United States Department of Labor
Employees' Compensation Appeals Board

TERRANCE J. FREIBURGER, Appellant	)	
and	)	**Docket No. 04-2165**
	)	**Issued: February 2, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Dubuque, IA, Employer	)	

Appearances:
Stephen J. Juergens, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 2, 2004 appellant filed a timely appeal of the May 8, 2004 merit decision of the Office of Workers' Compensation Programs, which denied his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty.

FACTUAL HISTORY

On November 11, 2002 appellant, then a 55-year-old letter carrier, filed an occupational disease claim alleging that his employment duties aggravated his upper back on the left side. He identified January 12, 2002 as the date he first became aware of his condition. Appellant stated that the aggravation became more pronounced after the employing establishment adjusted his mail route on January 5, 2002. The route adjustment allegedly required him to walk longer distances while carrying heavier loads. In an attached statement, appellant indicated that the

increased physical demands of his route also severely aggravated his lower back where he had had six surgeries between 1988 and 1992. He did not stop working and he continued to perform his regular duties.

Dr. Stephen E. Pierotti, a Board-certified orthopedic surgeon, examined appellant on May 22, 2002 for complaints of low back and upper back pain. He noted that on January 5, 2002 he was assigned a longer route with a larger volume of mail. Dr. Pierotti also noted that appellant had six prior back operations involving L4-5 and L5-S1, the last of which occurred in 1992. Although he had significant improvement with his fusion surgery, appellant continued to experience intermittent back pain since 1992. He currently complained of a lot of back pain, but reported no leg symptoms at all. Dr. Pierotti also noted that appellant continued to work, but he reportedly hurt more at the end of the day when he carried heavy loads. Physical examination revealed limited forward flexion, a little tenderness in the paraspinous muscles, no spasms and appellant was able to bend about 60 degrees at the waist. X-rays of the lumbar spine showed a solid fusion from L4 to the sacrum and there were no significant signs of arthritis of the disc space. Dr. Pierotti stated that appellant's symptoms were consistent with chronic back symptoms he previously had and it seemed to be exacerbated somewhat because he was carrying a heavier mail route. He further stated that it was somewhat to be expected because he had multiple surgeries in the past.

Dr. Pierotti next examined appellant on November 1, 2002 at which time he reported complaints of some upper back pain and no low back pain. Appellant reported that his route was longer and the change had created more stress for him and caused quite a bit of pain in the upper back. He cut back on overtime and noted that when he had time off or long weekends the pain significantly improved. When appellant was on jury duty during the summer he reportedly had no pain. Physical examination revealed tenderness on the medial border of the scapular muscle, no midline tenderness of the spine, full active motion of the shoulder and good strength. Dr. Pierotti diagnosed overuse syndrome secondary to work; specifically the carrying. He recommended physical therapy to strengthen appellant's muscles. Dr. Pierotti stated that it was clear that rest helped and it would be nice if appellant did not have to do the long routes he described and heavy carrying. He also indicated that, if appellant's route could be broken up in some way, he would do much better.

In a November 18, 2002 report, Dr. Pierotti diagnosed overuse syndrome and myofascial pain secondary to overuse syndrome in the upper back. He noted that appellant's ongoing treatment would consist of physical therapy for strengthening. Dr. Pierotti also stated that his work aggravated his underlying condition and caused further problems.

On December 17, 2002 the Office advised appellant of the need for additional factual and medical information. The Office was particularly interested in obtaining information regarding his six prior back surgeries. Additionally, the Office requested that appellant's treating physician provide a more definitive diagnosis, addressing whether the underlying back condition changed or materially worsened as a result of work activities.

The Office received medical records dating back to August 1966 concerning appellant's low back condition. On January 15, 1988 Dr. Julian G. Nemmers, a Board-certified orthopedic surgeon, began treating him for a ruptured disc he suffered on December 20, 1987 when he fell

off a horse. He performed six surgical procedures on appellant's low back between 1988 and 1992. Dr. Nemmers first operated on him on January 27, 1988 when he excised a ruptured disc at L5-S1. He repeated this procedure on June 30, 1989 and again on April 13, 1990.[1] Additionally, Dr. Nemmers excised an extruded fragment of the L4 disc on December 6, 1991.[2] Appellant suffered an infection from the December 6, 1991 lumbar incision so Dr. Nemmers debrided the wound on December 18, 1991. The sixth and final surgical procedure occurred on November 2, 1992 when Dr. Nemmers performed a lateral lumbar arthrodesis from L4 to the sacrum. In addition to his various operative reports, the Office also received Dr. Nemmers' extensive treatment records covering the period January 15, 1988 to January 4, 1994.

Regarding appellant's current back condition, the Office received additional medical reports from Dr. Pierotti. In a December 13, 2002 report, he noted continued improvement. He stated that physical therapy had helped appellant and he was to continue with his home exercise program. Dr. Pierotti reported a normal physical examination and advised that he no longer needed to see appellant.

Dr. Pierotti's December 27, 2002 report explained that appellant suffered from upper back pain due to carrying heavy loads of mail. He further stated that this had slightly worsened his condition, but he responded to physical therapy and strengthening.

On January 10, 2003 Dr. Pierotti reported that appellant returned with complaints of more pain in his upper back. He noted that the pain was confined to his upper back and there was no pain in the arms, low back and legs. Appellant complained of sharp pains going out to the right side of the upper chest, which were made worse by carrying some things at work. On physical examination he identified the area of the scapula as the source of his pain, which Dr. Pierotti indicated was no different than his prior complaints. The remainder of the physical examination was noted to be unremarkable. Dr. Pierotti surmised that appellant's condition was muscular in nature, but he could not rule out an underlying bony pathology. He recommended that appellant obtain a whole body bone scan. Dr. Pierotti further stated that, if the results of the bone scan were normal, he would recommend that appellant see a neurologist.

