

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

N.T., Appellant)

and)

GENERAL SERVICES ADMINISTRATION,)
PUBLIC BUILDING SERVICE,)
Kansas City, MO, Employer)

Docket No. 12-1024
Issued: December 20, 2012

Appearances:

Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 16, 2012 appellant, through his attorney, filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) merit decision dated December 2, 2011 denying his claim for an employment-related injury. Pursuant to the Federal Employees' Compensation Act¹ (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 that he sustained an aggravation of a preexisting emotional condition causally related to a May 14, 2007 employment incident.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant's attorney contends that Sean R. Evers, Ph.D., a clinical psychologist, supported that appellant's Asperger's syndrome was aggravated by his work duties and established causal relationship.

FACTUAL HISTORY

On May 13, 2010 appellant, then a 51-year-old building maintenance specialist, filed a traumatic injury claim (Form CA-1) alleging that he sustained an aggravation of his preexisting Asperger's syndrome as a result of being forced to attend a fitness-for-duty examination on May 14, 2007. The employing establishment advised on the claim form that he had been terminated effective September 4, 2007.

By letter dated June 3, 2010, OWCP requested additional factual and medical evidence. It afforded appellant 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted an April 27, 2007 letter from the employing establishment directing him to report for a fitness-for-duty examination and a July 2, 2010 narrative statement indicating that he submitted to the examination on May 14, 2007. He stated that he was forced to travel 100 miles to attend the examination which caused him stress and anxiety. As part of the examination, appellant had to recount the incidents that caused a June 15, 2005 employment injury² and describe what happened to cause him to decompensate during a January 9, 2007 second opinion evaluation, causing him stress and anxiety. He stated that he was forced to endure close physical contact by Dr. Robert Boesch, the Board-certified occupational medicine physician who conducted the fitness-for-duty examination, which included touching of his chest and genitals.

In reports dated March 25, 2008, January 26 and April 6, 2010, Dr. Evers advised that he had treated appellant since September 26, 2005. He diagnosed Asperger's disorder and anxiety disorder. On March 25, 2008 Dr. Evers opined that on or about March 23, 2005 appellant experienced a traumatic set of circumstances that caused an exacerbation of his psychological difficulties resulting in an exacerbation of his anxiety disorder and the obsessive-compulsive symptoms secondary to his Asperger's disorder. Appellant's workload increased in November 2004 which exacerbated his Asperger's symptomology. The situation came to head on or about March 23, 2005 when a flood at work required appellant to stay late, but he had previously been told not to stay after work. Dr. Evers opined that this confluence of contradictory directives was more than appellant could manage given his psychological limitation.

By decision dated July 9, 2010, OWCP denied appellant's claim finding that the evidence failed to establish fact of injury.

On August 7, 2001 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative. He submitted treatment notes by Dr. Evers dated September 26, 2005 to November 24, 2010.

² Under OWCP File No. xxxxxx813, OWCP accepted a claim for aggravation of hypertension and appellant received disability benefits.

In a January 9, 2007 report, Dr. John J. Verdon, Jr., a Board-certified psychiatrist, listed the diagnosis of Asperger's disorder, rendered by a psychologist, on questionable grounds. He opined that Dr. Evers missed the essential diagnosis of obsessive-compulsive disorder, which was quite severe. Upon examination, Dr. Verdon found that appellant was completely disorganized, perplexed, confused, ruminative, fearful and easily flustered. However, he could engage in a brief nonthreatening examination and be focused with goal direction. Dr. Verdon stated that appellant had been a long-standing employee of the Federal Government and advised that he was not fit for duty from a psychiatric standpoint.

In an October 13, 2010 report, Dr. Evers reiterated that appellant's emotional conditions were aggravated by the May 14, 2007 examination by Dr. Boesch. He explained that appellant found medical examination particularly difficult, especially when he had to travel a distance or if it involved physical contact. Appellant's fitness-for-duty examination by Dr. Boesch was approximately 70 miles from his home and he became very anxious due to the distance he had to travel and the fact that the examination could be critical to his return to work. After the examination, appellant manifested heightened anxiety and obsessive compulsive symptomology. Dr. Evers opined that appellant was in a state of emotional paralysis due to the May 14, 2007 examination. He was unable to function appropriately and manage his personal affairs for several months as he reviewed and re-reviewed the examination.

On December 6, 2010 an oral hearing was held before an OWCP hearing representative. Appellant provided testimony and the hearing representative held the case open for 30 days for the submission of additional evidence.

By decision dated January 25, 2011, the hearing representative modified the July 9, 2010 decision to find that the evidence established that appellant was touched by Dr. Boesch and recounted his medical history. The claim denial was affirmed on the basis that causal relationship was not established.

