

FACTUAL HISTORY

On August 30, 2010 appellant, then a 53-year-old supervisory transportation security officer (screener), filed a traumatic injury claim (Form CA-1) alleging that he sustained a lower left back/flank injury as a result of stacking inspection bins while in the performance of duty on August 25, 2010.²

In an August 30, 2010 emergency room report, Alison Laventure, a physician's assistant, diagnosed acute back pain and muscle spasm/strain due to a pulled muscle. She discharged appellant and released him to work three days from August 30, 2010 without restrictions.

On June 5, 2012 Dr. Robert Pollitt, an osteopath specializing in internal medicine, indicated that he was appellant's attending physician and opined that he was able to work with the following restrictions: no bending and no lifting greater than five pounds. In a June 21, 2012 report, Dr. Pollitt diagnosed scrotal infection, back pain, diabetes, hypertension and hyperlipidemia.

In a July 11, 2012 letter, OWCP notified appellant of the deficiencies of his claim and requested additional factual and medical evidence. It afforded him 30 days to submit additional evidence and respond to its inquiries.

Subsequently, appellant submitted a July 16, 2011 x-ray of the lumbar spine, an August 20, 2011 x-ray of the right hip and magnetic resonance imaging (MRI) scans of the lumbar spine dated September 2, 2011 and April 5, 2012. He also submitted reports dated July 15, 2011 through May 3, 2012 from Dr. Pollitt who diagnosed hip pain, cellulitis, sleep disturbance, decreased libido and erectile dysfunction. On June 25, 2012 Dr. Pollitt stated that he first evaluated appellant for back pain on July 15, 2011. He reviewed information provided by appellant pertaining to a back injury sustained on August 25, 2010 and based upon that information, as well as his complaints and symptoms, Dr. Pollitt opined that it was not unreasonable to conclude that appellant's back condition was related to his injury.

In reports dated April 3 and May 1, 2012, Dr. Shapur Ameri, a Board-certified neurosurgeon, indicated that appellant was seen for a neurological consultation regarding low back pain radiating to the right buttock, hip and thigh associated with numbness and weakness. He diagnosed lumbar radiculopathy due to lumbar disc herniation and stated that appellant's condition had been "ongoing since July 2011 and he [had] no other history of low back pain." According to Dr. Ameri, appellant recalled that "this was not related to specific trauma or injury, that he just woke up and could not get out of bed."

By decision dated August 14, 2012, OWCP accepted that the August 25, 2010 incident occurred as alleged but denied the claim finding that appellant failed to submit evidence containing a medical diagnosis in connection with the injury or events. Thus, it concluded that he had not established fact of injury.

² On June 20, 2012 appellant, through his attorney, filed a notice of recurrence.

On September 11, 2012 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative and submitted an August 13, 2012 report from Dr. Pollitt who reiterated his diagnoses.

An oral hearing was held before an OWCP hearing representative *via* telephone on December 13, 2012. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

Subsequently, appellant submitted a January 11, 2013 report from Dr. Pollitt who opined that it was reasonable to conclude that appellant's back condition was aggravated by his federal employment. Dr. Pollitt opined that appellant's condition was in part related to his work, but that it was not possible to definitively conclude that it was directly and exclusively related to his work.

By decision dated February 20, 2013, OWCP's hearing representative affirmed the August 14, 2012 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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 timely filed within the applicable time limitation period of FECA, that an injury⁴ was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. A fact of injury determination is based on two elements. 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. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.⁶

³ 5 U.S.C. §§ 8101-8193.

⁴ OWCP regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

⁵ See *T.H.*, 59 ECAB 388 (2008). See also *Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ *Id.* See also *Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

ANALYSIS

OWCP has accepted that the employment incident of August 25, 2010 occurred at the time, place and in the manner alleged. The issue is whether appellant sustained an injury as a result. The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury related to the August 25, 2010 employment incident.

In his reports, Dr. Pollitt diagnosed back and hip pain. On June 25, 2012 he reviewed information provided by appellant pertaining to a back injury sustained on August 25, 2010 and based upon that information, as well as his complaints and symptoms, Dr. Pollitt opined that it was not unreasonable to conclude that appellant's back condition was related to his injury. On January 11, 2013 Dr. Pollitt opined that it was reasonable to conclude that appellant's back condition was aggravated by his federal employment. He opined that appellant's condition was in part related to his work, but that it was not possible to definitively conclude that it was directly and exclusively related to his work. The Board finds that Dr. Pollitt's diagnosis of back and hip pain is a description of a symptom rather than a clear diagnosis of the medical condition.⁷ Moreover, he did not explain what in the nature of the employment activities appellant performed resulted in the nonspecific-diagnosed back problems.

In his reports, Dr. Ameri diagnosed lumbar radiculopathy due to lumbar disc herniation. He stated that appellant's condition had been "ongoing since July 2011 and he [had] no other history of low back pain." According to Dr. Ameri, appellant recalled that "this was not related to specific trauma or injury, that he just woke up and could not get out of bed." As his reports fail to mention the August 25, 2010 employment incident, the Board finds that they are insufficient to establish appellant's claim.

The emergency room report dated August 30, 2010 from Ms. Laventure, a physician's assistant, is of no probative value as she is not a physician under FECA.⁸ As such, the Board finds that appellant did not meet his burden of proof with this submission.

Similarly, the x-rays dated July 16 and August 20, 2011 and MRI scans dated September 2, 2011 and April 5, 2012 are diagnostic in nature and therefore do not address causal relationship. As such, the Board finds that they are insufficient to establish appellant's claim.

As appellant has not submitted any medical evidence to support his allegation that he sustained an injury related to the August 25, 2010 employment incident, he has failed to meet his burden of proof to establish the medical component of fact of injury.

On appeal, counsel contends that OWCP's decision was contrary to fact and law. For the reasons stated above, the Board finds that the attorney's arguments are not substantiated.

⁷ The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis. See *P.S.*, Docket No. 12-1601 (issued January 2, 2013); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

⁸ Section 8101(2) of FECA provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." See also *Paul Foster*, 56 ECAB 208, 212 n.12 (2004); *Joseph N. Fassi*, 42 ECAB 677 (1991); *Barbara J. Williams*, 40 ECAB 649 (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 has not met his burden of proof to establish that he sustained an injury in the performance of duty on August 25, 2010, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the February 20, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 20, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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