United States Department of Labor
Employees' Compensation Appeals Board

J.V., Appellant	)	
and	)	**Docket No. 13-2165**
	)	**Issued: February 25, 2014**
DEPARTMENT OF VETERANS AFFAIRS, NATIONAL CEMETERY ADMINISTRATION, Farmingdale, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 23, 2013 appellant filed a timely appeal from a May 22, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim. 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 sustained an injury on December 14, 2012 in the performance of duty.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 14, 2012 appellant, then a 44-year-old cemetery caretaker, filed a traumatic injury claim alleging that on that date he experienced a sharp low back pain while shoveling. He stopped work on December 15, 2012.

In a December 14, 2012 duty status report, a physician's assistant diagnosed lumbar sprain and found that appellant should be off work for seven days and work with restrictions beginning December 24, 2012. In a note dated December 24, 2012, a physician indicated that appellant was evaluated at the emergency room for back pain and recommended bed rest for two days.[2]

In a duty status report dated December 27, 2012, Dr. Jeffrey Goldstein, a Board-certified orthopedic surgeon, diagnosed low back pain and found that appellant could work with restrictions.

By letter dated January 4, 2013, OWCP informed appellant that it had paid a limited amount of medical expenses but was now formally adjudicating his claim. It requested that he submit supporting factual and medical evidence, including a detailed report from his attending physician, addressing the causal relationship between any diagnosed condition and the identified work factors.

In a progress report dated January 31, 2013, Dr. Goldstein noted that appellant had a history of a prior disc herniation at L5-S1 with stenosis. He diagnosed low back pain with a history of a prior left L5 compression.

By decision dated February 14, 2013, OWCP denied appellant's claim after finding that the evidence was insufficient to establish fact of injury. It determined that the December 14, 2012 incident occurred as alleged but that the medical evidence did not establish that he sustained a diagnosed condition causally related to the accepted work incident.

On February 26, 2013 appellant requested a review of the written record by an OWCP hearing representative.

In a report dated December 14, 2012, received by OWCP on March 1, 2013, Dr. Mandar Tank, a Board-certified internist, evaluated appellant in the emergency room. He noted that appellant described his injury as occurring when he felt a sharp back pain while shoveling dirt. Dr. Tank had experienced a herniated disc in the same location a year before that was work related. He diagnosed a straightened lumbar lordosis, moderate-to-severe disc space narrowing at L5-S1, facet hypertrophy at L4-S1 and a left lateral disc herniation at L5-S1 contracting the L5 nerve root on the left. Dr. Tank related that "[m]ore than likely this injury is related to the repetitive digging that often occurs in the cemetery."

On December 27, 2012 Dr. Goldstein made a provisional diagnosis of lumbar sprain. He noted that appellant described an injury to his back two weeks ago as a result of shoveling.

[2] The name of the physician is not legible.

Dr. Goldstein related that he initially experienced back pain two years before after moving a headstone and had a history of a disc herniation at L5 on the left. He listed work restrictions.

In a letter dated March 1, 2013, the employing establishment indicated that appellant had a preexisting L5-S1 disc herniation that was "being aggravated by the repetitive digging performed by the employee during the performance of his position." It advised that he had returned to his usual employment on February 1, 2013.

By decision dated May 22, 2013, an OWCP hearing representative affirmed the February 14, 2013 decision as modified to show that appellant had established fact of injury.[3] She found, however, that he failed to submit medical evidence sufficient to establish that he sustained a low back condition causally related to the December 14, 2012 employment incident. The hearing representative instructed appellant to file an occupational disease claim if he believed that his condition arose from factors of employment occurring over the course of more than one workday.

On appeal appellant contends that Dr. Tank in his December 14, 2012 report found that appellant's condition most likely resulted from repetitive digging at work. He discusses his physicians' findings and asserts that his condition was aggravated by repetitive shoveling.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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 filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[6]

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[7] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition

[3] OWCP's hearing representative indicated that she was modifying the decision to show that appellant had established fact of injury but had not established causation between any diagnosed condition and the identified work factors. The Board notes that the hearing representative accepted fact of incident rather than fact of injury.

[4] *Supra* note 1.

[5] *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

[6] *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

[7] *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

for which compensation is claimed.[8] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[9]

ANALYSIS

Appellant alleged that on December 14, 2012 he experienced a sharp pain in his lower back while shoveling. OWCP accepted that the incident occurred at the time, place and in the manner alleged. The issue, consequently, is whether the medical evidence establishes that he sustained an injury as a result of this incident.

The Board finds that appellant has not established that the December 14, 2012 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.[10]

In a form report dated December 14, 2012, a physician's assistant diagnosed lumbar sprain and found that appellant should be off work for seven days and return to work on December 24, 2012 with restrictions. A physician's assistant, however, is not considered a physician under FECA and thus the report is of no probative value.[11]

On December 14, 2012 Dr. Tank provided a history of appellant experiencing back pain in the same location as a prior herniated disc after shoveling dirt. He diagnosed a straightened lumbar lordosis, disc narrowing at L5-S1, facet hypertrophy at L4-S1 and a left L5-S1 disc herniation compressing the L5 nerve root. Dr. Tank found that the injury most likely resulted from repetitive digging in the course of appellant's federal employment. His opinion does not support that appellant sustained a traumatic injury on December 14, 2012 as he attributed the diagnosed conditions to work duties occurring over more than one workday, which is akin to an occupational injury claim.[12]

On December 24, 2012 a physician indicated that appellant was evaluated at the emergency room for back pain, noted that x-rays revealed no fractures and recommended bed rest for two days. However, the physician's signature is illegible. As such, the author cannot be readily identified as a physician. Consequently, the report is of no probative value.[13]

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[8] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[9] *Id.*

[10] *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

[11] *See* 5 U.S.C. § 8101(2); *Allen C. Hundley*, 53 ECAB 551 (2002).

[12] A traumatic injury is defined 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." 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift." 20 C.F.R. § 10.5(q).

[13] *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

On December 27, 2012 Dr. Goldstein related that appellant injured his low back two weeks earlier shoveling. He discussed his history of a herniated disc on the left at L5 and back pain two years ago moving a headstone. Dr. Goldstein provisionally diagnosed lumbar sprain and provided work restrictions. He did not, however, provide a firm diagnosis of appellant's condition or explain whether the described work incident caused or aggravated his condition. Without a firm diagnosis supported by medical rationale, the report is of little probative value.[14]

On January 31, 2013 Dr. Goldstein diagnosed low back pain and noted that appellant had a history of a disc herniation at L5-S1 with stenosis and left L5 compression. He did not address the cause of the low back pain or attribute any back condition to the December 14, 2012 employment incident, consequently his opinion is of little probative value.[15]

On appeal appellant attributes his condition to repetitive shoveling at work. If he believes that his condition is related to employment factors occurring over more than one work shift, he can file an occupational disease claim before OWCP.[16]

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on December 14, 2012 in the performance of duty.

[14] *See Samuel Senkow*, 50 ECAB 370 (1999) (finding that, because a physician's opinion of Legionnaires disease was not definite and was unsupported by medical rationale, it was insufficient to establish causal relationship).

[15] *See supra* note 13.

[16] *See supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 25, 2014
Washington, DC

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

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

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