United States Department of Labor
Employees' Compensation Appeals Board

R.E., Appellant	)	
and	)	**Docket No. 10-520**
	)	**Issued: December 7, 2010**
DEPARTMENT OF THE AIR FORCE, ANDERSON AIR FORCE BASE, Guam, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2009 appellant filed a timely appeal from a November 13, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 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 established that she sustained an injury in the performance of duty on May 21, 2007 causally related to her federal employment.

FACTUAL HISTORY

On December 20, 2008 appellant, a 43-year-old secretary, filed a traumatic injury claim (Form CA-1) in which she alleged sustaining fractured pars articulars, disc bulge and fibromyalgia. She attributed these conditions to a May 21, 2007 incident when, while walking to the womens' restroom to clean a coffee pot, she slipped on the heavily waxed tile floor and fell,

landing on her back. Included with appellant's claim form was the statement of a coworker who witnessed the incident.

Jeffrey R. Sabido, a physician's assistant, examined appellant on May 21 and 22, 2007. On May 21, 2007 he noted that she had fallen and had back pain. On May 22, 2007 Mr. Sabido noted that appellant was seen for leg pain. On May 30, 2007 he noted that she was seen for backache, with no visible bruising or bony tip. Mr. Sabido noted that appellant felt her right hip was bruised. He diagnosed "likely soft tissue injury" and noted that appellant was released from medical care, without any limitations.

On July 2, 2007 appellant moved to Hawaii and was placed on leave-without-pay (LWOP) status.

Appellant sought treatment from Dr. Jeffrey J. Schulte, an orthopedic surgeon, who on July 23, 25, August 20 and September 14, 2007 presented findings on examination and diagnosed abdominal pain, back strain and depression.

In reports dated September 25 and 28, 2007, Dr. Chuen Po Lau, Board-certified in family medicine, diagnosed back strain.

On October 26, 2007 Dr. Jerry M. Brown, a diagnostic radiologist, reported that x-rays of appellant's lumbosacral spine revealed mild thorocolumbar degenerative changes.

In progress reports dated October 26 to November 16, 2007, Dr. Schulte noted appellant's continuing complaints of pain all over her body. He diagnosed back strain, depression and osteoarthritis.

On November 16, 2007 Dr. Darryl Kiyoshi Itow, a Board-certified radiologist, presented findings on examination following a radiographic study of appellant's cervical spine. He diagnosed mild to moderate mid-cervical spine spondylitic changes.

On March 21, 2008 Dr. Felix Song, a Board-certified diagnostic radiologist, presented findings following x-rays of appellant's lumbar spine and diagnosed degenerative changes in the lumbar spine at the L5-S1 level and "possible" right and left pars articularis fracture.

On April 9, 2008 Dr. Dennis M. Crowley, a Board-certified physiatrist, presented findings on examination and diagnosed L5 spondylolysis. In his history, he wrote:

> "The history for this back pain first began in November 2006 when [appellant] jumped into a pool awkwardly and experienced acute intense back pain. That back pain subsided until she had a marked flareup of pain when she fell down in May 2007."

On April 15, 2008 Dr. Guy Takashi, a Board-certified radiologist, presented findings following a computerized tomography (CT) scan of appellant's lumbar spine and diagnosed right L5 spondylolysis.

On May 1, 2008 Dr. David R. Finger, a Board-certified internist, presented findings on examination and diagnosed fibromyalgia, hypertension and lumbago. He noted that appellant's symptoms began a year ago after a fall resulting in acute lower back pain.

On May 8, 2008 Dr. Blain S. Walker, a psychologist, diagnosed fibromyalgia and chronic pain. He noted that appellant began a pain management program on that day. Dr. Walker continued to submit progress notes through June 18, 2008.

In progress notes dated May 15 to November 21, 2008, Dr. Schulte noted appellant's continuing complaints of back pain and diagnosed back strain. On June 3, 2008 he noted that she needed a referral for physical therapy due to fibromyalisis. On September 11, 2008 Dr. Schulte also noted a diagnosis of depression.

On June 3, 2008 Dr. Travis R. Liddell, an orthopedic surgeon, reported a provisional diagnosis of low back pain and right and left pars articularis fracture.

