United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 11-1383**
	)	**Issued: February 9, 2012**
SMITHSONIAN INSTITUTION, NATIONAL ZOOLOGICAL PARK, Washington, DC, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 23, 2011 appellant, through his attorney, filed a timely appeal from a May 19, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied his traumatic injury claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a back injury causally related to the May 28, 2009 employment incident.

FACTUAL HISTORY

This case was previously before the Board. On June 9, 2009 appellant, then a 56-year-old pipe fitter, submitted a claim for traumatic injury alleging that on May 28, 2009 he felt

[1] 5 U.S.C. § 8101 *et seq.*

something pull in his back while digging up a yard hydrant. He explained that he was digging up an outside water hydrant when he lifted a boulder weighing about 10 to 15 pounds and felt his back give out. On September 28, 2009 OWCP issued a decision denying appellant's claim for compensation on the grounds of insufficient medical evidence providing a medical diagnosis. On October 14, 2009 appellant submitted a request for reconsideration.

In a September 25, 2009 medical report, Dr. John T. Stinson, a Board-certified orthopedic surgeon, noted appellant's complaints of severe back pain and bilateral leg pain for the past three months after lifting heavy rocks and digging a hole for a fire hydrant at work. He reviewed appellant's medical and social history. Upon examination, Dr. Stinson observed stiffness on range of motion of the spine on all planes, especially extension and back pain with straight leg raising. He also noted that appellant was able to forward flex to about 50 or 60 degrees and had no reflex asymmetry. Dr. Stinson concluded that appellant had moderate-to-severe back and leg pain of indeterminate cause and recommended a lumbar magnetic resonance imaging (MRI) scan test.

In the October 2, 2009 lumbar MRI scan report, Dr. Roberto F. Soto, a Board-certified diagnostic radiologist, observed congenital narrowing of appellant's lumbosacral canal with no fracture, spondylolisthesis, infection or neoplasm. His lumbar lordosis and distal thoracic cord were normal. Dr. Soto also noted a disc herniation, spondylosis and congenital canal narrowing, which contributed to marked spinal stenosis, L4-5 spondylosis without disc herniation and spondylosis at over levels with milder stenosis.

By decision dated November 17, 2009, OWCP denied appellant's request for reconsideration finding that the evidence submitted did not warrant further review of the merits.

In a June 22, 2010 left knee x-ray report, Dr. Alan A. Cohen, a Board-certified diagnostic radiologist, observed marked narrowing of appellant's medial compartment with osteophyte formation and subchondral sclerosis. He diagnosed moderate-to-severe osteoarthritis medial compartment. The x-ray examination of appellant's lumbar spine revealed marked narrowing at the L4-5 disc with normal posterior osteophytes, pedicles, posterior elements and sacroiliac (SI) joints. Dr. Cohen diagnosed marked degenerative change at the L4-5 disc.

In a March 2, 2011 decision,[2] the Board set aside OWCP's November 17, 2009 decision finding that Dr. Stinson's September 25, 2009 report and the October 2, 2009 MRI scan report constituted new and relevant evidence sufficient to warrant merit review. The Board remanded the case to OWCP to reopen his case for further review of the merits. The complete set of facts are set forth in the Board's March 2, 2011 decision and are herein incorporated by reference.

On March 4, 2011 appellant's counsel submitted a number of medical documents to the record. Some of the medical documentation submitted included form reports and progress notes with illegible signatures. Various prescription orders were submitted, as well as x-ray reports and nurses notes. The documentation also included work restriction reports dated August 26, 2009 from Dr. Krantz, as well as a narrative report from Dr. Krantz dated August 26, 2009,

[2] Docket No. 10-1217 (issued March 2, 2011).

which was previously of record. Also received with this medical documentation were two new narrative reports.

In a September 20, 2010 report, Dr. Richard I. Zamarin, a Board-certified orthopedic surgeon, noted appellant's complaints of low back pain and reviewed his medical history. Appellant related that on May 28, 2009 he lifted stones while digging an outside hydrant when he felt something pull in his lower back. He also reported that he had no prior history of back pain or leg numbness prior to his alleged May 28, 2009 injury. Diagnostic studies revealed marked degenerative change at the L4-5 disc, moderate-to-severe osteoarthritis, spondylosis, disc herniation and congenital spinal narrowing. Upon examination, Dr. Zamarin observed tenderness on the right side greater than the left with no paravertebral spasm. Appellant was able to flex 90 degrees, extend 30 degrees and bilaterally bend 30 degrees. His bilateral straight leg raise test was negative and his sensation was intact distally. Dr. Zamarin stated that, based upon a reasonable degree of medical certainty, appellant sustained a herniated disc at L3-4 with aggravation of underlying degenerative disease and stenosis as a result of the May 28, 2009 work injury. He explained that appellant had preexisting disease at several levels in his lower back with stenosis and the herniation further narrowed the canal at L3-4.

