

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

A.D., Appellant)	
)	
and)	Docket No. 09-2030
)	Issued: May 20, 2010
DEPARTMENT OF THE NAVY, NAVAL AIR)	
WARFARE CENTRAL WEAPONS DIVISION,)	
China Lake, CA, Employer)	

Appearances: *Case Submitted on the Record*
Sally F. LaMacchia, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 4, 2009 appellant, through his attorney, filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated July 17, 2009 denying his consequential injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has established that he sustained a chronic pain condition as a consequence of his accepted injuries.

On appeal appellant's counsel contends that the evidence of record establishes that appellant sustained chronic pain syndrome as a consequence of his accepted employment injuries.

FACTUAL HISTORY

On August 5, 1997 appellant, then a 44-year-old police officer, filed a traumatic injury claim alleging that on July 20, 1997 he ruptured a disc in his mid-back while changing a tire.

The Office accepted the claim for permanent aggravation of a preexisting L4-5 herniated nucleus pulposus and authorized a lumbar laminectomy, which was performed on August 14, 1997.¹ On August 13, 1998 appellant filed a recurrence of disability claim commencing on August 4, 1998, which the Office adjudicated as a new claim.² On September 28, 1998 the Office accepted this claim for temporary aggravation of a back strain, depressive disorder, intervertebral disc disorder with lumbar myelopathy, postlaminectomy syndrome of the lumbar region and other unspecified lumbar region disc disorders. Appellant stopped work on August 26, 1998 and the Office placed him on the periodic rolls in receipt of compensation for temporary total disability. The Office authorized a laminectomy and spinal stabilization surgery of March 31, 1999 and low back decompression laminotomy of March 28, 2001. It also authorized the implantation of an intrathecal morphine pump on November 11, 2002.³ On March 24, 2003 appellant underwent authorized surgery to remove the dorsal column implant.⁴

The record contains reports from Dr. John Beck, a treating Board-certified psychiatrist. As of 2002, he diagnosed a pain disorder due to the accepted back conditions and mood disorder as a result of a work injury.

Dr. Abdallah S. Farrukh, a treating Board-certified neurological surgeon, submitted treatment records in 2002, noting appellant's complaints of back and leg pain as a result of his back injuries. He diagnosed nerve root damage, failed back syndrome, chronic back pain and chronic leg pain. On June 5, 2007 Dr. Farrukh diagnosed chronic pain disorder as a result of appellant's worsening back condition. He stated that appellant's "clinical symptoms are all related to his chronic pain."

In a February 2, 2009 report, Dr. Farrukh diagnosed chronic back pain, nerve injury, chronic pain, status post lumbar fusion and status post implantation of intrathecal catheter and delivery of intrathecal morphine. A February 27, 2009 magnetic resonance imaging (MRI) scan revealed L4-5 discogenic disease with moderate central canal stenosis on the left and moderately severe right foraminal narrowing, suspected right L3 nerve root impingement and status post posterior and anterior L4-5 fusion. Appellant's complaint of low back pain, bilateral hip and leg pain radiating to his toes was noted.

In an April 4, 2009 report, Dr. Farrukh diagnosed chronic back pain with associated right lower extremity sciatica. He stated that appellant was known to have a nerve root injury. On March 30, 2009 Dr. Farrukh diagnosed chronic pain and nerve injury as a result of multiple L4-5 recurrent injuries.

On April 20, 2009 Dr. Farrukh stated that appellant's sensory disturbance was consistent with chronic pain and probably associated peripheral neuropathy. Based on the MRI scans he

¹ The Office assigned claim number xxxxxx116.

² The Office assigned claim number xxxxxx582.

³ The preoperative diagnoses noted on the surgical report included chronic pain, chronic back pain and morphine receptor deficit.

⁴ Preoperative diagnoses included nerve root injury, chronic back pain, chronic leg pain and failed dorsal column stimulator to relieve leg pain.

reviewed, he found that appellant's L4-5 discogenic disease was worsening and reiterated that appellant had chronic pain.

In a May 12, 2009 report, Dr. Farrukh diagnosed lumbar myelopathy, postlumbar region laminectomy syndrome and other lumbar unspecified disc disorders. He attributed appellant's chronic pain syndrome to his injuries. Dr. Farrukh stated that, "[b]y definition, chronic pain is a structural deformity of morphine receptors" and reiterated that the February 27, 2009 MRI scan revealed worsening L4-5 discogenic disease with foraminal narrowing.

In a letter dated June 15, 2009, appellant, through his attorney, requested that the Office accept chronic pain syndrome as related to his accepted claims. On June 29, 2009 counsel requested a final decision be issued on appellant's claim for consequential chronic pain.

