

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

N.T., Appellant)	
)	
and)	Docket No. 14-390
)	Issued: December 18, 2014
GENERAL SERVICES ADMINISTRATION,)	
PUBLIC BUILDING SERVICE,)	
Kansas City, MO, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
Thomas R. Uliase, Esq., for the appellant	
Office of Solicitor, for the Director	

DECISION AND ORDER

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

JURISDICTION

On December 9, 2013 appellant, through his attorney, filed a timely appeal from a September 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 sustained an aggravation of his preexisting emotional condition causally related to a May 14, 2007 employment incident.

On appeal, counsel contends that a July 23, 2013 report from appellant's psychologist addressed the Board's previous decision and was sufficient to establish that the fitness-for-duty examination by an occupational medicine specialist on May 14, 2007 aggravated appellant's preexisting psychological condition.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case was previously before the Board. In a decision dated December 20, 2012, the Board affirmed OWCP's December 2, 2011 decision, finding that appellant had met his burden of proof to establish an aggravation of his preexisting emotional condition causally related to a May 14, 2007 employment incident.² The facts of the case, as set forth in the prior decision, are incorporated by reference.

By letter dated August 1, 2013, appellant, through his attorney, requested reconsideration. He submitted a July 23, 2013 report from Dr. Sean R. Evers, an attending clinical psychologist, who found appellant's May 14, 2007 fitness-for-duty examination by Dr. Robert Boesch that exacerbated his Asperger's disorder symptomology and obsessive/compulsive behavior. Dr. Boesch explained that appellant's Asperger's disorder was typified by marked impairment in the use of nonverbal behaviors and lack of appropriate social and emotional reciprocity. For this reason, appellant had difficulty with close interpersonal contact. When preoccupied, he demonstrated an abnormal intensity and focus on that interest. Appellant also had significant obsessive compulsive traits that included preoccupation with details, rules, and inflexibility in appellant's thinking with a rigid approach to problems. Dr. Evers indicated that appellant's problems at work, as well as his court hearings, revealed significant evidence of his social impairment. He opined that appellant's Asperger's disorder impacted his relations with coworkers and had been misinterpreted by his supervisors as oppositional or disruptive behavior when it was merely a manifestation of his disorder. Dr. Evers stated that appellant's disorder caused him to become extraordinarily uncomfortable with close interpersonal contact, which resulted in his inability to participate in activities such as getting a haircut because he did not want anyone to touch him. Appellant was preoccupied with his employment situation and his need to return to work.

Dr. Evers opined that being required to be examined by Dr. Boesch needed to be understood in the context of appellant's disorder. When appellant was notified of the examination, at quite a distance from his house, his anxiety skyrocketed. He tried to obtain assistance from his employing establishment for transportation to the visit, understanding his limitations for fear he would get lost or be late for the examination; but his requests were denied. Appellant had great difficulty getting to the examination, but recognized that he had to attend. Dr. Evers credited Dr. Boesch's ability to "help [appellant] relax enough to have the examination." He concluded that the May 14, 2007 examination "caused [appellant's] symptoms to be exacerbated because the examination involved travel to a new and novel location far from his home, where he had to travel without assistance" and "required close personal contact and interpersonal contact which [was] very stress producing for him."

By decision dated September 11, 2013, OWCP denied modification of its December 2, 2011 decision on the basis that the evidence submitted was insufficient to establish a causal relationship between the aggravation of appellant's Asperger's disorder and the May 14, 2007 incident.

² Docket No. 12-1024 (issued December 20, 2012). OWCP accepted that on July 9, 1996 appellant, then a 38-year-old building maintenance specialist, sustained an aggravation of hypertension while in the performance of duty.

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 accepted as a compensable factor that on May 14, 2007 appellant was required to undergo a fitness-for-duty examination by Dr. Boesch related to his 2005 claim accepted for an aggravation of hypertension. During the examination, appellant was touched by Dr. Boesch and was required to recount his medical history to the physician.⁸ The issue is whether this

³ 5 U.S.C. §§ 8101-8193.

⁴ OWCP 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 See *T.H.*, 59 ECAB 388 (2008). See also *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).

