

**United States Department of Labor
Employees' Compensation Appeals Board**

E.S., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY)
CUSTOMS & BORDER PROTECTION,)
St. Thomas, VI, Employer)

Docket No. 14-493
Issued: June 16, 2014

Appearances:
Appellant, pro se
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 January 2, 2014 appellant filed a timely appeal from the November 19, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant met his burden of proof to establish a traumatic injury in the performance of duty on March 4, 2012.

FACTUAL HISTORY

On March 5, 2012 appellant, then a 54-year-old customs and border patrol officer, filed a traumatic injury claim alleging that on March 4, 2012 he injured his hip, back and neck when his car slammed into a concrete wall as he was backing out of his driveway on the way to work. He stopped work on March 5, 2012 and returned to work on March 13, 2012.

¹ 5 U.S.C. § 8101 *et seq.*

By letter dated April 11, 2012, OWCP advised appellant that additional factual and medical evidence was needed.

In a March 6, 2012 report, Dr. Hillary Woodson Gaskins, Board-certified in family medicine, noted that appellant was backing down the driveway and he “couldn’t see well.” Appellant backed his car into a wall in his driveway. Dr. Gaskins noted last seeing appellant for neck pain in July 2011 and advised that he had a history of cervicalgia. She diagnosed pain in the joint involving the lower leg and cervicalgia and prescribed Motrin. Dr. Gaskins placed appellant off work through March 8, 2012.

In an April 2, 2012 report, Dr. George A. Flowers, a Board-certified orthopedic surgeon, noted that appellant was involved in a motor vehicle collision, about a month earlier. He complained of right leg numbness and tingling, down to the lateral aspect of his right thigh and leg. Dr. Flowers related that appellant had some back pain after the injury but that had resolved. He examined the lumbar spine which revealed no tenderness to palpation over the lumbar, thoracic and lumbar spinous processes. Dr. Flowers advised that x-rays of the lumbar spine revealed no signs of intervertebral disc space narrowing or signs of any osteophytes with no coronal or sagittal malalignment. He diagnosed mechanical lower back pain. OWCP also received physical therapy notes.

In an April 18, 2012 statement, appellant explained that he was in transit and in uniform to perform his duties as a customs and border protection officer when his claimed injury occurred. He received a telephone call from his supervisor at 7:40 a.m. to complete an immigration inspection on a cruise ship, which was to start at 8:00 a.m. Appellant stated that he was injured in his driveway and the workplace was about three miles away. He indicated that as he was attempting to back down a 45-degree driveway and in his attempt to arrive on time, he lost control of the motor vehicle while trying to avoid a 30-foot drop to the right of the driveway. Appellant indicated that cruise ship inspections and traveling to them were regular parts of his duties.

By decision dated May 14, 2012, OWCP denied appellant’s claim. It found that the medical evidence was insufficient to establish that a medical condition causally related to the work incident.

Appellant requested reconsideration and submitted additional medical evidence. In an undated disability certificate, Dr. Jeffrey M. Chase, an orthopedic surgeon and associate of Dr. Flowers, noted that appellant could return to work on May 14, 2012. He was awaiting magnetic resonance imaging (MRI) scan results. On April 23, 2012 Dr. Flowers advised that appellant was seen for persistent lower back pain. He recommended an MRI scan. In a May 17, 2012 report, Dr. Flowers noted that appellant’s MRI scan revealed L5-S1 right-sided facet arthropathy.² He advised that appellant had a degenerative disc with disc bulge at L4-L5 and he wished to proceed with an injection of the right-sided L5-S1 facet to see if this would provide pain relief. Dr. Flowers noted tenderness to palpation over the L5-S1 lumbosacral junction. He diagnosed L5-S1 right-sided facet arthropathy. In a May 31, 2012 report, Dr. Flowers noted that

² A May 1, 2012 lumbar MRI scan report from Dr. George I. Rosenberg, a diagnostic radiologist, noted right-sided facet arthropathy at L5-S1 and disc desiccation at L4-L5.

appellant was recently treated for L4-L5 facet arthropathy. Appellant indicated that his lower back symptoms started after a motor vehicle collision in March. Dr. Flowers noted that appellant related that he had no symptoms or any history of back pain prior to the accident. He advised that the onset of back pain led to a diagnosis of L4-L5, right-sided facet arthropathy and L5-S1 degenerative disc disease. Dr. Flowers reiterated that the symptoms began after the motor vehicle collision.

