United States Department of Labor
Employees' Compensation Appeals Board

A.C., Appellant	)	
and	)	**Docket No. 11-1339**
	)	**Issued: March 9, 2012**
DEPARTMENT OF HOMELAND SECURITY, TSA-FEDERAL AIR MARSHALL SERVICE, McLean, VA, Employer	)	

Appearances:
Stephen D. Scavuzzo, Esq., for the appellant
Office of Solicitor, for the Director

Case submitted on the record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 11, 2011 appellant, through his representative, filed a timely appeal of a November 26, 2010 decision of the Office of Workers' Compensation Programs (OWCP), which affirmed the denial of his claim for a recurrence. 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 on appeal is whether appellant met his burden of proof to establish a recurrence of disability causally related to his September 13, 2006 employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 15, 2006 appellant, then a 38-year-old federal air marshal, filed a traumatic injury claim alleging that, while at work on September 13, 2006, he sustained a low back injury while riding an airport shuttle. He noted that he picked up a suitcase to exit the vehicle and the shuttle driver braked suddenly and aggressively, throwing him forward while his body was in a contorted position. On October 20, 2006 OWCP accepted the claim for lumbar sprain. The record reflects that appellant was released to work on October 29, 2006, by Dr. Alan Rohrer, a Board-certified internist. Appellant performed full duty until February 2009.

In a March 9, 2009 report, Dr. Christopher Berman, a Board-certified internist and treating physician, noted that he last saw appellant on February 9, 2009. He noted that appellant's back pain flared up after he took a long car ride to Georgia. Dr. Berman diagnosed low back pain with lumbar degenerative disc disease and bilateral lower extremity radiculopathy. He noted that appellant related that "this is going to be a workman's comp case as a continuation of his old injury." In reports dated April 6 and May 6, 2009, Dr. Berman diagnosed lumbar strain and low back pain with lumbar degenerative disc disease and bilateral lower extremity radiculopathy. He recommended continued physical therapy and limited duty. OWCP received numerous physical therapy, nurses' notes and physician assistant reports from Dr. Rohrer's office beginning February 19, 2009.

By letter dated June 11, 2009, OWCP advised appellant that it had erred in authorizing medical treatment as it was not clear whether the medical evidence from his treating physician supported that the current condition was due to the accepted work-related condition of September 13, 2006. It advised him that there had been no medical history since November 2006. OWCP requested that appellant's healthcare provider submit all intervening medical documentation to support ongoing treatment.

Thereafter, appellant submitted a May 14, 2009 report from Dr. Rohrer, which diagnosed low back pain, neuralgia and radiculopathy. His medical history was noted to be noncontributory. Dr. Rohrer recommended that appellant continue current restrictions for three to six months and advised that it was undetermined if appellant would ever be able to return to work as an air marshal. Also submitted was a November 14, 2007 work capacity evaluation, in which he indicated that appellant was capable of completing his usual job for eight hours per day with restrictions.

In a July 8, 2009 letter, appellant noted that he began to have low back pain in February 2009, which was in the same location as his September 13, 2006 injury. He noted that when he informed his supervisor, he was advised that his claim was still open and that he should use that case number to receive medical treatment. Furthermore, appellant explained that, on February 18, 2009, he was conducting physical training during his regularly scheduled duty day in the employing establishment gymnasium. He noted that, while running on the treadmill, he felt a sharp pain in his lower back, with shooting pain down both legs. Appellant noted that, on February 19, 2009, he awoke with a burning pain in both legs.

By letter dated September 3, 2009, OWCP advised appellant that his claim was accepted for a lumbar sprain due to a work-related injury of September 13, 2006 and after he returned to

full duty on November 14, 2007 OWCP should have closed his case. It noted that he requested authorization for further medical treatment from his treating physician on March 5, 2009; however, he was notified that his claim lacked supporting bridging medical documentation and the medical evidence received did not support an ongoing condition related to the September 13, 2006 injury but rather a new injury. OWCP advised appellant of the requirements and definition pertaining to a claim for recurrence. It informed him that it appeared that he was describing an occupational disease and advised him to contact the employing establishment if he wished to file a new occupational disease claim.[2]

In a statement received September 10, 2009, appellant noted that, on or about September 3, 2008 after working out in the gym, he experienced back pain for three days. He indicated that he sought medical treatment and did "not recall a traumatic injury causing this back pain. After having back pain for three days and the medication (Motrin) not providing relief my wife advised me to seek medical treatment." Appellant also noted that he was advised by his employer that he had an open claim. He explained that, when he reinjured his back in February 2009, he was given the same advice.