In a July 17, 2009 decision, the Office denied appellant's consequential injury claim.⁵ It found that pain was not a firm diagnosis and that his pain was considered a subjective finding.⁶

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.⁷ The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury.⁸ 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.⁹

ANALYSIS

The Office accepted that appellant sustained lumbar and cervical sprains, a contusion of the left elbow, a disc herniation at C4-5, depressive disorder, intervertebral disc disorder with

⁵ On January 24, 2008 appellant's counsel requested that the Office accept appellant's claim for bilateral ulnar nerve neuropathy. There is no evidence that the Office issued a final decision on this request. As this matter is in an interlocutory posture, it is not before the Board on this appeal. See 20 C.F.R. § 501.2(c)(2) (the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of or not disposed of during the pendency of the case). See also *E.L.*, 59 ECAB ____ (Docket No. 07-2421, issued March 10, 2008); *Scott R. Walsh*, 56 ECAB 353 (2005); *Gloria Swanson*, 43 ECAB 161 (1991).

⁶ Following the July 17, 2009 decision, the Office received additional evidence. The Board may not consider new evidence for the first time on appeal. See 20 C.F.R. §§ 501.2(c); *M.B.*, 60 ECAB ____ (Docket No. 09-176, issued September 23, 2009); *J.T.*, 59 ECAB ____ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁷ *Albert F. Ranieri*, 55 ECAB 598 (2004).

⁸ *S.M.*, 58 ECAB 166 (2006); *Debra L. Dillworth*, 57 ECAB 516 (2006); *Carlos A. Marrero*, 50 ECAB 117 (1998); A. Larson, *The Law of Workers' Compensation* § 10.01 (2005).

⁹ *L.S.*, 60 ECAB ____ (Docket No. 08-1270, issued July 2, 2009); *Kathy A. Kelley*, 55 ECAB 206 (2004).

lumbar myelopathy, postlaminectomy syndrome of the lumbar region, depression and other unspecified lumbar region disc disorders as a result of his accepted employment injuries. Appellant claimed chronic pain as a consequence of his accepted conditions. The Board notes that appellant has the burden to establish this condition is the direct and natural result of his compensable injuries.¹⁰

The Office denied the claim, stating that pain is not an acceptable diagnosis; however, the Board has held that chronic pain and limitations resulting from an employment injury are compensable under the Federal Employees' Compensation Act.¹¹ To establish his claim, appellant must submit rationalized medical evidence relating his chronic pain syndrome to his accepted back conditions.¹²

Appellant submitted the medical reports of Dr. Farrukh who attributed appellant's chronic pain to his accepted employment injuries. On June 5, 2007 Dr. Farrukh first diagnosed a chronic pain disorder as a result of appellant's worsening back condition. On April 20, 2009 he advised that a review of recent MRI scan testing showed appellant's L4-5 discogenic disease was worsening with nerve damage and resulting in chronic pain. Dr. Farrukh noted the history of appellant's low back surgeries and use of a morphine pump for control of pain. Based on injury to the nerve roots in the lumbar spine, appellant developed a chronic pain disorder which precluded him from returning to work. In a May 12, 2009 report, he noted that "[b]y definition chronic pain is a structural deformity of morphine receptors." Dr. Farrukh found that appellant remained disabled due to his accepted lumbar disc disorders and had chronic pain syndrome resulting from these injuries. The reports from Dr. Beck diagnosed a pain condition and mood disorder which he attributed to appellant's back injuries.

While the reports of Dr. Farrukh and Dr. Beck are not completely rationalized, as to the issue of causal relation, the physicians have maintained that appellant's employment-related back injuries caused a chronic pain syndrome. This evidence, moreover, is not contradicted by any substantial medical evidence of record nor did the claims examiner seek review of an Office medical adviser.¹³ While the reports are not sufficient to meet appellant's burden of proof, they raise an uncontroverted inference of causal relationship between his accepted back conditions sufficient to require further development of the medical evidence.¹⁴

¹⁰ *S.S.*, 59 ECAB ____ (Docket No. 07-579, issued January 14, 2008); *Debra L. Dillworth*, *supra* note 8; *Kathy A. Kelley*, *supra* note 9.

¹¹ *See N.M.*, 60 ECAB ____ (Docket No. 08-2081, issued September 8, 2009); *see also J.B.*, Docket No. 09-95 (issued July 15, 2009); *Patricia Stryker*, Docket No. 99-654 (issued March 6, 2001).

¹² *Charles D. Gregory*, 57 ECAB 322 (2006).

¹³ The procedure manual notes that, as to consequential injuries, the claims examiner should obtain an evaluation of the evidence by an Office medical adviser. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.6(a) (June 1995).

¹⁴ *See E.J.*, 61 ECAB ____ (Docket No. 09-1481, issued February 19, 2010); *see also John J. Carlone*, 41 ECAB 354 (1989).

It is well established that proceedings under the Act¹⁵ are not adversarial in nature. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.¹⁶ On remand, the Office should obtain the review of an Office medical adviser or refer appellant to an appropriate Board-certified specialist for a rationalized opinion as to whether appellant has a consequential condition causally related to his accepted injuries. After such further development as deemed necessary, the Office shall issue a decision on appellant's claim.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the July 17, 2009 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further development consistent with this decision.

Issued: May 20, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ 5 U.S.C. §§ 8101-8198.

¹⁶ *R.B.*, 60 ECAB ____ (Docket No. 08-1662, issued December 18, 2008); *A.A.*, 59 ECAB ____ (Docket No. 08-951, issued September 22, 2008); *Donald R. Gervasi*, 57 ECAB 281 (2005).