United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 09-95**
	)	**Issued: July 15, 2009**
DEPARTMENT OF THE AIR FORCE, EIELSON AIR FORCE BASE, AK, 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, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 15, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated March 13 and September 24, 2008 that denied his claim. Pursuant to 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 emotional condition as a consequence of his June 18, 2007 employment injury.

FACTUAL HISTORY

On June 18, 2007 appellant, then a 58-year-old transportation assistant, sustained multiple injuries when he fell down a flight of stairs in the performance of his federal duties. The claim was also accepted for back contusion, cervical spinal stenosis, cervical spinal cord contusion, traumatic right subarachnoid hemorrhage, concussion with brief loss of consciousness and neurogenic bladder. Appellant was hospitalized from June 18 to 22, 2007. In a consultation

report dated June 18, 2007, Dr. Janice Onorato, a Board-certified neurologist, noted the history of injury and review of systems. Appellant had a history of depression and adult attention deficit disorder (ADD) and had taken antidepressants in the past. A magnetic resonance imaging (MRI) scan was consistent with cervical cord contusion at the C3-4 level. Dr. Onorato diagnosed cervical spinal stenosis and cervical myelopathy. Shortly after appellant's release from the hospital, he moved to San Antonio, Texas. In August 2007, appellant moved to Joplin, Missouri, and in October 2007 to Carthage, Missouri. In a September 4, 2007 attending physician's report, Dr. Arthur S. Daus, a Board-certified neurosurgeon, diagnosed cervical spondylosis, cervical cord contusion, cervical spinal stenosis, postconcussive syndrome, amnesia, depression, cerebral contusion and cerebral concussion. He checked a form box "yes," indicating that all the conditions were employment related, stating that appellant fell down stairs while in Alaska. Dr. Daus advised that appellant was totally disabled.

By decision dated October 4, 2007, the Office denied appellant's claim for wage-loss compensation beginning July 9, 2007 on the grounds that the medical evidence was sufficient to support that he continued to be disabled after his discharge from the hospital.[1] On October 31, 2007 Dr. M. Adam Kremer, a neurosurgeon, performed authorized cervical spine surgery. Appellant received wage-loss compensation as of October 31, 2007.

On November 29, 2007 appellant asked that the diagnosis of major depression be added to his accepted conditions. In a November 15, 2007 note, Dr. David R. Trobaugh, an osteopath who practices psychiatry, advised that appellant had major depression secondary to his spinal injury. By letter dated December 4, 2007, the Office informed appellant of the evidence needed to support his emotional condition claim. Dr. Trobaugh forwarded treatment notes dated October 17, 2007 in which he noted a history that appellant was healthy prior to his spinal cord injury. On November 16, 2007 he reported that appellant had had neck surgery and diagnosed depression. In a December 29, 2007 statement, appellant related that he had retired from the Air Force on October 31, 2004 and began civilian employment. He described the June 18, 2007 employment injury and his current physical condition which limited his activities of daily living, advising that it left him emotionally unsteady and depressed. Appellant stated that he had no prior history of depression, had never sought mental help, and had never been diagnosed with mental health issues or prescribed any mood altering medications.

In a January 20, 2008 report, an Office medical adviser noted that several records found that, after appellant fell on June 18, 2007, he had a reactive depression. He opined that this would be expected to remit with resolution of the residuals of his cervical spine injury, stating that it would be expected that, since he had had surgery, some of his myeolopathic problems should resolve. The Office medical adviser noted a history that appellant was seen for depression and ADD prior to the June 18, 2007 injury and recommended that the Office obtain all medical records regarding his behavioral health and updated records from all physicians since the October 31, 2007 cervical operative procedure. He concluded that the diagnosis of major depression could not be accepted at that time. On January 28, 2008 the Office requested that appellant provide the additional medical records. In a February 15, 2008 report, Dr. Brian V. Curtis, a Board-certified neurosurgeon, advised that appellant should not work for two months. In a March 10, 2008 report, the Office medical adviser noted that, since his

[1] Appellant did not appeal this decision with the Board.

previous review of the medical record, nothing had been submitted that was sufficient to establish a consequential emotional condition.

By decision dated March 13, 2008, the Office denied appellant's emotional condition claim. It found that appellant did not submit sufficient medical evidence on causal relationship.

