

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

S.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Willowick, OH, Employer**

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**Docket No. 08-584
Issued: July 3, 2008**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 18, 2007 appellant filed a timely appeal from the merit decisions of the Office of Workers' Compensation Programs dated February 27 and November 16, 2007 denying appellant's claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant established that he sustained an injury in the performance of duty, causally related to factors of his federal employment.

FACTUAL HISTORY

On November 13, 2005 appellant, then a 39-year-old letter carrier, filed an occupational disease claim alleging that he sustained a herniated disc as a result of the duties of his federal employment. He stated that, after carrying heavy mail for the week of September 17, 2004, he "literally could not get up."

By letter dated December 30, 2005, the Office requested that appellant submit additional evidence. No evidence was submitted in a timely manner.

By decision dated February 7, 2006, the Office denied appellant's claim for compensation, finding that the evidence was insufficient to establish that the occupational exposure and that there was no medical evidence that provided a diagnosis which could be connected to the claimed event.

By letter dated February 13, 2006 appellant, through his attorney, requested an oral hearing. At the hearing held on April 15, 2006, the Office hearing representative stated that he found the evidence was sufficient to establish the factual component of the injury. He also noted that appellant had a prior employment-related back injury on December 13, 2003 that was accepted for lumbar strain. The hearing representative indicated that the hearing would proceed on the issue of whether the medical evidence was sufficient to establish that appellant sustained an employment-related injury as claimed. Appellant testified at the hearing indicating that he was previously injured on December 13, 2003 when he slipped on ice and his claim was accepted for a lumbar sprain. He noted that he had no intervening injuries between the December 13, 2003 injury and the increased pain in September 2004.

At the hearing, appellant submitted a report of a magnetic resonance imaging (MRI) scan of November 26, 2004, which revealed a mild diffuse disc bulge which mildly encroached on the bilateral lateral recesses without significant canal stenosis. The report also noted a four millimeter central disc herniation at L4-5 and a bilateral facet hypertrophy with mild to moderate canal stenosis. In an October 2, 2004 report, Dr. David C. Parris, a Board-certified internist, indicated that he saw appellant in early September 2004 at which time he was working full duty but had a recurrence of his back pain. He noted that he treated appellant with medication and work restrictions. Dr. Parris stated:

“It is my opinion that his new problem was an exacerbation of his previous injury, which was work related. At the time of his examination, he did have back pain, which limits his duty. [Appellant] should be able to return to work fully without restriction at the conclusion of treatments.”

In an August 25, 2005 medical report, Dr. Parris indicated that he first saw appellant on January 7, 2004, at which time he complained of left lumbar pain that radiated to the thigh and some tingling and numbness in the thigh. Appellant was released to full duty on June 7, 2004, at which time he stated that he was feeling good with an occasional back twinge. He returned on September 24, 2004 and complained of pain in the left buttock for six or seven days with decreased sensation in the left thigh. Dr. Parris stated:

“It is possible that [appellant] did herniate a disc on his initial injury. He did have the sensations of tingling in the left thigh, which recurred later in 2004. The symptoms have recurred in the same place. It is possible that [appellant] herniated the disc in December 2003 and exacerbated it at the time of the second injury. I think it is quite likely that he did herniate a disc initially which the symptoms resolved with treatment but then had an exacerbation.”

By decision dated October 27, 2006, the hearing representative found that appellant's work activities occurred as alleged. He further found that the medical evidence, while insufficient to accept the claim, was sufficient to require further development of the claim. The hearing representative remanded the case for referral of appellant for a second opinion.

By letter dated December 6, 2006, the Office referred appellant to Dr. Karl V. Metz, a Board-certified orthopedic surgeon, for a second opinion. In a medical opinion dated December 20, 2006, Dr. Metz stated: "It is my opinion, within reasonable medical certainty, that [appellant's] second low back injury on [September 17, 2004] represents a separate and second injury to his low back." He opined that this was a distinct new injury, not an aggravation of the prior injury. Dr. Metz opined that appellant did not incur an acute disc herniation at the L4-5 level in September 2004. Although appellant continued to complain of low back pain, these complaints were unrelated to his original injury on December 13, 2003 or his second alleged injury on September 17, 2004. Rather his ongoing complaints are secondary to the lumbar degenerative facet disease that was identified on the MRI scan of record. Dr. Metz stated:

"As noted above, it is my opinion, within reasonable medical certainty, that [appellant's] accepted condition of lumbar strain has resolved and again, is based upon the data provided, as well as the accepted guidelines, that have been discussed above. It is also my opinion, within reasonable certainty, that [appellant's] second low back injury has also resolved. It is my opinion that if this claim is allowed for herniated L4-5 disc, that condition should also have resolved within [six] to [eight] months, based upon the accepted guidelines."