In a narrative report dated October 21, 2009, Dr. Ramani Peruvemba, a Board-certified anesthesiologist, noted that appellant had developed increasing lower back and leg pain since May 26, 2009. She noted examination findings, diagnosed lumbar disc displacement and lumbar radiculitis and explained that she had treated appellant with a left transforaminal epidural steroid injection.

By decision dated May 19, 2011, OWCP affirmed its September 28, 2009 decision on the grounds of insufficient medical evidence to establish causal relationship. It accepted that appellant sustained a back injury but found that the medical evidence failed to demonstrate that his back injury was causally related to the May 28, 2009 employment incident.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his claim by the weight of the reliable, probative and substantial evidence[4] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether "fact of injury" has been established.[6]

[3] 5 U.S.C. §§ 8101-8193.

[4] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[5] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989); *M.M.*, Docket No. 08-1510 (issued November 25, 2010).

[6] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[7] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[8] An employee may establish that the employment incident occurred as alleged but fail to show that his disability or condition relates to the employment incident.[9]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence providing a diagnosis or opinion as to causal relationship.[10] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the specified employment factors or incident.[11] The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.[12] The weight of the 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.[13]

While an employee who claims benefits under FECA has the burden of establishing the essential elements of his claim, it is well established that proceedings under FECA are not adversarial in nature. While the employee has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[14]

ANALYSIS -- ISSUE 1

OWCP accepted that on May 28, 2009 he felt something pull in his lower back while digging up a fire hydrant and lifting boulders at work. In its May 19, 2011 decision, it refused to modify its September 28, 2009 denial decision finding that the medical evidence failed to establish that his back condition was causally related to the May 28, 2009 employment incident. The Board finds that appellant has provided sufficient evidence to require further development of

[7] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

[8] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[9] *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[10] *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

[11] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[12] *B.B.*, 59 ECAB 234 (2007); *Victor J. Woodhams*, *supra* note 11; *D.S.*, Docket No. 09-860 (issued November 2, 2009).

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

[14] *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

the medical record to determine whether appellant's back condition was causally related to the accepted incident.

In support of his claim, appellant, through counsel, submitted a September 20, 2010 report by Dr. Zamarin. He provided an accurate history of injury that on May 28, 2009 appellant lifted stones while digging an outside hydrant and felt something pull in his lower back. Dr. Zamarin conducted an examination and diagnosed marked degenerative change at the L4-5 disc, moderate-to-severe osteoarthritis, spondylosis, disc herniation and congenital spinal narrowing. He opined that appellant sustained a herniated disc at L3-4 with aggravation of underlying degenerative disease and stenosis as a result of the May 28, 2009 work injury. While Dr. Zamarin's report is not completely well rationalized as he does not explain the mechanism of injury of how the May 28, 2009 employment incident caused his back condition, his report supports that appellant sustained an employment-related injury. His opinion is based on an accurate history of injury and objective findings and is not contradicted by any substantial medical or factual evidence. Therefore, while Dr. Zamarin's report is not sufficient to meet appellant's burden of proof to establish her claim, it raises an uncontroverted inference between appellant's claimed condition and the employment incident of May 28, 2009, and is sufficient to require OWCP to further develop the medical evidence and the case record.[15]

The Board also notes that the May 19, 2011 decision of OWCP did not acknowledge receipt of Dr. Peruvemba's October 21, 2009 report, which is generally supportive of appellant's claim, or the other medical documentation submitted by appellant's counsel on March 4, 2011. The Board is therefore unable to determine whether OWCP reviewed all of the evidence of record prior to the May 19, 2011 decision.

CONCLUSION

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

[15] *Richard E. Simpson*, 55 ECAB 490, 500 (2004); *John J. Carlone*, 41 ECAB 354, 360 (1989).

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further development consistent with this decision of the Board.

Issued: February 9, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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