United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 10-1378**
	)	**Issued: March 14, 2011**
DEPARTMENT OF VETERANS AFFAIRS VETERANS HEALTH ADMINISTRATION, Chillicothe, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 22, 2010 appellant, through his attorney, filed a timely appeal from a March 30, 2010 merit decision of the Office of Workers' Compensation Programs that denied certain conditions as causally related to his accepted employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that his claim should be accepted for aggravation of bilateral ulnar neuropathies causally related to his accepted employment injury.

FACTUAL HISTORY

On September 30, 2008 appellant, then a 44-year-old housekeeping aide, sustained a back injury while buffing floors and pushing a bed across the floor. He stopped work that day and

returned to modified work on October 12, 2008. The Office accepted the claim for lumbar and thoracic sprain.[1]

An October 24, 2008 magnetic resonance image (MRI) scan showed an unremarkable alignment of the thoracic spine. There was mild posterior spurring and diffuse disc bulge at multiple thoracic levels spanning T6 through T12 but no dominant disc herniation or significant central canal stenosis and no epidural mass or cyst. A November 18, 2008 electromyogram (EMG) revealed severe acute chronic bilateral ulnar mononeuropathies at the elbow and no evidence of radiculopathy, plexopathy or polyneuropathy.

In a November 5, 2008 report, Dr. Carl E. Otten, Board-certified in occupational medicine and a treating physician, diagnosed cervical, thoracic and lumbar strains. He advised that appellant's left hand was continuously tingly since the date of injury. Appellant denies any prior neck or left upper extremity problems. He had prior right elbow surgery in 2001 and an EMG at that time. In December 2 and 16, 2008 reports, Dr. Otten requested that the Office accept appellant's claim for a bilateral ulnar neuropathy condition. He checked the box "yes" in response to whether he believed appellant's condition was caused or aggravated by his employment. Dr. Otten advised that appellant could do sedentary work with no lifting over 15 pounds.

By letter dated January 8, 2009, the Office provided Dr. Otten with a statement of accepted facts and noted that appellant engaged in weight lifting. It requested that he explain how the reported work incident caused the claimed injury.

In a January 9, 2009 report, Dr. Otten diagnosed cervical thoracic and lumbar strains. He noted that there was a "pending" diagnosis of aggravation of bilateral ulnar neuropathies. Dr. Otten advised that a November 17, 2008 EMG revealed severe bilateral ulnar neuropathies. He recommended sedentary work level, with no lifting greater than 15 pounds occasionally.[2]

On March 2, 2009 the Office accepted a cervical sprain, aggravation of cervical spondylosis, aggravation of lumbar facet arthritis and aggravation of cervical degenerative disc disease. It advised appellant that a second opinion examination would be scheduled to develop whether the September 30, 2008 work injury caused or contributed to a bilateral ulnar neuropathy condition. In a separate March 2, 2009 letter, the Office referred him to Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon.

In a March 29, 2009 report, Dr. Fisher described appellant's history of injury and treatment. He examined him and found no objective clinical findings over the neck, thoracic or lumbar regions. Dr. Fisher advised that appellant only had "generalized subjective complaints with a great deal of pain magnification symptoms over the entire back from the neck to the low back area." He noted that the pain symptoms did not correspond with any positive objective

[1] Appellant's nonwork medical history is significant for a 1982 neck injury while in the military, rectal cancer, and hypertension. He underwent lymph node removal in 2007, gastric reconstruction and anal reconstruction.

[2] Appellant stopped work to undergo nonwork-related left elbow surgery on January 29, 2009. He returned to his limited-duty position on March 6, 2009.

findings over the neck or back area. Dr. Fisher stated that the only objective finding was due to recent nonwork-related left elbow surgery for which there was some decreased sensation over the left hand. His review of the medical record revealed no mention of any ulnar nerve complaints or problems at the elbows or numbness or tingling. Dr. Fisher added that the first note of any complaints was on November 5, 2008 when appellant was seen by Dr. Otten. He advised that the November 2008 diagnostic reports of the upper extremities revealed chronic severe ulnar nerve neuropathy at the elbows bilaterally. Dr. Fisher opined that the condition was not directly caused by the work injury of September 30, 2008 as it was preexisting and became symptomatic in November 2008, two months after the injury occurred. He stated that it was not aggravated, accelerated or precipitated by the September 30, 2008 injury and was completely unrelated. Dr. Fisher found that appellant was able to return to his regular duties without restrictions.

The Office provided Dr. Otten with a copy of Dr. Fisher's March 29, 2009 report and requested a response regarding his findings. On May 7, 2009 Dr. Otten concurred with Dr. Fisher that appellant appeared to magnify some of his symptoms; but reiterated his opinion that appellant had ulnar neuropathy and advised that appellant was unable to return to his duties as a housekeeper. He continued to treat him and submit reports.