Dr. Metz advised that appellant was not able to return to full duties as a letter carrier, but was capable of performing modified duties.

By decision dated February 27, 2007, the Office denied appellant's claim, finding that the medical evidence did not establish that his claimed medical condition was related to the accepted work duties.

By letter dated March 4, 2007, appellant requested an oral hearing. At the hearing held on July 26, 2007, he noted that he was employed as a letter carrier, a position he has held since October 1994. Appellant began having problems with his back as a result of the December 13, 2003 injury and had returned to work with restrictions. On September 17, 2004 after a week of lifting heavy mail, he could not get out of bed; however, he continued to work limited duty and was currently working light duty. Appellant noted that he has not missed any time from work as a result of this injury.

By decision dated November 16, 2007, the Office affirmed the prior denial of appellant's claim, finding the medical evidence insufficient to establish that he incurred an occupational condition causally related to his work duties.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his claim. When the employee claims injury in the performance of duty, he must submit sufficient evidence to establish that he sustained a specific incident at the time, place and in the manner alleged and that such incident caused an injury.² The mere fact that a condition manifests itself or worsens during a period of employment does not raise an inference of causal relationship.³

To establish a causal relationship between an employee's condition and an alleged employment injury, appellant must submit rationalized medical opinion from a physician based on a complete and accurate medical and factual background.⁴ The physician's opinion must be expressed in terms of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the claimant's employment factors.⁵

ANALYSIS

The Office accepted that appellant engaged in lifting and carrying mail as a letter carrier. It denied his claim due to lack of medical evidence establishing that he sustained an injury as a result of these work activities.

Appellant's physician, Dr. Parris, indicated that it was possible that he herniated his disc on December 13, 2003 and sustained an exacerbation of this injury in September 2004. However, his opinion is speculative. While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.⁶ Dr. Parris did not provide an opinion of sufficient certainty as to whether appellant sustained an injury as a result of heavy lifting during the week of September 17, 2004.

Dr. Metz, the physician to whom the Office referred appellant for a second opinion examination, opined that appellant's ongoing complaints were secondary to the lumbar degenerative facet disease that was identified on the MRI scan which had resolved. He specifically noted that appellant did not incur a disc herniation at the L4-5 level in September 2004. Dr. Metz attributed the onset of appellant's back condition in September 2004 to his underlying degenerative arthritic condition. This opinion does not support the fact that

¹ 5 U.S.C. §§ 8101-8193.

² See *John W. Montoya*, 54 ECAB 308 (2003).

³ See *Louis T. Blair*, 54 ECAB 348 (2003).

⁴ See *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁵ See *Charles W. Downey*, 54 ECAB 421 (2003).

⁶ See *Ricky S. Storms*, 52 ECAB 349 (2001); *Morris Scanlon*, 11 ECAB 384, 385 (1960).

appellant's lumbar condition was caused or aggravated by the duties he performed during the work of September 17, 2004.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor his belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship. Causal relationship must be established by rationalized medical opinion evidence.⁷ As appellant failed to submit such evidence, the Office properly denied his claim.⁸

CONCLUSION

The Board finds that the Office properly found that appellant failed to establish that he sustained an injury in the performance of duty, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 16 and February 27, 2007 are affirmed.

Issued: July 3, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁷ See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

⁸ The Board notes that appellant filed his appeal to this Board on December 18, 2007. Therefore, the Office's decision dated December 31, 2007 denying a November 24, 2007 request for reconsideration is null and void. The Board and the Office may not have simultaneous jurisdiction over the same issue in the same case. See *Arlonia B. Taylor*, 44 ECAB 591, 597 (1993); *Russell E. Lerman*, 43 ECAB 770, 772 (1992).