United States Department of Labor
Employees' Compensation Appeals Board

D.A., Appellant **and** **DEPARTMENT OF THE ARMY, U.S. ARMY ACQUISITION SUPPORT CENTER, Redstone, AL, Employer**	**Docket No. 13-52** **Issued: January 8, 2013**

Appearances:
Davis L. Middlemas, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 10, 2012 appellant, through his representative, filed a timely appeal from decisions of the Office of Workers' Compensation Programs (OWCP) dated June 20, 2011 and April 19, 2012. 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 has established that he sustained a diagnosed cervical condition on June 9, 2010.

FACTUAL HISTORY

On June 14, 2010 appellant, then a 46-year-old international program management specialist, filed a traumatic injury claim (Form CA-1) alleging that he injured his neck on June 9,

[1] 5 U.S.C. § 8101 *et seq.*

2010 at work when an elevator malfunctioned. He stated that as the doors closed, the elevator lurched or jumped up and down, causing him to snap his neck.

In a letter dated June 24, 2010, OWCP advised appellant that the evidence submitted was insufficient to establish that he had sustained a traumatic injury in the performance of duty. It requested additional information, including medical evidence providing a diagnosis and a physician's opinion explaining a causal relationship between the diagnosed condition and the alleged June 9, 2010 incident.

In a June 24, 2010 report, Dr. Larry Parker, a Board-certified orthopedic surgeon,[2] noted that appellant recently experienced the onset of pain on the right side of his neck when he was jolted by a malfunctioning elevator. Prior to the elevator episode, appellant had been doing well following a cervical fusion from C4 down to T1. X-rays of the cervical spine showed a solid arthrodesis with retained hardware at C4-5. Dr. Parker diagnosed cervicalgia, cervical radiculitis and cervical degenerative disc disease and recommended a magnetic resonance imaging (MRI) scan of the cervical spine. The record contains a report of a July 10, 2010 MRI scan of the cervical spine. On July 13, 2010 Dr. Parker reviewed the results of the July 10, 2010 MRI scan, which revealed spondylitic changes at C3-4 above the fusion mass. He recommended a computerized tomography (CT) scan of the cervical spine in order to determine the integrity of the most recent fusion at C4-5.

By decision dated August 4, 2010, OWCP denied appellant's claim, finding the medical evidence of record was insufficient to establish a causal relationship between his cervical condition and the claimed June 9, 2010 incident.

On August 31, 2010 appellant, through his representative, requested an oral hearing. Counsel contended that the June 9, 2010 incident aggravated his preexisting cervical condition.

In an August 10, 2010 narrative report, Dr. Parker stated that appellant had undergone several cervical fusions, the most recent of which had occurred on March 2, 2009. He was released to routine follow-up on March 25, 2010. Dr. Parker enclosed a copy of his notes from a March 25, 2010 examination of appellant, which reportedly revealed that he had no complaints and would not need additional x-rays on his next visit.[3] On June 24, 2010 he examined appellant following a June 9, 2010 whiplash incident at work, in which an elevator had lurched significantly, jarring his neck. A July 23, 2010 CT scan showed a significant fracture through the C4-5 fusion graft, which was not present prior to the June 9, 2010 incident. Dr. Parker opined to a reasonable degree of medical certainty that the June 9, 2010 work injury had aggravated appellant's preexisting condition.[4]

The record contains an August 23, 2010 operative report describing a posterior cervical fusion at C4-5 performed by Dr. Parker.

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[2] The June 24, 2010 report was written by Ron Philly, a physician's assistant and cosigned by Dr. Parker.

[3] Dr. Parker stated that he had enclosed a copy of the March 2, 2009 operative report and notes from appellant's March 25, 2010 visit. The record, however, does not reflect that he submitted a copy of the operative report or March 25, 2010 notes along with his August 10, 2010 report.

[4] The record contains a report of a July 23, 2010 CT myelogram.

