United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 09-1988**
	)	**Issued July 9, 2010**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Tallahassee, FL, Employer	)	

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument May 11, 2010

DECISION AND ORDER

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

JURISDICTION

On July 31, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' October 30, 2008 and June 8, 2009 merit decisions denying his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant sustained a traumatic injury to his back based on the May 1, 1998 incident.

FACTUAL HISTORY

On July 15, 1998 appellant, then a 37-year-old correctional officer, filed a traumatic injury claim alleging that he sustained a back injury on May 1, 1998 when he fell from monkey bars during a training exercise. He claimed constant mild back pains and occasional numbness in his left leg and foot. (File No. xxxxxx373) The Office did not develop the claim at that time. The only evidence associated with the original file was a form report of the incident to the

Capital Health Plan and a July 17, 1998 letter from the employing establishment reflecting that the incident occurred as alleged. Appellant did not seek immediate medical attention or miss work at the time of the incident. There is no medical evidence of record associated with the original file.[1]

When appellant sought treatment in 2008, the Office developed the claim under File No. xxxxxx897. In a September 25, 2008 letter, it informed appellant that he had failed to submit sufficient evidence to establish his claim.

Appellant submitted reports from Dr. Steven Currieo, a treating physician, reflecting that he had a long history of back pain, dating back to his air force career in the mid-1980's. On January 15, 1996 Dr. Currieo diagnosed chronic mechanical low back pain, noting that appellant's symptoms were intermittent; the pain would usually last for several weeks, followed by a two-month period of remission. On examination, he experienced pain on an almost daily basis for nearly three months. September 20 and December 5, 1996 notes indicate that Dr. Currieo continued to treat appellant and prescribed Flexeril for low back pain.

On July 7, 1998 Dr. Currieo stated that appellant fell and injured his back six weeks earlier on a training day at the prison. Appellant "felt it pop" and experienced persistent pain ever since, which radiated into both hips. He also developed numbness to his left leg, radiating down to the top of his left foot. Dr. Currieo diagnosed "probable post-traumatic hernia nucleus purposis, affecting the left side, L5-S1" and prescribed an LS spine series.

On October 16 1998 Dr. Gene E. Jenkins, a chiropractor, related appellant's description of falling from monkey bars during a training exercise several months earlier. Appellant landed flat on his back and developed immediate low back pain, which was centralized in the lumbosacral region. On examination, he had mild hypertonicity and was tender at L3-L5. Appellant had a positive Bechterew's test bilaterally. Straight-leg raising test was positive on the right at 75 degrees for lumbosacral region pain without radicular complaint. On thoracolumbar ranges of motion, he had full flexion without restriction or report of pain. Appellant had restricted extension with pain almost instantaneously and pain in the left and right lateral rotation at the extreme. Dr. Jenkins diagnosed mechanical joint dysfunction resulting in chronic lower back pain.

In an August 26, 2008 report, Dr. Yusuf Mosuro, a Board-certified anesthesiologist, stated that appellant had experienced back pain since 1998. Examination revealed tenderness on palpation of the midline L5-S1. SLR was positive on the left at 45 degrees and negative on the right. Faber's sign was equivocal on the left and negative on the right. Lumbar spine motion was preserved in all six planes except for left lateral rotation. There was reduced touch sensation in the left calf as compared to the right. Motor power was 5/5 in the iliopsoas, quadriceps, dorsiflexion, plantar flexion and extensor hallucis longus bilaterally. Deep tendon reflex was 2+ in the knees and ankles. Dr. Mosuro reported that an August 13, 2008 magnetic resonance imaging (MRI) scan of the lumbar spine showed broad-based central disc extrusion at L4-5 with

[1] Appellant also has an occupational disease claim (File No.xxxxxx443), which was accepted on May 16, 2007 for right carpal tunnel syndrome.

disc desiccation, associated spinal canal stenosis and minimal annular disc bulge at L5-S1. He diagnosed herniation of the lumbar intervertebral disc with L5 radiculopathy.

