United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 10-2022**
	)	**Issued: July 18, 2011**
DEPARTMENT OF THE AIR FORCE, MICHIGAN AIR NATIONAL GUARD, SELFRIDGE AIR NATIONAL GUARD BASE, MI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 3, 2010 appellant, through his attorney, filed a timely appeal of the July 7, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming the denial of his traumatic injury claim in Office File No. xxxxxx218 and a recurrence of disability claim in Office File No. xxxxxx528. Pursuant to the Federal Employees' Compensation Act,[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE -- OWCP FILE NO. xxxxxx218

The issue is whether appellant established that he sustained a back injury on June 30, 2009 in the performance of duty, as alleged.

[1] 5 U.S.C. § 8101 *et seq.*

ISSUE -- OWCP FILE NO. xxxxxx528

The issue is whether appellant has established that he sustained a recurrence of disability commencing June 30, 2009 causally related to his April 23, 2008 employment-related injury.

On appeal, counsel contends that the Office's decision is contrary to fact and law.

FACTUAL HISTORY -- OWCP FILE NOS. xxxxxx218 and xxxxxx528

Under file number xxxxxx528, OWCP accepted that on April 23, 2008 appellant, then a 26-year-old electronic integrated systems mechanic, sustained aggravation of lumbar degenerative disc disease at L4-5 and L5-S1 as a result of twisting his body on a ladder as he screwed a clamp with a screwdriver. Following injury, he returned to full-duty work on September 12, 2008. On September 1, 2009 appellant filed a recurrence of disability claim under file number xxxxxx528 alleging that on June 30, 2009 he stopped work after he experienced a light pop and pain in his low back when he tried to lean up from a table where he was reading schematics and troubleshooting an engine problem. The employing establishment noted that he was accommodated with a job assignment working 10 hours a day, 4 days per week, within medically defined limitations.

Appellant submitted a May 9, 2008 lumbar magnetic resonance imaging (MRI) scan report from Dr. Sneha R. Patel, a Board-certified radiologist, which revealed postsurgical changes on the right at L5-S1 with enhancing granulation along the right lamina and surrounding the traversing right S1 nerve root. There had been a resection of a previously noted right paracentral disc herniation. There was a persistent broad-based predominantly nonenhancing central disc protrusion without causing significant mass effect. There was moderate bilateral neural foramen stenosis at L5-S1 from degenerative disc disease, and bilateral facet and ligamentum flavum degenerative changes. There were stable degenerative changes of the remainder of the lumbar spine, most prominent at L3-4 and L4-5.

In a July 13, 2009 report, Deanna Braidwood advised that appellant was treated at Washington Family Medicine Practice. Appellant was unable to work from June 30 to July 23, 2009. In a July 24, 2009 report, Ms. Braidwood stated that appellant was unable to work through August 24, 2009.

A July 17, 2009 lumbar MRI scan report from Dr. Rimma L. Aronov, a Board-certified radiologist, revealed probable mild compression of the descending right S1 nerve root by a moderate broad-based central and right paracentral disc protrusion at L5-S1. There was degeneration of the intervertebral discs and small central disc protrusions at L4-5 and L3-4, and a small nonacute Schmorf's node at L1-2.

In a July 24, 2009 report, Dr. Umesh Singla, a radiologist, advised that appellant had lumbago.

In a report dated August 20, 2009, Dr. Milos Marjanovic, a Board-certified anesthesiologist, obtained a history of the April 23, 2008 employment injury and medical treatment and appellant's family background. He noted his complaint of low back pain. On

physical and neurological examination, Dr. Marjanovic reported essentially normal findings with the exception of positive tenderness to palpation in the lumbar paravertebrals. He reviewed a July 2009 MRI scan. Dr. Marjanovic diagnosed discogenic pain. On September 17, 2009 he performed a lumbar discogram which was positive with concordant pain at L3-4, L4-5 and L5-S1 and negative at L2-3.

In a September 17, 2009 report, Dr. Roli R. Agrawal, a Board-certified radiologist, advised that a computerized tomography scan of appellant's lumbar spine demonstrated central broad-based disc protrusion at L3-4 and L4-5 with no significant spinal canal or neural foraminal stenosis. There was central and left paracentral disc protrusion at L5-S1 with compression of both S1 spinal nerves, left more than right.

In an October 22, 2009 report, a physician whose signature is illegible advised that appellant had lumbar degenerative disc disease.

By letter dated November 17, 2009, OWCP advised appellant that the evidence submitted did not establish that he sustained a recurrence of disability of the April 23, 2008 employment injury. Rather, appellant's claim would be adjudicated as a new traumatic injury and was assigned file number xxxxxx218. OWCP addressed the medical evidence needed to establish his claim.