Appellant was also seen on June 3, 2008 by Dr. Christina A. Lewis, who noted that appellant had related that she had experienced chronic pain in multiple sites for over a year. Dr. Lewis noted that appellant had discussed falling two times last year and injuring her back. She diagnosed syndrome presentation with multiple myalgias to low back, right rib area, neck pain, leg pains and fibromyalgia.

On September 5, 11 and 30, 2008 Dr. Schulte presented findings on examination and diagnosed depression.

In an October 31, 2008 report, Dr. Amy B. Kogut, Board-certified in family medicine, presented findings on examination and diagnosed chronic pain syndrome and fibromyalgia.

By separate report dated October 31, 2008, Dr. Thomas R. Burkhard, a radiologist, presented findings following x-rays of appellant's cervical spine and diagnosed degenerative changes in the C4 through C6 vertebrae.

In a November 10, 2008 note, Dr. James Finley, a chiropractor, reviewed appellant's history of injury and diagnosed nonallopathic lumbars, nonallopathic lesion cervicals, nonallopathic lesion upper thoracic and spondylolysis. He opined that appellant was unable to perform her usual job but could perform sedentary work.

On December 4, 2008 Dr. Lewis reported that appellant was seen for chronic pain to multiple body sites. She diagnosed degenerative changes of the cervical spine, C4-6 and fibromyalgia.

On December 22, 2008 Dr. Ricardo Burgos, a Board-certified diagnostic radiologist, presented findings following a magnetic resonance imaging (MRI) scan of appellant's lumbar spine. He diagnosed degenerative disc disease at the L4-5 and L5-S1 levels, chronic right L5 pars defect without spondylolisthesis and lower lumbar spine bilateral facet joint degenerative arthropathy.

On January 9, 2009 Dr. Schulte noted that appellant had no new symptoms and had no generalized pain.

On March 12, 2009 Dr. Ewa S. Stamper, a psychologist, diagnosed moderate "[m]ajor depressive disorder … in the course of back injury (L5 fracture and disc bulge)."

By decision dated March 26, 2009, the Office accepted that the May 21, 2007 employment incident occurred as alleged but denied the claim because the medical evidence of record did not establish that the May 21, 2007 employment incident caused a medically-diagnosed injury.

On April 23, 2009 appellant requested an oral hearing.

Appellant submitted reports, dated July 27, 2009, in which Dr. Stamper diagnosed moderate "[m]ajor depressive disorder … in the course of back injury (L5 fracture and disc bulge)." She opined that this condition was related to appellant's May 21, 2007 injury.

The Office conducted an oral hearing on September 14, 2009 at which appellant and her attorney were present. Appellant described the May 21, 2007 incident and her subsequent medical treatment. She moved to Hawaii because her husband, who is active-duty military personnel, was transferred. Appellant did not have a job waiting for her in Hawaii and, because she was a civilian employee, her former employer placed her on LWOP status until she found a job in Hawaii. She registered with the employing establishment in Hawaii but never got a job because "I was told I had these injuries and that I'm not able to work."

In a September 17, 2009 report (Form CA-20), Dr. Schulte noted that appellant had fallen at work on May 30, 2007 and had hit her right hip, right wrist and right elbow. He noted appellant's complaints of chronic back and neck pain and diagnosed L5 spondylolysis, lumbar degenerative joint disease and chronic back and neck pain. By checkmark, Dr. Schulte opined that these conditions were employment related; that appellant could return to work and noted that she was so advised on July 12, 2007.

By decision dated November 13, 2009, the Office hearing representative affirmed the Office's March 26, 2009 decision because the medical evidence of record did not establish that the May 21, 2007 employment incident caused a medically-diagnosed injury.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of proof to establish the essential elements of her claim by the weight of the evidence,[2] including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.[3] As part of her burden, the employee must submit rationalized medical opinion evidence

[1] 5 U.S.C. §§ 8101-8193.

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

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

based on a complete factual and medical background showing causal relationship.[4] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[5]

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

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.[8]

ANALYSIS

The Office accepted that appellant slipped and fell on May 21, 2007. Appellant's burden is to demonstrate that this employment incident caused a medically-diagnosed injury.

