

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

J.Z., Appellant

and

**DEPARTMENT OF HOUSING & URBAN
DEVELOPMENT, Alexandria, VA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 11-437
Issued: January 18, 2012**

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On December 14, 2010 appellant, through his attorney, filed a timely appeal from a November 8, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim. Pursuant to the Federal Employees' Compensation Act (FECA)¹ 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 and neck injury in the performance of duty on December 5, 2007.

FACTUAL HISTORY

On December 5, 2007 appellant, then a 45-year-old operation analyst, filed a traumatic injury claim (Form CA-1) alleging that he sustained neck and back pain, spasms and headaches

¹ 5 U.S.C. § 8101 *et seq.*

when he was in a motor vehicle accident at 10:00 a.m. on that same date. He reported that he twisted his neck when the front left fender of the vehicle in which he was riding was hit by a van. Appellant later notified his supervisor on December 27, 2007.

By letter dated January 14, 2008, OWCP requested additional factual and medical evidence from appellant and asked that he respond to the provided questions within 30 days. By letter of that same date, it also requested additional information from the employing establishment.

Appellant submitted an unsigned and undated authorization for treatment (Form CA-16). In a January 14, 2008 attending physician's report (Form CA-20), his physician reported that appellant was in a car accident and diagnosed cervical disc displacement and lumbar disc displacement with radiculitis.

By letter dated January 24, 2008, appellant reported that he was scheduled to attend a meeting on December 5, 2007 in New York City. While on route, another vehicle struck his cab. A police report was filed and appellant went to his meeting.² Appellant sought treatment that day and returned to work on December 7, 2007.

By decision dated February 20, 2008, OWCP denied appellant's claim finding that the medical evidence did not demonstrate that the injury was related to the established December 5, 2007 employment incident.

On March 12, 2008 appellant requested reconsideration of OWCP's decision.

In a December 19, 2007 medical report, Dr. Fadi Bejjani, Board-certified in pain medicine, reported that appellant complained of lower back and neck pain following a car accident and diagnosed cervical disc displacement and lumbar disc displacement with radiculitis.

In a February 26, 2008 magnetic resonance imaging (MRI) scan report, Dr. Steven Winter, a Board-certified diagnostic radiologist, reported that examination revealed an increase in size of the left-sided disc herniation at the C5-C6 level causing increased left cord compression and mild central stenosis. The MRI scan also showed discogenic disease, bulging and spondylosis with unvertebral osteophyte formation. Dr. Winter noted moderate-to-severe foraminal stenosis.

Dr. Winter reported that an MRI scan of the lumbar spine showed no interval change. He noted L1-2, L4-5 and L5-S1 right herniated discs, as well as L2-3 and L3-4 protrusion.

On February 27, 2008 appellant underwent a nerve conduction study. In medical reports dated February 27 and March 10, 2008, Dr. Bejjani diagnosed cervical disc displacement with radiculitis, lumbar disc displacement with radiculitis, cervical nerve root compression at C6, left lumbar nerve root compression at L4-5, left carpal tunnel syndrome and right tardy ulnar nerve palsy.

² Neither OWCP nor the employing establishment disputes that the December 5, 2007 employment incident occurred while in the performance of duty.

By decision dated June 10, 2008, OWCP denied modification of its February 20, 2008 decision on the grounds that the medical evidence of record failed to establish the causal relationship between appellant's injury and the accepted December 5, 2007 employment incident.

On September 11, 2008 appellant requested a second reconsideration of OWCP's decision. In support of his request, he submitted medical reports from Dr. Bejjani dated December 19, 2007 to September 2, 2008. Appellant specifically noted that Dr. Bejjani's conclusion on the last page of the reports would establish causal relationship in his claim.

In a March 17, 2008 medical report, Dr. Bejjani reported that appellant underwent a lumbar discogram study of the lumbar spine levels L1-2 through L5-S1. On June 20, 2008 appellant underwent a caudal epidural injection with epidurogram under fluroscopy. Based on diagnostic tests and appellant's medical history, Dr. Bejjani opined that appellant sustained his injuries as a direct result of the December 5, 2007 motor vehicle accident.

