United States Department of Labor
Employees' Compensation Appeals Board

S.W., Appellant	)	
and	)	**Docket No. 13-1831**
	)	**Issued: December 11, 2013**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, New York, NY, Employer	)	

Appearances:
Thomas R. Uliase, 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 August 2, 2013 appellant, through his attorney, filed a timely appeal from a May 24, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 an injury in the performance of duty on October 30, 2010, as alleged.

FACTS

On November 1, 2010 appellant, then a 57-year-old park ranger, filed a claim alleging injuries to his hip, leg and back in the performance of duty on October 30, 2010 as a result of a

[1] 5 U.S.C. § 8101 *et seq.*

slip and fall off the second step in Theater 2. On the claim form, Peter Wong, a witness, verified that appellant fell from the front stairs of Theater 2, landed awkwardly and violently twisted his back and leg.

Appellant submitted a November 1, 2010 left hip x-ray, physical therapy notes and statements from the employing establishment pertaining to his injury and continuation of pay, and a report of the October 30, 2010 incident.

Dr. Craig Antell, a Board-certified physiatrist, treated appellant. In an October 1, 2010 report, he noted that appellant presented with an acute exacerbation of lower back pain for the past day and denied any significant trauma. Appellant related a history of recurrent back pain and that he was having difficulty ambulating and was unable to stand without assistance. He also mentioned a history of cervical myelopathy, but was not complaining of cervical pain. An impression of probable acute lumbar disc derangement was provided.

In a November 1, 2010 report, Dr. Antell related that appellant presented with an acute exacerbation of lower back pain for the past day and again denied any significant trauma. He noted that appellant has a history of recurrent back pain and of cervical myelopathy. There were no preset complaints of cervical pain. Dr. Antell provided an impression of probable acute lumbar disc derangement and opined that appellant was totally disabled.

In a November 10, 2010 duty status report, Dr. Antell noted that appellant slipped from a step to the floor on October 30, 2010. He opined that lumbar disc damage resulted from the injury. Dr. Antell also opined that appellant was totally disabled. In a November 17, 2010 Form CA-16, Dr. Antell diagnosed chronic lower back pain from October 1, 2010.

In a December 8, 2010 letter, OWCP informed appellant of the deficiencies in his claim. It afforded him 30 days to submit additional evidence and respond to its questions.

In a December 8, 2010 letter to Dr. Antell, OWCP requested that the physician address the causal relationship of appellant's back conditions to the October 30, 2010 job injury.

OWCP received physical therapy notes for neck and left shoulder conditions for various dates in 2008; a November 1, 2010 x-ray report of left hip and lumbar spine, September 22, 2009 magnetic resonance imaging (MRI) scan of the cervical spine and a January 13, 2011 MRI scan of the lumbar spine. A partial January 13, 2011 report from Dr. Jeffrey Perry, a Board-certified family practitioner, noted that appellant reported he was injured at work on October 30, 2010 when he slip on some stairs and fell approximately six steps.

In a January 13, 2011 report, Dr. John A. Bendo, a Board-certified orthopedic surgeon, noted appellant's complaints of severe lower back pain and left leg sciatica after he slipped and fell off a series of stairs on October 30, 2010. He had acute back pain since that time. An MRI scan revealed a large extruded disc herniation at L5-S1. Dr. Bendo listed an impression of severe left S1 radiculopathy secondary to left lumbar disc herniation/extrusion L5-S1 and recommended an urgent lumbar microdiscectomy decompression.

In medical reports dated February 24 and April 28, 2010, Dr. Jacqueline Friedman, a Board-certified neurologist, stated that appellant was undergoing physical therapy for back pain.

She reviewed MRI scan studies from September 2009 and listed an impression of straightening of the lumbar spine with superimposed degenerative changes, most prominent at the left L5-S1 level.

By decision dated January 21, 2011, OWCP found that the October 30, 2010 incident occurred as alleged. It denied the claim finding that the medical evidence failed to establish a causal relationship between the diagnosed low back condition and the October 30, 2010 incident.

On December 15, 2011 appellant, through his attorney, requested reconsideration. He stated that he was enclosing medical records of Dr. Bendo for review. Although there was evidence of a preexisting low back condition, counsel contended that Dr. Bendo's January 13 and March 8, 2011 reports confirmed that appellant's low back condition was caused by the work incident.

An addendum to Dr. Bendo's January 13, 2011 report stated that the MRI scan study of the lumbar spine was consistent with an extruded disc contacting the left descending S1 nerve root at the L5-S1 level. He recommended a surgical evaluation. In a February 8, 2011 report, Dr. Bendo noted that appellant was scheduled for a posterior lumbar discectomy surgery on February 14, 2011 for a left-sided herniated disc L5-S1. He was expected to be out of work approximately four weeks. Additional reports from Dr. Bendo addressed postlumbar surgery progress on March 2 and May 5, 2011. Dr. Bendo's March 8, 2011 report, as noted by appellant's attorney, was not received.

