

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

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**G.S., Appellant** )  
 )  
**and** ) **Docket No. 16-0908**  
 ) **Issued: October 26, 2017**  
**U.S. POSTAL SERVICE, POST OFFICE,** )  
**Milwaukee, WI, Employer** )  

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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 13, 2015 appellant filed a timely appeal from an April 20, 2015 merit decision and a July 15, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. See 20 C.F.R. § 501.3(f). One hundred eighty days from April 20, 2015, the date of OWCP's last merit decision, was October 17, 2015. Since using October 21, 2015, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is October 13, 2015, rendering the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that appellant submitted additional evidence after OWCP rendered its July 15, 2015 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from considering this new evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

## **ISSUES**

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty, as alleged; and (2) whether OWCP properly denied his request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On November 6, 2014 appellant, then a 45-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 3, 2014 he sustained neck, back, and left shoulder injuries when he was repetitively bending forward and reaching at a 45 degree angle. He reported that he was unable to use appropriate equipment while working which resulted in continually bending his lower back, causing neck strain, back strain, and muscle strain with associated herniated disc in the lower back. On the reverse side of the form, appellant's supervisor disagreed with the facts surrounding the claimed incident and reported that the injury appeared to be preexisting and occupational. Appellant did not stop work.

By letter dated November 25, 2014, OWCP notified appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the medical and factual evidence needed and was asked to respond to the provided questionnaire. The questionnaire requested him to specify whether he was claiming an occupational disease or traumatic injury based on the definitions provided. Appellant was afforded 30 days to submit the requested evidence. He did not respond and no other evidence was received.

By decision dated December 30, 2014, OWCP denied appellant's claim, finding that he had not established fact of injury as he had not established that a medical condition was diagnosed in connection with the claimed event and/or work factors.

On January 21, 2015 appellant requested reconsideration of OWCP's decision. In an accompanying narrative statement, he reported that he had prior workers' compensation claims regarding his neck (OWCP File No. xxxxxx968) and back (OWCP File No. xxxxxx678) for injuries, which occurred while working as a letter carrier.<sup>4</sup> Appellant reported that he had been provided reasonable accommodation for his back conditions since 2001. In 2007, he was provided a special vehicle with built in trays and a special cart to use during his mail delivery. When appellant's vehicle was taken away for 10 days without appropriate accommodation, he sustained the back injury alleged in this claim. Appellant reported that he was claiming a traumatic injury of thoracic back strain caused from not being able to use his postal vehicle.

In a January 13, 2015 narrative statement, appellant reported that the injury to his back occurred when he was delivering mail. He explained that, after he filed a lawsuit, the employing establishment provided him with a special vehicle equipped with trays so that he would not have to bend further than a 45 degree angle. Appellant did not have use of the vehicle on the dates in question because it was sent for repairs. He explained that when he delivered mail with a standard vehicle he had to reach and lean forward to retrieve mail trays and parcels 50 to 100 times a day. Appellant noted that the injury felt like a pulling sensation at his lower back and by

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<sup>4</sup> The Board notes that the record contains no other information pertaining to appellant's prior claims.

the 10<sup>th</sup> day it caused him discomfort. He experienced spasms between his shoulder blade which started to affect his preexisting neck and back injuries. Appellant reported no similar injuries involving the thoracic spine and explained that his prior injuries involved a herniated and bulging disc.

In a December 22, 2014 medical report, Dr. Lawrence J. Maciolek, a Board-certified orthopedic surgeon, reported that appellant was seen for a new work-related injury, which occurred on November 3, 2014 due to events which transpired a week prior. He related that appellant had previously been granted a modified mail truck as an accommodation, but his modified truck was out of service, undergoing repair. Therefore, appellant was relegated to using a standard issue mail truck, which required him to bend over 50 to 60 times per day at a 45 degree angle. He reported straining the interscapular region of his thoracic spine. Dr. Maciolek provided findings on physical examination and review of diagnostic testing. An x-ray of the cervical spine revealed straightening of the cervical lordosis and degenerative disc space narrowing particularly at C5-6 and C6-7. Thoracic films demonstrated appropriate alignment with mild diffuse degenerative spondylosis. Lumbar films demonstrated appropriate alignment with slight disc space narrowing at L5-S1. Dr. Maciolek reported that appellant sustained a thoracic strain that was caused by the repetitive nature of bending over into the mail truck at the end of October 2014. He noted lingering symptoms and recommended physical therapy and work restrictions.

