United States Department of Labor
Employees' Compensation Appeals Board

G.M., Appellant	)	
and	)	**Docket No. 12-1682**
	)	**Issued: February 11, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer	)	

Appearances:
Alan Peacock, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 2, 2012 appellant, through his representative, filed a timely appeal of the April 26, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). He also appealed a June 4, 2012 nonmerit decision of OWCP. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a traumatic injury in the performance of duty; and (2) whether OWCP properly denied appellant's request for reconsideration under section 8128(a) of FECA.

FACTUAL HISTORY

On March 5, 2012 appellant, then a 42-year-old letter carrier, filed a Form CA-1, traumatic injury, alleging that he sustained a low back injury after lifting a tub of parcels. He

[1] 5 U.S.C. §§ 8101-8193.

stopped work on March 5, 2012. Submitted with the claim was an employing establishment accident report dated March 12, 2012, which related that appellant was performing his casing duties and reported bending down to pick up a mail tub with five parcels and felt pain in his back.

Appellant submitted a report from Dr. Jose Maldonado, a Board-certified internist, who treated him for low back pain which began after a lifting incident at work. He reported bending over to pick up a container of mail at work and feeling his back "twinge" with pain and a tingling sensation into his legs. Dr. Maldonado diagnosed low back pain. In a prescription note dated March 5, 2012, he noted that appellant could not case mail until March 8, 2012. A March 5, 2012 lumbar spine x-ray revealed mild degenerative changes. On March 9, 2012 appellant was treated by Dr. Dexter Frederick, a Board-certified internist, who diagnosed severe musculoskeletal muscle spasm and low back pain with radiculopathy. Dr. Frederick opined that appellant was totally disabled for two weeks. A March 5, 2012 nursing report noted treatment for low back pain and leg numbness.

On March 20, 2012 OWCP advised appellant of the type of evidence needed to establish his claim. It particularly requested that he submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific work factors.

Appellant submitted another March 9, 2012 report from Dr. Frederick, who treated him for chronic neck pain. He was status post authorized left C7-T1 foraminotomy in 2007. Appellant reported intermittent flare-ups of back pain after returning to work in June 2010. He further noted that in the prior week he attempted to lift a tub of mail and felt a sharp pain over the center of his lower back radiating into both legs. Dr. Frederick found tense muscle spasm near T12-L3 and decreased rotation. He diagnosed acute lower back pain with radiculopathy and opined that appellant was disabled for two weeks.

On March 27, 2012 Dr. Frederick treated appellant for chronic neck pain. Appellant also reported injuring his low back at work and having difficulty standing and sitting for prolonged periods. Dr. Frederick noted lumbar spine tenderness and diagnosed acute lower back pain with radiculopathy secondary to the March 5, 2012 work injury. He noted radiological evidence of low back nerve irritation due to disc herniation. Dr. Frederick opined that appellant's symptoms may be in response to a slight worsening of the herniation but it was difficult to determine if the work injury accounted for all of this. He opined that appellant was disabled due to low back pain.

A March 27, 2012 duty status report repeated Dr. Frederick's findings, diagnosis and restrictions. On April 10, 2012 Dr. Frederick noted that a recent lumbar spine magnetic resonance imaging (MRI) scan showed multiple herniated disc levels that may or may not be new.[2] He opined that the low back pain was due to the herniated disc and degenerative disc disease from the March 5, 2012 injury. Dr. Frederick stated that appellant was disabled due to the March 5, 2012 injury, which affected his ability to lift, push, kneel, climb and walk for prolonged periods of time. In an April 10, 2012 work status report, he diagnosed multiple herniated discs and advised that appellant could work part time with restrictions on

[2] A March 20, 2012 MRI scan of the lumbar spine revealed multilevel degenerative changes, most prominent at L4/5 with mild to moderate spinal canal and foraminal stenosis.

April 16, 2012. On March 23, 2012 Dr. Patricia A. Mossop, a Board-certified internist, advised that appellant was seen and requested paperwork be prepared. Appellant also submitted nursing records.

On April 26, 2012 OWCP denied appellant's claim finding that the evidence did not establish that a medical condition was causally related to the accepted work events.

On May 1, 2012 appellant requested reconsideration. In a May 2, 2012 statement, appellant's union representative asserted that he established causal relationship between the March 5, 2012 lifting incident and his back pain. Appellant submitted a May 1, 2012 report from Dr. Frederick who treated him for neck pain from a herniated disc and subsequent surgery which he noted was work related. Dr. Frederick opined that appellant should be given reasonable accommodations for work-related disability. He recommended an ergonomically efficient work area to prevent reactivation of his work-related disability. In a May 1, 2012 duty status report, Dr. Frederick diagnosed multiple herniated disc and advised that appellant could work full time with restrictions.

By decision dated June 4, 2012, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed is 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 occupational disease.[3]

To determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[4] The second component of fact of injury is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[5]

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

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

[4] *Michael E. Smith*, 50 ECAB 313 (1999).

[5] *Id*.

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.[6] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[7]

ANALYSIS -- ISSUE 1

It is not disputed that appellant worked as a letter carrier and that on March 5, 2012 he was lifting a tub of parcels. It is also not disputed that he was diagnosed with acute lower back pain with radiculopathy and multiple herniated discs. However, appellant has not submitted sufficient medical evidence to establish that his diagnosed conditions are causally related to the March 5, 2012 work incident.