By decision dated December 4, 2008, OWCP denied modification of its June 10, 2008 decision on the grounds that the medical evidence of record failed to establish the causal relationship between appellant's injury and the accepted December 5, 2007 employment incident.

On June 10, 2009 appellant requested a third reconsideration of OWCP's decision.

In support of his request, appellant submitted a June 8, 2009 medical report from Dr. Bejjani, who diagnosed lumbar disc displacement with radiculitis, lumbosacral facet arthropathy and lumbosacral instability. Dr. Bejjani further opined that appellant sustained the instability, arthropathy and aggravated disc displacements as a direct result of his December 2007 motor vehicle accident.

By decision dated September 3, 2009, OWCP affirmed the December 4, 2008 decision.

For the fourth time, on August 4, 2010 appellant, through counsel, requested reconsideration of OWCP's decision. He argued that the medical evidence submitted established causal relationship and that OWCP should have developed the case.

In support of his request, appellant submitted a July 20, 2009 medical report from Dr. Richard Mutty, a Board-certified orthopedic surgeon, who diagnosed osteomyelitis of L5 with some discitis at L4-L5 and L5-S1.

In an August 24, 2009 CT scan report, Dr. Maurice Oehlsen, a Board-certified diagnostic radiologist, reported that appellant showed changes at the L5-S1 level including poor definition of the anterior margin of the adjoining L5 and S1 vertebral endplates and radiodense material within the L5 and L5-S1 disc spaces.

In a December 7, 2009 initial consultation report, Dr. Andrew Cappuccino, a Board-certified orthopedic surgeon, reported that appellant informed him that he was in a work-related injury on December 5, 2007 and had back pain since that date. He provided the details of the December 5, 2007 motor vehicle accident. Dr. Cappuccino also reviewed appellant's prior

medical history and diagnostic tests and provided a summary of the findings. He diagnosed appellant with bilateral L5 radiculopathy and pseudoarthrosis, L4-5, L5-S1. Dr. Cappuccino further opined that appellant's injury was causally related to his workers' compensation claim.

In a December 15, 2009 medical report, appellant underwent a three-phase bone scan and an MRI scan of the lumbar spine. Dr. Oehlsen diagnosed osteomyelitis and discitis at the L5-S1 level.

By decision dated November 8, 2010, OWCP affirmed the September 3, 2009 decision and denied appellant's August 4, 2010 request for modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed are causally related to the employment injury.³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁴

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether 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.⁵ 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.⁶ 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,

³ *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

⁴ *Michael E. Smith*, 50 ECAB 313 (1999).

⁵ *Elaine Pendleton*, *supra* note 3.

⁶ *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁷

ANALYSIS

OWCP accepted that the December 5, 2007 incident occurred as alleged. The issue is whether appellant established that the incident caused a neck and back injury. The Board finds that he did not submit sufficient medical evidence to support that his injury was causally related to the December 5, 2007 employment incident.⁸

In a December 7, 2009 initial consultation report, Dr. Cappuccino reported that appellant informed him that he was in a work-related injury on December 5, 2007 and had back pain since that date. He provided the details of the December 5, 2007 motor vehicle accident, reviewed appellant's prior medical history and diagnostic tests and provided a summary of the findings. Dr. Cappuccino diagnosed appellant with bilateral L5 radiculopathy and pseudoarthrosis, L4-5, L5-S1 and opined that appellant's injury was causally related to his workers' compensation claim.

