lower back pain with likely nerve root impingement at L5. In reports dated August 1 to 29, 2005, Dr. Lowry noted that appellant reported injuring his back in June 2005 when he dropped a trailer hitch. On August 11, 2005 she noted that appellant worked in the produce section for 21 years and lifted 50- to 60-pound packages four hours per day. Dr. Lowry diagnosed low back pain and advised that appellant was totally disabled. On August 29, 2005 she saw appellant for severe persistent low back pain. Dr. Lowry noted that appellant injured his back on July 11, 2005 while bending over to lift an item and felt a "popping" and severe back pain. She observed that appellant worked as a produce stocker for the past 23 years and had periodic low back pain. On September 8, 2005 Dr. Lowry noted appellant's multiple visits for low back pain since July 15, 2005.

[1] Appellant also filed a CA-2, notice of occupational disease, alleging that on July 2, 2005 he was lifting watermelons and injured his back. This claim was not signed by him but is part of the case record.

Treatment notes from Dr. Schlifka dated September 14 to 16, 2005, noted that appellant was a commissary manager who felt a "pop" in his back on July 4, 2004. Thereafter, he experienced diffuse lumbar pain. Dr. Schlifka diagnosed cervical myelopathy and lumbar radiculopathy. On September 16, 2005 he noted that a magnetic resonance imaging (MRI) scan of the lumbar spine revealed cord compression at C5-6 and C6-7 and diagnosed cervical myeloradiculopathy and recommended a spinal fusion. In an operative report dated September 29, 2005, Dr. Schlifka performed an anterior cervical discectomy at C5-6 and C6-7 and diagnosed cervical myeloradiculopathy secondary to a herniated nucleus pulposus at C5-6 and C6-7. In reports dated October 12 and October 26, 2005, he advised that appellant was progressing well postoperatively.

In a decision dated December 1, 2005, the Office denied appellant's claim, finding the evidence insufficient to establish that he experienced the claimed incident on July 2, 2005, as alleged.

In a letter dated December 22, 2005, appellant requested an oral hearing that was held on July 26, 2006. He testified that he worked in the produce department of the employing establishment for 20 years and was responsible for stocking produce and unloading delivery trucks. Appellant indicated that, on July 2, 2005, he was transferring 700-pound pallets of watermelons into a bin for the period June 30 to July 2, 2005 and experienced severe low back pain. He testified that he assisted his family member with hitching a trailer the following weekend. Appellant indicated that he sought medical treatment but did not relate his pain, at that time, to his prior work activities.

On October 2, 2006 the hearing representative set aside the December 1, 2005 decision and remanded the case for further development. The hearing representative determined that there was *prima facie* evidence of causal relationship between the diagnosed osteoarthritis and disc bulge at L5-S1 and appellant's work duties which required further development.[2]

On January 8, 2007 the Office referred appellant for a second opinion to Dr. David S. Smith, a Board-certified orthopedic surgeon, to determine whether he developed a low back condition as a result of his work duties. The Office provided Dr. Smith with appellant's medical records, a statement of accepted facts as well as a detailed description of his employment duties.

In a February 14, 2007 report, Dr. Smith reviewed the records and the medical history. He noted findings upon physical examination of limited range of motion of the back on flexion, extension, lateral bending and rotation with mild low back discomfort and some give-way weakness with negative straight leg raises. Dr. Smith diagnosed cervical myeloradiculopathy, status post anterior cervical discectomy at C5 to C7 and fusion with hardware and nonspecific low back pain. He opined that appellant did not develop a specific work-related injury or an occupational disease. Dr. Smith indicated that the medical records did not support an injury at work despite appellant's claims and noted that he did not believe a lifting injury would cause

[2] The hearing representative found that the evidence supported that appellant experienced an occupational illness from moving watermelons for a produce sale for each day from June 30 to July 2, 2005. The hearing representative further advised that appellant's claim would be developed as an occupational disease.

acute cervical myeloradiculopathy. He advised that no further treatment was indicated for the residuals of the above diagnoses and recommended conservative treatment.