By decision dated February 7, 2011, OWCP's hearing representative vacated its August 4, 2010 decision and remanded appellant's claim for further development. The representative instructed OWCP to prepare a statement of accepted facts (SOAF) identifying appellant's history of six prior neck surgeries from 2003 to 2009, describing the June 9, 2010 incident and appellant's August 23, 2010 surgery. OWCP was to refer the medical file, including a copy of appellant's March 2009 surgical report, to a medical adviser for review and an opinion as to whether appellant's cervical condition was causally related to the June 9, 2010 employment incident or the need for surgery on August 23, 2010.

The record contains an April 11, 2011 SOAF reflecting that on June 9, 2010 appellant experienced neck and arm pain when an elevator lurched up and down, causing his neck to snap. The SOAF further indicated that Dr. Parker had treated him for this incident since June 24, 2010 and had performed surgeries on March 2, 2009 and August 23, 2010. OWCP forwarded the SOAF to a medical adviser, with copies of the July 10, 2010 cervical MRI scan and July 23, 2010 cervical and CT myelogram to the medical adviser.

In an April 27, 2011 report, OWCP's medical adviser diagnosed healed status postoperative C4-7 spinal fusion from chronic degenerative disc disease of the cervical spine. He opined that the established diagnosis was not causally related to the June 9, 2010 employment incident which did not contribute to the August 23, 2010 surgery. The medical adviser stated that on March 2, 2009 appellant required fusion at C4-5 for preexisting cervical disease. Thereafter, he developed nonunion with lucency at the inferior end plate at C4, which is compatible with incomplete fusion at this level, resulting in the need for his August 23, 2010 surgery.

By decision dated June 20, 2011, OWCP denied the claim, finding that the weight of the evidence rested with the April 21, 2011 report of its medical adviser. The claims examiner found that the evidence of record did not establish that appellant had sustained a medical condition causally related to accepted work events.

On February 22, 2012 appellant, through his attorney, requested reconsideration. In a January 10, 2012 report, Dr. Parker reiterated the history of injury and treatment. He stated that by the time of his March 25, 2010 office visit, appellant had fully recovered from the cervical fusion that had been performed on March 2, 2009. Appellant had no complaints with his neck and his condition was so satisfactory that Dr. Parker did not feel the need to see him again for another six months for a simple check on his medication. Dr. Parker was confident enough in appellant's satisfactory condition to opine that there would not even be the need for an x-ray on his return.[5] On June 24, 2010 appellant was treated for severe and significant pain following the lurching elevator incident on June 9, 2010 that caused a jarring and whiplash movement in his neck. The results of the cervical myelogram were significant and striking: there was a definite and significant crack or lytic lesion through the C-4-5 fusion which had been performed in March 2009. This crack or lytic lesion had not been present before the June 9, 2010 workplace elevator accident. Dr. Parker opined to a reasonable degree of medical certainty, that the

[5] Dr. Parker noted that the report from appellant's March 25, 2009 office visit had been previously provided. The record, however, does not reflect that a copy of that report had been received by OWCP by the date of Dr. Parker's January 10, 2012 report.

crack/lytic lesion present in the June 2010 myelogram and the need for surgery in August 2010 was caused by the elevator lurching incident on June 9, 2010.

By decision dated April 19, 2012, OWCP denied modification of the June 20, 2011 decision, finding that the evidence of record did not establish that appellant's claimed medical condition was caused by the established June 9, 2010 incident. The claims examiner stated that there was no x-ray evidence showing that the crack at C4-5 was not present prior to the June 9, 2010 incident. Rather, based on the medical adviser's report, he found that the medical evidence established that his condition was more compatible with an incomplete fusion.

