United States Department of Labor
Employees' Compensation Appeals Board

L.H., Appellant **and** **DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Tacoma, WA, Employer**	)	**Docket No. 09-1310** **Issued: February 16, 2010**

Appearances:
Alan J. Shapiro, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 22, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 30, 2009 merit decision denying his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an injury causally related to factors of his federal employment.

FACTUAL HISTORY

This case is before the Board for the second time. In a decision dated May 19, 2008, the Board affirmed the Office's March 7, 2007 decision denying his January 29, 2007 occupational disease claim, in which he alleged that he developed a lower back herniated disc and groin hernia as a result of his duties as a nursing assistant, which included washing, changing and dressing patients and lifting them into wheelchairs. The Board found that there was no probative,

rationalized medical evidence of record establishing how employment factors caused or aggravated a diagnosed condition. The Board also affirmed the Office's July 27, 2007 nonmerit decision denying appellant's request for reconsideration.[1] The facts and the law contained in the Board's May 19, 2008 decision are incorporated herein by reference.

On July 25, 2008 appellant, through his representative, submitted a request for reconsideration. In support of his request, he provided a September 18, 2007 report from Dr. Steven Litsky, a Board-certified physiatrist, who noted that appellant's duties as a nursing assistant involved patient care and lifting requirements of up to 150 pounds. Dr. Litsky indicated that appellant had injured his back on January 5, 2005, when he tried to catch a patient who had fallen, and that his pain continued to increase over the next two years and now radiated to the right lower extremity. Appellant's pain was exacerbated by lifting, carrying, twisting, sitting, standing, walking or stair climbing. An August 1, 2007 magnetic resonance imaging (MRI) scan showed degenerative disc disease at the L4-5 level, right more severe than the left, neural foraminal stenosis, caused by a circumferential disc bulge, left facet hypertrophy, some mild dual decompression and a lipoma. Dr. Litsky's neurological examination revealed slightly decreased sensation on the right to pinprick and light touch. Cranial nerves 2 to 12 were intact bilaterally, with no focal deficit. Coordination was intact bilaterally. Reflexes were 2/4 at the biceps, triceps, and left patella, and 1/4 at both Achilles. Forward range of motion was to 25 degrees, forward flexion was 15 degrees and extension was only a few degrees. Straight leg raises were negative on the left, but positive on the right. Appellant exhibited an antalgic gait, favoring the right side. There was a paraspinal tendency going into the sciatic notch area on the left. Dr. Litsky diagnosed: chronic lower back pain with probable right L4-5 radiculopathy; degenerative disc disease, more severe at the L4-5 level; lumbar stenosis; facet arthropathy and vocational dysfunction. Based on his examination findings, the clinical history and MRI scan results, he opined that appellant's condition was due to his occupational injury. In an accompanying work capacity evaluation, Dr. Litsky restricted appellant to light duty two days per week. He stated that appellant was unable to meet the lifting requirements of his position.

Appellant submitted a September 23, 2008 report in which Dr. Thomas J. Young, a chiropractor, diagnosed long-standing degenerative disc disease and degenerative joint disease of the lower lumbar spine, with overt disc failure secondary to a January 5, 2005 work injury. Dr. Young opined that the degenerative disc changes to appellant's lower lumbar spine preexisted the January 5, 2005 work injury, and that he had likely undergone multiple injuries contributing to his condition. In an accompanying work capacity evaluation, he indicated that appellant was unable to work. On December 19, 2008 Dr. Young opined that appellant was permanently disabled. He stated that appellant's preexisting lumbar degenerative condition was merely exacerbated by heavy lifting, and that the January 2005 work incident was the "provocative event."

Appellant submitted a November 21, 2008 report of a functional capacity evaluation from Marsha K. Hiller, a physical therapist, who opined that he was unable to work as a nursing assistant, as he was unable to lift more than five pounds. Noting that the date of injury was

[1] Docket No. 08-159 (issued May 19, 2008).

January 5, 2005, she stated that appellant had a three-year history with the military, where he performed a lot of repetitive lifting and carrying activities.