In a January 13, 2011 report, Dr. Perry noted that appellant reported he was injured at work on October 30, 2010 when he slipped on some stairs and fell down approximately six steps. Appellant was bedridden for approximately three weeks. Dr. Perry stated that it was two and half months since his work-related accident and appellant had severe low back pain into the lower extremities, worse on the left than the right. An x-ray study of the left hip was unremarkable and x-ray studies of the lumbar spine revealed mild spondylosis most pronounced at L4-5 associated with severe degenerative disc disease and left facet joint arthropathy. Dr. Perry opined that appellant's low back pain and left sciatica was a direct consequence of the October 30, 2010 accident. In an addendum, he stated that an MRI scan study of the lumbar spine was consistent with an extruded disc contacting the left descending S1 nerve root at the L5-S1 level and advised surgical evaluation.

Diagnostic studies dated November 1, 2010 were received along with the February 14, 2011 operative and surgical pathology report and pre and postsurgery physical therapy reports.

In a January 4, 2012 letter, OWCP advised counsel that the March 8, 2011 report of Dr. Bendo was not received. It afforded him 30 days in which to submit the report. In a February 10, 2012 response, counsel advised that Dr. Bendo's January 31, 2012 report supported a causal relationship between appellant's October 30, 2010 work injury and his low back condition and surgery.

On January 31, 2012 Dr. Bendo stated that he first evaluated appellant on January 13, 2011 for severe lower back pain and left leg sciatica. Appellant reported that he slipped and fell off a series of stairs on October 30, 2010 while working at Ellis Island. He had an MRI scan of

the lumbar spine on that date that showed evidence of a large disc herniation at L5-S1. A lumbar computerized tomography (CT) myelogram showed evidence of advanced degeneration at L4-5 without significant foraminal and/or high-grade stenosis and evidence of a large extruded disc herniation at L5-S1 to the left with severe displacement of a left S1 nerve root. Dr. Bendo stated an impression of severe left S1 radiculopathy due to a large left lumbar disc extrusion at L5-S1. Appellant's persistent back and left leg pain with weakness prompted an urgent lumbar microdiscectomy on February 14, 2011, which he performed. He had made steady progress after that date. Dr. Bendo concluded that appellant sustained a work-related accident when he slipped and fell on October 30, 2010 while working as a park ranger on Ellis Island. He opined that the event precipitated a large disc herniation at L5-S1 that required urgent surgical attention, which appellant underwent on February 14, 2011.

By decision dated March 5, 2012, OWCP denied modification of the January 21, 2011 decision. It found that the medical evidence submitted failed to provide sufficient rationale to support a causal relationship between the diagnosed conditions and the October 30, 2010 incident.

In a July 20, 2012 letter, counsel requested reconsideration. He indicated that he was enclosing a copy of the July 9, 2012 addendum report of Dr. Bendo with prior medical records from Dr. Bendo previously submitted. Counsel contended that Dr. Bendo's July 9, 2012 report discussed the preexisting condition and why the work accident caused new medical findings resulting in the aggravation of the prior condition.

Appellant submitted a March 8, 2011 physical therapy report and a September 22, 2009 cervical MRI scan and lumbar MRI scan.

In a July 9, 2012 report, Dr. Bendo opined that appellant's need for surgery was directly related to the October 30, 2010 work-related injury. He noted that while appellant had a preexisting lumbar condition that was being treated by other doctors prior to the October 30, 2010 accident, the vast majority of his symptoms prior to the accident were axial in location rather than radiculopathic. Dr. Bendo opined that the work-related accident aggravated his low back condition resulting in greater disability, worse radiculopathic leg pain and the subsequent need for surgery.

By decision dated May 24, 2013, OWCP denied modification of its prior decision as there was no well-reasoned medical explanation with supporting objective findings as to how the October 30, 2010 employment incident directly caused, aggravated (temporarily or permanently), precipitated or accelerated a medical condition.

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 timely filed within the applicable time limitation period of FECA, that an injury[2] 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.[3]

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.[4]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. 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.[5]

An award of compensation may not be based on surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between his condition and his employment.[6] To establish causal relationship, appellant must submit a physician's report, in which the physician reviews the factors of employment identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination and appellant's medical history, state whether these employment factors caused or aggravated his diagnosed condition.[7]

ANALYSIS

OWCP accepted that the October 30, 2010 incident occurred as alleged. It denied appellant's claim on the basis that there was no well-rationalized medical explanation with

[2] OWCP's 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).

