United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 13-74**
	)	**Issued: March 21, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Newark, NJ, Employer	)	

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

On October 12, 2012 appellant, through his attorney, filed a timely appeal from the May 22, 2012 merit decision denying his traumatic injury claim and the June 8, 2012 nonmerit decision denying his request for reconsideration. 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.

ISSUES

The issues are: (1) whether appellant sustained injuries to his head, neck, buttocks and shoulders while in the performance of duty on April 4, 2006; and (2) whether OWCP properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case was previously before the Board. In a decision dated May 6, 2009, the Board set aside OWCP's July 30, 2008 decision denying appellant's traumatic injury claim and

[1] 5 U.S.C § 8101 *et seq.*

remanded the case for further development of the medical evidence. The facts contained in that decision are incorporated herein by reference.[2] The relevant facts are set forth.

In a February 15, 2007 traumatic injury claim, appellant sustained injury to his head, neck, buttocks and shoulders on April 4, 2006, when the vehicle he was driving was struck by another vehicle in the employing establishment parking lot. He submitted medical reports from his treating physicians, including Dr. Jordan Fersel, a Board-certified anesthesiologist, who provided a history of injury and examination findings. Dr. Fersel diagnosed sprain/strain of the back and neck, cervical degenerative disc disease with protrusions at C3-4, cervical radiculopathy, lumbar bulging discs at the L4-5 level and lumbar radiculopathy. He opined that the April 4, 2006 accident was the proximate cause of appellant's conditions.

By decision dated April 17, 2007, OWCP denied appellant's claim. Accepting that the work incident occurred as alleged, the medical evidence was found not to contain a diagnosis that could be connected to the accepted event. By decision dated March 20, 2008, OWCP's hearing representative affirmed the April 17, 2007 decision. In a decision dated June 6, 2008, OWCP denied appellant's request for merit review. By decision dated July 30, 2008, it denied modification of its previous decisions.

In the May 6, 2009 decision, the Board set aside the July 30, 2008 decision, finding that the reports of appellant's physicians were consistent in stating that he sustained an employment-related injury and were not contradicted by any medical or factual evidence of record. While the reports were not sufficient to meet appellant's burden of proof, they were sufficient to require further development of the medical evidence.

On remand, OWCP referred appellant to Dr. Sean Lager, a Board-certified orthopedic surgeon, for an examination and an opinion as to whether the April 4, 2006 motor vehicle accident caused or aggravated an injury.

In an October 18, 2010 report, Dr. Lager reviewed a history of injury reflecting that appellant sustained injuries to his back, neck, buttocks and shoulders and suffered dizziness as a result of a work-related motor vehicle accident which occurred on April 4, 2006. Range of motion measurements of the spine revealed 50 degrees of flexion and 10 degrees of extension. Straight leg raising was mildly positive, bilaterally. Range of motion of the neck was limited. Review of a December 2008 magnetic resonance imaging (MRI) scan revealed numerous levels of degenerative disc disease in the cervical spine and lumbar spine, which was more consistent with age than a specific event, as well as a prominent herniated disc at C5-6 and L5-S1.

Dr. Lager stated:

> "It is difficult to comment at this point as to if these conditions are directly related to the motor vehicle accident. The patient was in a parking lot and this was likely a low energy injury. The patient is currently 57 years old and his degenerative condition may be secondary to age and the type of work he was doing, but not in particular a specific accident."

[2] Docket No. 08-2136 (issued May 6, 2009).

Dr. Lager noted that appellant's degenerative changes at numerous levels were "likely consistent with his age and possible work environment." He was, however, unable to "specifically conclude that there [was] a direct relationship to the accident and his current status."

In an accompanying work capacity evaluation, Dr. Lager stated that OWCP had accepted the conditions of degenerative disc disease of the neck and back, that appellant was capable of performing his usual job and that he had reached maximum medical improvement.

By decision dated January 3, 2011, OWCP denied appellant's claim based upon Dr. Lager's second opinion report.

On January 7, 2011 appellant, through counsel, requested a telephonic hearing, which was held on April 4, 2011. In a May 9, 2011 decision, OWCP's hearing representative affirmed the January 7, 2011 decision, finding that the weight of the medical evidence was represented by Dr. Lager's October 18, 2010 report, which established that appellant had not sustained an injury as a result of the April 4, 2006 incident.

