

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

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B.B., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
FEDERAL AVIATION ADMINISTRATION,)
Denver, CO, Employer)

_____)

Docket No. 06-1524
Issued: November 6, 2006

Appearances:

John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On June 20, 2006 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated August 15, 2005 and a nonmerit decision dated May 30, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the merits and nonmerit decisions in this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing an injury in the performance of duty; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 25, 2004 appellant, then a 45-year-old air traffic control specialist, filed a traumatic injury claim alleging that on March 11, 2004 he injured his back walking down 32 flights of stairs while in the performance of duty.

In a report dated March 29, 2004, Dr. Franklin Shih, Board-certified in physical medicine and rehabilitation, noted appellant's history of injury and diagnosed mechanical low back pain. He stated that appellant had a history of chronic back pain and indicated with a checkmark "yes" that his condition was aggravated by the employment activity of walking down stairs.

In a letter dated April 26, 2004, the Office requested that appellant provide additional factual and medical evidence in support of his claim. It allowed 30 days for a response. Appellant submitted a narrative statement and alleged that on March 11, 2004 the only elevator to the control tower was out of service and that he had to walk down 32 flights of concrete steps to exit the building. He noted that he had a preexisting condition of right femoral nerve neuralgia. Appellant stated that the walk down the steps jarred his back increasing the pain in his back, leg and right testicle. He delayed seeking medical treatment in hope that the pain would subside. Appellant sought treatment on March 22, 2004 the earliest available appointment with Dr. Shih.

Appellant provided medical records addressing his previous back surgeries and treatment. The Office previously accepted that he sustained an aggravation of right genitofemoral neuralgia on September 23, 1999. Appellant underwent a lumbar decompression, instrumentation and fusion of L4-S1 on January 9, 2002. On August 15, 2003 he underwent surgical removal of his spinal instrumentation. On January 15, 2004 the employing establishment advanced appellant 100 hours of sick leave to recover from his back and shoulder surgery. He sought treatment for his preexisting back symptoms on March 9, 2004 and Dr. Shih noted that appellant was considering pursuing a claim for aggravation of his preexisting condition by work duties

Dr. Shih examined appellant on March 29, 2004 and stated that his supervisor directed him to file a claim. In a note dated April 6, 2004, he stated that appellant had ongoing back complaints and had requested advice regarding pain management. Dr. Shih did not mention the alleged employment incident and any resulting condition. On April 12, 2004 he recommended a magnetic resonance imaging (MRI) scan and possible injections.

On May 5, 2004 Dr. Shih noted that he initially examined appellant on July 11, 2000 due to back pain. He diagnosed lumbar degenerative disc disease, radiculitis and low back pain. Dr. Shih noted that appellant had undergone injections, two back surgeries and other treatment modalities. He stated that appellant returned to work in January 2004 and noted an increase in back symptomatology. Dr. Shih stated:

"[M]ost recently, in March 2004, [appellant] had a significant increase in his back symptomatology after have[ing] to walk down approximately 30 flights of stairs. Since that time [he] has had significant ongoing increase in his back discomfort and we at this point are looking at potential selective injections to see if we can get things settled down."

Dr. Shih noted that appellant had a postoperative fusion of L4-5 and L5-S1, that his prognosis was guarded and would likely require long-term analgesic medications that would prevent him from returning to his current position.

By decision dated May 25, 2004, the Office denied appellant's claim for a traumatic injury. It accepted that the March 11, 2004 incident occurred, but he had not submitted sufficient medical evidence to establish a diagnosed condition resulting from this event.

Appellant requested an oral hearing on June 5, 2004. He submitted additional notes from Dr. Shih describing his continued discomfort following walking multiple flights of stairs at work. On July 8, 2004 Dr. Shih stated, "I can reasonably relate an increase in [appellant's] pain complaints with the day where he had to walk multiple flights of stairs." He believed that this incident should have resulted in only a temporary aggravation of his pain symptoms. Appellant also submitted his permanent medical disqualification from his position as an air traffic control specialist.

Appellant underwent an MRI scan on April 14, 2004 which demonstrated scarring surrounding the S1 nerve root. The report noted a small residual or recurrent disc herniation could not be excluded. The MRI scan also demonstrated an old hematoma or seroma outside the confines of the thecal sac.

Appellant testified at the oral hearing on February 25, 2005. He noted that he was performing light duty beginning in July 2004. On March 22, 2004 Dr. Shih stated that appellant reported significant aggravation of his back pain after walking down 32 flights of stairs, approximately a week earlier. He stated, "I would associate a temporary aggravation of low back pain to [appellant's] walking the 32 flights of stairs. I would anticipate this to last no longer than approximately two weeks."

By decision dated May 5, 2005, the hearing representative found that appellant had established the alleged employment incident of walking down stairs on March 11, 2004. However, he found that appellant had not established a causal relationship between the diagnosed condition and any disability or specific condition.

