United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 16-1579**
	)	**Issued: January 24, 2017**
U.S. POSTAL SERVICE, TRENTON PROCESSING & DISTRIBUTION CENTER, Trenton, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 1, 2016 appellant, through counsel, filed a timely appeal from an April 26, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met his burden of proof to establish a back injury causally related to the accepted September 21, 2014 employment incident.

On appeal, counsel contends that appellant submitted sufficient medical evidence to establish that his back injury was caused by the accepted work incident. Alternatively, he asserts that there is sufficient evidence of record to require additional development of the medical evidence.

FACTUAL HISTORY

On September 30, 2014 appellant, then a 56-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on September 21, 2014 he strained his lower back while processing South Jersey rejects on the bottom of a reject carrier automated street tray rack machine at work.

In an October 8, 2014 medical report, Dr. Niti D. Cooper, a Board-certified anesthesiologist, provided a history of injury that on September 21, 2014 appellant was bending down and lifting something while working at a flats sequencing system (FSS) machine at the employing establishment when he suddenly started experiencing lower back pain into his thighs, left greater than the right. She noted that he had progressive pain since this event. Dr. Cooper reported appellant's family, social, and medical background. She provided findings on physical, neurologic, and psychiatric examination. Dr. Cooper diagnosed low back pain and lumbar radicular pain.

By letter dated October 1, 2014, C.C., a distribution operations supervisor, controverted appellant's claim. He contended that appellant had filed a claim every two to three years since 2006 with almost identical circumstances to an injury he claimed to have sustained in 2009. C.C. asserted that appellant did not immediately report his injury, which prevented a full investigation into the allegations. He maintained that appellant's outward physical appearance did not indicate that he was suffering from any lower back pain and that appellant had not submitted sufficient medical evidence.

In an October 8, 2014 attending physician's report (Form CA-20), Dr. Cooper again noted a history of the September 21, 2014 incident. She diagnosed low back pain, chronic pain syndrome, and lower limb radicular syndrome. Dr. Cooper indicated by checking a box marked "yes" that the diagnosed conditions were caused or aggravated by employment activity. She noted that appellant bent down and lifted something while working. Dr. Cooper advised that he could perform light duty with restrictions as of October 13, 2014. In an October 8, 2014 prescription, she ordered a lumbosacral orthosis brace and transcutaneous electrical stimulation unit. In an October 10, 2014 duty status report (Form CA-17), Dr. Cooper reiterated her diagnosis of chronic pain syndrome and diagnosed lumbago due to appellant's September 21, 2014 injury. She also reiterated her opinion regarding appellant's work capacity.[3]

[3] On October 14, 2014 appellant accepted the employing establishment's job offer for full-time light-duty work. On December 1, 2014 he returned to full-duty work.

By letter dated November 6, 2014, OWCP advised appellant of the deficiencies of his claim and afforded him 30 days to submit additional evidence and respond to its inquiries.

A November 5, 2014 Form CA-17 report from a physician assistant diagnosed chronic pain syndrome and lumbago due to appellant's September 21, 2014 injury. The report indicated that he could return to part-time, light-duty work with restrictions.

On November 12, 2014 Dr. Trina M. Lisko, a Board-certified physiatrist, noted appellant's complaint that he had intermittent back pain, more on the left than right, with pain radiating around the left thigh anterior and posterior and some tightness and cramping as a result of a September 21, 2014 work-related injury. She performed electromyogram and nerve conduction velocity (EMG/NCV) studies, which revealed evidence of mild chronic L4 and L5 lumbar radiculopathy on the left and L5 and S1 on the right. Dr. Lisko found no electrodiagnostic evidence of any other peripheral nerve entrapment, lumbosacral plexopathy, or generalized peripheral neuropathy or myopathy.

In November 5 and December 1, 2014 reports and a Form CA-17 form report dated December 3, 2014, Dr. Cooper reported results on examination and reiterated her prior lumbar and lower limb diagnoses and added the new diagnosis of lumbar herniated nucleus pulposus (HNP). She advised that his work status was light with progressive advancement as pain was controlled. In a return to work note dated December 1, 2014, Dr. Cooper related that appellant was seen in her office and that he could return to work on that date.

On December 5, 2014 OWCP received appellant's response to its November 30, 2014 development letter. Appellant attributed his lower back injury to the September 21, 2014 incident. On that date he claimed to have been working on an FSS machine when he felt a pull/strain in the center and left side of his lower back as he bent over to pull out a tray that was loaded with mail from a bottom shelf. Appellant noted that he had a previous lumbar strain in 2009.

In a December 15, 2014 decision, OWCP denied appellant's claim as the medical evidence was insufficient to establish an injury or medical condition causally related to the accepted September 21, 2014 employment incident.

OWCP received a November 17, 2014 lumbosacral spine magnetic resonance imaging scan report from Dr. Lisa Marie Sheppard, a Board-certified radiologist, who provided an impression of L4-5 disc bulge and L5-Sl shallow midline subligamentous disc herniation.

