United States Department of Labor
Employees' Compensation Appeals Board

L.R., Appellant	)	
and	)	**Docket No. 10-744**
	)	**Issued: October 25, 2010**
DEPARTMENT OF AGRICULTURE, CONFEDERATE TRIBES OF THE GRAND RONDE, Grand Ronde, OR, Employer	)	

Appearances:
Appellant, pro se
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 January 25, 2010 appellant filed a timely appeal from the November 16, 2009 merit decision of the Office of Workers' Compensation Programs, which denied his recurrence claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant sustained a recurrence of disability on December 17, 2008 causally related to his August 11, 2000 employment injury.

FACTUAL HISTORY

On August 11, 2000 appellant, then a 35-year-old firefighter, on a six-month detail, sustained an injury in the performance of duty when a burning snag hit him in the head and left shoulder while he was suppressing a fire. The Office accepted his claim for mild concussion and left shoulder contusion.

Appellant did not file a claim for compensation due to wage loss. He was held off work for two weeks and returned to limited duty. Appellant returned to full duty in 2001. He performed a number of jobs thereafter, including construction laborer, commercial truck driver, seasonal firefighter and operator of his own firefighting and forestry business.[1]

Appellant filed a claim alleging that he sustained a recurrence of total disability on December 17, 2008 causally related to his August 11, 2000 employment injury. He stated that he was never able to return to his job as a Type 1 firefighter and Class C sawyer. Appellant stated that he was never without pain or discomfort "for the past several years" due to the snag falling on him in 2000. He added that he had continuous medical treatment for his original injury and had many painful aggravations and setbacks extending from that injury.

In a narrative statement, appellant notified the Office that, on December 17, 2008, the date of his claimed recurrence, he had fallen on the ice at work, which reaggravated his injuries "to the point where I no longer have the physical or mental ability to pull-through or tough-it-out again." A December 17, 2008 treatment note stated that appellant slipped on ice, landing on his elbow and exacerbating an old shoulder and neck injury. The osteopath diagnosed a left shoulder strain.[2]

The Office advised appellant that it appeared he sustained a new injury on December 17, 2008 and that a recurrence was a work stoppage resulting from a worsening of the accepted work injury without intervening cause. It asked for additional information, including the attending physician's opinion on the relationship between appellant's ability to work and the accepted work-related conditions. "Your physician's opinion is crucial to the claim."

On March 19, 2009 Dr. Melvin D. Herd, Board-certified in family medicine, noted that appellant had a history of chronic back pain for about 10 years and had been having problems with his back ever since a tree fell on him in 2000. "Patient states several months ago he reinjured his back." Magnetic resonance imaging (MRI) scans on August 17, 2007 showed disc bulging at C5-6, C6-7 and T1-2 and a mild disc protrusion at L1-2. Dr. Herd diagnosed low back pain.

In a May 13, 2009 decision, the Office denied appellant's recurrence claim. It found that the factual and medical evidence did not establish that the claimed recurrence resulted from the accepted work injury.

[1] The office manager at PCR Inc. in Beavercreek, OR, advised that appellant was an employee from March 2007 off and on until July 2008, depending on the work available. She explained that he was mostly a truck driver, but the position required more physical work than he was able to perform. Appellant was eventually taking more time off for his previous back injuries and was unable to perform the tasks. The office manager added that he would have been currently employed with PCR Inc. if he were able to perform the tasks.

[2] A January 5, 2009 treatment note stated: "Patient comes in to tell me how he is sure that the accident where he slipped and fell out of the Jeep is going to cause his back and shoulders to have another 10 years of misery like he has suffered over the last 10 years. He went on for probably 15 minutes telling me how horrible the last 25 years had been suffering with his back and shoulder and he says he gets very angry at times."

On October 2, 2009 Dr. Herd offered the following opinion:

> "I had the patient under my care since March 19, 2009. He has been seeing me for back pain. At this time he has been requiring medications because of his back pain. The patient has had this continuing back pain problems since his workers' comp[ensation] injury. It is currently my opinion that his former workers[']comp[ensation] injury could have contributed to his current situation with back pain. We have been unable to verify new damage to his back because we have been unable to get the patient an MRI [scan] due to insurance problems."

Dr. Herd also reported that appellant was requesting a letter to be written stating that his current back problems are due to his old workers' compensation injury:

> "Patient has continued to have some degree of pain since his initial workers[']comp[ensation] accident. Patient has been working as a firefighter since then. No new episodes of trauma have occurred. At this time [we] are not sure whether the pain is a residual pain from his old injury or is possibly due to his work as a firefighter."

In a decision dated November 16, 2009, an Office hearing representative affirmed the denial of appellant's recurrence claim. The hearing representative noted that the Office did not accept his claim for a low back condition and that treatment notes from 2000 to 2004 and from 2006 until late 2008 discussed almost exclusively appellant's left shoulder and cervical spine.[3] The hearing representative also noted that none of the medical reports addressed how the alleged December 17, 2008 recurrence was causally related to the August 11, 2000 employment injury. "The evidence is more indicative that [appellant] may have sustained a new injury.

