United States Department of Labor
Employees' Compensation Appeals Board

R.J., Appellant	)	
and	)	**Docket No. 16-1733**
	)	**Issued: May 16, 2017**
U.S. POSTAL SERVICE, CLEARING STATION, Chicago IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 30, 2016 appellant, through counsel, filed a timely appeal from the June 8, 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.

ISSUE

The issue is whether appellant met his burden of proof to establish a back injury causally related to the October 29, 2014 employment incident.

[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.*

On appeal counsel contends that OWCP's decision nick-picks the evidence and creates inconsistency when none actually exists.

FACTUAL HISTORY

On November 5, 2014 appellant, then a 38-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 29, 2014 he sustained an injury as a result of walking down stairs onto an uneven surface while delivering mail at work. He stopped work on October 30, 2014. In an employee statement dated November 5, 2014, appellant described his injury, indicating that on October 29, 2014 he felt a sharp twinge in his lower back while carrying a bag of mail as he descended stairs. He continued to work that day with mild discomfort. Later that night, appellant experienced worsening pain with spasms in his lower back through his buttocks and into his left hamstring. He was unable to sleep or to work the next day. Appellant sought medical treatment on November 5, 2014 and was prescribed medication and referred to physical therapy. He still had difficulties standing and walking for periods of time and noted that staying off work helped his condition.

In a November 5, 2014 medical report, Dr. Howard I. Freedberg, an attending Board-certified orthopedic surgeon, noted a history of injury that on October 29, 2014 appellant felt a twinge in his lower back while carrying mail down stairs. He also noted a history of his medical treatment, family, and social background, and his current symptoms. Dr. Freedberg reported findings on physical examination of the spine and upper and lower extremities and x-ray examination of the lumbar spine. He provided a diagnosis of lumbar neuritis/radiculitis and referred appellant to physical therapy. In a November 5, 2014 work status report, Dr. Freedberg advised that appellant was medically unable to work.

In a November 19, 2014 e-mail, the employing establishment controverted appellant's claim, contending that he reported his accident 16 days after it had occurred.

By letter dated November 25, 2014, OWCP advised appellant of the deficiencies of his claim and afforded him 30 days to submit additional medical evidence.

In a November 5, 2014 prescription dispensing office note, Dr. Freedberg listed a breakdown of ingredients in a prescribed medication. In a medicine order dated December 3, 2014, Dr. Freedberg, Dr. Thomas A. McNally, a Board-certified orthopedic surgeon, Dr. Ankur Chhadia, a Board-certified orthopedic surgeon, and Dr. Dmitry A. Novoseletsky, a Board-certified physiatrist, listed appellant's medication dosages for various conditions, including spasms.

By decision dated December 30, 2014, OWCP accepted that the October 29, 2014 incident occurred as alleged. However, it denied appellant's claim as the medical evidence was insufficient to establish a medical condition causally related to the accepted employment incident.

In a medicine order dated November 5, 2014, Dr. Freedberg, Dr. McNally, Dr. Chhadia, and Dr. Novoseletsky again listed appellant's medication dosages. In reports dated December 3, 2014 and January 22, 2015, Dr. Freedberg provided results on examination and reiterated his

diagnosis of lumbar neuritis/radiculitis. He opined that appellant's traumatic injury, his condition of ill-being, and recommended treatment were causally connected to the October 29, 2014 employment incident.[3]

In a February 15, 2015 letter and February 23, 2015 report, Dr. Freedberg again provided results on examination and reiterated his diagnosis of lumbar neuritis/radiculitis and his opinion that appellant's condition was causally connected to the October 29, 2014 employment incident. He noted that appellant had never previously had low back pain, prior problems, or treatment for any back conditions.

In a May 20, 2015 decision, OWCP denied modification of the December 30, 2014 decision. It found that Dr. Freedberg's reports did not contain a rationalized medical opinion to establish a causal relationship between appellant's lumbar condition and the accepted October 29, 2014 work incident.

In reports dated May 13 to July 9, 2015, Dr. Freedberg examined appellant and reiterated his prior diagnosis of lumbar neuritis/radiculitis and opinion on causal relationship. He related that further review of mechanism of the injury revealed that appellant was at work and carried a bag weighing 30 pounds as he walked down stairs. On the last step appellant felt a pull in his lower back, stopped, "shook off," and continued with some stiffness. Several hours later he began to have low back spasms and pain referral down his left leg.

