United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 13-1821**
	)	**Issued: March 26, 2014**
DEPARTMENT OF THE AIR FORCE, RANDOLPH AIR FORCE BASE, CA, Employer	)	

Appearances:
Max Gest, 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 July 30, 2013 appellant, through counsel, filed a timely appeal of a June 20, 2013 decision of the Office of Workers' Compensation Programs (OWCP) concerning the denial of 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 established that he sustained a cervical condition causally related to a July 17, 2012 work incident.

FACTUAL HISTORY

On July 20, 2012 appellant, then a 54-year-old Assistant Fire Chief, filed a traumatic injury claim alleging that on July 17, 2012 he experienced neck pain while throwing a football during physical fitness. He stopped work on July 19, 2012.

[1] 5 U.S.C. § 8101 *et seq.*

In an August 23, 2012 report, Dr. Dana R. Johnson, a treating Board-certified family practitioner, stated that appellant was injured at the job site on July 17, 2012 when he threw a football while running around. The diagnosed conditions included: cervical spine stenosis without myelopathy and cervical intervertebral disc disorder with myelopathy. The physical examination revealed decreased cervical range of motion and positive tenderness at C5-7 on palpitation. Dr. Johnson opined that there was "insufficient data to state this is a work-related injury and insufficient data to state there is a preexisting contribution."

By letter dated August 29, 2012, OWCP informed appellant that the evidence of record was insufficient to establish his claim. Appellant was asked to submit additional medical and factual evidence.

In response to OWCP's request for factual information, appellant noted that physical fitness and activity was supported and encouraged by management, but participation was optional. In response to whether there was an employing establishment Physical Fitness Plan (PFP), he noted that it was not applicable. Appellant stated generally that it was important to stay physically fit as a firefighter and that the employing establishment permitted employees to engage in activities. He stated that the activity occurred during work hours on the employer's premises and that the employer had areas to support activities.

In an e-mail dated September 21, 2012, Jeffrey W. Konersman, Chief Fire Emergency Services, stated that the position description for firefighters required physical fitness training. He noted that there was no employing establishment fitness plan, but employees were encouraged to stay physically fit. Appellant's injury occurred on the premises and during working hours. Mr. Konersman noted no equipment or facilities were provided for tossing a football around.

On October 5, 2012 Mr. Konersman responded to questions posed by OWCP. He stated that personnel were required to be physically fit, but the type of workout was their choice. The employing establishment derived a benefit from appellant's participation in the activity as it maintained his fitness level. As to whether employees were required or permitted to participate in the activity, he stated "Yes. All are allowed to workout." Mr. Konersman noted that appellant was the supervisor on duty and he was to "decide if activities are too demanding to be performed while on duty."

In a September 5, 2012 report, Dr. Laura Gridley, a treating Board-certified family practitioner, diagnosed muscle spasm and cervical disc disorder with myelopathy. She reported the date of injury as July 17, 2012, but noted under subjective complaints that appellant injured himself three days previously at work while running around and throwing a football. Dr. Gridley noted that appellant was seen for neck pain and that he had a cervical spinal fusion in 2005 and a history of chronic cervical pain. Physical findings included decreased neck range of motion.

On September 7, 2012 Dr. Johnson reported seeing appellant that day for complaints of neck pain. He noted that appellant's neck pain complaints began on July 17, 2012 while throwing a football at work. Diagnoses included: cervical spine stenosis without myelopathy and cervical intervertebral disc disorder with myelopathy. A physical examination revealed

decreased cervical range of motion and tenderness on palpation at C5-6. Dr. Johnson stated that this was not a workers' compensation case.

On November 30, 2012 OWCP received an August 22, 2012 report by Dr. Johnson who noted that appellant had C5-6 cervical fusion performed in September 2001 due to a C5-6 cervical herniated nucleus pulposus causing myelopathy. The diagnosed conditions included: cervical spine stenosis without myelopathy and cervical intervertebral disc disorder with myelopathy. Dr. Johnson noted that appellant was seen for severe neck pain which began on July 17, 2012 as a result of throwing a football at work. Under mechanism of injury, he related that "[t]his recent exacerbation is layered upon a long history of chronic residual cervical myelopathy. Dr. Johnson conducted a physical examination and reviewed magnetic resonance imaging scans and x-ray interpretations. As to the cause of appellant's neck pain, Dr. Johnson opined that there was insufficient data to determine whether it was employment related or due to a preexisting contribution.