In a September 17, 2012 decision, OWCP modified the May 14, 2012 decision to find that the injury did not arise in the course of employment. It found that the injury occurred off premises and was not sustained in the scope of employment.

On October 5, 2012 appellant requested reconsideration. He noted that his work hours on Sundays were from 10:00 a.m. to 6:00 p.m. Appellant explained that his work-duty station was not always fixed at one location. He noted that, on any given day, his reporting station could be a cruise ship located at several docks or islands. Appellant noted that the place of injury was Highway 332 leading to his driveway. He explained that his duty day began when he was notified to report to work, if not annotated on the schedule. Appellant stated that, on the day of his injury, his supervisor contacted him at 7:55 a.m. to report to the “WICO” dock to commence inspecting a cruise ship located at that dock. He noted that he had to rush as the assignment was not on his schedule and the assignment was to begin at 8:00 a.m.

In a January 8, 2013 decision, OWCP modified the September 17, 2012 decision to find that appellant was in the performance of duty. It denied the claim as the medical evidence did not establish a back condition causally related to the accepted incident.

On February 26, 2013 appellant requested reconsideration. He contended that the medical evidence presented by his physician supported his claim.

In a February 20, 2013 report, Dr. Flowers noted that he initially evaluated appellant on April 2, 2012. He advised that appellant was involved in a motor vehicle collision which started his back pain. Dr. Flowers explained that appellant’s “arthritis has been coming on as a chronic condition; however, it could have been remained as an asymptomatic condition until such time as the impact caused the arthritic joint in his lower back to become symptomatic.” He stated that his determination was made with a certain degree of medical certainty based on appellant’s evaluation and treatment over a period of time.

By decision dated May 30, 2013, OWCP denied modification of its January 8, 2013 decision.

On September 9, 2013 appellant requested reconsideration. He submitted a periodical article on arthritis. Appellant contended that his physician advised him that he was “medically incapable of explaining” how the accident might aggravate his condition, as there were too many variables to consider. He noted that his physician provided an opinion that the accident directly aggravated his condition.

In an August 8, 2013 report, Dr. Walter J.M. Pedersen, Jr., an orthopedic surgeon, noted that appellant presented with lower back and right hip pain. He explained that appellant was involved in a motor vehicle accident one year and five months prior, on March 4, 2012.

Dr. Pedersen advised that appellant's pain was aggravated by sitting and standing. He noted that appellant related that "he was reversing his truck down a steep decline out of his garage when he suddenly seemed to be going over the edge of a cliff. To avoid the plunge appellant quickly turned the vehicle and as a result slammed into the brick wall of his apartment building. This occurred on March 4, 2012. At first appellant did not feel much in the way of pain but it came on gradually and was felt in the lower back and right posterior hip." Dr. Pedersen related that appellant was seen by an orthopedic surgeon and referred for an MRI scan, which revealed right-sided L5-S1 facet arthropathy, L4-L5 disc desiccation and degenerative disc disease. He examined appellant and found the spine was central with no spasms. Dr. Pedersen found tenderness with right hip adduction and internal rotation. Flexion and extension were normal and pain free. Dr. Pedersen found some limitation in lumbar spine motion in all planes, with distal pulses and normal sensation. Lower extremities had no atrophy and gait and reflexes were normal. Dr. Pedersen diagnosed degenerative lumbar disc disease, arthritis of the facet joint at L4-L5 and sacroiliitis. He opined that the present condition was "aggravated by the incident of hitting the wall but not caused by it."

By decision dated November 19, 2013, OWCP denied modification of the prior decision.

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 FECA³ and that an injury was sustained in the performance of duty.⁴ These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.⁶ The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷ The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.

³ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁶ *See John J. Carlone*, 41 ECAB 354, 357 (1989).