Appellant submitted an MRI scan of the lumbar spine dated August 29, 2006, which revealed multilevel degenerative disc disease and degenerative joint disease. On October 31, 2006 Dr. Lowry indicated that appellant underwent a stress test that revealed multilevel degenerative changes. On November 16, 2006 she advised that appellant underwent extensive treatment for diffuse osteoarthritis and disc bulges in the cervical and lumbar area. Dr. Lowry indicated that appellant sustained an injury on July 4, 2005 when lifting a heavy object and has been disabled since. She noted that appellant initially presented with low back pain with lower extremity weakness due to a disc bulge at L5-S1 but was found to have facet arthropathy at L1-2, L2-3, L3-4 and L4-5 that contributed to his chronic low back pain. Appellant also underwent an evaluation for progressive right arm numbness and pain and was found to have severe C5-6 and C6-7 cervical spinal stenosis with spinal cord impingement requiring spinal surgery, including a discectomy and spinal fusion, at C5 to C7. Dr. Lowry opined that spinal MRI scan findings included diffuse osteoarthritis and disc bulges with spinal impingement and were occupationally related. She indicated that this condition was a well-described phenomenon in literature in which compressive, torsional, pulling and angular movements could result in soft tissue injuries that increased the development of osteoarthritis. Dr. Lowry opined that appellant's primary job-related activity for the past 20 years was lifting and moving of agricultural goods which placed a fair amount of strain on his back.

On February 28, 2007 the Office requested clarification from Dr. Smith. It asked that he diagnose all of appellant's low back conditions and address whether any diagnoses were caused or aggravated by moving watermelons from June 30 to July 2, 2005. In a supplemental report dated March 9, 2007, Dr. Smith diagnosed nonspecific low back pain. He noted that appellant's examination was essentially normal without radiculopathy despite his various complaints. Dr. Smith indicated that the MRI scan revealed degenerative changes, but asserted those changes were consistent with age and not the cause of his symptoms. He opined that appellant's diagnoses was not caused, aggravated, accelerated or precipitated by his moving watermelons from the lower bin to an upper bin from June 30 to July 2, 2005.

In a decision dated April 9, 2007, the Office denied appellant's claim on the grounds that the weight of the evidence as established by the Office referral physician did not demonstrate that appellant developed the diagnosed conditions as a result of his employment duties.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or his claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that the injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. 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.[3]

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) 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 employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a 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.[4]

ANALYSIS

On September 20, 2005 appellant filed a claim alleging that he developed a back condition while performing his produce store worker duties. The Office denied appellant's claim finding that Dr. Smith's reports did not demonstrate that he developed any diagnosed conditions as a result of his employment duties.

The Board finds that there is a conflict in medical opinion between Dr. Smith, the Office referral physician, and Dr. Lowry, appellant's treating physician, both of whom are Board-certified specialists in their respective fields.

Dr. Smith diagnosed cervical myeloradiculopathy, status post anterior cervical discectomy at C5 to C7, fusion with hardware and nonspecific low back pain. He opined that the activities of appellant's employment duties would not have caused his low back conditions and did not believe appellant developed a specific work-related injury or an occupational disease. Dr. Smith further opined that the degenerative changes on the MRI scan were consistent with age and not the cause of appellant's symptoms. By contrast, Dr. Lowry, a treating physician, noted that appellant's job duties for the past 20 years required heavy lifting and moving of agricultural goods and these activities contributed to appellant's complaints of low back pain. She noted that the compressive, torsional, pulling and angular movements of appellant's job duties resulted in a soft tissue injury that increased the development of osteoarthritis. Dr. Lowry opined that the findings of the MRI scan of diffuse osteoarthritis and disc bulges with spinal impingement were occupationally related. She has consistently supported that appellant developed diffuse

[3] *Gary J. Watling*, 52 ECAB 357 (2001).

[4] *Solomon Polen*, 51 ECAB 341 (2000).

osteoarthritis and disc bulges with spinal impingement while performing his produce leader duties, while Dr. Smith found no objective orthopedic findings and did not believe that appellant developed a specific work-related injury or an occupational disease but believed his degenerative changes were related to age. The Board, therefore, finds that a conflict in medical opinion has been created.

Section 8123 of the Act[5] provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, the Office shall appoint a third physician who shall make an examination.[6]

The case, therefore, requires remand for an impartial medical specialist to resolve the conflict in the medical opinions. On remand, the Office should refer the case record and a statement of accepted facts to an appropriate physician to reevaluate the evidence pursuant to section 8123(a) of the Act. Following this and such further development as the Office deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8123(a); *see also Charles S. Hamilton*, 52 ECAB 110 (2000); *Leonard M. Burger*, 51 ECAB 369 (2000); *Shirley L. Steib*, 46 ECAB 39 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 9, 2007 is set aside and the case remanded to the Office for further action consistent with this decision.

Issued: February 1, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board