On July 7, 2009 the Office referred appellant to Dr. Michael S. Lefkowitz, a Board-certified orthopedic surgeon, for an impartial evaluation to resolve the conflict in medical opinion between Drs. Fisher and Otten regarding the extent of appellant's work-related condition and whether his upper extremity condition was related to the accepted work injury.

In a July 30, 2009 report, Dr. Lefkowitz reviewed appellant's history and reported findings on examination. He noted that appellant had numbness along the medial side of his left elbow and a well-healed incision. Dr. Lefkowitz noted subjective decreased sensation in his left fourth and fifth fingers. A November 18, 2008 EMG revealed severe acute chronic bilateral ulnar neuropathies at the elbow with no evidence of radiculopathy, plexopathy or polyneuropathy identified. Dr. Lefkowitz advised that other diagnostic reports revealed multiple thoracic diffuse disc bulges and mild posterior spurring expanding from T6 through T12. There was similar narrowing and foraminal narrowing at the C5-6, C6-7 levels with some nerve-root impingement. Dr. Lefkowitz advised that appellant had a history of tobacco abuse of one pack a day for 15 years, that conflicted with the self-reported information from appellant. He noted that the initial injury was a spinal injury that occurred on September 30, 2008 while appellant was trying to bend over and move a 400-pound wooden bed while also holding a buffer. Dr. Lefkowitz stated that appellant displayed significant signs of symptom magnification. He noted that the MRI scan of the lumbar spine showed an absence of any central canal stenosis, herniated discs, fractures or osseous metastatic lesions. On the other hand, appellant states that he had pain essentially around the clock, was unable to do any significant activity, and held himself in a position which would aggravate, not relieve, pain from degenerative disc disease. "I do believe that his objective findings from the MRI scan do not correlate with the subjective complaints of pain." The description of numbness in both the dorsum and plantar aspect of both feet associated with pain and numbness in his right thigh and calf did not make anatomic sense. Dr. Lefkowitz advised that the MRI scan confirmed that appellant had degenerative disc disease of the cervical spine and opined that he likely had an aggravation of his lumbar facet arthritis in addition to a previous lumbar strain. He advised that the cervical and thoracic strains, which

were present at the time of injury were not present on his examination. Dr. Lefkowitz opined that the chronic bilateral ulnar neuropathies, despite an acute component in November 2008, were not related to the September 30, 2008 work injury. He added that he would not certify this as an aggravation of previously long-standing bilateral ulnar neuropathies nor would he certify it as a new injury from the September 30, 2008 work injury. Dr. Lefkowitz clarified that he did not believe the bilateral ulnar neuropathy was aggravated, caused or related to his September 30, 2008 work injury. He advised that appellant could not return to his housekeeping aid duties. Dr. Lefkowitz explained that appellant continued to have an aggravation of his lumbar facet arthritis and that frequently lifting 50 pounds and other associated activities at work would materially aggravate his allowed condition. He completed a work capacity restriction and noted that appellant could return to work with restrictions.

In a May 19, 2009 report, Dr. Kort M. Gronbach, a Board-certified anesthesiologist, noted that appellant had known spondylitic changes in the cervical and lumbar region and received epidural steroids. He advised that appellant's degenerative spondylitic changes in the cervical spine involved both the disc and facet joints and opined that it was likely related to his spondylosis. Dr. Gronbach requested authorization for medial branch blocks. Appellant underwent the procedures on September 8 and 22, 2009.

In a September 30, 2009 decision, the Office denied appellant's request to accept his claim for aggravation of bilateral ulnar neuropathies. It found that the weight of the medical evidence, represented by Dr. Lefkowitz, established that this condition was not caused or aggravated by the September 30, 2008 work injury.

Appellant's representative requested a telephonic hearing, which was held on January 14, 2010. In an October 6, 2009 report, Dr. Otten reiterated his diagnoses. In a December 8, 2009 report, Dr. James Fleming, a Board-certified orthopedic surgeon, diagnosed mild lumbar degenerative disc disease and mild cervical spondylosis.

In a January 20, 2010 report, Dr. Slyun Li, an orthopedist, noted appellant's history and stated that he had significant pain involving the neck, back and legs, with pronounced pain at the site of the injury. However, imaging studies did not show significant bony structural abnormalities. Dr. Li opined that the pain was likely related to appellant's musculature or secondary muscular spasms, noting that it was "unclear why the pain is beyond the site of injury and quite diffuse." He saw no evidence of cervical, thoracic or lumbar radiculopathy.

By decision dated March 30, 2010, an Office hearing representative affirmed the September 30, 2009 decision.