OWCP acknowledged receipt of claims for compensation for periods of disability from September 27 to December 19, 2009, which were filed electronically.

By decision dated May 7, 2010, OWCP denied appellant's claim for a recurrence of disability beginning on September 27, 2009.

In a letter dated June 3, 2010, appellant's representative requested a hearing, which was scheduled for September, 21, 2010. On September 21, 2010 he withdrew his request for a hearing and requested a review of the written record.

By letter dated October 18, 2010, appellant's representative submitted additional evidence and argument. He disputed that "since the letter of September 3, 2009 this office has never received any medical evidence to establish the need for additional medical treatment or authorization of disability." Appellant's representative advised that the statement was in error as medical evidence from Dr. Rohrer was submitted on or about November 3, 2009. He argued that Dr. Rohrer was appellant's treating physician since the injury and OWCP ignored his opinion without obtaining a second opinion examination. Appellant's representative requested that the decision be set aside and the case remanded for a referral to another physician and a *de novo* decision.

Appellant's representative included performance requirements for appellant's position, a medical documentation form and a November 3, 2009 report from Dr. Rohrer, who diagnosed low back pain/radiculitis, L5-S1 and herniated disc "due to fall in mud slide; exacerbated in fall in bus in sudden stop." Dr. Rohrer noted that "full recovery unlikely at this point." In an accompanying November 3, 2009 form report, he noted the type of work duties that appellant could or could not perform. OWCP received an undated nurse's note on October 21, 2010.

[2] On October 15, 2009 appellant filed an occupational disease claim for his low back condition, Case No. xxxxxx448, which was denied on January 19, 2010. This claim is not presently before the Board.

By decision dated November 26, 2010, an OWCP hearing representative affirmed the May 7, 2010 decision. The hearing representative found that appellant had not met his burden of proof to establish a recurrence. He explained that the current diagnosis for appellant's low back condition was not clear as appellant was diagnosed with both lumbar degenerative disc disease and L5-S1 herniated disc. The hearing representative noted that the record indicated that appellant's low back condition was a preexisting condition. He found that the medical evidence was not sufficient to establish a recurrence causally related to the accepted work injury.

LEGAL PRECEDENT

Section 10.5(x) of OWCP's regulations provide that 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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[3]

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.[4]

Appellant has the burden of establishing that he sustained a recurrence of a medical condition[5] that is causally related to his accepted employment injury. To meet his burden, appellant must furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical rationale.[6] Where no such rationale is present, the medical evidence is of diminished probative value.[7]

OWCP regulations define a recurrence of medical condition as the documented need for further medical treatment after release from treatment of the accepted condition when there is no work stoppage. Continued treatment for the original condition is not considered a renewed need for medical care, nor is examination without treatment.[8]

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of

[3] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[4] *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.104.

[5] 20 C.F.R. § 10.5(y) (2002).

[6] *Ronald A. Eldridge*, 53 ECAB 218 (2001).

[7] *Mary A. Ceglia*, 55 ECAB 626 (2004); *Albert C. Brown*, 52 ECAB 152 (2000).

[8] 20 C.F.R. § 10.5(y).

employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.[9]

ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain on September 13, 2006. Appellant's treating physician released him to return to work on October 29, 2006. The record indicates that appellant returned to regular duty. Thereafter, he sought medical treatment commencing on February 19, 2009 and filed several claims for compensation for disability for the period September 27 to December 19, 2009. OWCP treated this as a claim for a recurrence with medical treatment commencing on February 19, 2009 and disability commencing September 27, 2009. Appellant, however, did not submit sufficient reasoned medical evidence to establish that his present condition was causally related to his accepted injury. For example, he did not submit a medical report in which his treating physician explained why medical treatment beginning February 19, 2009 and disability commencing September 27, 2009 would be related to the accepted injury.