By decision dated December 5, 2012, OWCP denied appellant's claim. It found that the medical evidence was insufficient to establish that his neck condition had been caused or aggravated by the July 17, 2012 employment incident.

On January 3, 2013 appellant requested an oral hearing before an OWCP hearing representative, which was changed to a request for review of the written record. Counsel argued that appellant's claim should have been developed as an occupational disease claim instead of a traumatic injury claim. He contended that appellant's neck condition had been aggravated over time by his strenuous employment duties and that the July 17, 2012 incident was a catalyst.

In an April 7, 2013 statement, appellant disagreed with Dr. Johnson's opinion that his neck condition was not employment related.

In a July 21, 2012 report, Dr. Gridley provided physical findings and noted a history of chronic neck pain and cervical spine fusion in 2005. On July 21, 2012 she noted that appellant suddenly felt neck pain three days prior while running and throwing a football. Dr. Gridley reviewed objective evidence and conducted a physical examination, which revealed normal findings. She diagnosed muscle spasm and cervical intervertebral disc disorder without myelopathy.

On July 27, 2012 Dr. Gridley noted that appellant was seen for complaints of neck pain, which had been significantly exacerbated while he was throwing a football at work as a firefighter on July 17, 2012. Diagnoses included: muscle spasm and cervical intervertebral disc disorder without myelopathy.

In an August 1, 2012 addendum, Dr. Todd M. Goldenberg, a treating Board-certified neurological surgeon, related that appellant was seen in September 2001 for treatment of a C5-6 herniated nucleus pulposus with cervical myelopathy and that he has had chronic neck pain since his surgery. Currently appellant related having severe neck pain following an incident at work on July 17, 2012 after throwing a football. Appellant stated that he believed that "he tweaked his neck" due to throwing the football. Dr. Goldenberg reviewed objective tests and conducted a physical examination. He diagnosed cervical spine stenosis with cervical myelopathy due to

C5-6 herniated disc and recommended surgery to prevent a worsening of his neurologic condition.

In an August 21, 2012 report, Dr. Goldenberg noted appellant's cervical history and that his neck pain began on July 17, 2012 at work while throwing a football. He related that appellant believed that "he tweaked his neck." Dr. Goldenberg diagnosed cervical spine stenosis with cervical myelopathy due to C5-6 herniated disc and recommended surgery to prevent a worsening of his neurological condition.

In a March 19, 2013 report, Dr. Jacob E. Tauber, an examining Board-certified orthopedic surgeon, performed a physical examination and reviewed medical evidence. He included status post cervical surgery for myelopathy. Appellant related that on July 17, 2012 he developed neck pain due to throwing a football at work. A physical examination revealed diffuse weakness and sensory deficits, hyperreflexia and positive bilateral Hoffman's signs. Under discussion, Dr. Tauber opined that appellant's firefighter duties contributed to his cervical degeneration. He also opined that the throwing of a football as part of his training program aggravated this condition. Specifically, Dr. Tauber opined that appellant had a traumatic aggravation, but that the cervical condition itself was due in part to his employment duties as a firefighter. In concluding, he opined that a cervical condition should be accepted as employment related as "his years of work contributed to this condition and the specific incident aggravated his underlying condition."

