

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

M.W., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Cleveland, OH, Employer**

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**Docket No. 10-2102
Issued: May 18, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 17, 2010 appellant timely appealed the June 8, 2010 merit decision of the Office of Workers' Compensation Programs which denied his traumatic injury claim. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on May 1, 2008.

¹ 5 U.S.C. §§ 8101-8193.

² The record forwarded to the Board includes evidence received after the Office issued its June 8, 2010 decision. The Board's review of a case is limited to the evidence in the record that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c)(1) (2010).

FACTUAL HISTORY

On September 10, 2009 appellant, a 56-year-old part-time housekeeping aide, alleged that in May 2008 he injured his head, neck, back and shoulders in the performance of duty. He reportedly fell to the floor while attempting to sit on a chair. Appellant noted that the chair's legs gave way.³ He continued to work following the May 2008 incident and did not file a claim (Form CA-1) until approximately 16 months later. Appellant also filed a claim for a recurrence of disability (Form CA-2a) beginning July 10, 2009.⁴

The employer challenged the alleged May 2008 incident noting that appellant did not seek medical treatment until June 5, 2008. As to the claimed recurrence of disability beginning July 10, 2009, the employer noted that appellant initially advised that he hurt his back cleaning his garage on July 10, 2009. The employer further noted that appellant reported to work July 11, 2009, but had not returned since stopping work on July 12, 2009.

On June 5, 2008 appellant went to employee health where he was seen by Martha Brennan, a nurse practitioner. He complained of low back pain and left shoulder rotator cuff pain that was aggravated by a fall at work three weeks prior. Appellant reported that he attempted to sit in a chair when the legs gave way and he fell to the floor, landing on his buttocks. He had not sought immediate medical attention after the fall because he tried to "deal with it" and "block it out." A lumbar x-ray obtained on June 5, 2008 revealed degenerative changes, but no evidence of fracture. An x-ray of the left shoulder also obtained that day showed mild degenerative changes of the acromioclavicular joint. Ms. Brennan diagnosed lumbar strain and left rotator cuff exacerbation. She advised that pending further evaluation, appellant could return to work in a light-duty capacity with restrictions of no lifting in excess of 10 pounds.

On July 25, 2009 appellant was seen in the Cleveland Veterans Affairs Medical Center (VAMC) emergency department. Dr. Sheikh M. Asaduzzaman, a Board-certified internist, reported that appellant had a history of chronic low back pain with a background of disc space narrowing at L4-5. His medications included methadone and ibuprofen. Appellant's pain had reportedly worsened about two days prior. Dr. Asaduzzaman noted that appellant had not mentioned any particular precipitating factors, such as heavy lifting or any unusual physical activity. The pain was localized in appellant's low back and was similar to "previous episodes which he always had for years." Dr. Asaduzzaman's assessment was chronic, recurrent lower back pain with known disc disease.

Dr. Todd S. Hochman, a Board-certified internist, first examined appellant on August 12, 2009. He listed a July 10, 2009 date of injury when appellant sat in a chair that collapsed. Appellant reportedly had "[fallen] hard, landing on his back and striking his head." There was an immediate onset of pain throughout the back, and soon afterwards pain developed

³ Charles Cavore, appellant's team leader, was listed as a witness.

⁴ Appellant regularly worked weekends (Saturday and Sunday) from midnight until 8:00 a.m. He claimed to have been injured while working extra hours during the middle of the week on either a Wednesday or Thursday. Appellant only identified the month and year of his alleged injury (May 2008), therefore, the Office designated Thursday, May 1, 2008 as the date of injury.

throughout the neck. Dr. Hochman noted that appellant also developed some pain throughout the right shoulder. Appellant had been off work since the July 10, 2009 injury. His chief complaints were neck pain radiating into the upper extremities, back pain radiating into the right lower extremity, right shoulder pain and headache. Dr. Hochman diagnosed lumbar, thoracic, cervical and right shoulder sprains. He advised appellant to remain off work as there was no light-duty work available. Appellant was to return for follow-up in three to four weeks. In a September 9, 2009 report, Dr. Hochman noted chief complaints of back pain, neck pain and right shoulder pain. He adjusted appellant's medications and advised him to remain off work due to his employer's inability to accommodate his light-duty restrictions. Appellant was to return in a month. The September 9, 2009 follow-up report continued to identify July 10, 2009 as the date of injury.

In a decision dated November 20, 2009, the Office denied appellant's traumatic injury claim because he failed to establish fact of injury. It found that the medical evidence did not provide a diagnosis related to the May 1, 2008 employment incident.

