United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant **and** **DEPARTMENT OF DEFENSE, PENTAGON FORCE PROTECTION AGENCY, Chambersburg, PA, Employer**	)	**Docket No. 10-524** **Issued: November 1, 2010**

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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 14, 2009 appellant, through counsel, filed a timely appeal from the November 18, 2009 merit decision of the Office of Workers' Compensation Programs denying his 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 met his burden of proof to establish a causal connection between his back condition and the October 6, 2007 employment incident.

FACTUAL HISTORY

This case was previously before the Board. By decision dated June 2, 2009, the Board affirmed the Office's June 11, 2008 decision finding that appellant did not sustain a back injury

in the performance of duty on October 6, 2007 as alleged.[1] The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.

On October 28, 2009 appellant requested reconsideration before the Office and submitted additional medical evidence. On reconsideration, his attorney referred to the October 5, 2009 report of Dr. Caruso, a Board-certified neurosurgeon. The record reveals that the Office also received additional medical reports from the Parkway Neuroscience and Spine Institute dated January 15, 2008 to October 5, 2009, including physician's reports, physical therapy notes, diagnostic test and chiropractor reports. In a February 6, 2008 medical report, Dr. Michael G. Radley, a Board-certified neurosurgeon, reported that appellant's lumbar myelogram showed good filling of the nerve roots with no compression, though there were post surgical changes at the L5-S1 level on the right.

On May 15, 2008 appellant was seen by Dr. Daniel J. Sullivan, an osteopath physician, who recorded a history of a prior lumbar laminectomy in 2005 at L5-S1. He noted that appellant reported an onset of back and leg pain on October 6, 2007 while doing leg lifts and felt a popping sensation. Dr. Sullivan noted that prior diagnostic testing did not show a recurrent disc problem. He listed findings on examination of appellant, including negative bilateral straight leg raising. Due to the failure of conservative care, appellant underwent a sacroiliac joint injection on May 20, 2008 by Dr. Michael DeMarco, an osteopathic physician. The sacroiliac joint injection was noted as the third epidural procedure necessitated by significant back pain that was unresolved with medication and physical therapy.

On June 7, 2008 Dr. Walter Silbert, a Board-certified diagnostic radiologist, performed a lumbosacral computerized tomography (CT) scan that showed no evidence of a lumbar spine fracture of malalignment, degenerative disease at L4-5 and L5-S1 without evidence of central canal or foraminal stenosis. He also performed a thoracic spine CT scan that showed no evidence of thoracic vertebral fracture, malalignment or paraspinal hematoma, but did show mild degenerative disc disease at T9-10. A June 13, 2008 treatment record by Dr. DeMarco obtained a history that appellant presented with a complaint of increased back and leg pain that began two weeks prior while on vacation.

Additional reports dated July 15 to August 13, 2008 were also submitted from Dr. Mark E. Freimuth, appellant's chiropractor, who found appellant had pain in his lower back bilaterally caused by bending, prolonged sitting, standing from the sitting position and walking. Dr. Freimuth also reported asymmetry in the cervical, thoracic and lumbosacral regions along with notion palpation at T6, T7, T8, L3, L4, L5, lumbosacral junction, right sacroiliac flexion and the left and right hip.

On September 3, 2008 Dr. Caruso performed a redo right L5-S1 hemilaminectomy with disectomy and nerve root decompression. In a report dated July 24, 2009, he stated that the procedure discovered that appellant had an anular tear at the midline that was slightly asymmetric to the right side. Dr. Caruso further stated that the S1 nerve was encased with scar

[1] Docket No. 08-2242 (issued June 2, 2009). On October 11, 2007 appellant, then a 26-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that, on October 6, 2007, while performing leg lifts, he felt a pop in his lower back and that over the next few days the pain extended to his right leg.

where he found a compromise of disc and free fragments, several of which were removed, the largest being a 3 x 1 centimeter fragment.

In the October 5, 2009 report, Dr. Caruso stated that he had reviewed records obtained by Dr. Radley, his associate in practice. He noted that the history in 2007 showed a "work[-]related effect," for which appellant underwent a long trial of conservative care. Dr. Caruso stated that appellant failed conservative management and required surgery. In addressing causal relation, he stated:

> "I do believe there is a causal relationship to your injury that had occurred back on October 6, 2007 and this then led to your ultimate surgery. The injury that occurred as described on the contact from November 2007 did indeed cause your plight that led to your ultimately needing surgery."

In a November 18, 2009 decision, the Office denied modification of its June 11, 2008 decision.

LEGAL PRECEDENT

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. 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 which is alleged to have occurred.[2] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[3] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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 specific employment factors identified by the claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[4]

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[2] *J.F.*, 61 ECAB ___ (Docket No. 09-1061, issued November 17, 2009).

[3] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[4] *James Mack*, 43 ECAB 321 (1991).