Appellant submitted a July 23, 2008 disability certificate from Dr. Gail S. Williams, a Board-certified internist, which advised that he should remain off work until he underwent an evaluation for epidural injections on August 4, 2008. In a September 15, 2008 disability certificate, Dr. Williams advised that appellant could work with physical restrictions.

Reports dated October 30, 2008 through February 6, 2009 from Dr. Sarah Gouy, Dr. Djordje Varga, Dr. Jessica Lupo and Dr. Joseph Lupo, chiropractors, advised that appellant had disc bulges and protrusions at L3-4, L4-5 and L5-S1 and a central annular tear at L3-4. His physical restrictions were listed and he was able to work with the restrictions through March 9, 2009.

In a March 31, 2009 disability certificate, Dr. Mark J. Hornyak, a neurologist, advised that appellant could return to work on April 1, 2009 with physical restrictions.

In a December 22, 2009 decision, OWCP denied appellant's claim, finding the medical evidence insufficient to establish that he sustained a back injury causally related to the accepted June 30, 2009 employment incident.

In a January 8, 2010 letter, appellant, through his attorney, requested a telephonic hearing with OWCP's hearing representative.

A December 4, 2009 radiological report from Dr. Mark I. Burnstein, a Board-certified radiologist, revealed a spinal fusion with fluoroscopic time digital spot films.

In an April 9, 2009 report, Dr. Jeffrey F. Wirebaugh, a Board-certified family practitioner, advised that the April 23, 2008 employment injury aggravated appellant's

preexisting lumbar disc disease at L4-5 and L5-S1 with radiculopathy into the right lower extremity.

During the April 16, 2010 telephonic hearing, appellant contended that he did not sustain a new injury on June 30, 2009. Rather, he sustained a recurrence of disability due to his April 23, 2008 employment injury.

In a July 7, 2010 decision, OWCP's hearing representative affirmed the December 22, 2009 decision, finding the medical evidence insufficient to establish that appellant sustained a back injury that was caused or aggravated by the accepted June 30, 2009 employment incident in OWCP file number xxxxxx218. He also found that the medical evidence was insufficient to establish that appellant sustained a recurrence of disability on June 30, 2009 due to his April 23, 2008 employment injury in OWCP file number xxxxxx528.

LEGAL PRECEDENT -- ISSUE 1 -- OWCP FILE NO. xxxxxx218

An employee seeking benefits under FECA[2] 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; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury of an occupational disease.[4]

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 or exposure, which is alleged to have occurred.[5] In order to meet his burden of proof to establish the fact that he sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he actually experienced the employment injury or exposure at the time, place and in the manner alleged.[6]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[7] The evidence required to establish

[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 3.

[5] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

[6] *Linda S. Jackson*, 49 ECAB 486 (1998).

[7] *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).

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.[8] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.[9]

ANALYSIS -- ISSUE 1 -- OWCP FILE NO. xxxxxx218

OWCP accepted that appellant leaned up from a table where he was reading schematics and troubleshooting an engine problem on June 30, 2009 while working as an electronic integrated systems mechanic. The Board finds that the medical evidence of record is insufficient to establish that his back condition was caused or aggravated by the June 30, 2009 employment incident.

Dr. Marjanovic's August 20, 2009 reports provided essentially normal findings on physical and neurological examination, noting positive tenderness to palpation in the lumbar paravertebrals. He advised that appellant had discogenic pain for which he performed a lumbar discogram September 17, 2009. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value.[10] Dr. Marjanovic failed to explain how leaning up from a table would cause or contribute to the diagnosed discogenic pain and resultant surgery. Further, the Board notes that a physician's mere diagnosis of pain, without more by way of medical rationale, does not constitute a basis for payment of compensation as pain is a symptom, not a medical condition.[11] The Board finds that Dr. Marjanovic's reports are insufficient to establish that appellant sustained an injury causally related to the accepted employment incident.

The diagnostic test reports of Dr. Aronov, Dr. Singla, Dr. Agrawal and Dr. Burnstein did not provide an opinion addressing whether the diagnosed lumbar conditions and spinal fusion were causally related to the June 30, 2009 employment incident.[12] The Board finds that this evidence is insufficient to establish appellant's claim.

Dr. Patel's May 9, 2008 diagnostic test report diagnosed appellant's lumbar conditions. Dr. Williams' July 23, 2008 disability certificate advised that appellant was disabled for work through August 4, 2008. In a September 15, 2008 disability certificate, he advised that appellant could return to work with physical restrictions. Dr. Hornyak's March 31, 2009 disability certificate stated that appellant could return to work on April 1, 2009 with physical restrictions. Dr. Wirebaugh's April 9, 2009 report found that the April 23, 2008 employment injury aggravated appellant's preexisting lumbar disc disease at L4-5 and L5-S1 with radiculopathy into the right lower extremity. None of these reports are relevant in establishing causal relation as

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

[9] *Charles E. Evans*, 48 ECAB 692 (1997).