In a December 29, 2014 report, Dr. Cooper reiterated the history of the September 21, 2014 employment incident, provided findings on examination, reviewed diagnostic test results, and again diagnosed low back pain, lumbar radicular pain, and lumbar HNP. She noted that appellant's pain had not resolved with conservative therapy. Dr. Cooper opined that his symptoms were a direct consequence of the September 21, 2014 work incident.

On January 7, 2015 appellant requested a review of the written record by an OWCP hearing representative regarding the December 15, 2014 decision.

In a November 5, 2014 report, Dr. Scott J. Pello, a Board-certified neurologist, noted a history of the September 21, 2014 work incident and appellant's medical background. He provided findings on physical, neurologic, and psychiatric examination. Dr. Pello diagnosed low back pain and lumbar radicular pain. He advised that appellant could perform light work with progressive advancement as pain controlled.

In a December 1, 2014 report, Dr. Cooper reiterated the history of the September 21, 2014 employment incident and her diagnoses of low back pain, lumbar radicular pain, and lumbar HNP. In a February 18, 2015 report, she administered a left lumbar transforaminal epidural steroid injection at L3-4 and L4-5 under fluoroscopic guidance.

On January 26, 2015 Dr. Gary B. Buck, a Board-certified anesthesiologist, noted a history of the September 21, 2014 work incident and appellant's history. He reported findings on physical, neurologic, and psychiatric examination and reviewed diagnostic test results. Dr. Buck diagnosed low back pain, lumbar radicular pain, and lumbar HNP. He noted that appellant's pain had not resolved with conservative therapy. Dr. Buck opined that his symptoms were a direct consequence of the September 21, 2014 work incident. He concluded that appellant could perform light work with progressive advancement as pain controlled.

By decision dated June 12, 2015, an OWCP hearing representative affirmed the December 15, 2014 decision. He found that Dr. Cooper's December 29, 2014 report did not provide any rationale to support a causal relationship between appellant's lumbar condition and the accepted September 21, 2014 employment incident.

On July 28, 2015 appellant, through counsel, requested reconsideration and submitted medical evidence. In a June 5, 2015 report, Dr. Buck again noted a history of the September 21, 2014 work incident, listed examination findings, and reiterated previous diagnoses. He also diagnosed chronic traumatic pain. Dr. Buck opined that appellant's lumbar disc herniations and lumbar radiculopathy were causally related to the accepted work incident.

Appellant provided a June 8, 2015 report from Dr. Pello who administered medial branch blocks of the bilateral L3 and L4 medial branches and the L5 dorsal ramus under fluoroscopic guidance. In a June 29, 2015 report, he performed a right L4-5 and L5-Sl radiofrequency ablation (right L3 and L4 medial branch ablation and L5 dorsal ramus ablation).

By decision dated October 23, 2015, OWCP denied modification of the June 12, 2015 decision. It found that the medical evidence submitted failed to provide sound medical rationale to establish a causal relationship between appellant's lumbar condition and the accepted September 21, 2014 employment incident.

In a September 29, 2015 report, Dr. Pello examined appellant, restated his low back pain diagnosis and also diagnosed lower limb radicular syndrome, chronic pain due to trauma, and lumbar HNP myelopathy. He reiterated a history of the accepted September 21, 2014 employment incident and opined that appellant's current pain complaints were a direct result of his injury at work on that date.

By letter dated November 5, 2015, counsel requested an update as to the status of appellant's July 28, 2015 request for reconsideration. On November 9, 2015 OWCP reissued the October 23, 2015 decision.

In an October 28, 2015 report, Dr. Matthew J. Lesneski, an anesthesiologist, noted a history of the accepted September 21, 2014 work incident and appellant's medical, family, and social background. He provided examination findings and diagnosed chronic pain due to trauma, intervertebral disc disorders with radiculopathy in the lumbar region, radiculopathy in the lumbar region, and low back pain. Dr. Lesneski advised that appellant's current pain complaints were a direct result of his injury at work. He concluded that he could perform light work with progressive advancement as pain controlled.

In a June 29, 2015 report, Dr. Pello recommended a lumbar/sacral radiofrequency procedure. In a patient fact sheet of the same date, he reiterated his diagnoses of low back pain and HNP.

By letter dated January 26, 2016, counsel requested reconsideration of the June 12 and November 9, 2015 decisions.

In an April 26, 2016 decision, OWCP denied modification of the November 9, 2015 decision. It found that the medical evidence did not provide a well-reasoned medical explanation as to how the September 21, 2014 work incident contributed to, aggravated, precipitated, or accelerated appellant's diagnosed lumbar conditions.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence[4] including that he or she sustained an injury in the performance of duty and that any specific condition or claimed period of disability for work is causally related to that employment injury.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.[6] There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged.[7]

[4] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[5] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[7] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[8] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[9] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.[10]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a traumatic injury caused by the accepted September 21, 2014 employment incident. Appellant failed to submit sufficient medical evidence to establish that he sustained a back injury causally related to the accepted employment incident.