In a June 13, 2015 lumbar magnetic resonance imaging (MRI) scan report, Dr. Doris L. Yip, a Board-certified radiologist, provided an impression of congenitally short pedicles with a baseline narrow canal. She also provided an impression of small left paracentral disc protrusion at L2-3, small central disc extrusion at L3-4, small central/left paracentral disc protrusion at L4-5, and mild central stenosis at T10-11, left lateral recess compromise and moderate left neuroforaminal narrowing.

On August 25, 2015 appellant requested reconsideration of the May 20, 2015 decision.

By letter dated July 15, 2015, Dr. Freedberg clarified his prior opinion on causal relationship and again related that appellant had never previously had low back problems or any treatment for his back condition prior to his work injury and described the October 29, 2014 employment incident. Based on his history, he believed that appellant's condition was causally related. Dr. Freedberg opined that the accepted work incident indeed had certainly exacerbated any preexisting conditions shown on the MRI scan as well as caused appellant's significant problems.

In a decision dated November 6, 2015, OWCP denied modification of the May 20, 2015 decision. It again found that Dr. Freedberg failed to provide a rationalized medical opinion on causal relationship.

In a December 23, 2015 work care treatment note, Dr. Luis R. Muñoz, who specializes in occupational medicine, noted a history of injury that on October 29, 2014 appellant was climbing

[3] OWCP also received toxicology reports from Essential Testing.

down stairs when the leather strap on his mailbag inadvertently hooked onto the stair railing as he quickly pulled away from the stairs. The strap around appellant's shoulders rapidly twisted his lower back and upper body as he quickly moved away in a downward direction. Dr. Muñoz also noted a history of appellant's medical treatment. He reported findings on physical examination and provided an impression of lumbar L3-4 disc extrusion/herniation, lumbar radiculopathy, and lumbar deconditioning. Dr. Muñoz maintained that appellant's lumbar spine pain and radiculopathy were a result of rapid twisting and pulling forces of a leather strap placed on his upper and lower spine structures. The rotational forces abruptly encountered by the lumbar discs provided the torsional and sheer forces that led to the mechanism of injury, which caused appellant's L3-4 extrusion herniation of the lumbar spine. Therefore, Dr. Muñoz opined that the work injury event and mechanism of injury were consistent with the outcome of an L3-4 disc extrusion injury detected on his physical examination and a July 2015 MRI lumbar spine scan. He addressed his treatment plan and concluded that appellant was unfit for duty and placed him off work. In prescriptions dated December 23, 2015 and February 4, 2016, Dr. Muñoz ordered medications to treat appellant's condition.

On March 10, 2016 appellant requested reconsideration of the November 6, 2015 decision.

In a March 2, 2016 attending physician's report (Form CA-20), Dr. Muñoz reiterated the history that on October 29, 2014 appellant's mailbag strap caught on the stair railing, injuring his back. He also reiterated his diagnosis of lumbar L3-4 disc herniation extrusion. Dr. Muñoz indicated by checking a box marked "yes" that this condition was caused or aggravated by an employment activity. He explained that the twisting of appellant's lumbar spine and torsional sheer forces caused his herniation. In prescriptions dated March 10, 2016, Dr. Muñoz again ordered medications to treat appellant's condition.

In a June 8, 2016 decision, OWCP denied modification of the November 6, 2015 decision.

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 disability for work for which he or she claims compensation 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

[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).

submit sufficient evidence to establish that she actually experienced the employment incident at the time, place, and in the manner alleged.[7]

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 back condition caused or aggravated by the accepted October 29, 2014 employment incident.

Appellant initially submitted several reports from Dr. Freedberg. In reports dated December 3, 2014 to July 15, 2015, Dr. Freedberg provided a history of the October 29, 2014 work incident and diagnosed lumbar neuritis/radiculitis. He opined that appellant's condition and recommended medical treatment were causally related to the October 29, 2014 work incident. Dr. Freedberg further opined that the accepted employment incident exacerbated appellant's preexisting conditions as verified by the MRI scan. He reasoned that appellant never had any back symptoms or received any treatment for a back condition prior to the accepted incident. The Board has found insufficient medical opinion finding causal relationship for an employment injury because the employee was asymptomatic before the injury but was symptomatic after the injury, without further supporting rationale.[11] Dr. Freedberg did not explain, with reference to the specific mechanism of injury, how walking down stairs onto an uneven surface on October 29, 2014 caused the diagnosed back condition or aggravated preexisting conditions, and thus his reports are of diminished probative value. While his November 5, 2014 reports noted a history of the October 29, 2014 employment incident, Dr. Freedberg reiterated a diagnosis of lumbar neuritis/radiculitis, and found that appellant was medically unable to work. He did not opine whether appellant's conditions and resultant disability were caused by the accepted employment incident.[12] Similarly, appellant's November 5, 2014 prescription and his November 5 and December 3, 2014 medicine orders cosigned by Drs. Freedberg, McNally, Chhadia, and Novoseletsky did not offer a specific opinion as to whether the accepted employment incident caused or aggravated the diagnosed