Appellant submitted reports from Dr. Bruce S. Cooper, a Board-certified internist. On September 22, 2008, he stated that appellant had injured his back on monkey bars at work in 1997. An August 2008 MRI scan showed a broad-based extrusion with extension laterally to involve the bases of both neural exit foramina, as well as compression of the thecal sac and spinal canal stenosis. Examination revealed positive SLR on the left at 45 degrees. Reflexes were 2+ bilaterally at the knees. Appellant was able to stand on his heels and toes. He had mild back discomfort while bending at 60 degrees.

On October 16, 2008 Dr. Cooper advised that appellant had been experiencing intermittent back pain with radiculopathy and numbness down his left leg since injuring his back on monkey bars at work in 1998. Appellant did not seek medical treatment until June 2008, when the pain recurred and did not resolve with over-the-counter drugs. Examination reflected positive SLR bilaterally at 45 degrees. Appellant was able to bend at 90 degrees without pain. He had mild discomfort with lateral twisting. Dr. Cooper diagnosed displacement of the lumbar intervertebral disc and lumbar radiculopathy.

By decision dated October 30, 2008, the Office accepted that the May 1, 1998 incident occurred, but denied the claim on the grounds that the medical evidence failed to establish a causal relationship between his back condition and the accepted incident.

At a March 12, 2009 hearing, appellant testified that he had delayed in filing his claim for more than two months because he believed his injury would resolve without treatment. He stated that, although he filed his original claim for compensation in July 1998, the Office did not contact him until September 25, 2008 to inform him of the deficiencies in the medical evidence.

By decision dated June 8, 2009, an Office hearing representative affirmed the October 30, 2008 decision.

On appeal appellant contends that the medical evidence establishes that his current condition, which includes displacement of lumbar intervetebral disc, was caused by the May 1, 1998 incident. He has experienced chronic lower back pain with radiculopathy since that time and contends that he experienced a worsening of his original injury in 2008, rather than a new injury.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee, resulting from personal injury sustained while in the performance of duty.[2] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[3]

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[4] When an employee claims that he sustained a traumatic injury in the performance of duty, he must establish the "fact of injury," consisting of two components which must be considered in conjunction with one another. The first is whether the employee actually experienced the incident that is alleged to have occurred at the time, place, and in the manner alleged. The second is whether the employment incident caused a personal injury, and generally this can be established only by medical evidence.[5]

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.[6] An award of compensation may not be based on appellant's belief of causal relationship.[7] Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish a causal relationship.[8] Simple exposure to a workplace hazard does not constitute a work-related injury entitling an employee to medical treatment under the Act.[9]

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[2] 5 U.S.C. § 8102(a).

[3] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

[4] *Robert Broome*, 55 ECAB 339 (2004).

[5] *See Tracey P. Spillane*, 54 ECAB 608 (2003) *Deborah L. Beatty*, 54 ECAB 340 (2003); *Betty J. Smith*, 54 ECAB 174 (2002). The term "injury," as defined by the Act refers to a disease proximately caused by the employment. 5 U.S.C. § 8101(5). *See* 20 C.F.R. § 10.5(q), (ee).

[6] *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

[7] *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[8] *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[9] 20 C.F.R. § 10.303(a).

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion 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.[10]

ANALYSIS

The Board finds that this case is not in posture for decision regarding whether appellant sustained an injury in the performance of duty.

An employee who claims benefits under the Act has the burden of establishing the essential elements of his claim. The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.[11] However, it is well established that proceedings under the Act are not adversarial in nature and, while the claimant has the burden of establishing entitlement to compensation the Office shares responsibility in the development of the evidence to see that justice is done.[12]

The Office accepted that the May 1, 1998 fall from monkey bars occurred as alleged, but found that there was no medical evidence that provided a diagnosis that could be connected to that injury. The Board finds that the medical evidence of record is sufficient to require further development as to whether appellant sustained a work-related injury on May 1, 1998.