Appellant submitted several reports from Dr. Cooper. In an October 8, 2014 Form CA-20 report, Dr. Cooper found that appellant had low back pain, chronic pain syndrome, and lower limb radicular syndrome. She indicated by checking a box marked "yes" that the diagnosed conditions were caused or aggravated by the September 21, 2014 work incident. The Board has held that an opinion consisting of a physician's checkmark, without any explanation or rationale for the conclusion reached is of reduced probative value.[11] Dr. Cooper did not explain how the diagnosed conditions were caused or aggravated by the accepted employment incident. Similarly, in the October 10, 2014 Form CA-17 report and the December 29, 2014 narrative report, she indicated that appellant's chronic pain syndrome, lumbago, low back pain, lumbar radicular pain, and lumbar HNP were due to the accepted September 21, 2014 work incident. However, Dr. Cooper did not provide rationale explaining how his physical activity at work actually caused or aggravated the diagnosed conditions.[12] Her remaining reports and prescription addressed appellant's lumbar and lower limb conditions, medical treatment, and work capacity, but did not provide an opinion on the causal relationship between the diagnosed conditions and the accepted employment incident.[13] 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. Thus, Dr. Cooper's reports are of diminished probative value and are insufficient to establish appellant's claim.

The reports of Dr. Buck and Dr. Lesneski addressed causal relationship. In his reports dated January 26 and June 5, 2015, Dr. Buck diagnosed low back pain, lumbar radicular

[8] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

[9] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[10] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

[11] *D.D.*, 57 ECAB 734 (2006); *Sedi L. Graham*, 57 ECAB 494 (2006).

[12] *See K.W.*, Docket No. 10-98 (issued September 10, 2010).

[13] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

radiculopathy, and lumbar HNP. He opined in a conclusory statement that these conditions were directly caused by the accepted September 21, 2014 work incident. Dr. Lesneski's October 28, 2015 report diagnosed chronic pain due to trauma, intervertebral disc disorders with radiculopathy in the lumbar region, radiculopathy in the lumbar region, and low back pain. He found that appellant's current pain complaints were a direct result of the accepted employment incident. Neither physician however explained how the accepted work incident caused or aggravated the diagnosed conditions.[14]

Similarly, Dr. Pello's September 29, 2015 report is of diminished probative value. He examined appellant and diagnosed low back pain, lower limb radicular syndrome, chronic pain due to trauma, and lumbar HNP myelopathy. Dr. Pello opined that appellant's current pain complaints were a direct result of the accepted September 21, 2014 employment incident. He did not specify the reasons that the accepted work incident would cause the diagnosed conditions.[15] Dr. Pello's remaining reports addressed appellant's lumbar conditions, medical treatment, and work capacity, but did not provide a medical opinion finding that the diagnosed conditions were caused or aggravated by the September 21, 2014 employment incident.[16]

Dr. Lisko's November 12, 2014 EMG/NCV report revealed evidence of mild chronic L4 and L5 lumbar radiculopathy on the left and L5 and S1 on the right. She found no electrodiagnostic evidence of any other peripheral nerve entrapment, lumbosacral plexopathy, or generalized peripheral neuropathy or myopathy. Dr. Lisko noted appellant's complaint that his intermittent back pain with pain radiating around the left thigh anterior and posterior and some tightness and cramping resulted from the September 21, 2014 work-related incident. However, she did not provide a rationalized medical opinion of her own as to whether the accepted employment incident caused or aggravated the diagnosed conditions.[17]

Likewise, other medical reports are of diminished probative value as they do not offer any opinion regarding the cause of an appellant's condition.[18] Appellant provided evidence from a physician assistant. However, the Board has held that reports by physician assistants are not considered medical evidence as such persons are not considered physicians under FECA.[19]

Therefore, the Board finds that there is insufficient medical evidence to establish that appellant sustained a back injury causally related to the accepted September 21, 2014 employment incident.

[14] *See supra* note 12.

[15] *Id.*

[16] *See* cases cited, *supra* note 13.

[17] *Id.*

[18] *Id.*

[19] *Sean O'Connell*, 56 ECAB 195 (2004). *See* 5 U.S.C. § 8101(2). Section 8102(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law.

On appeal, counsel contends that appellant had submitted sufficient medical evidence to establish that his back injury was caused by the accepted September 21, 2014 work incident. Alternatively, he asserts that there is sufficient evidence of record to require additional development of the medical evidence. For reasons provided above, the Board finds that the weight of the medical evidence does not establish that appellant sustained a back injury causally related to the accepted September 21, 2014 work incident. Appellant has failed to meet his burden of proof.

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.

CONCLUSION

The Board finds that appellant has failed to meet his burden of proof to establish a back injury causally related to the September 21, 2014 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the April 26, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board