On November 4, 2011 appellant requested reconsideration of the May 9, 2011 decision. He submitted an August 31, 2011 report from Dr. Nicholas Diamond, a Board-certified osteopath specializing in osteomanipulative medicine, who provided examination findings and diagnosed bilateral cervical and lumbar radiculopathy, herniated nucleus pulposes at L3-4 and chronic myofascial pain syndrome. Dr. Diamond provided an impairment rating and opined that the April 4, 2006 motor vehicle accident was the competent producing factor for appellant's condition.[3]

By decision dated February 8, 2012, OWCP denied modification of its prior decisions.

On February 24, 2012 appellant again requested reconsideration, contending that Dr. Lager's second opinion report was of diminished probative value because it lacked rationale and was not contemporaneous with the accepted 2006 incident.

By decision dated May 22, 2012, OWCP denied modification of its prior decisions on the grounds that the medical evidence was insufficient to establish a causal relationship between appellant's diagnosed conditions and the accepted incident.

On May 25, 2012 appellant, through counsel, again requested reconsideration, contending that Dr. Lager had mistakenly assumed that the April 4, 2006 incident was a low-impact collision. In support of his request, he submitted a witness statement, damage estimate and partial hearing transcript.

By decision dated June 8, 2012, OWCP denied appellant's request for reconsideration on the grounds that the evidence and argument were insufficient to warrant merit review.

[3] Dr. Diamond opined that appellant had the following permanent partial impairment: left lower extremity -- 17 percent; right lower extremity -- 17 percent; left upper extremity -- 2 percent; and right upper extremity -- 5 percent.

LEGAL PRECEDENT -- ISSUE 1

FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[4] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.[5]

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that he or she is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[6] 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 medical evidence.[7]

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.[8] An award of compensation may not be based on appellant's belief of causal relationship.[9] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[10] Simple exposure to a workplace hazard does not constitute a work-related injury entitling an employee to medical treatment under FECA.[11]

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[4] 5 U.S.C. § 8102(a).

[5] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

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

[7] *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).

[8] *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

[9] *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[10] *Id.*

[11] 20 C.F.R. § 10.303(a).

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion must be based on a complete factual and medical background of the claimant, 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 established incident or factor of employment.[12]

ANALYSIS -- ISSUE 1

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

OWCP referred appellant to Dr. Lager for a second opinion examination. The Board finds, however, that Dr. Lager's report is insufficient to form the basis of OWCP's May 22, 2012 decision denying appellant's claim.

In an October 18, 2010 report, Dr. Lager reviewed a history of injury and diagnosed degenerative disc disease of the back and neck. He stated that it was difficult to comment on whether the diagnosed conditions were directly related to the accepted motor vehicle accident; but appellant's degenerative condition might be secondary to age and the type of work he performed, but not in particular a specific accident. Dr. Lager was unable to "specifically conclude that there [was] a direct relationship to the accident and his current status." The Board finds that his report is vague and speculative. Dr. Lager did not offer an unequivocal medical opinion on the cause of appellant's diagnosed condition. Moreover, he did not definitively state whether appellant's condition was caused or aggravated by the 2006 accepted motor vehicle accident. Dr. Lager failed to explain why the accepted incident was not competent to have caused or aggravated appellant's cervical and lumbar conditions. Therefore, the report is of diminished probative value.

Proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter.[13] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[14] As OWCP undertook development of the medical evidence by referring appellant to Dr. Lager, it had an obligation to secure a report adequately addressing the relevant issue in each case.[15] The case shall be remanded to OWCP for further development as it deems necessary, and an appropriate merit decision. For this reason, the second issue on appeal is moot.

[12] *John W. Montoya*, 54 ECAB 306 (2003).

[13] *Vanessa Young*, 55 ECAB 575 (2004).

[14] *Richard E. Simpson*, 55 ECAB 490 (2004).

[15] *Peter C. Belkind*, 56 ECAB 580 (2005).

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether appellant sustained a traumatic injury to his neck and back on April 4, 2006.

ORDER

IT IS HEREBY ORDERED THAT the June 8 and May 22, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with the provisions of this decision.

Issued: March 21, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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