

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

C.B., Appellant)
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and)
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DEPARTMENT OF VETERANS AFFAIRS,)
INDIANAPOLIS -- VETERANS)
ADMINISTRATION MEDICAL CENTER,)
Indianapolis, IN, Employer)

**Docket No. 12-27
Issued: July 20, 2012**

Appearances:

Joseph E. Allman, 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, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2011¹ appellant, through his attorney, filed a timely appeal from a March 10, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim. Pursuant to the Federal Employees' Compensation Act²

¹ Under the Board's Rules of Procedure, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. *See* 20 C.F.R. § 501.3(f)(2). As OWCP's merit decision was issued on March 10, 2011, the 180-day computation begins, to determine the timeliness of the appeal from that decision, March 11, 2011 and 180 days from March 11, 2011 was September 7, 2011. Since using October 7, 2011, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights as to the appeal from the March 10, 2011 decision, the date of the postmark or other identifiable marking is considered the date of filing. The shipping date on the federal express envelope containing the appeal is September 2, 2011, which renders the appeal timely filed from the March 10, 2011 decision. *See* 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

(FECA) and 20 C.F.R §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has established that he sustained an injury in the performance of duty on August 11, 2010 as alleged.

FACTUAL HISTORY

On August 23, 2010 appellant, then a 40-year-old lead medical instrument technician, filed a traumatic injury claim alleging that on August 11, 2010 he sustained a low back injury while assisting a heavy patient to the table. He stopped work on August 11, 2010.

In an August 20, 2010 report, Dr. Sadia Saba, a Board-certified neurologist, noted that appellant reported that, while he was assisting an obese patient at work on August 11, 2010, he noticed a sudden back pain going down his right leg and to the big toe and the toe next to it and became numb. Since then appellant had constant back pain. Dr. Saba stated that he had back surgery in 2007 and 2009 for herniated disc at L4-5, but his symptoms did not completely resolve as he had some mild pain. However, after the work injury, appellant has had very severe pain and difficulty working and walking. Dr. Saba reported the August 11, 2010 lumbar x-ray taken in the emergency room showed mild intervertebral disc space height loss at L5-S1; otherwise, it was unremarkable. She also noted that a November 2009 magnetic resonance imaging (MRI) scan showed degenerative disc disease at levels L4-5 and L5-S1 with a moderate-size disc bulge at L4-5 and L5-S1 with moderate bilateral foraminal stenosis. Appellant also had persistent epidural fibrosis encasing the right L5 nerve root. Dr. Saba opined that the August 11, 2010 incident may have exacerbated his systems. In an accompanying duty status report, she noted that appellant had an “apparent reinjury to a prior old back problem.” No diagnosis was provided. In her August 20, 2010 attending physician’s report, Dr. Saba noted that the history of injury and diagnosed “probable lumbo-sacral radiculopathy.” She opined that appellant’s condition was “possibly aggravated” by the employment activity.

In a September 1, 2010 letter, OWCP notified appellant that the information received was insufficient to establish his claim. It asked him to have his physician submit a medical opinion supported by a medical explanation that the work incident caused or aggravated a medical condition.

In response, OWCP received: copies of memoranda dated August 26, September 15 and 24, 2010, from the employing establishment regarding continuation of pay an August 26, 2010 witness statement from Jeremy Bricker, a coworker; an August 12, 2010 off work note; an August 11, 2010 lumbosacral spine x-ray report; requests for physical therapy authorization and a September 20, 2010 physical therapy evaluation.

An August 11, 2010 emergency room report showed appellant was treated for low back pain. He was diagnosed with low back pain with right leg radiculopathy.

In an October 1, 2010 report, Dr. Saba noted that appellant had been treated for back pain on August 20 and September 24, 2010. She stated that the new MRI scan did not show any significant difference from the prior MRI scan. Dr. Saba opined that appellant's back pain was aggravated by the work injury of moving an obese patient to the operating table. In an October 22, 2010 attending physician's report, she stated that his chronic back pain was exacerbated by trying to lift an obese patient. Dr. Saba opined that appellant's condition was aggravated by his activity.