On appeal, counsel contends that the medical evidence is sufficient to establish appellant's claim. Specifically, he contends that Dr. Parker's March 25, 2010 notes show that a cervical spine x-ray was performed at the time of the March 25, 2010 office visit establishing that the crack at C4-5 was not present at that time.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence,[6] including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.[7] As part of his or her burden, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.[8] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[9]

When an employee claims that he or she sustained a traumatic injury in the performance of duty, he or she must establish the fact of injury, consisting of two components, which must be considered in conjunction with one another. The first is whether the employee actually experienced the incident that is alleged to have occurred at the time, place and in the manner alleged. The second is whether the employment incident caused a personal injury and generally this can be established only by rationalized medical evidence.

The medical evidence required to establish a causal relationship between the employee's diagnosed condition and the compensable employment event must be well rationalized.[10] The physician's opinion 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

[6] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[7] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[8] *Id.; Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

[9] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[10] *Deborah L. Beatty*, 54 ECAB 340 (2003). *See also Tracey P. Spillane*, 54 ECAB 608 (2003); *Betty J. Smith*, 54 ECAB 174 (2002). The term injury as defined by FECA, refers to a disease proximately caused by the employment. 5 U.S.C. § 8101(5). *See* 20 C.F.R. § 10.5(q)(ee).

rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[11]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[12]

ANALYSIS

The Board finds this case not in a posture for decision because an unresolved conflict of medical opinion exists between appellant's attending physician, Dr. Parker, on one side and OWCP's medical adviser on the other.

Dr. Parker treated appellant for preexisting cervical stenosis and cervical division of developmental disabilities and performed a cervical fusion on March 2, 2009. The record reflects that appellant had recovered from his March 2, 2009 surgery and was asymptomatic by the time of his March 25, 2010 visit with Dr. Parker. On June 24, 2010 appellant presented with severe neck pain following the June 9, 2010 elevator incident in which an elevator had lurched significantly, jarring his neck. A July 23, 2010 CT scan showed a significant fracture through the C4-5 fusion graft, which was not present prior to the June 9, 2010 incident. On August 10, 2010 Dr. Parker opined to a reasonable degree of medical certainty that the June 9, 2010 work injury had aggravated appellant's preexisting condition. In his January 10, 2012 report, he stated that the results of the cervical myelogram following the June 9, 2010 elevator incident were significant and striking: there was a definite and significant crack or lytic lesion through the C4-5 fusion which had been performed in March 2009. This crack or lytic lesion had not been present before the June 9, 2010 workplace elevator accident. Dr. Parker opined to a reasonable degree of medical certainty, that the crack/lytic lesion present in the June 2010 myelogram and the need for surgery in August 2010 was caused by the elevator lurching incident on June 9, 2010.

In his April 27, 2011 report, OWCP's medical adviser diagnosed healed status postoperative C4-7 spinal fusion from chronic degenerative disc disease of the cervical spine and opined that the established diagnosis was not causally related to the June 9, 2010 employment event, and that the event did not contribute to the August 23, 2010 surgery. He indicated that appellant had developed nonunion with lucency at the inferior end plate at C4 following the March 2, 2009 fusion, which was more compatible with incomplete fusion than an elevator incident.

The Board finds that the opinion of OWCP's medical adviser conflicts with that of appellant's attending physician, Dr. Parker, concerning whether appellant sustained an injury causally related to the accepted June 9, 2010 elevator incident. Accordingly, the case will be remanded for further medical development. On remand, OWCP should refer appellant to an appropriate specialist, along with the case record and a SOAF for an examination and an opinion

[11] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[12] 5 U.S.C. § 8123(a).

on the relevant issue in order to resolve the conflict. After such development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.[13]

CONCLUSION

The Board finds that this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2012 and June 20, 2011 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further development consistent with this decision of the Board.

Issued: January 8, 2013
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

[13] On appeal, counsel contends that Dr. Parker's notes dated March 25, 2010 establish conclusively that x-rays were performed that show no crack at C4-5 level at that time. The Board notes that the record prior to the issuance of the April 19, 2012 decision does not contain a copy of Dr. Parker's March 25, 2010 notes. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).