The record contains largely illegible physicians' notes from the Army medical clinic from January 22 to August 29, 1980, which reflect appellant's complaints of back pain. The record also contains a report of a December 4, 2008 x-ray of the lumbar spine and a December 12, 2008 report of an MRI scan of the lumbar spine.

Appellant submitted a report dated March 11, 2009 from Dr. Richard Wohns, a Board-certified neurological surgeon, who related appellant's report that his low back pain had begun in the military as a result of heavy lifting requirements. On January 5, 2005 appellant felt a pop in his back while helping a patient who was falling. He advised that his pain had progressed since that time and was aggravated by activities such as sitting, standing, walking, lifting and bending. Dr. Wohns diagnosed: right proximal medial lower extremity pain; severe neural foraminal narrowing bilaterally at the L4-5 disc space; posterior disc bulge with an annular tear producing mild dual compression at L4-5; lumbar degenerative disc disease; low back pain, lumbar stenosis and lumbar herniated disc.

By decision dated March 30, 2009, the Office denied modification of its previous decision, finding that there was no evidence of a diagnosed condition that was causally related to factors originally identified by appellant. It noted that the alleged January 5, 2005 incident was not accepted as factual and that a claim for traumatic injury would not be considered under this claim.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim, including the fact that an injury was sustained in the performance of duty as alleged,[3] and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[4]

An occupational disease or illness means a condition produced by the work environment over a period longer than a single workday or shift.[5] 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) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and

[2] 5 U.S.C. §§ 8101-8193.

[3] *Joseph W. Kripp,* 55 ECAB 121 (2003); *see also Leon Thomas*, 52 ECAB 202, 203 (2001). "When an employee claims that he sustained injury in the performance of duty he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury." *See also* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. § 10.5(q) and (ee) (2002) ("Occupational disease or Illness" and "Traumatic injury" defined).

[4] *Dennis M. Mascarenas*, 49 ECAB 215, 217 (1997).

[5] 20 C.F.R. § 10.5(q).

(3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[6] The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence, *i.e.*, medical evidence presenting a physician's well-reasoned opinion on how the established factor of employment caused or contributed to claimant's diagnosed condition. To be of probative value, 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.[7] The Board has held that the mere diagnosis of pain does not constitute a basis for the payment of compensation.[8]

Additionally, the Board has consistently held that unsigned medical reports are of no probative value[9] and that any medical evidence upon which the Office relies to resolve an issue must be in writing and signed by a qualified physician.[10] Lay individuals such as physician assistants, nurse practitioners and social workers are not competent to render a medical opinion.[11]

ANALYSIS

The Board finds that this case is not in posture for decision regarding whether appellant sustained an injury in the performance of duty.

An employee who claims benefits under the Act has the burden of establishing the essential elements of his or her claim. The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.[12] However, it is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[13]

---

[6] *Michael R. Shaffer,* 55 ECAB 386 (2004). *See also Solomon Polen*, 51 ECAB 341, 343 (2000).

[7] *Leslie C. Moore,* 52 ECAB 132, 134 (2000); *see also Ern Reynolds*, 45 ECAB 690, 695 (1994).

[8] *Robert Broome*, 55 ECAB 339, 342 (2004).

[9] *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[10] *James A. Long*, 40 ECAB 538, 541 (1989).

[11] *Janet L. Terry*, 53 ECAB 570 (2002).

[12] *See Virginia Richard*, *claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); *see also Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

[13] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard*, *supra* note 12; *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

Following the Board's May 19, 2008 decision, appellant submitted additional medical evidence. In his September 18, 2007 report, Dr. Litsky provided a history of injury and treatment, detailed examination findings and a definitive diagnosis, which included degenerative disc disease and lumbar stenosis. His report reflected an understanding of appellant's duties as a nursing assistant, which involved patient care and lifting requirements of up to 150 pounds. Noting that appellant had injured his back on January 5, 2005, when he tried to catch a patient who had fallen, Dr. Litsky stated that his pain continued to increase over the next two years, and now radiated to the right lower extremity. Appellant's pain was exacerbated by lifting, carrying, twisting, sitting, standing, walking or stair climbing. Based on his examination findings, the clinical history and MRI scan results, he opined that appellant's condition was due to his occupational injury. While Dr. Litsky's report is not completely rationalized, it strongly supports appellant's claim that he sustained a lumbar condition as a result of his employment activities.