In an October 18, 2010 report, Dr. Mitesh V. Shah, a Board-certified neurologist, noted that he saw appellant on October 15, 2010. He noted that appellant had a prior L4-5 microlumbar discectomy on the right and at L5-S1 on the left. Dr. Shah reported that, following lifting a patient at work on August 25, 2010, appellant had complaints of severe back pain that radiated down his right leg with numbness involving the bottom of his foot. He reviewed the August 25, 2010 MRI scan studies and reported that there was no difference from the July 2009 films. Dr. Shah noted that appellant had an annular tear on the right at L4-5 and a central bulging disc at L5-S1. He stated that, even though the report seems to indicate that there was severe foraminal stenosis, he did not think there was anything substantially different from the July 2009 films as a central bulging disc was also present at L5-S1. Dr. Shah opined that appellant was not a surgical candidate. In an October 18, 2010 follow-up note, he indicated that the October 15, 2010 lumbar x-rays indicated no abnormal motion across the L4-5 or L5-S1 interspaces, but the disc height at L4-5 was slightly collapsed.

By decision dated October 26, 2010, OWCP denied the claim on the grounds that fact of injury was not established. It found that the medical evidence was not sufficient to establish that a medical condition was diagnosed in connection with the claimed event.

On October 31, 2010 appellant requested a review of the written record before a hearing representative.

In a November 5, 2010 attending physician's report, Dr. Shah diagnosed right L5 radiculopathy and opined with a checkmark "yes" that he believed the condition was caused or aggravated by employment activity.

By decision dated March 10, 2011, OWCP's hearing representative affirmed the denial of appellant's claim. The hearing representative found that the medical evidence was insufficient to establish that the effects of the August 11, 2010 incident caused an injury or disability.

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 and/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

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether fact of injury is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁵ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.⁶ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.⁷

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's 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, 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.⁸

ANALYSIS

The work incident of August 11, 2010 is not in dispute as the record indicates that appellant lifted an obese patient on August 11, 2010. However, appellant has not submitted sufficient medical evidence to establish that the August 11, 2010 work incident caused an injury or disability.

In her August 20, 2010 reports, Dr. Saba opined that appellant had "probable lumbo-sacral radiculopathy" and indicated that the August 11, 2010 incident may have exacerbated his symptoms. In her October 1, 2010 report, she stated that the new MRI scan did not show any significant difference from the prior MRI scan. Dr. Saba continued to opine in her October 1 and 22, 2010 reports that appellant's chronic back pain was aggravated by his work activity of trying to lift an obese patient. Although she provided some support for causal relationship, her opinion that the August 11, 2010 incident may have exacerbated his symptoms is couched in speculative terms. The Board has held that medical opinions which are speculative

³ *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

⁴ *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁵ *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

⁶ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

⁷ *Id.*

⁸ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

or equivocal in character have little probative value.⁹ Dr. Saba also did not offer a firm diagnosis and she offered no rationale as to why appellant's chronic back pain was aggravated by the August 11, 2010 incident especially since the new MRI scan did not show any significant difference from the prior MRI scan. Thus, her opinion is insufficient to establish appellant's claim.

The November 5, 2010 form report from Dr. Shah which supports causal relationship with a check mark is insufficient to establish the claim, as the Board has held that, without further explanation or rationale, a checked box is not sufficient to establish causation.¹⁰ Although Dr. Shah diagnosed right L5 radiculopathy and explained that appellant had radiating pain on August 11, 2010, she did not adequately address how this was causally related to the August 11, 2010 work incident. As she noted that there was no change from the previous MRI scan, there is insufficient rationalized evidence to support that his right L5 radiculopathy was work related. Thus, Dr. Shah's reports are insufficient to establish appellant's claim.

Appellant also provided several diagnostic reports. However, these reports merely reported findings and did not contain a physician's opinion regarding the cause of the reported condition. Additionally, appellant provided physical therapy notes. As physical therapists are not physicians as defined by FECA, their opinions regarding the cause of his condition are of no probative medical value.¹¹

Appellant has not submitted rationalized medical evidence in which a physician explains the reasons why the effects of the August 11, 2010 work incident caused an injury or disability. The Board therefore finds that, as he did not submit medical evidence to establish that his aggravation of back pain was causally related to factors of employment, he has failed to meet his burden of proof.

On appeal, counsel essentially argues that OWCP's decision is contrary to fact and law. For the reasons outlined above, appellant failed to submit rationalized medical evidence in which a physician explains the reasons why the effects of the August 11, 2010 work incident caused an injury or disability.

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 has not met his burden of proof in establishing that he sustained an injury in the performance of duty.

⁹ *Vaheh Mokhtarians*, 51 ECAB 190 (1999).

¹⁰ *Debra S. King*, 44 ECAB 203 (1992); *Salvatore Dante Roscello*, 31 ECAB 247 (1979).

¹¹ See 5 U.S.C. § 8101(2); *H.S.*, Docket No. 11-679 (issued October 6, 2011); *Roy L. Humphrey*, 57 ECAB 238 (2005). See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 20, 2012
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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