By decision dated June 20, 2013, OWCP's hearing representative affirmed the December 5, 2012 decision. She found that OWCP properly developed appellant's claim as a traumatic injury claim based on his allegation of a specific injury occurring during a single work shift. The hearing representative further found that the medical evidence failed to explain how the July 17, 2012 employment incident caused or aggravated appellant's neck and head condition.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] has the burden of establishing the essential elements of his 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.[3] 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.[4]

Section 8102(a) of FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of his or her

[2] 5 U.S.C. § 8101 *et seq.*

[3] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[4] *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

duty.[5] This phrase 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.[6] Whereas arising out of the employment addresses the causal connection between the employment and the injury, arising in the course of employment pertains to work connection as to time, place and activity.[7] For the purposes of determining entitlement to compensation under FECA, arising in the course of employment, *i.e.*, performance of duty must be established before arising out of the employment, *i.e.*, causal relation, can be addressed.[8]

With regards to recreational or social activities, the Board has held that such activities arise in the course of employment when: (1) they occur on the premises during a lunch or recreational period as a regular incident of the employment; or (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the service of the employee, brings the activity within the orbit of employment; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.[9]

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.[10] 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.[11] 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.[12]

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.[13] An award of compensation may not be based on appellant's belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that

[5] 5 U.S.C. § 8102(a).

[6] *See Bernard E. Blum*, 1 ECAB 1 (1947). *See also J.J.*, Docket No, 12-947 (issued March 11, 2013).

[7] *See Robert J. Eglinton*, 40 ECAB 195 (1988). *See also G.W.*, Docket No, 12-1416 (issued January 16, 2013).

[8] *Kenneth B. Wright*, 44 ECAB 176 (1992).

[9] *S.B.*, Docket No. 11-1637 (issued April 12, 2012); *R.P.*, Docket No. 10-1173 (issued January 19, 2011); *Ricky A. Paylor*, 57 ECAB 568 (2006); *Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993); *Kenneth B. Wright supra* note 8; *William D. Zerillo*, 39 ECAB 525 (1988). *See also* A. Larson, *The Law of Workers' Compensation* § 22.00 (2012).

[10] *B.F.*, Docket No. 09-60 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 3.

[11] *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

[12] *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 3.

[13] *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Katherine J. Friday*, 47 ECAB 591 (1996).

the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[14]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[15] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.[16] 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.[17]

ANALYSIS

Appellant alleged that he sustained neck pain on July 17, 2012 as the result of throwing a football in the performance of duty during physical fitness. OWCP accepted that the incident occurred as alleged, but denied the claim on the grounds that the medical evidence of record was insufficient to establish that the cervical condition was causally related to the July 17, 2012 work incident.

The Board finds that OWCP did not fully develop the issue of whether appellant was in the performance of duty at the time of the alleged injury. OWCP began development of this issue by requesting additional information from both appellant and the employing establishment. Appellant responded generally that the employing establishment derived a benefit from his participation in sports and was encouraged by management. Mr. Konersman responded that personnel were required to be physically fit. He did not respond to whether there was an agency PFP or submit any such material to the record. While both Mr. Konersman and appellant stated that he was required to stay physically fit for his job, neither have presented any evidence showing how playing football constituted a benefit to the employer or how it fit within the physical fitness training for the position of firefighters.

The Board will set aside OWCP's June 20, 2013 decision and remand the case for further factual development to determine whether the July 17, 2012 incident was within the performance of duty. After such further development as may become necessary, OWCP shall issue a *de novo* decision on whether appellant's injury arose in the course of employment.

On appeal appellant's counsel contends that OWCP erred in failing to develop appellant's claim as an occupational instead of a traumatic injury claim. He argued that the evidence clearly establishes that appellant's 31 years performing duties as a firefighter caused or aggravated his

[14] *P.K.*, Docket No. 08-2551 (issued June 2, 2009); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[15] *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

[16] *J.J.*, Docket No. 09-27 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

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

cervical condition. The Board notes that appellant did not file an occupational disease claim; rather he attributed his neck pain to throwing a football at work on July 17, 2012. The claim was properly adjudicated as a traumatic injury claim. If appellant believes that his duties as a firefighter over the years caused or aggravated his cervical condition, then he may file an occupational disease claim.

CONCLUSION

The Board finds that this case is not in posture for decision. Further development of the evidence is warranted.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 20, 2013 is set aside and the case remanded for further development consistent with the above opinion.

Issued: March 26, 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