Dr. Wohns noted that appellant felt a pop in his back when helping a patient who was falling January 5, 2005, and that his pain had progressed since that time and was aggravated by activities such as sitting, standing, walking, lifting and bending. He diagnosed: right proximal medial lower extremity pain; severe neural foraminal narrowing bilaterally at the L4-5 disc space; posterior disc bulge with an annular tear producing mild dual compression at L4-5; lumbar degenerative disc disease; low back pain, lumbar stenosis and lumbar herniated disc. Dr. Wohns' report does not contain an opinion as to the cause of appellant's condition and, therefore, is of limited probative value.[14] However, it is consistent with appellant's claim that he sustained a back condition due to factors of his federal employment.

The remaining medical evidence submitted in support of appellant's request consists of 1980 illegible physicians' notes from the Army medical clinic; a November 21, 2008 report of a functional capacity evaluation from Ms. Hiller, a physical therapist, and reports dated September 23 and December 19, 2008 from Dr. Young, a chiropractor. While these notes do not constitute competent medical evidence, they corroborate appellant's claim.[15]

The Office found that there was no evidence of a diagnosed condition that was causally related to factors originally identified by appellant, namely washing, changing and dressing patients and lifting them into wheelchairs. It further stated that the alleged January 5, 2005 incident was not accepted as factual, and that a claim for traumatic injury would not be considered under this claim. The Board finds, however, that Dr. Litsky's report does support a

---

[14] Medical evidence which does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, 50 ECAB 313 (1999).

[15] A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician under section 8101(2) of the Act, which provides: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." Therefore, the November 21, 2008 physical therapist's report lacks probative value. Section 8101(2) of the Act further provides: "The term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist, and subject to regulation by the secretary." As Dr. Young did not diagnose subluxation by x-ray, he is not considered a "physician" under the Act. Illegible physicians' progress notes, lacking proper identification, also cannot be considered as probative evidence. *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

causal relationship between appellant's diagnosed conditions and those work factors identified by appellant. Dr. Litsky did not state that appellant's diagnosed conditions were due entirely to the January 5, 2005 work incident. His discussion of appellant's lifting requirements and other activities which exacerbated his condition, generally supports that the January 5, 2005 incident was merely a significant event, in a series of events, which caused appellant's current back condition. The fact that appellant has recently identified the January 5, 2005 incident as an additional event contributing to his claimed condition, does not preclude its consideration by the Office or the Board.[16]

The Board notes that, while none of the reports of appellant's attending physicians is completely rationalized, they are consistent in indicating that he sustained an employment-related low back condition, and are not contradicted by any substantial medical or factual evidence of record. While the reports are not sufficient to meet his burden of proof to establish his claim, they raise an uncontroverted inference between appellant's claimed conditions and the identified employment factors, and are sufficient to require the Office to further develop the medical evidence and the case record.[17]

On remand the Office should prepare a statement of accepted facts which includes a detailed employment history, job descriptions for each position held, and specific functions performed by appellant in each position. It should submit the statement of accepted facts to appellant's treating physician, or to a second opinion examiner, in order to obtain a rationalized opinion as to whether his current condition is causally related to factors of his employment, either directly or through aggravation, precipitation or acceleration.

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether appellant sustained an injury in the performance of duty.

[16] The Board notes that the appellant's claim is not necessarily undermined by the fact that he had a preexisting lumbar degenerative condition. *See supra* note 6 and accompanying text. Appellant must, however, submit medical evidence establishing that the diagnosed condition is causally related to the identified employment factors, either directly or through aggravation, precipitation or acceleration.

[17] *See Virginia Richard, supra* note 12; *see also Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: February 16, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board