By decision dated April 20, 2015, OWCP found that the evidence submitted was sufficient to modify the December 30, 2014 decision in that appellant had established a diagnosed condition of thoracic sprain. However, it denied the claim as appellant had not established causal relationship. OWCP noted that Dr. Maciolek's opinion was of diminished probative value because the factual background he provided, that appellant's thoracic strain was a result of repetitive bending at the end of October 2014, was inconsistent with appellant's allegations regarding the factual circumstances of the case.

On June 15, 2015 appellant requested reconsideration of the April 20, 2015 OWCP decision. In an accompanying narrative statement, he explained the differences in the modified vehicle that accommodated his injury and the regular postal vehicle he was forced to use. Appellant provided pictures of the vehicles and explained the different motions that resulted from the use of each vehicle and why the regular vehicle caused his injury. He further stated that Dr. Maciolek properly diagnosed his condition as thoracic strain and provided an opinion regarding the cause of his condition.

By decision dated July 15, 2015, OWCP denied appellant's request for reconsideration of the merits of his claim, finding that it neither raised substantive legal questions nor included new and relevant evidence.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>5</sup> has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an "employee of

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<sup>5</sup> *Supra* note 2.

the United States” within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>6</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>7</sup>

In order 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.<sup>8</sup> The second component is whether the employment incident caused a personal injury and generally can only be established by medical evidence.

To establish causal relationship between the claimed condition, or any attendant disability claimed, and the employment event or incident, the employee must submit rationalized medical opinion evidence supporting such causal relationship.<sup>9</sup> 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. This medical opinion must include an accurate history of the employee’s employment injury and must explain how the condition is related to the injury. 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.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

In this case, appellant filed a traumatic injury claim (Form CA-1) alleging that he sustained a thoracic back strain on November 3, 2014 as a result of repetitive bending. The April 20, 2015 OWCP decision found an inconsistent factual background pertaining to his claim for a traumatic injury and his physician’s opinion regarding the occupational cause of his condition. The Board finds this case is not in posture for decision.

Appellant alleged a traumatic injury on November 3, 2014 as a result of his federal employment duties. In his January 13, 2015 narrative statement, however, he explained that during 10 days without his personal employment vehicle, he sustained a back injury. Appellant further noted that the injury felt like a pulling sensation at his lower back and by the 10<sup>th</sup> day it

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<sup>6</sup> *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

<sup>7</sup> *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>8</sup> *Elaine Pendleton*, *supra* note 6.

<sup>9</sup> *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

<sup>10</sup> *James Mack*, 43 ECAB 321 (1991).

was causing him discomfort. Therefore, it is unclear whether appellant is alleging an occupational disease produced by his work environment over a period longer than a single workday or shift, or a traumatic injury from a single occurrence within a single workday or shift.<sup>11</sup> The only medical evidence received was a December 22, 2014 medical report from Dr. Maciolek. Dr. Maciolek reported that appellant returned with a new work-related injury, which occurred on November 3, 2014 due to events having transpired a week prior. He reported that appellant sustained a thoracic strain that was caused by the repetitive nature of bending over into the mail truck at the end of October 2014.

Under FECA, although it is the employee's burden of proof to establish his or her claim, OWCP also has a responsibility in the development of the factual evidence.<sup>12</sup> It is the duty of the claims examiner to develop a claim based on the facts at hand and not solely on the basis of the type of claim form filed.<sup>13</sup> The Federal Procedure (FECA) Manual provides that if the actual benefits claimed by the claimant cannot be determined from review of the form, OWCP should develop the claim based upon the claim form filed and direct questions to the claimant to determine the type of benefits claimed. Based upon the response to the development letter, OWCP should make a determination as to whether the correct claim was established and, if not, it should convert the claim to the proper type of claim, and notify the claimant and employing establishment (and any representative, if applicable) of the conversion.<sup>14</sup>

In this instance, OWCP did not discharge its burden to make findings as to whether appellant sustained a traumatic injury or an occupational disease. Therefore, the case should be remanded for further findings regarding whether appellant sustained a traumatic injury or an occupational disease in the performance of duty.<sup>15</sup> Following this and any other further development deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim.<sup>16</sup>

### **CONCLUSION**

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

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<sup>11</sup> A traumatic injury means a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

<sup>12</sup> *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988).

<sup>13</sup> *Id.*

<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3(c)(2)(b) (June 2011). *C.f. S.N.*, Docket No. 12-1814 (issued March 11, 2013).

<sup>15</sup> *Colleen A. Murphy*, Docket No. 01-1319 (issued November 6, 2002).

<sup>16</sup> Given the disposition of the first issue as this case is not in posture for decision, the second nonmerit issue is moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decisions dated July 15 and April 20, 2015 are set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: October 26, 2017  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

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