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

[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] *T.M.*, Docket No. 08-0975 (issued February 6, 2009); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[12] *A.D.*, 58 ECAB 159 (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).

conditions.[13] Thus, the Board finds that the reports from Drs. Freedberg, McNally, Chhadia, and Novoseletsky are insufficient to meet appellant's burden of proof.

The remaining medical evidence is also insufficient to establish causal relationship between appellant's injury and the October 29, 2014 employment incident. Dr. Muñoz' December 23, 2015 treatment note and March 2, 2016 Form CA-20 report discussed appellant's history of an October 29, 2014 back injury. In the December 23, 2015 treatment note, he noted that appellant was descending stairs while delivering mail when the leather strap on his mailbag inadvertently hooked onto the stair railing as he quickly pulled away from the stairs. Dr. Muñoz further noted that the strap around appellant's shoulders rapidly twisted his lower back and upper body as he quickly moved away in a downward direction. In the March 2, 2016 Form CA-20 report, he noted a history that appellant injured his back when the strap on his mailbag caught on the stairs. In both reports, Dr. Muñoz attributed his lumbar L3-4 disc extrusion/herniation, lumbar radiculopathy, and lumbar deconditioning to the October 29, 2014 incident. He, however, relied upon an inaccurate history of injury, that appellant's mailbag strap inadvertently hooked around the stair railing causing his back to twist rapidly, rather than appellant injuring his back when he walked down stairs onto an uneven surface while delivering mail. The most contemporaneous evidence regarding the October 29, 2014 employment incident, appellant's Form CA-1 and his November 5, 2014 statement, made no mention of the mailbag strap being caught on a railing.[14] It is well established that medical reports must be based on a complete and accurate factual and medical background and that medical opinions based on an incomplete or inaccurate medical history are of diminished probative value.[15] Dr. Muñoz' remaining prescriptions dated December 23, 2015 and February 4 and March 10, 2016 ordered medications, but did not provide a firm diagnosis of a particular medical condition[16] or a specific opinion as to whether the accepted work incident caused or aggravated appellant's condition.[17] Therefore, his reports are of limited probative value.

Similarly, Dr. Yip's June 13, 2015 diagnostic test results are of limited probative value. She failed to offer an opinion on whether appellant's diagnosed lumbar conditions were caused or aggravated by the accepted October 29, 2014 employment incident.[18]

[13] *Id.*

[14] The Board has held that contemporaneous evidence is entitled to greater probative value than later evidence. *S.S.*, 59 ECAB 315 (2008).

[15] *See W.S.*, Docket No. 15-0602 (issued August 11, 2016); *Joseph M. Popp*, 48 ECAB 624 (1997).

[16] *See Deborah L. Beatty*, 54 ECAB 340 (2003) (where the Board found that, in the absence of a medical report providing a diagnosed condition and a reasoned opinion on causal relationship with the employment incident, appellant did not meet her burden of proof).

[17] *Supra* note 12.

[18] *Id*.

The toxicology reports dated November 14, 2014 and March 12 and July 21, 2015 are of limited probative value as they do not contain a physician's medical opinion that any diagnosed condition was causally related to the accepted work incident.[19]

The Board finds that appellant has failed to submit any rationalized, probative medical evidence sufficient to establish a back injury causally related to the October 29, 2014 employment incident. Appellant, therefore, did not meet his burden of proof.

On appeal counsel contends that OWCP's decision nick-picks the evidence and creates inconsistency when none actually exists. For the reasons stated above, however, the Board finds that the weight of the medical evidence does not establish a back condition causally related to the accepted October 29, 2014 work incident.

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 October 29, 2014 employment incident.

[19] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 16, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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