[10] *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

[11] *C.F.*, Docket No. 08-1102 (issued October 10, 2008); *Robert Broome*, 55 ECAB 339 (2004).

[12] *See* cases cited, *supra* note 10.

they predate the June 30, 2009 employment incident and fail to address whether appellant sustained an injury causally related to the June 30, 2009 employment incident. The Board finds that this evidence is insufficient to establish appellant's claim.

The reports of Dr. Gouy, Dr. Varga, Dr. Jessica Lupo and Dr. Joseph Lupo, chiropractors, are insufficient to establish appellant's claim. The physicians diagnosed several lumbar conditions, none of which included subluxation as demonstrated by x-ray. The term physician under section 8101(2) of the Act 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.[13] As Dr. Gouy, Dr. Varga, Dr. Jessica Lugo and Dr. Joseph Lugo did not diagnose spinal subluxation based on x-rays; the Board finds their reports are of no probative medical value.[14]

The October 22, 2009 report which contained an illegible signature and Ms. Braidwood's reports do not constitute probative medical evidence. A medical report may not be considered as probative evidence if there is no indication that the person completing the report is a physician as defined at section 8101(2) of the Act.[15] The Board finds, therefore, that the disability certificates and reports do not establish appellant's claim.

The Board finds that there is insufficient rationalized medical evidence of record to establish that appellant sustained a back injury causally related to the accepted June 30, 2009 employment incident. Appellant did not meet his burden of proof.

LEGAL PRECEDENT -- ISSUE 2 -- OWCP FILE NO. xxxxxx528

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[16] This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[17]

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to

[13] 5 U.S.C. § 8101(2).

[14] *See Michelle Salazar*, 54 ECAB 523 (2003).

[15] *R.M.*, 59 ECAB 690 (2008).

[16] 20 C.F.R. § 10.5(x).

[17] *Id.*

establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[18]

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.[19]

ANALYSIS -- ISSUE 2 -- OWCP FILE NO. xxxxxx528

OWCP accepted that appellant sustained aggravation of lumbar degenerative disc disease at L4-5 and L5-S1 on April 23, 2008 while working as an electronic integrated systems mechanic. Following this injury, he returned to full-duty work. At the time he claimed a recurrence of total disability commencing June 30, 2009 causally related to his accepted employment injury of April 23, 2008 while he was performing modified-duty work. Appellant must demonstrate either that his condition has changed such that he could not perform the activities required by his modified job or that the requirements of the limited light-duty job changed.[20] The Board finds that the record contains no evidence that the limited light-duty job requirements were changed or withdrawn or that appellant's employment-related condition has changed such that it precluded him from performing limited light-duty work.

None of the medical evidence submitted by appellant establishes that he sustained a recurrence of disability commencing June 30, 2009 due to the April 23, 2008 employment injury. Although the reports from Dr. Marjanovic, Dr. Aronov, Dr. Singla, Dr. Agrawal and Dr. Burnstein indicated that appellant had lumbar conditions, none of the evidence addressed whether he sustained the claimed recurrence of disability due to the accepted employment injury.[21] Dr. Patel's diagnostic test report, Dr. Williams' disability certificates and Dr. Hornyak's and Dr. Wirebaugh's reports predate the alleged recurrence of disability and are, therefore, of diminished probative value as to the claimed period of disability. The chiropractic reports of Dr. Gouy, Dr. Varga, Dr. Jessica Lupo and Dr. Joseph Lupo are of no probative value as they did not diagnose subluxation as demonstrated by x-ray.[22] Lastly, the reports which contained an illegible signature and signed by Ms. Braidwood are of no probative value as there is no indication that the evidence was signed by a physician.[23]

[18] *Albert C. Brown*, 52 ECAB 152, 154-55 (2000); *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[19] *James H. Botts*, 50 ECAB 265 (1999).

[20] *See supra* note 18.

[21] *See* cases cited *supra* note 10.

[22] *See supra* note 14.

[23] *R.M., supra* note 15.

Appellant has not met his burden of proof in establishing that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the limited-duty requirements which would prohibit him from performing the limited light-duty position, he assumed after he returned to work.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a back injury in the performance of duty on June 30, 2009, as alleged in File No. xxxxxx218. The Board further finds that appellant has failed to establish that he sustained a recurrence of disability commencing June 30, 2009 causally related to his April 23, 2008 employment injury in File No. xxxxxx528.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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