Appellant submitted several reports from his treating physicians. They included a March 9, 2009 report, from Dr. Berman, who diagnosed low back pain with lumbar degenerative disc disease and bilateral lower extremity radiculopathy. Dr. Berman noted that appellant stated that his back pain flared up after he took a long car ride to Georgia. The Board notes that the only condition accepted by OWCP was a lumbar sprain.[10] Furthermore, Dr. Berman noted that appellant related that "this is going to be a work[ers'] comp[ensation] case as a continuation of his old injury." He did not offer his own opinion as to the cause of appellant's condition, he merely noted that appellant believed it was a continuation of his old injury. In any event, Dr. Berman did not explain why appellant's current condition was attributable to a spontaneous change in the September 13, 2006 lumbar sprain condition nor did he explain why appellant's symptoms were not attributable to the automobile travel noted by appellant.

In a November 3, 2009 report, Dr. Rohrer diagnosed low back pain/radiculitis, L5-S1 and herniated disc "due to fall in mud slide; exacerbated in fall in bus in sudden stop." He opined that "full recovery unlikely at this point." The Board notes that this report is of limited probative value as he did not provide any objective findings in support of his opinion or otherwise provide medical rationale explaining how the accepted lumbar sprain required continuing treatment or contributed to the claimed disability.[11] Furthermore, Dr. Rohrer offered no bridging evidence between the time of the 2006 work injury and the treatment and claimed disability that began in

[9] *Walter D. Morehead*, 31 ECAB 188 (1986).

[10] *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (where an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury).

[11] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

2009 to support his opinion on causal relationship.[12] Thus this report also is of limited probative value as it did not provide medical reasoning to explain why appellant's continuing condition and disability were attributable to the September 13, 2006 lumbar sprain. Other reports from Dr. Rohrer either predate the time of the claimed recurrence or do not address how appellant's condition and disability are attributable to the original work injury.

Appellant also submitted physical therapy, physician assistant and nurses' notes. However, health care providers such as nurses, physician's assistants and physical therapists are not physicians under FECA. Thus, their opinions do not constitute medical evidence and have no weight or probative value.[13]

Appellant did not submit any other medical evidence to support a recurrence of medical treatment beginning February 19, 2009 or disability beginning September 27, 2009 to support that his recurrence was causally related to the work injury of September 13, 2006. Consequently, he has not met his burden of proof in establishing his claim for a recurrence of disability.

On appeal, appellant's representative argues that OWCP's decision was in error because it ignored the reports of the treating physician, Dr. Rohrer. He also referred to the case of *William Stewart,* Docket No. 96-2020 (issued January 8, 1999) and argued that OWCP should have referred appellant for a second opinion examination. In *Stewart,* the Board found that the case was not in posture for decision and remanded the case for a second opinion examination. It noted that the treating physician's reports were insufficient to establish entitlement; however, they could not be completely disregarded by OWCP. The Board found that their probative value was diminished. The Board also found that the treating physician's report, which contained an opinion that appellant's myositis ossificans was caused by the 1985 employment injury, was sufficient to require further development of the record.[14] However, in this case, while there is no contrary evidence, the only report in which a physician specifically provided an opinion on causal relationship is the November 3, 2009 report of Dr. Rohrer, which found that it was "due to fall in mud slide; exacerbated in fall in bus in sudden stop." Dr. Rohrer opined that "full recovery unlikely at this point." This report was submitted more than three years from his October 29, 2006 release to work and provided no medical reasoning to explain how the employment injury contributed to claimed disability and need for treatment. This is especially important in light of Dr. Rohrer's notation that appellant had other factors, such as a fall in a mud slide and working out in a gym, which could have caused his current condition. Thus, this report was insufficient to require additional development.

[12] *See Mary A. Ceglia*, 55 ECAB 626 (2004) (to establish that a claimed recurrence of the condition was caused by the accepted injury, medical evidence of bridging symptoms between the present condition and the accepted injury must support the physician's conclusion of a causal relationship).

[13] *See George H. Clark*, 56 ECAB 162 (2004); *Jane A. White*, 34 ECAB 515, 518 (1983). *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *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).

[14] *See John J. Carlone*, 41 ECAB 354 (1989).

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 a recurrence and disability causally related to his September 13, 2006 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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