Appellant submitted reports from Dr. Frederick. On April 10, 2012 Dr. Frederick noted that a lumbar MRI scan revealed multiple levels of herniated discs and opined that the low back pain was secondary to the herniated disc and degenerative disc disease from the March 5, 2012 injury. He opined that appellant's disabling condition was the result of the injury sustained on March 5, 2012, which made it difficult for him to lift, push, kneel, climb and walk for prolonged periods of time. Dr. Frederick advised that appellant was totally disabled from working full time. In his March 9, 2012 report, he noted that appellant felt a sharp pain over the center of his lower back radiating to both legs after attempting to lift a tub of mail. Dr. Frederick diagnosed acute lower back pain with radiculopathy and opined that appellant was temporarily disabled. On March 27, 2012 he noted radiological evidence of low back nerve irritation due to disc herniation but opined that appellant's symptoms "may be" in response to a slight worsening of the herniation but it was difficult to determine if the work injury accounted for all of the injury. Although Dr. Frederick generally supported causal relationship, he did not provide medical rationale explaining the basis of his conclusion regarding the causal relationship between appellant's low back condition and work factors.[8] In his March 27, 2012 report, he also couched his support for causal relationship in speculative terms.[9] In none of these reports did Dr. Frederick explain the process by which lifting a tub of parcels would cause the diagnosed conditions. He also did not address what affect the prior 2007 back injury at C7-T1 had on the claimed low back condition. Other reports from Dr. Frederick are insufficient as they did not specifically address how appellant's employment activities had caused or aggravated a diagnosed

[6] *Leslie C. Moore*, 52 ECAB 132 (2000).

[7] *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

[8] *Jimmie H. Duckett, id.*

[9] Medical opinions that are speculative or equivocal in character are of diminished probative value. *D.D.*, 57 ECAB 734 (2006).

medical condition.[10] Therefore, these reports from him are insufficient to meet appellant's burden of proof.

Appellant submitted the March 5, 2012 report from Dr. Maldonado who diagnosed low back pain, which began after a lifting incident at work. He reported bending over to pick up a container of mail and feeling his back twinge. In the prescription slip dated March 5, 2012, Dr. Maldonado noted that appellant was treated and could not case mail until March 8, 2012. However, he is merely repeating the history of injury as reported by appellant without providing his own opinion regarding whether appellant's condition was work related. To the extent that Dr. Maldonado provided his own opinion, he failed to provide a rationalized opinion regarding the causal relationship between appellant's low back pain and the factors of employment believed to have caused or contributed to such condition. Therefore, this report is insufficient to establish his claim.

The remainder of the medical evidence is insufficient to establish the claim as it did not specifically address how lifting a tub of parcels at work on March 5, 2012, caused or aggravated a diagnosed low back condition. Thus, this evidence is not sufficient to meet appellant's burden of proof. Appellant also submitted nursing records but the Board has held that treatment notes signed by a nurse are not considered medical evidence as these providers are not a physician under FECA.[11]

On appeal, appellant asserts that he submitted sufficient evidence to establish that he sustained a work-related lumbar condition on March 5, 2012. However, as noted, he failed to provide a rationalized report, which provides a history of injury and specifically explains how his work activities on March 5, 2012 caused or aggravated a diagnosed medical condition.

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(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,[12] OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may

[10] *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[11] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the FECA); 5 U.S.C. § 8101(2) (this subsection defines a ''physician'' as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

[12] 5 U.S.C. § 8128(a).

obtain review of the merits of his or his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(1) Shows that OWCP erroneously applied or interpreted a specific point of law; or
>
> "(2) Advances a relevant legal argument not previously considered by the (Office); or
>
> "(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[13]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.[14]

ANALYSIS -- ISSUE 2

OWCP's most recent merit decision dated April 26, 2012 denied appellant's claim for a traumatic injury on the grounds that the evidence was insufficient to establish that a medical condition was causally related to the accepted work events. It denied his reconsideration request, without a merit review and he appealed this decision to the Board. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim.

In his May 2, 2012 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. He asserted that he established causal relationship between the work-related lifting incident and his back pain. However, appellant's general statements and allegations did not show that OWCP erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by OWCP. Consequently, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by OWCP, appellant submitted a May 1, 2012 report from Dr. Frederick who indicated that he was under his treatment for neck pain from a herniated disc and subsequent surgery, which he noted was work related. He recommended reasonable accommodations and an ergonomic workplace. Also submitted was a duty status report dated May 1, 2012 in which Dr. Frederick diagnosed multiple herniated disc and advised that appellant was able to return to work full time with restrictions. Although these reports are new, they are not relevant because they do not reference the particular area of the body involved, whether appellant's diagnosed low

[13] 20 C.F.R. § 10.606(b)(2).

[14] *Id*. at § 10.608(b).

back condition was causally related to the work events of March 5, 2012. Therefore, this new evidence is not relevant and is insufficient to warrant reopening the case for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that his claimed conditions were causally related to his employment. The Board finds that OWCP properly denied his request for reconsideration.[15]

ORDER

IT IS HEREBY ORDERED THAT the June 4 and April 26, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 11, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[15] With his request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).