On May 25, 2005 appellant's attorney submitted a May 18, 2005 report from Dr. Christopher Ryan, a physician Board-certified in physical medicine and rehabilitation. He reviewed the history of injury on March 11, 2004 as well as the most recent MRI scan. Dr. Ryan noted that appellant's diagnosis in 2000 was right lumbosacral radiculitis and epidural fibrosis and that in 2002 he underwent surgical decompression at L4-5, partial discectomy and bilateral intertransverse fusion at the lowest two levels of appellant's spine. Dr. Ryan stated:

"An acute event substantially contributed to a permanent worsening of [appellant's] condition that much is apparent historically."

* * *

"The biomechanics of the aggravation are apparent. First of all, the areas of greatest tenderness appear to be the (presumed) seroma and also [appellant] has very significant pain to palpation over the sacroiliac joints. When he tries to put weight on his right foot, he reproduces his pain exquisitely. Therefore, it appears that the pain is being generated by both the right sacroiliac joint and the seroma. When an individual goes down stairs their center of gravity shifts forward. The foot that is stepping down brings the pelvis forward and requires the individual to

shift weight over that extremity as it lands on the step below, but the foot resting on the step above rotates the pelvis in such a way as to increase the lordosis (back bending) of the lumbar spine on that side. This cycle then repeats, as the individual steps down with the opposite foot, putting hyperextension into the pelvis on the other side. As this reciprocating motion also puts stress on the sacroiliac joint on the side that is standing on the step, this also aggravates the condition. Assuming having to do this same activity roughly 500 times down 32 stories, it is easy to see where this would aggravate the sacroiliac joint. The seroma lies next to the muscles, which are worked excessively and unfortunately there are not very many of them left after all the surgeries. These overworked muscles pull sharply and probably irritated the seroma as well.”

Dr. Ryan opined that appellant’s activity resulted as a permanent worsening of his underlying condition. However, he did not provide a specific diagnosis of the underlying condition.

Appellant’s attorney requested reconsideration of the hearing representative’s decision on June 2, 2005 based on Dr. Ryan’s report. By decision dated August 15, 2005, the Office reviewed appellant’s claim on the merits and denied modification of the May 5, 2005 decision.

Dr. Ryan submitted an additional report dated April 17, 2006. He stated that appellant had a preexisting diagnosed condition of lumbar spondylosis. Dr. Ryan stated that after the March 11, 2004 stair incident, he had a new degenerative abnormality of fluid collection. He stated that this could certainly be considered part of the lumbar spondylosis and that his prior explanation demonstrated how the lumbar spondylosis was aggravated. Dr. Ryan concluded that appellant’s lumbar spondylosis was permanently aggravated because of the March 11, 2004 employment incident.

Appellant’s attorney requested reconsideration on April 26, 2006. By decision dated May 30, 2006, the Office declined to reopen appellant’s claim for further consideration of the merits.

LEGAL PRECEDENT -- ISSUE 1

A traumatic injury is defined 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.¹

An employee who claims benefits under the Federal Employees’ Compensation Act² has the burden of establishing that he or she sustained an injury while in the performance of duty.³ In order to determine whether an employee actually sustained an injury in the performance of

¹ 20 C.F.R. § 10.5(ee).

² 5 U.S.C. §§ 8101-8193.

³ *Deborah L. Beatty*, 54 ECAB 340 (2003).

duty, the Office 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 that is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.⁴

Establishing whether an injury, traumatic or occupational was sustained in the performance of duty as alleged, *i.e.*, “fact of injury,” and establishing whether there is a causal relationship between the injury and any disability and/or specific condition for which compensation is claimed, *i.e.*, “causal relationship,” are distinct elements of a compensation claim. While the issue of “causal relationship” cannot be established until “fact of injury” is established, acceptance of fact of injury is not contingent upon an employee proving a causal relationship between the injury and any disability and/or specific condition for which compensation is claimed. An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that his or his disability and/or specific condition for which compensation is claimed are causally related to the injury.⁵

The medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁶ The physician must provide an opinion on whether the employment injury described caused or contributed to the claimant’s diagnosed medical condition and support that opinion with medical reasoning to demonstrate that the conclusion reached is sound, logical and rational.⁷ The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 established incident or factor of employment.⁸

When employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation. However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. This is true even though the employee is found medically disqualified to continue in such employment because of the effect, which the employment factors might have on the underlying condition. Under such circumstances, his disqualification for continued employment is due to the underlying condition, without any contribution by the employment.⁹

⁴ *Id.*

⁵ *Elaine Pendleton*, 40 ECAB 1143, 1147 (1989).

⁶ *John W. Montoya*, 54 ECAB 306, 308 (2003).