Contemporaneous medical evidence reflects that appellant fell from the monkey bars onto his back on May 1, 1998, as alleged. On July 7, 1998 Dr. Currieo described the incident in detail, noting that appellant had "felt it pop" and had been experiencing persistent pain and numbness to his left leg ever since. He diagnosed "probable post-traumatic hernia nucleus purposis, affecting the left side, L5-S1;" prescribed an LS spine series; and noted that "this is a workers' compensation injury." His report does not contain a rationalized opinion explaining how the accepted incident that caused his condition; however, his report supports appellant's contention that he sustained an injury, or exacerbation of an injury, on the date in question.

On October 16, 1998 Dr. Jenkins related appellant's description of falling from monkey bars during a training exercise several months earlier, noting that he fell flat on his back and

[10] *John W. Montoya*, 54 ECAB 306 (2003).

[11] *See Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); *see also Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

[12] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard*, *supra* note 11; *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

developed immediate low back pain, which was centralized in the lumbosacral region. He provided examination findings and diagnosed mechanical joint dysfunction resulting in chronic lower back pain. As Dr. Jenkins is a chiropractor, his report does not constitute probative medical evidence without a diagnosis of a subluxation as revealed by x-ray.[13] It does, however, generally support appellant's claim that he sustained an injury in the manner alleged.

On August 26, 2008 Dr. Mosuro stated that appellant experienced back pain since 1998. He provided findings on examination and reported that an August 13, 2008 MRI scan of the lumbar spine showed broad-based central disc extrusion at L4-5 with disc desiccation, associated spinal canal stenosis and minimal annular disc bulge at L5-S1. He diagnosed herniation of the lumbar intervertebral disc with L5 radiculopathy. Reports from Dr. Cooper also include a history of injury reflecting that appellant injured his back on monkey bars at work in 1998. Dr. Cooper noted that appellant did not seek medical treatment until June 2008, when the pain recurred and did not resolve with over-the-counter drugs. He also provided examination findings and diagnosed displacement of the lumbar intervertebral disc and lumbar radiculopathy. None of the physicians provided a definitive opinion as to the cause of appellant's diagnosed condition. The Board notes that, while none of the reports of appellant's attending physicians are completely rationalized, they are consistent in indicating that he sustained an employment-related back injury and are not contradicted by any substantial medical or factual evidence of record. While the reports are not sufficient to meet his burden of proof to establish his claim, they raise an uncontroverted inference between appellant's claimed condition and the accepted employment incident, and are sufficient to require the Office to further develop the medical evidence and the case record.[14] As noted, proceedings under the Act are not adversarial in nature and, while the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[15] The Board finds that this case is not in posture for a decision and will be remanded for consolidation of File Nos. xxxxxx373 and xxxxxx897 and further development of the medical evidence.

[13] A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as "physician" as defined in 5 U.S.C. § 8101(2). Section 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law." *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[14] *See Virginia Richard*, *supra* note 11; *see also Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

[15] *Phillip L. Barnes*, *supra* note 12; *see also Virginia Richard*, *supra* note 11; *Dorothy L. Sidwell*, *supra* note 12; *William J. Cantrell*, *supra* note 12.

On remand the Office should obtain a rationalized opinion from a physician as to whether appellant sustained an injury causally related to the accepted incident. It shall issue an appropriate decision in order to protect his rights of appeal.[16]

CONCLUSION

The Board finds that this case is not in posture for decision as to whether appellant sustained an injury in the performance of duty on May 1, 1998.

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2009 and October 30, 2008 decisions of the Office of Workers' Compensation Programs be set aside. The case is remanded for further development consistent with this decision.

Issued: July 9, 2010
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

[16] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating the Medical Evidence, Second Opinion Examinations*, Chapter 2.810.9.d) (March 1995) (if the case has not yet been accepted and causal relationship is at issue, the specialist should be asked for an opinion with medical rationale confirming or negating a causal relationship between any condition found and the accepted incident).

The Board notes that the existence of a back condition prior to the accepted incident does not preclude the possibility that his condition was aggravated by the May 1, 1998 incident. *See id.* at Chapter 2.810.9.e (in cases involving a preexisting or underlying condition, the specialist should be asked to provide a rationalized opinion as to whether the condition was aggravated by the employment incident and, if so, whether the aggravation was permanent or temporary).