On March 24, 2008 appellant, through his attorney, requested a telephonic hearing. In a March 10, 2008 report, Dr. Deborah R. Schneider, a Board-certified physiatrist, reviewed the history of cervical spinal cord injury from a fall at work with subsequent clonus, spasticity, painful dysesthesias and associated bowel and bladder dysfunction, all of which prevented him from performing activities of daily living. She reviewed the medical records and advised that appellant apparently also had an element of situational depression currently seeing a psychiatrist but had not had the full benefit of rehabilitative counseling. Dr. Schneider recommended that appellant obtain a wheelchair and enter an acute comprehensive inpatient program to cover all necessary disciplines including rehabilitative psychology for his situational depression. A March 1, 2008 MRI scan of the cervical spine demonstrated multifocal areas of disc protrusion with bilateral neural foraminal narrowing, nerve root impingement, and post-traumatic myelomalacia without enhancement on the cervical cord at the C3-4 level, made worse with neck extension. A March 19, 2008 MRI scan of the thoracic spine demonstrated degenerative changes, no spinal stenosis or intrinsic cord abnormality and no acute process. In an April 1, 2008 report, Dr. Curtis reported the history of injury and advised that appellant had residual cervical myelopathy with progression of symptoms. By report dated May 1, 2008, Dr. Chad Morgan, a Board-certified surgeon, reviewed the history of injury, appellant's complaints including anxiety and depression, and listed findings on physical examination. He diagnosed an incomplete spinal cord injury at C4, spasticity and hyperreflexia, all following a fall at work on June 18, 2007. Dr. Morgan recommended further studies. In reports dated May 1, June 3 and July 11, 2008, Dr. Curtis reiterated his findings. He recommended additional cervical surgery.

A hearing was telephonically held on July 15, 2008. Appellant testified that he had not had psychiatric treatment prior to his fall at work but had been depressed when he retired from the Air Force in 2004. He spoke with a therapist but had no follow-up care and did not remember if he was given antidepressant medication. Appellant took medication for ADD in the 1990s to help focus and stated that he was not seeing a psychiatrist. Appellant's attorney noted that appellant's physical injuries were exceptionally severe, arguing that he had no real history of depression and no evidence of depression over the years. He contended that the Office should have sent appellant for a second opinion evaluation or obtained his medical records from the Air Force. The hearing representative advised appellant to try and get his military records.

In a September 24, 2008 decision, an Office hearing representative affirmed the March 13, 2008 decision on the grounds that appellant had not submitted a medical evidence to establish causal relationship.

LEGAL PRECEDENT

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that

flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct. The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. With respect to consequential injuries, the Board has stated that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation to arise out of and in the course of employment and is compensable.[2]

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is evidence which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.[3]

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[4]

ANALYSIS

The Board finds this case is not in posture for decision. In a September 4, 2007 report, Dr. Daus diagnosed depression and advised that this was caused by appellant's fall at work. In November 2007 reports, Dr. Trobaugh diagnosed depression secondary to appellant's cervical injury. On January 20, 2008 an Office medical adviser recognized that appellant had situational depression but advised that this should be remitted following his cervical spine surgery. The medical evidence; however, indicates that appellant's condition worsened, as noted by Dr. Curtis in his April through July 2008 reports. In a March 10, 2008 report, Dr. Schneider advised that appellant had situational depression and recommended comprehensive inpatient treatment, to include rehabilitative psychology.

It is well established that proceedings under the Federal Employees' Compensation Act[5] are not adversarial in nature and while the claimant has the burden to establish entitlement to

[2] *S.S.*, 59 ECAB ____ (Docket No. 07-579, issued January 14, 2008).

[3] *Charles W. Downey*, 54 ECAB 421 (2003).

[4] Larson, *The Law of Workers' Compensation* § 10.01 (December 2000); *see Charles W. Downey*, 54 ECAB 421 (2003).

[5] 5 U.S.C. §§ 8101-8193.

compensation, the Office shares responsibility in the development of the evidence.[6] The reports listed above, taken together, are generally supportive of appellant's claim for a consequential emotional condition and constitute sufficient evidence to warrant further development of the issue by it.[7]

The Board notes that the Office has focused on the fact that appellant did not provide medical records regarding his previous treatment for depression. Whether appellant had a prior history of depression is immaterial to the issue of whether his cervical injury aggravated a preexisting depression or caused a new situational depression. He reported that he was briefly seen at the Eielson Air Force Base clinic for anxiety regarding his upcoming retirement. After appellant's retirement, he began civilian employment at Eielson and this is where he fell on June 18, 2007. The Office has a responsibility in the development of factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source.[8] On remand, it should attempt to obtain appellant's clinic records, both military and civilian, from the employing establishment. The Office shall then refer appellant, an appropriate statement of accepted facts a and the medical evidence of record, to an appropriate Board-certified specialist for an examination, diagnosis and a rationalized opinion regarding whether he sustained a consequential emotional condition. After such further development as deemed necessary, the Office shall issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for decision regarding whether appellant has a consequential emotional condition.

[6] *See Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

[7] *John J. Carlone*, *supra* note 6.

[8] *Marco A. Padilla*, 51 ECAB 202 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 24 and March 13, 2008 be set aside and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: July 15, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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