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

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

[5] *Id. See Gary J. Watling*, 52 ECAB 278 (2001).

[6] *William S. Wright*, 45 ECAB 498, 503 (1993).

[7] *Calvin E. King*, 51 ECAB 394, 401 (2000).

supporting objective findings as to how the October 30, 2010 employment incident caused or aggravated a preexisting condition which resulted in a lumbar discectomy at L5-S1 on February 14, 2011. The Board finds that he did not submit sufficient medical evidence to support that he sustained an injury causally related to the October 30, 2010 employment incident.[8]

The record reflects that appellant had a preexisting back condition. This is confirmed by diagnostic testing and medical reports predating the October 30, 2010 incident, including the February 24, 2010 and April 28, 2010 reports from Dr. Friedman. The x-rays, MRI scan and other diagnostic testing, both predating and following the October 30, 2010 incident, as well as the surgical report and surgical pathology report are diagnostic in nature and therefore do not address causal relationship. As such, they are insufficient to establish appellant's claim.

The medical reports submitted by Dr. Antell state that appellant presented for an exacerbation of lower back pain, that he suffers from recurrent back pain and deny any recent trauma. Dr. Antell's November 1, 2010 report specifically states that appellant denied any trauma to his back and his October 1, 2010 report predates the work injury of October 30, 2010. On duty status report of November 10, 2010 and attending physician's report of November 12, 2010, he diagnosed lumber disc herniation due to October 30, 2010 employment incident. However, there was no well-reasoned medical explanation with supporting objective findings as to how the October 30, 2010 employment incident caused or aggravated lumbar disc herniation. Additionally, the exact location of the disc herniation was not mentioned. While OWCP requested in a December 8, 2010 letter that Dr. Antell discuss the relationship between appellant's back condition and the October 30, 2010 work injury, Dr. Antell did not respond. Thus, Dr. Antell's reports are of limited probative value and insufficient to meet appellant's burden of proof to establish his claim.

In his January 13, 2011 report, Dr. Perry states that appellant fell at work on October 30, 2010 and opined that appellant's low back pain and left sciatica was a direct consequence of the October 30, 2010 work-related accident. While he provides in his addendum objective evidence of an extruded disc contacting the left descending S1 nerve root at the L5-S1 level which subsequently required surgical evaluation, he offered no rationale as to how appellant's current back condition was caused or aggravated by the employment incident. Lacking thorough medical rationale on the issue of causal relationship, Dr. Perry's report is of limited probative value and insufficient to establish that appellant sustained an employment-related injury in the performance of duty on October 30, 2010.[9]

Several reports were submitted from Dr. Bendo. In his January 13, 2011 report, Dr. Bendo notes the history of injury, diagnoses severe left S1 radiculopathy secondary to left lumbar disc herniation/extrusion L5-S1 and recommends an urgent lumbar microdiscectomy decompression. However, no opinion on causal relationship is provided in the January 13, 2011

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

[9] *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

report, the addendum or the subsequent progress reports.[10] In his January 31, 2012 report, Dr. Bendo states that the persistent back and left leg pain and weakness following the October 20, 2010 slip and fall necessitated the urgent lumbar microdiscectomy left side L5-S1 on February 14, 2011. He concluded, without providing any rationale, that the October 20, 2010 incident precipitated the disc herniation at L5-S1 and the subsequent surgery. In his July 9, 2012 report, Dr. Bendo explained that the October 20, 2010 work incident aggravated appellant's preexisting lumbar condition as the vast majority of appellant's symptoms prior to the accident were axial in location and were now radiculopathic in nature, which resulted in greater disability, greater pain and the ultimate need for surgery. This explanation however is not sufficient to establish causal relationship as Dr. Bendo failed to explain how the October 20, 2010 slip and fall would have aggravated appellant's preexisting lumbar condition and resulted in radiculopathic symptoms which resulted in surgery. The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the relationship between the diagnosed condition and the established incident or factor of employment.[11] Dr. Bendo's reports do not meet that standard and are insufficient to meet appellant's burden of proof.[12]

On appeal, counsel contends that the medical evidence of record from Dr. Bento is sufficient to establish causal relationship between the October 30, 2010 employment incident and an aggravation of appellant's preexisting back condition. However, as previously noted, Dr. Bendo failed to explain how the October 30, 2010 employment incident caused or aggravated any diagnosed condition and present medical rationale in support of his opinion.[13] Thus, he has failed to meet his burden of proof.

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 an injury on October 30, 2010 in the performance of duty.

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

[11] *See Lee R. Haywood*, 48 ECAB 145 (1996).

[12] *See supra* note 10.

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

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 2013
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