Appellant requested a hearing, which was held on March 19, 2010. He submitted several reports from Dr. Hochman dated October 14, 2009 to April 27, 2010. The reports documented appellant's ongoing treatment for back, neck and shoulder pain. On December 18, 2009 Dr. Hochman documented left shoulder complaints in addition to the previously reported right shoulder discomfort. The January 19, 2010 report included a diagnosis of left shoulder sprain, with no mention of the previously diagnosed right shoulder sprain. Dr. Hochman attributed appellant's condition to a July 10, 2009 employment-related fall due to a chair that collapsed. The February 17, 2010 follow-up report also documented left shoulder complaints, but did not identify any specific complaints with respect to the opposite shoulder. The March 24 and April 27, 2010 reports also documented back, neck and left shoulder complaints, however, the two latest reports attributed appellant's injuries to a June 5, 2008 fall at work rather than the previously reported July 10, 2009 fall. Upon reviewing appellant's intake sheet, Dr. Hochman noted that appellant initially reported a June 5, 2008 date of injury, but then crossed it out and wrote in July 10, 2009; the collapsing chair incident occurred on June 5, 2008 rather than July 10, 2009. Dr. Hochman also noted that appellant continued to work for financial reasons. On July 10, 2009 appellant was reportedly performing his regular duties, which included taking out the trash and mopping on a regular basis. He developed an increase in pain at the time and the "next day, he lost his balance and fell." According to Dr. Hochman, appellant's "work activities on July 10, 2009, exacerbated the incident."

By decision dated June 8, 2010, the Branch of Hearings and Review affirmed the November 20, 2009 decision. The hearing representative found that the employment incident occurred as alleged, however appellant failed to establish that he sustained an injury as a result of the May 1, 2008 employment incident.

LEGAL PRECEDENT

A claimant seeking benefits under the Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence, including

that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.⁵

To determine if an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether “fact of injury” is established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred.⁶ The second component is whether the employment incident caused a personal injury.⁷

ANALYSIS

The Office accepted that on or about May 1, 2008, appellant fell when a chair collapsed beneath him. Having established that the employment incident occurred as alleged, appellant still must demonstrate that the May 1, 2008 employment incident caused a personal injury.

More than a month after the May 1, 2008 employment incident, appellant went to employee health. The June 5, 2008 employee health records included a history of injury consistent with what appellant alleged to have occurred on May 1, 2008. Ms. Brennan, a nurse practitioner, diagnosed lumbar strain and left rotator cuff exacerbation. However, as a nurse practitioner, Ms. Brennan is not competent to offer a medical opinion for purposes of determining appellant’s entitlement to benefits under the Act.⁸ The June 5, 2008 lumbar and left shoulder x-rays revealed underlying degenerative changes, without reference to any employment-related aggravation or exacerbation. Therefore, the June 5, 2008 employee health treatment records are insufficient to satisfy appellant’s burden of proof.

The next documented medical treatment occurred some 13 months later on July 25, 2009. At that time, appellant was seen in the VMAC emergency department. Dr. Asaduzzaman reported that appellant had a known history of chronic low back pain with a background of disc space narrowing at L4-5. His pain reportedly worsened about two days prior without mention of any particular precipitating factors. Appellant’s pain pattern was similar to “previous episodes which he always had for years.” Dr. Asaduzzaman diagnosed chronic, recurrent lower back pain and known disc disease. He did not mention a history of the May 1, 2008 employment-related fall as either the primary cause or a contributing factor to appellant’s lumbar condition.

⁵ 20 C.F.R. § 10.115(e), (f); see *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁶ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. See *Robert G. Morris*, 48 ECAB 238 (1996). A physician’s opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician’s opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant’s specific employment factors. *Id.*

⁸ A nurse practitioner is not considered a “physician,” as that term is defined under 5 U.S.C. § 8101(2). *E.g.*, *Roy L. Humphrey*, 57 ECAB 238, 242 (2005).

Consequently, Dr. Asaduzzaman July 25, 2009 report is insufficient to establish that appellant sustained an employment-related injury on May 1, 2008.

Dr. Hochman's various reports are similarly insufficient to satisfy appellant's burden. He diagnosed lumbar, thoracic, cervical and shoulder sprains. Initially, it was a right shoulder sprain and then months later Dr. Hochman diagnosed left shoulder sprain. He attributed each of appellant's diagnosed conditions to a July 10, 2009 employment incident where appellant reportedly fell when a chair collapsed beneath him. Dr. Hochman later clarified that the chair incident occurred on June 5, 2008 rather than July 10, 2009. He also reported that appellant fell at work on July 11, 2009. Dr. Hochman never referenced an accurate history of the accepted May 1, 2008 incident. The reported June 5, 2008 date of injury coincided with appellant's visit to employee health for treatment of his low back and left shoulder condition. Appellant did not claim to have injured himself on June 5, 2008.

Dr. Hochman failed to explain how the diagnosed sprains persisted for approximately two years after appellant fell from a chair at work. Dr. Hochman also indicated that appellant's "work activities on July 10, 2009" exacerbated his condition. Appellant did not work on July 10, 2009. According to the employer, that was the day appellant reportedly injured his back while at home cleaning his garage. Dr. Hochman also referenced a fall at work on July 11, 2009, which is not otherwise documented. An opinion on causal relationship should be based on a complete factual and medical background.⁹ Dr. Hochman's treatment records are fraught with inaccuracies and inconsistent diagnoses such that his opinion on causal relationship is of limited probative value. Accordingly, appellant has failed to establish that his claimed back, neck and shoulder conditions are related to the May 1, 2008 employment incident.

CONCLUSION

Appellant failed to establish that he sustained an injury in the performance of duty on May 1, 2008.

⁹ *Victor J. Woodhams, supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 18, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board