ANALYSIS

The Office accepted that the October 6, 2007 incident occurred as alleged. The issue is whether appellant established that the incident caused a lower back condition. The Board finds that he has not met his burden of proof. While appellant submitted additional medical evidence addressing his back injury, it is not sufficiently well reasoned in explaining the causal relationship between his back condition and the October 6, 2007 employment incident.[5]

On September 3, 2008 appellant underwent surgery for a redo right L5-S1 hemilaminectomy with disectomy and nerve root decompression performed by Dr. Caruso. When stating his surgical findings in a July 24, 2009 report, Dr. Caruso reported that appellant had a large fragment of disc encased with scar which was removed during the surgery, causing severe compromise of the S1 nerve root. Dr. Caruso, however, failed to address the causal relation between appellant's back condition and the leg lifts which he performed on October 6, 2007. The report provided a detailed explanation of the surgery but failed to provide any opinion on the cause of the diagnosed low back condition.

In a October 5, 2009 report, Dr. Caruso stated his conclusion that there was a causal relationship that "occurred back on October 6, 2007 and this then led to your ultimate surgery. The injury that occurred as described on the contact from November 2007 did indeed cause your plight that led to your ultimately needing surgery." The Board finds that the opinion of Dr. Caruso is not well rationalized. Dr. Caruso did not provide an adequate explanation of how the incident accepted in this case caused or contributed to any preexisting lumbar condition or the need for treatment commencing in November 2007. While he noted that appellant underwent extensive conservative care, he did not address how the leg lifting incident would contribute to or worsen appellant's preexisting degenerative disease of the lumbar spine or did not incorporate the diagnosis previously provided. Dr. Caruso failed to describe the nature and extent of any postsurgical changes. It was not explained whether the incident at work caused a change in the underlying disease process or L5-S1 disc space. While noting that appellant's contact with his office in 2007 showed a "work[-]related effect," Dr. Caruso did not set forth an accurate history of the October 6, 2007 incident accepted in this case.

Dr. Caruso made general reference to having reviewed appellant's records, but did not set out any details pertaining to appellant's prior medical history or treatment. His medical note lacked a clear explanation on the causal relationship of appellant's back condition to his leg lifting on October 6, 2007 and failed to support the explanation with reference to medical evidence. Medical reports not containing adequate rationale on causal relationship are of diminished probative value and are insufficient to meet an employee's burden of proof.[6] The opinion of a physician supporting causal relationship must be based on a complete factual and medical background, supported by affirmative evidence, address the specific factual and medical

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

[6] *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

evidence of record and provide medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[7]

The remaining medical evidence of record is also insufficient to establish a causal relationship between appellant's back condition and the October 6, 2007 employment incident. Diagnostic testing was obtained, but the October 23, 2007 MRI scan previously of record found no sign of a recurrent herniated disc and the CT scan of June 7, 2008 was reported as showing degenerative disc disease at L4-5 and L5-S1 with no evidence of central canal or foraminal stenosis to support impingement of any specific nerve root. The Board notes that Dr. Sullivan found negative straight leg raising during examination on May 15, 2008 with focal pain over the right Sacroiliac joint. Dr. Radley noted that appellant showed postsurgical changes at the L5-S1 level on the right. Further, Dr. DeMarco stated that appellant had his third epidural procedure necessitated by back pain that was unresolved with medication and physical therapy. While the above treatment records submitted from Parkway Neuroscience and Spine Institute addressed appellant's treatment and injury, the physicians failed to address the causal relationship between appellant's back condition and his leg lifting on October 6, 2007. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[8] Without medical reasoning explaining how appellant's leg lifts caused his back condition, the reports are not sufficient to meet his burden of proof.[9]

Appellant's chiropractor, Dr. Freimuth, also provided detailed results of his examination; however, there is no indication that Dr. Freimuth obtained or reviewed x-rays in rendering his diagnosis. A chiropractor is considered a physician for purposes of the Act only where he treats a spinal subluxation as demonstrated by x-ray to exist.[10] As Dr. Freimuth does not meet the statutory definition of a physician, his reports lack any probative value.

The Board held that the mere fact that a condition manifests itself during a period of employment does not raise an inference of causal relation.[11] An award of compensation may not be based on surmise, conjecture, speculation or on the employee's own belief of causal relation.[12] Causal relationships must be established by rationalized medical opinion evidence.

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[7] *See Lee R. Haywood*, 48 ECAB 145 (1996); *Robert Broome*, *supra* note 5.

[8] *C.B.*, 61 ECAB ___ (Docket No. 09-2027, issued May 12, 2010); *S.E.*, 60 ECAB ___ (Docket No. 08-2214, issued May 6, 2009).

[9] *C.B.*, 60 ECAB ___ (Docket No. 08-1583, issued December 9, 2008).

[10] 5 U.S.C. § 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. The term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a sublexation as demonstrated by x-ray to exist and subject to regulations by the secretary. *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[11] *Daniel O. Vasquez*, 57 ECAB 559 (2006).

[12] *D.D.,* 57 ECAB 734 (2006).

Appellant failed to submit such evidence and the Office properly denied his claim for compensation.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a traumatic injury on October 6, 2007 in the performance of duty, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the November 18, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 1, 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