United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	**Docket No. 15-0023**
	)	**Issued: July 28, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Cherry Hill, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 7, 2014 appellant, through counsel, filed a timely appeal from a July 7, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 established a cervical spine injury; and (2) whether he established a recurrence of disability on and after May 23, 2013 due to the cervical spine injury.

FACTUAL HISTORY

OWCP accepted that, on March, 6, 2006 appellant, then a 51-year-old custodian, sustained a right shoulder and upper arm sprain with periosteitis of the right shoulder when he

[1] 5 U.S.C. §§ 8101-8193.

tripped and fell on an uneven surface. Appellant stopped work on March 6, 2006. He later revised the history of injury, explaining that on March 6, 2006, he was sent to repair a mailbox in a brick column that was damaged by a postal vehicle. The column fell on appellant, striking his right arm and shoulder. Following the injury, he returned to light duty.

Dr. Steven H. Kahn, an attending osteopath Board-certified in orthopedic surgery, in a March 10, 2006 report diagnosed right rotator cuff inflammation.[2] Dr. Charles E. Wilkins, an attending Board-certified orthopedic surgeon, diagnosed a biceps tendon rupture on April 26, 2006.[3]

A September 12, 2007 MRI scan of the cervical spine showed a left C4-5 disc herniation, and central disc protrusions at C3-4 and C6-7. A September 26, 2007 electromyogram (EMG) showed chronic C5-6 radiculitis, left C4 radiculitis, moderate bilateral carpal tunnel syndrome, chronic C8 radiculitis, right worse than left, mild ulnar neuropathy of the left elbow, and a right biceps tendon rupture.

On December 11, 2007 Dr. Kahn performed arthroscopic debridement of the right biceps anchor, partial bursectomy, and subacromial decompression of the right shoulder, authorized by OWCP. He prescribed physical therapy.

In a March 5, 2008 letter, appellant asserted that he developed severe cervical spine pain due to his history of three herniated discs. He submitted a January 2, 2000 MRI scan of the cervical spine showing a mild central disc bulge at C7-T1 without disc herniation or canal stenosis. January 20, 2000 cervical spine x-rays showed minimal degenerative disc disease at C5-6. Appellant advised Dr. Kahn of his history, and noted the onset of left-sided neck pain on March 19, 2008 while undergoing physical therapy for his right shoulder.

Dr. Robert Ponzio, an attending osteopath Board-certified in orthopedic surgery, followed appellant beginning on March 24, 2008. He related appellant's complaints of left-sided neck pain and headache beginning the previous week. Dr. Ponzio opined that it was "odd that [appellant's] complaints of neck pain began a year and a half after" the March 6, 2006 injury. He stated that he was "unable to relate his neck pain to this work injury." Dr. Ponzio diagnosed multilevel cervical disc protrusions and cervical radiculitis. He reiterated that appellant's cervical pathology was unrelated to the work injury.

[2] March 6, 2006 right shoulder x-rays were negative.

[3] An August 13, 2007 magnetic resonance imaging (MRI) scan of the right humerus showed subscapular tendinosis and subacromial subdeltoid bursitis. An August 17, 2007 MRI scan of appellant's right shoulder demonstrated a tear of the biceps tendon and rotator cuff impingement.

Appellant returned to limited duty on March 26, 2008. He continued under medical treatment with Dr. Laura Ross, an attending osteopath Board-certified in orthopedic surgery. On June 2, 2008 Dr. Ross diagnosed multilevel cervical disc herniations with upper extremity radiculitis and radiculopathy.

On June 3, 2008 OWCP obtained a second opinion from Dr. Zohar Stark, a Board-certified orthopedic surgeon, who opined that appellant's cervical disco genic disease and C4-5 disc herniation were unrelated to the March 6, 2006 right shoulder injury. It found a conflict of medical opinion between Dr. Stark, for the government, and Dr. Kahn, for appellant, regarding the nature and extent of appellant's condition. To resolve the conflict, OWCP selected Dr. Howard Zeidman, a Board-certified orthopedic surgeon. In an October 23, 2008 report, Dr. Zeidman noted that appellant had a history of cervical spine problems dating to 2000, then had neck pain in March 2008 during physical therapy. He opined that appellant's neck issues were unrelated to the accepted right shoulder injury.