The Board finds that the opinion of Dr. Cappuccino is not well rationalized. Dr. Cappuccino's broad statement that appellant's injury was causally related to his workers' compensation claim does not offer meaningful support to the conclusion that the December 5, 2007 incident caused an injury. While Dr. Cappuccino diagnosed appellant's back injury, he failed to explain how appellant's employment incident contributed to or caused the condition. Medical reports without adequate rationale on causal relationship are of diminished probative value and are insufficient to meet an employee's burden of proof.⁹ The opinion of a physician supporting causal relationship must be based on a complete factual and medical background with affirmative evidence. The opinion must address the specific factual and medical evidence of record and explain the relationship between the diagnosed condition and the established incident or factor of employment.¹⁰ Thus, Dr. Cappuccino's report is not probative because it does not adequately explain the cause of appellant's condition.¹¹

In medical reports dated December 19, 2007 to June 8, 2009, Dr. Bejjani reported that appellant complained of lower back and neck pain following a car accident and diagnosed cervical disc displacement, lumbar disc displacement with radiculitis, lumbosacral facet arthropathy and lumbosacral instability. He further opined that appellant sustained the instability, arthropathy and aggravated disc displacements as a direct result of his December 5, 2007 motor vehicle accident.

⁷ *James Mack*, 43 ECAB 321 (1991).

⁸ *See Robert Broome*, 55 ECAB 339 (2004).

⁹ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

¹⁰ *See Lee R. Haywood*, 48 ECAB 145 (1996); *Robert Broome*, *supra* note 8.

¹¹ *Id.*

Dr. Bejjani did not provide an adequate explanation of how the incident accepted in this case caused or contributed to any back injury or the need for treatment commencing in December 2007. Though he concluded that causal connection exists between appellant's injury and the December 5, 2007 employment incident, the reports provided no support for that conclusion. Without medical reasoning explaining how the December 5, 2007 motor vehicle accident caused his back injury, Dr. Bejjani's reports are insufficient to meet appellant's burden of proof.¹²

The remaining medical evidence of record is also insufficient to establish a causal relationship between appellant's back condition and the December 5, 2007 employment incident. A January 14, 2008 attending physician's report noted that appellant was in a car accident and diagnosed cervical disc displacement and lumbar disc displacement with radiculitis. In a February 26, 2008 MRI scan report, Dr. Winter noted moderate-to-severe foraminal stenosis, L1-2, L4-5 and L5-S1 right herniated discs, as well as L2-3 and L3-4 protrusion. Dr. Mutty's July 20, 2009 report diagnosed osteomyelitis of L5 with some discitis at L4-L5 and L5-S1. Dr. Oehlsen's August 24 and December 15, 2009 radiology reports showed osteomyelitis and discitis at the L5-S1 level. While the above medical records addressed appellant's treatment and injury, the physicians failed to state any causal relationship between appellant's back condition and the December 5, 2007 motor vehicle accident. 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.¹³ Without medical reasoning explaining how the accepted employment incident caused his back condition, the reports are not sufficient to meet appellant's burden of proof.¹⁴

The Board notes that OWCP conducted a merit review in its November 8, 2010 decision as appellant's August 4, 2010 request for reconsideration was accompanied by relevant evidence not previously considered by OWCP.¹⁵ Upon review of the additional evidence, OWCP properly found that appellant failed to meet his burden of proof to establish that his neck and back injury were causally related to the December 5, 2007 employment incident.

The November 8, 2010 decision, however, concluded that modification of the prior decision was unwarranted on the grounds that the arguments and medical documentation submitted failed to establish clear evidence of error on the part of OWCP.¹⁶ The Board finds that OWCP conducted a merit review of appellant's reconsideration request as should have been done. The Board finds that this inaccuracy by the senior claims examiner in noting an

¹² *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

¹³ *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

¹⁴ *Supra* note 12.

¹⁵ 20 C.F.R. § 10.606(b)(2).

¹⁶ It is clear from the record that OWCP evaluated appellant's reconsideration correctly and granted him a merit review. The decision concludes by listing the applicable standard of review as "clear evidence of error" rather than a simple statement that after review, the evidence presented by appellant was not probative under a preponderance of evidence standard.

inappropriate standard for review was harmless error. The context of the November 8, 2010 decision clearly establishes that appellant was afforded a merit review.¹⁷

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a neck and back injury on December 5, 2007 in the performance of duty, as alleged.

ORDER

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

Issued: January 18, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁷ *Terry Newsom*, Docket No. 06-226 (issued May 15, 2006).