⁸ See *Raymond H. Schultz, Jr.*, 23 ECAB 25 (1971) (Schwartz, Chairman, dissenting) the Board found that the requirement to undergo a fitness-for-duty psychiatric examination was a compensable factor of employment. Contrast *Margaret M. Boyle*, 13 ECAB 172 (1961) in which the Board found that the employee did not attribute her emotional condition to her regular or specially assigned duties or to a requirement that she undergo a fitness-for-duty examination.

examination aggravated appellant's preexisting emotional condition. The Board finds that he did not meet his burden of proof to establish a causal relationship between the May 14, 2007 employment incident and an aggravation of his Asperger's syndrome.

In his July 23, 2013 report, Dr. Evers opined that there was a causal relationship between appellant's May 14, 2007 examination by Dr. Boesch and an exacerbation of his Asperger's disorder symptomology and obsessive/compulsive behaviors. He explained that appellant's disorder caused him to become extraordinarily uncomfortable with close interpersonal contact. When appellant was notified of the examination, at a distance from his house, "his anxiety skyrocketed." He had difficulty getting to the examination, but recognized that he had to attend. Dr. Evers credited Dr. Boesch's ability to help appellant relax enough to undergo the examination. He concluded that the May 14, 2007 examination "caused [appellant's] symptoms to be exacerbated because the examination involved travel to a new and novel location far from his home, where he had to travel without assistance" and "required close personal contact and interpersonal contact which [was] very stress producing for him."

The fact that work activities produced pain or discomfort revelatory of an underlying condition does not raise an inference of an employment relation.⁹ The record establishes that appellant underwent a fitness-for-duty examination by Dr. Boesch on May 14, 2007. It is noted that, following the examination, Dr. Boesch did not prepare a medical report. The record reflects that appellant instituted a Merit Systems Protection Board proceeding to subpoena the report of Dr. Boesch, but it was determined that no such document existed to produce. He contended that the report was suppressed by his employing establishment in order to have an advantage over him in the settlement agreement that culminated in his separation.

As to the examination, appellant testified before the Branch of Hearings and Review that Dr. Boesch conducted the examination in a professional manner and, subsequently related to appellant in a telephone call on September 28, 2007 that he did not generate any report in connection with the fitness-for-duty examination.

The Board finds that the reports of Dr. Evers do not adequately explain how the examination of May 14, 2007 aggravated appellant's condition. Dr. Evers generally attributed the aggravation of appellant's condition to the travel involved without assistance and the personal contact during the examination. He noted that intense triggers in appellant's ritualistic behavior arose when he found out that the examination did not result in a report from Dr. Boesch, which he understood to be "the rule." Dr. Evers stated this inconsistency shook appellant's basic means of functioning in the world. He did not provide sufficient medical rationale explaining how appellant's Asperger's disorder was aggravated by the requirement of the May 14, 2007 examination. Rather, Dr. Evers addressed stress occurring after the examination when he learned that Dr. Boesch had not prepared a report and when he learned at the settlement agreement with the employing establishment, that he was unaccommodateable. He stated that appellant had "no choice but to believe that it must be Dr. Boesch's report that made that conclusion."

Lacking thorough medical rationale on the issue of causal relationship, the reports of Dr. Evers are of limited probative value and insufficient to establish that appellant sustained an

⁹ See *Wilbur D. Starks*, 23 ECAB 85 (1971).

employment-related injury on May 14, 2007. Appellant has not submitted sufficient rationalized medical opinion to support his allegation that the May 14, 2007 fitness-for-duty examination aggravated his preexisting Asperger's syndrome.

On appeal, counsel contends that the July 23, 2013 report from Dr. Evers addresses the criticisms of the Board's previous decision and is sufficient to establish that physical contact with Dr. Boesch on May 14, 2007 aggravated appellant's condition. He further contends that appellant has provided sufficient evidence to establish a *prima facie* case. For the reasons stated above, the Board finds that the medical evidence is not sufficient to establish appellant's claim.

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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an aggravation of his preexisting emotional condition causally related to a May 14, 2007 fitness-for-duty examination.

ORDER

IT IS HEREBY ORDERED THAT the September 11, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 18, 2014
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