Dr. Pierotti examined appellant again on January 31, 2003. He reportedly injured himself at work on January 28, 2003 while squatting to put a tray away. Appellant stated that he felt a pop in his back. He went to the emergency room the following morning with complaints of severe pain and he received a prescription for muscle relaxants and ibuprofen. When Dr. Pierotti examined appellant a few days after his injury, appellant reported he was much better. Dr. Pierotti's physical examination revealed that he was comfortable and he appeared to be in no distress. He also noted that appellant was not tender, had good movement and he could bend over. X-rays of the lumbar spine showed a solid L4-5 and L5-S1 fusion. Dr. Pierotti stated that he believed that this was just more muscular pain and he advised appellant to exercise and return to work.

[1] Dr. Nemmers' treatment records indicated that appellant further injured his back on April 4, 1989 when a car rolled over his foot. He also reported that he fell on a snow covered step while working on February 15, 1990.

[2] Appellant reportedly injured his back in November 1991, while placing a suitcase in a car.

Appellant also submitted a January 13, 2003 report from his chiropractor, Dr. James A. Sullivan, who stated that he presented with symptoms of chronic upper back pain on January 21, 2002. He noted that appellant attributed his condition to carrying a heavy mail load beginning January 2002. Dr. Sullivan explained that a March 4, 2002 x-ray showed mild degenerative changes in both the cervical and thoracic spine. He diagnosed chronic myofascial pain syndrome, which was exacerbated by appellant's working conditions. Dr. Sullivan also stated that, although appellant gained relief from adjustments, his symptoms returned with the heavy carrying he performed at work.

In a decision dated March 4, 2003, the Office denied appellant's claim, finding that he failed to establish that he sustained an injury in the performance of duty.[3]

Appellant requested reconsideration on February 26, 2004. He submitted a February 18, 2004 letter from Dr. Pierotti who stated that he had been treating appellant for complaints of upper back pain related to his letter carrying job. He diagnosed myofascial syndrome due to appellant's work. Dr. Pierotti further stated that he could not find any factors that contributed to his pain other than his job.

In a report dated February 17, 2004, Dr. Patrick R. Sterrett, a Board-certified neurologist, stated that he examined appellant on March 19, 2003 for complaints of chronic mid thoracic pain. He noted that he had a normal bone scan and his examination was consistent with myofascial pain in the mid thoracic region from T4 to T8. Dr. Sterrett also indicated that March 21, 2003 x-rays of the thoracic spine were normal and cervical spine x-rays showed very mild degenerative changes at C3-4 and C4-5. He diagnosed post-traumatic myofascial mid thoracic pain and spasms as a result of the posture in which appellant carried his mail.

Dr. John P. Viner, a Board-certified internist, reported on February 18, 2004 that appellant had been his patient the past 12 years, during which time he received treatment for hypertension, hyperlipidemia and chronic lumbar pain. He stated that appellant had been admitted to the hospital on March 4, 2002 for chest pain caused by cervical radicular pressure. A follow up appointment on March 21, 2002 showed improvement with appellant's left arm pain. However, on May 9, 2002 Dr. Viner noted that there was still intermittent pain in the upper back. At that time, he recalled noting that appellant's thoracic pain was probably from carrying heavy bundles and was likely the cause of his March 2002 chest pain. On October 24, 2002 Dr. Viner noted that his upper back pinched nerve was still bothering him and he referred appellant for treatment with Dr. Pierotti.

By decision dated May 28, 2004, the Office denied modification of the March 4, 2003 decision.

[3] On March 17, 2003 the Office received an undated statement from appellant in response to its December 17, 2002 development letter. He described his recreational activities, prior injuries to his right wrist and hand, and his prior back surgeries. Appellant also described the employment duties he believed contributed to his current back condition.

LEGAL PRECEDENT

A claimant seeking benefits under the Federal Employees' Compensation Act[4] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence, including that any specific condition or disability for work for which he claims compensation is causally related to the employment injury.[5]

In an occupational disease claim, to establish that an injury was sustained in the performance of duty, 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 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 diagnosed condition is causally related to the employment factors identified by the claimant.[6]

ANALYSIS

Appellant's treating physician, Dr. Pierotti, diagnosed overuse syndrome and myofascial pain syndrome due to his work. Dr. Sterrett, a neurologist, diagnosed employment-related post-traumatic myofascial mid thoracic pain and spasms.[7] Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[8] Although the opinions of Drs. Pierotti and Sterrett are insufficient to discharge appellant's burden of proving that his claimed mid thoracic myofascial pain syndrome is causally related to his employment duties, this evidence is sufficient to require further development of the case record by the Office.[9]

On remand the Office should refer appellant, the case record and a statement of accepted facts to an appropriate specialists for an evaluation and a rationalized medical opinion regarding

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[4] 5 U.S.C. § 8101 *et seq*.

[5] 20 C.F.R. § 10.115(e), (f) (1999); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996). Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, in order to be considered rationalized, the 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 appellant's specific employment factors. *Id.*

[6] *Victor J. Woodhams*, *supra* note 5.

[7] Appellant's chiropractor, Dr. Sullivan, also diagnosed employment-related chronic myofascial pain syndrome. However, because he did not diagnose or treat appellant for a subluxation of the spine as demonstrated by x-ray, Dr. Sullivan's January 13, 2003 opinion does not constitute a physician's opinion, as that term is defined under the Act. 5 U.S.C. § 8101(2); *see Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

[8] *William J. Cantrell*, 34 ECAB 1223 (1983).

[9] *See John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

whether his claimed condition is causally related to the identified employment factors. After such development of the case record as the Office deems necessary, a *de novo* decision shall by issued.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: February 2, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member