⁷ *Id.* For a definition of the term "traumatic injury," see 20 C.F.R. § 10.5(ee).

The opinion of the physician 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 specific employment factors identified by the claimant.⁸

ANALYSIS

OWCP accepted that the March 4, 2012 incident occurred in the performance of duty. The Board finds that the first component of fact of injury is established as incident occurred as alleged on March 4, 2012. OWCP denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that he sustained a back condition causally related to the March 4, 2012 work incident.

The Board finds that he did not submit sufficient medical evidence to establish an injury causally related to the March 4, 2012 employment incident.

In a February 20, 2013 report, Dr. Flowers noted first seeing appellant on April 2, 2012. He noted that the motor vehicle collision started appellant's back pain. Dr. Flowers explained that appellant's "arthritis has been coming on as a chronic condition; however, it could have been remained as an asymptomatic condition until such time as the impact caused the arthritic joint in his lower back to become symptomatic." While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal.⁹ Dr. Flowers couched his opinion in speculative terms and did not provide sufficient medical reasoning to support that the accepted work incident aggravated appellant's preexisting arthritic condition. In a May 31, 2012 report, he listed diagnoses and related that appellant stated that his low back symptoms started after the motor vehicle collision and that he had no symptoms or history of back pain before the accident. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.¹⁰ The need for rationale in support of his opinion is particularly important in view of appellant's preexisting degenerative conditions. The reports of Dr. Flowers are insufficient to establish the claim as the physician did not further address how the motor vehicle accident caused or aggravated the diagnosed medical condition. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹¹

In an August 8, 2013 report, Dr. Pedersen noted appellant's symptoms and explained that appellant was involved in a motor vehicle accident on March 4, 2012. He described the accident and noted that, at first, appellant "did not feel much in the way of pain but it came on gradually

⁸ *D.E.*, 58 ECAB 448 (2007).

⁹ *Samuel Senkow*, 50 ECAB 370 (1999); *Thomas A. Faber*, 50 ECAB 566 (1999).

¹⁰ *John F. Glynn*, 53 ECAB 562 (2002).

¹¹ *Michael E. Smith*, 50 ECAB 313 (1999).

and was felt in the lower back and right posterior hip.” Dr. Pedersen provided findings and diagnosed degenerative lumbar disc disease, facet joint arthritis at L4-L5 level and sacroiliitis. He opined that the present condition was “aggravated by the incident of hitting the wall but not caused by it.” The Board finds that, while Dr. Pedersen opines that appellant’s employment incident aggravated his underlying condition, he did not provide adequate medical rationale. Dr. Pedersen did not explain how the March 4, 2012 motor vehicle accident resulted in an aggravation of appellant’s underlying back condition. Without medical reasoning supporting his conclusions of causal relationship, Dr. Pedersen’s reports are not sufficient to meet appellant’s burden of proof.

OWCP also received a March 6, 2012 report in which Dr. Gaskins noted that appellant backed into a wall and had joint pain in the lower leg and cervicgia. However, Dr. Gaskins’ report is insufficient to establish the claim as she did not specifically address whether the employment incident caused or contributed to appellant’s diagnosed condition. Likewise, other medical reports are insufficient to establish the claim as they do not contain a physician’s opinion supporting that the work incident caused or contributed to a diagnosed medical condition.¹²

The record also contains physical therapy reports. However, these reports are of no probative medical value as the Board has held that lay individuals such as physician’s assistants, nurses and physical therapists are not competent to render a medical opinion under FECA.¹³ Thus, these reports are insufficient to establish the claim.

The Board finds that appellant has failed to submit rationalized medical evidence establishing that he sustained an injury causally related to the March 4, 2012 employment incident. Appellant did not meet his burden of proof.

On appeal, appellant indicated that he believed his physicians provided a rationalized opinion. However, as explained, the medical evidence was insufficiently rationalized to establish the claim.

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 in establishing that he sustained an injury in the performance of duty.

¹² *See id.*

¹³ *David P. Sawchuk*, 57 ECAB 316 (2006). *See* 5 U.S.C. § 8101(2) (provides that the term “physician” includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by the applicable state law).

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 16, 2014
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