LEGAL PRECEDENT

When an employee claims that he or she sustained an injury in the performance of duty, the employee must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. The employee must also establish that such event, incident or exposure caused an injury. Once an employee establishes an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, which the employee

claims compensation, is causally related to the accepted injury.[3] To meet his or her burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.[4] Medical conclusions unsupported by rationale are of diminished probative value and are insufficient to establish causal relation.[5]

ANALYSIS

The Office initially accepted the claim for lumbar and thoracic strain and later expanded the claim to include cervical sprain, aggravation of cervical spondylosis, aggravation of lumbar facet arthritis and aggravation of cervical degenerative disc disease. Appellant asserted that his bilateral ulnar neuropathies were due to the work injury. The Office found that a conflict in medical opinion was created between his physician, Dr. Otten, who found that appellant had work-related bilateral ulnar neuropathies and Dr. Fisher, the second opinion physician, who determined that the bilateral ulnar neuropathies were preexisting. It referred appellant to Dr. Lefkowitz, a Board-certified orthopedic surgeon and impartial medical examiner, to resolve the conflict.

Section 8123(a) of the Federal Employees' Compensation Act[6] provides, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination.[7] In situations were there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[8]

The Board finds that the thorough and well-documented report of Dr. Lefkowitz, the impartial specialist selected to resolve the medical conflict, is entitled to special weight. Dr. Lefkowitz noted appellant's history, examined him and reviewed the results of diagnostic testing. He advised that appellant showed "significant signs of symptom magnification" as test results did not correlate with appellant's reports of pain "essentially around the clock" nor with him holding "himself in a position, which if anything would logically aggravate, not relieve pain from degenerative disc disease." Dr. Lefkowitz explained that the MRI scan findings supported that appellant had degenerative disc disease of the cervical spine which resulted in an aggravation of his lumbar facet arthritis in addition to the previous lumbar strain. Regarding the chronic bilateral ulnar neuropathies, he noted findings of diagnostic testing and opined that, while present in November 2008, they were not related to the September 30, 2008 work injury.

[3] *See Leon Thomas*, 52 ECAB 202 (2001).

[4] *See Gary J. Watling*, 52 ECAB 278 (2001).

[5] *Albert C. Brown*, 52 ECAB 152 (2000).

[6] 5 U.S.C. §§ 8101-8193.

[7] *Id.* at § 8123(a).

[8] *Barbara J. Warren*, 51 ECAB 413 (2000).

Furthermore, Dr. Lefkowitz did not believe that it was as an aggravation of previously long-standing bilateral ulnar neuropathies. He concluded that the bilateral ulnar neuropathies were not caused or aggravated by the September 30, 2008 work injury.

The Office properly accorded special weight to the impartial medical examiner's July 30, 2009 findings. The Board finds that Dr. Lefkowitz' report is sufficiently well rationalized and based on a proper factual background and represents the weight of the medical evidence and establishes that the bilateral ulnar neuropathy conditions were not caused by the accepted work injury.

The Office received additional reports from Dr. Otten. However, Dr. Otten merely reiterated previously stated findings and conclusions regarding appellant's condition. As he had been on one side of the conflict in the medical opinion that the impartial specialist resolved, the treating physician's reports were insufficient to overcome the special weight accorded the impartial specialist or to create a new medical conflict.[9] The additional reports from Dr. Otten do not contain any new information or rationale sufficient to overcome or create a new conflict with the opinion of Dr. Lefkowitz. The Board also notes that he was in agreement that appellant was "magnifying" some of his symptoms.

The Office received several reports from other treating physicians. In a May 19, 2009 report, Dr. Gronbach noted that appellant had degenerative spondylitic changes throughout the cervical spine involving both the disc and facet joints and opined that it was likely related to his spondylosis. The Office also received a December 8, 2009 report from Dr. Fleming who diagnosed mild lumbar degenerative disc disease and mild cervical spondylosis. In a January 20, 2010 report, Dr. Li noted that he saw evidence of cervical, thoracic or lumbar radiculopathy. However, none of the physicians provided any opinion regarding the bilateral ulnar neuropathy condition and its relation to appellant's work injury. 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.[10] As these physicians did not provide a rationalized opinion to explain how the bilateral ulnar neuropathy was causally related to the September 30, 2008 employment injury, these reports are of little probative value.[11]

The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor the belief of appellant that the disease was caused or aggravated by employment conditions, is sufficient to establish causal relation.[12]

[9] *See supra* note 8; *Alice J. Tysinger*, 51 ECAB 638 (2000).

[10] *Michael E. Smith*, 50 ECAB 313 (1999).

[11] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[12] *Lucrecia M. Nielsen*, 42 ECAB 583, 593 (1991); *Joseph T. Gulla*, 36 ECAB 516, 519 (1985).

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that his claim should be expanded to include aggravation of bilateral ulnar neuropathies as causally related to his accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 14, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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