The Board finds appellant has not submitted rationalized medical evidence which establishes that appellant sustained an injury as a result of the fall on May 21, 2007.[9]

Initially after the May 21, 2007 fall appellant was seen by Mr. Sabido who noted appellant's fall and recorded complaints of back, leg and right hip pain. By decision dated May 30, 2007, Mr. Sabido noted that appellant was released from further medical care. While he noted a "likely soft tissue injury," healthcare providers such as physician assistants are not

[4] *Id.*; *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

[5] *Jennifer Atkerson,* 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[6] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

[7] *T.H.*, 59 ECAB 388 (2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

[8] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[9] On appeal, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB 293 (2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision.)

"physicians" for purposes of the Act.[10] Therefore their reports and opinions do not constitute probative medical evidence.[11]

After appellant's move to Hawaii, she was seen on a number of occasions by Dr. Schulte who diagnosed several conditions, including L5 spondylolysis, lumbar degenerative joint disease and "chronic" back and neck pain. By checkmark, Dr. Schulte indicated that these conditions were employment related. A report purporting to address causal relationship with a checkmark, unsupported by a reasoned discussion and explanation, has little probative value and is insufficient to establish causal relationship.[12] Dr. Schulte did not explain how appellant's May 21, 2007 fall at work caused any of the conditions he diagnosed. The medical record indicates that appellant's pain complaints continued to increase over the course of time and the diagnoses of appellant's condition also increased over time. Given this medical history, it is especially important for the treating physician to explain the causal relationship between the diagnosed conditions and the accepted employment incident. Dr. Schulte never offered this rationalized medical opinion explaining causal relationship. Consequently, his opinion and reports do not establish the required causal relationship.

Dr. Crowley noted that appellant's condition "[flared up] when she fell down in May 2007." Dr. Finger noted that appellant's symptoms began a "year ago" after "a fall resulting in acute [lower back pain]." Neither physician described the "fall" with any detail or explained how the accepted employment incident caused the conditions they diagnosed. Thus, the opinions, notes and reports from Drs. Finger and Crowley have little probative value and do not establish the required causal relationship.

Appellant submitted a number of medical reports from various physicians which offered diagnoses of back strain, degenerative changes of the lumbar and thorocolumbar spines, cervical spondylitic changes, possible bilateral pars articularis fracture, based upon diagnostic evaluations. However none of these reports provided a history of appellant's fall on May 21, 2007 and none of these reports offered an opinion regarding the cause of appellant's condition.

In May 2008 Drs. Finger, Walker, Lewis and Kogut noted a diagnosis of fibromyalgia, but again none of these physicians explained how appellant's fall in May 2007 would have led to the diagnosis of fibromyalgia a year later. The Board also notes that none of these physicians explained the examination findings that supported this diagnosis.

Dr. Stamper diagnosed "major depressive disorder" and opined that this condition was related to appellant's May 21, 2007 injury. She provided no reasoned discussion explaining how this "injury" caused the condition she diagnosed. Therefore, this evidence does not establish the requisite causal relationship.

[10] 5 U.S.C. § 8101(2).

[11] *Id.*; *see also G.G.*, 58 ECAB 389 (2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983).

[12] *See Calvin E. King, Jr.*, 51 ECAB 394 (2000); *see also Frederick E. Howard, Jr.*, 41 ECAB 843 (1990).

Appellant submitted reports from Dr. Finley, a chiropractor, whose report is of no probative value on causal relationship because he is not a "physician" for purposes of the Act.[13] The term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[14] Dr. Finley did not diagnose or treat spinal subluxation and, thus, he is not a "physician" for purposes of the Act. Accordingly, this evidence does not establish the requisite causal relationship.

An award of compensation may not be based on surmise, conjecture or speculation.[15] Appellant has not submitted sufficient probative medical opinion evidence containing a reasoned discussion that explains how the accepted May 21, 2007 employment incident caused or aggravated any of the diagnosed medical conditions. The Board finds appellant has not established the essential element of causal relationship.

CONCLUSION

The Board finds appellant did not establish that she sustained an injury in the performance of duty on May 21, 2007 causally related to her federal employment.

[13] *Id.*

[14] 5 U.S.C. § 8101(2); *see also Jack B. Wood*, 40 ECAB 95 (1988).

[15] *Edgar G. Maiscott*, 4 ECAB 558 (1952) (holding appellant's subjective symptoms and self-serving declarations do not, in the opinion of the Board, constitute evidence of a sufficiently substantial nature).

ORDER

IT IS HEREBY ORDERED THAT the November 13, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 7, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board