On appeal, appellant argues that the hearing representative never took into account the many different doctors he has seen over the past nine years, which established a continuing medical problem and re-aggravation of his original injury. He adds: "My current Doctor (Dr. Heard) clearly stated in a letter that is part of this record, that in his medical opinion that my injuries are from the accident in 2000."

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.[4] "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[5]

[3] Typical is a December 19, 2000 treatment note, four months after the injury, stating that appellant presented for follow up on his shoulder and neck pain. The diagnosis was cervical strain and bilateral shoulder sprains. The first mention of some tenderness across the lumbar area appears in May 2001, nine months after the employment injury.

[4] 5 U.S.C. § 8102(a).

[5] 20 C.F.R. § 10.5(f).

A "recurrence of disability" means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[6] An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and who supports that conclusion with sound medical reasoning.[7]

ANALYSIS

Appellant sustained injury on August 11, 2000 accepted by the Office for a mild concussion and left shoulder contusion. He filed a claim alleging that he sustained a recurrence of total disability on December 17, 2008. Appellant has the burden of proof to establish that his total disability beginning that date is causally related to his August 11, 2000 employment injury.

The Board notes that the Office accepted his original injury claim for a mild concussion and a left shoulder contusion. The evidence indicates that appellant's disability on December 17, 2008 might be better explained by an intervening injury on that date rather than by a spontaneous change in his accepted medical conditions. It appears that he slipped on ice and landed on the point of his left elbow, causing a left shoulder strain, as the treatment note that date diagnosed. Such an intervening injury, although it involves the same shoulder appellant injured on August 11, 2000, does not constitute a recurrence of disability as the Office defines that phrase.

Appellant may still meet his burden of proof by submitting a report from a physician who, on the basis of a complete and accurate factual and medical history, concludes that his disability beginning December 17, 2008 is causally related to the August 11, 2000 employment injury and who supports that conclusion with sound medical reasoning. While the record contains numerous treatment notes and other medical documents, there are no medical opinions, based on a complete and accurate factual and medical history, soundly explaining how the August 11, 2000 employment injury caused appellant to become totally disabled beginning December 17, 2008.

Dr. Herd, the specialist in family medicine, is the only physician to address the issue, but his opinion is based on an unsubstantiated history. When he first saw appellant on March 19, 2009, appellant related that he had been having problems with his back ever since a tree fell on him in 2000. So Dr. Herd was under the impression that appellant had injured his back in the course of his federal employment in 2000 and had been suffering from chronic back pain ever since. The Office accepted only a mild concussion and a left shoulder contusion, not a back injury. As the hearing representative noted, and as the Board's review of the medical evidence confirms, appellant's medical record contemporaneous to the August 11, 2000 incident at work focuses almost exclusively on the head, left shoulder and neck, a transient partial loss of hearing in the left ear and headaches. There is no mention of the low back pain Dr. Herd diagnosed on

[6] *Id*. at § 10.5(x).

[7] *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956).

March 19, 2009. Medical conclusions based on inaccurate or incomplete histories are of little probative value.[8]

Nonetheless, with the understanding that appellant had suffered from continuing back problems since his employment injury in 2000, Dr. Herd concluded: "It is currently my opinion that his former workers' comp[ensation] injury could have contributed to his current situation with back pain." The Board finds this opinion speculative and of little probative value. Dr. Herd's opinion must be given to a reasonable medical certainty.[9] He also stated that he was not sure whether appellant's back pain was from his old injury in 2000 or was possibly due to his subsequent work as a firefighter. This only highlights the uncertainty of his opinion on causal relationship.

Because appellant has not submitted a well-reasoned medical opinion based on a proper factual and medical history explaining how his total disability beginning December 17, 2008 was causally related to his August 11, 2000 employment injury, as opposed to an intervening injury that date causing him to seek medical attention, the Board finds that appellant has not met his burden of proof to establish his recurrence claim. The Board will therefore affirm the Office's November 16, 2009 decision.

Appellant argues that the hearing representative never took into account the many different doctors he saw over the past nine years. Both the hearing representative and the Board have reviewed all the medical evidence submitted, and nowhere does a physician explain that appellant injured his back in the performance of duty on August 11, 2000. Dr. Herd reported only that the 2000 injury "could have contributed" to the current situation with appellant's back pain, but this is not a persuasive medical opinion, particularly when it appears he based his opinion on the history appellant provided and not on his own review of the medical evidence.

CONCLUSION

The Board finds that appellant has not met his burden to establish that he sustained a recurrence of disability on December 17, 2008 causally related to his August 11, 2000 employment injury.

[8] *James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

[9] *Jennifer Beville*, 33 ECAB 1970 (1982) (finding that a physician's opinion that the employee's complaints "could have been" related to her work injury was speculative and of limited probative value).

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 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