⁷ *Id.*

⁸ *Louis T. Blair*, 54 ECAB 348, 350 (2003).

⁹ *Larry Warner*, 43 ECAB 1027 (1992).

ANALYSIS -- ISSUE 1

The Office accepted that appellant walked down 32 flights of stairs on March 11, 2004. However, the hearing representative found that he had not submitted the necessary medical evidence to establish a causal relationship between his musculoskeletal pain and his alleged diagnosed conditions and disability.

Appellant submitted reports from Dr. Shih, Board-certified in physical medicine and rehabilitation, addressing the employment incident. On March 29, 2004 Dr. Shih diagnosed mechanical low back pain and described the March 11, 2004 incident. He indicated with a checkmark “yes” that appellant’s condition was aggravated by the employment activity of walking down stairs. Dr. Shih did not explain how walking down stairs would aggravate appellant’s preexisting back condition or result in mechanical low back pain or any other condition. The Board has held that an opinion on causal relationship which consists only of a physician checking “yes” to a medical form report question on whether the claimant’s condition was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.¹⁰ As Dr. Shih did not provide an explanation or medical reasoning in support of his opinion, this report is not sufficient to establish a causal relationship between appellant’s condition or disability and his employment.

On May 5, 2004 Dr. Shih diagnosed lumbar degenerative disc disease, radiculitis and low back pain. He described appellant’s prior medical treatment and noted that following the March 2004 employment incident appellant experienced an increase in back discomfort. Dr. Shih did not offer any opinion on the causal relationship between appellant’s diagnosed conditions of lumbar degenerative disc disease and radiculitis by direct causation or aggravation. He also failed to support a specific period of disability due to the incident. The Board notes that on March 9, 2004, three days prior to the accepted incident, Dr. Shih noted that appellant felt his preexisting condition was aggravated by his regular work duties. Dr. Shih failed to explain how the incident of walking down 32 flights of steps would aggravated appellant’s preexisting lumbar pathology.

In a report dated July 8, 2004, Dr. Shih stated that appellant’s increased pain complaints were related to the employment incident of walking down multiple flights of stairs. He indicated that this incident should have resulted in only a temporary aggravation of appellant’s pain symptoms. Dr. Shih did not identify a specific period of disability or specific condition as resulting from appellant’s employment incident. Therefore, this report is not sufficient to meet appellant’s burden of proof.

Following the oral hearing, appellant submitted a May 25, 2005 report from Dr. Ryan who reviewed his medical history and an April 14, 2004 MRI scan. Dr. Ryan concluded that appellant’s MRI scan established a seroma rather than an old hematoma. He provided an explanation of how walking down multiple flights of stairs could aggravate his sacroiliac joints

¹⁰ *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

and the seroma through pelvic shifts and muscle overuse. Dr. Ryan stated that appellant's activity resulted in a permanent worsening of his underlying condition.

Dr. Ryan's report is not sufficient to meet appellant's burden of proof as he did not provide a diagnosis of the underlying condition that he felt was permanently aggravated. Furthermore, he did not explain why he felt that the MRI scan demonstrated a seroma rather than the old hematoma as also suggested by the MRI scan report. Dr. Ryan specifically noted that the seroma was presumed rather than definitively diagnosed. While he offered an explanation of how walking down stairs could aggravate appellant's sacroiliac joints, Dr. Ryan did not explain why this aggravation would be permanent or diagnosis a condition as a result of any such aggravation. Dr. Ryan did not provide a rationalized opinion on how the accepted incident caused or contributed to a diagnosed condition or period of disability. His report is not sufficient to establish appellant's claim.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹¹ the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹² When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.¹³

ANALYSIS -- ISSUE 2

Appellant submitted a report dated April 17, 2006 from Dr. Ryan in support of his request for reconsideration. This report diagnosed his preexisting condition, lumbar spondylosis and noted an abnormality of fluid collection. Appellant stated that this condition was permanently aggravated due to the March 11, 2004 employment incident. Dr. Ryan referenced his May 18, 2005 report as providing the explanation of how appellant's preexisting condition of lumbar spondylosis was aggravated by the March 11, 2004 employment incident. The Board finds that Dr. Ryan's April 17, 2006 report is essentially duplicative of his May 18, 2005 report. This evidence is not sufficient to require the Office to reopen his claim for further consideration of the merits.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that his accepted employment injury of mechanical back pain resulted in a medical condition or period of

¹¹ 5 U.S.C. §§ 8101-8193, § 8128(a).

¹² 20 C.F.R. § 10.606(b)(2).

¹³ 20 C.F.R. § 10.608(b).

disability. The Board further finds that the additional evidence submitted in support of his April 26, 2006 request for reconsideration was not sufficient to require the Office to reopen his claim for further merit review.

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2006 and August 15, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 6, 2006
Washington, DC

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

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

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