On June 27, 2011 appellant, through his attorney, requested reconsideration. He submitted a June 7, 2011 report by Dr. Evers who reiterated the diagnosis and opined that the May 14, 2007 examination by Dr. Boesch caused appellant an acute period of anticipatory anxiety prior to the examination; a marked period of decomposition immediately after the examination due to the physical contact; and that the stress of the examination caused decomposition when it became apparent that the examination had not resulted in a formal report. Appellant had also been misled into signing a settlement agreement which ended his career with the employing establishment.

Appellant submitted reports dated August 1 and September 16, 2011 by Dr. Joseph W. Slap, a Board-certified psychiatrist, who diagnosed Asperger's disorder. Dr. Slap opined that, if appellant's promotion occurred before June 15, 2005, the incident was related to his Asperger's disease. If the promotion was not discussed, then Dr. Slap would conclude that the June 15, 2005 incident was unrelated to the Asperger's disease.

By decision dated December 2, 2011, OWCP denied modification of the January 25, 2011 decision on the basis that the evidence submitted was insufficient to establish causal

relationship between the aggravation of appellant's Asperger's disorder and the May 14, 2007 employment incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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 timely filed within the applicable time limitation period of FECA, that an injury⁴ was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. A fact of injury determination is based on two elements. 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. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.⁶

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. 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.⁷

ANALYSIS

OWCP has accepted that the employment incident of May 14, 2007 occurred at the time, place and in the manner alleged. The issue is whether an aggravation of appellant's preexisting emotional condition resulted from the May 14, 2007 employment incident. The Board finds that he did not meet his burden of proof to establish a causal relationship between the condition for which compensation is claimed and the May 14, 2007 employment incident.

³ 5 U.S.C. §§ 8101-8193.

⁴ OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

⁵ *T.H.*, 59 ECAB 388 (2008). See *Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ *Id.* See *Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

⁷ *Id.* See *Gary J. Watling*, 52 ECAB 278 (2001).

Dr. Evers diagnosed Asperger's disorder and anxiety disorder. On March 25, 2008 he opined that appellant's emotional condition was aggravated by a flood at work on or about March 23, 2005. On October 13, 2010 Dr. Evers opined that appellant's emotional condition was aggravated by a May 14, 2007 examination by Dr. Boesch. He failed to reconcile the date of injury as he indicated that appellant's emotional condition was aggravated at work on or about March 23, 2005 and on May 14, 2007 as a result of the fitness-for-duty examination. Dr. Evers' reports fail to adequately address the causal relationship between the aggravation of appellant's conditions and the May 14, 2007 employment incident. The fact that work activities produced pain or discomfort revelatory of an underlying condition does not raise an inference of an employment relation.⁸ Dr. Evers did not explain how the contact by Dr. Boesch, found to be appropriate, or addressing the medical history on May 14, 2007 caused or aggravated appellant's conditions. He did not provide sufficient medical rationale for his conclusion that appellant's Asperger's or anxiety disorder were caused or aggravated by the May 14, 2007 examination. Lacking thorough medical rationale on the issue of causal relationship, the reports are of limited probative value and not sufficient to establish that appellant sustained an employment-related injury in the performance of duty on May 14, 2007.

Dr. Slap diagnosed Asperger's disorder. He opined that, if appellant's promotion occurred before June 15, 2005, then he would conclude that the June 15, 2005 incident was related to his Asperger's disease. If the promotion was not discussed, then Dr. Slap would conclude that the June 15, 2005 incident was unrelated to the Asperger's disease. Although he provided a firm diagnosis, Dr. Slap attributed appellant's condition to an injury other than the May 14, 2007 employment incident. His reports are of a limited probative value and insufficient to meet appellant's burden of proof to establish a claim.

The January 9, 2007 report by Dr. Verdon is irrelevant as it predates the May 14, 2007 employment incident and therefore fails to constitute probative medical evidence on the issue of causal relationship in this case.

As appellant has not submitted any rationalized medical evidence to support his allegation that he sustained an injury causally related to a May 14, 2007 employment incident, he has failed to meet his burden of proof.

On appeal appellant's attorney contends that Dr. Evers provided reports indicating that appellant's Asperger's syndrome was aggravated by his work duties and, thus, established causal relationship. For the reasons stated above, the Board finds the attorney's argument is not substantiated.

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.

⁸ See *Wilbur D. Starks*, 23 ECAB 85 (1971).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an aggravation of a preexisting emotional condition causally related to a May 14, 2007 employment incident, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 20, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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