In a July 29, 2008 report, Dr. Peter F. Arino, an attending osteopath Board-certified in anesthesiology, provided a history of a right shoulder injury sustained when trying to prevent a brick mailbox from falling on him. He noted that appellant developed neck pain "at a later date," becoming more intense on March 19, 2008 while lifting a two-pound weight in physical therapy. Dr. Arino noted an MRI scan and EMG findings showing cervical disc herniations.[4] He diagnosed "[a]cute/chronic neck pain with bilateral cervical radiculitis/radiculopathy secondary to multiple disc herniations and cervical facet syndrome." Dr. Arino administered cervical epidural steroid injections and recommended a surgical consultation

In an August 4, 2008 report, Dr. Ross diagnosed right shoulder impingement syndrome, multiple cervical disc herniations, radiculopathy into both arms, and bilateral cervical radiculitis.[5]

In a February 2, 2009 report, Dr. Steven Mandel, an attending Board-certified neurologist, noted that EMG and nerve conduction velocity showed left-sided C4 changes, chronic C5-6 changes, and bilateral carpal tunnel syndrome, unchanged from September 26, 2007 studies. A February 2, 2009 MRI scan of the cervical spine showed a worsening C4-5 left-sided disc herniation, smaller C3-4 and C6-7 herniations.

In a March 1, 2009 report, Dr. Ross reviewed medical records. She opined that appellant's cervical spine condition was causally related to the accepted March 6, 2006 right shoulder injury. Dr. Ross stated that on review of January 2, 2000 and September 12, 2007 cervical MRI scans, the January 2, 2000 MRI scan showed a C6-7 disc bulge predating the injury. The September 12, 2007 scan after the injury showed a left-sided C4-5 herniation, and central disc herniation at C3-4 and C6-7. In March 2008, appellant was undergoing physical

[4] A July 15, 2008 MRI scan of the right shoulder showed postsurgical status, moderate to pronounced rotator cuff tendinitis, mild degenerative changes in the glenohumeral joint, a small spingoglenoid notch cyst, and a longitudinal biceps tendon tear.

[5] In September 2009, OWCP had appointed Dr. Larry S. Rosenberg, a Board-certified orthopedic surgeon, to resolve a conflict of medical opinion between Dr. Kahn, for appellant, and Dr. Stark, for the government. As it had not provided the complete medical record to Dr. Rosenberg, it did not rely on his opinion.

therapy for his shoulder when his head went numb. Dr. Ross found that his injuries were "permanent in nature and directly related to the accident that occurred on March 6, 2006. [Appellant] most likely will require cervical spine surgery." She recommended a neurosurgical consultation. Dr. Ross provided progress notes through 2011.

In April 6, 2009, April 12, and August 25, 2010 letters, counsel requested that OWCP expand appellant's claim to accept a cervical spine injury and authorize recommended surgery.[6]

In a November 5, 2009 report, Dr. Scott A. Rushton, an attending Board-certified orthopedic surgeon, noted a "[w]ork injury in 2006 with continued complaints of neck pain." He diagnosed a herniated C4-5 disc.

On February 12, 2010 appellant's postal vehicle was rear-ended by a car driven by another postal employee. He claimed a traumatic injury under File No. xxxxxx139.[7] Dr. Ross noted on March 25, 2010 that appellant experienced increased neck pain due to the accident.[8]

OWCP accepted a recurrence of disability commencing July 13, 2010. Appellant remained off work through August 2011, then worked one to two hours a day limited duty.

Dr. Joan F. O'Shea, an attending Board-certified neurosurgeon, submitted reports from September 28, 2010 to May 2012 noting a history of the March 2006 right shoulder injury, and the March 2010 motor vehicle accident. She diagnosed C4-5 and C6-7 disc herniations and recommended epidural injections. Dr. O'Shea opined that appellant injured his neck in March 2008 while in physical therapy.

A January 25, 2011 MRI scan of the right shoulder showed that the spingoglenoid cyst had resolved and the rotator cuff tendinosis had greatly decreased. February 2, 2011 right shoulder x-rays showed widening of the acromioclavicular joint space, possibly due to postsurgical status.

In a February 7, 2011 letter, counsel again requested that OWCP adjudicate the issue of whether appellant's cervical spine condition was causally related to the accepted right shoulder injury.

[6] In an October 1, 2010 letter, OWCP advised counsel that it would issue a decision on whether to accept a cervical spine condition "within the next couple of weeks."

[7] The employing establishment controverted the claim, asserting that appellant did not ask permission to remove the vehicle from the premises. The record contains April 8, 2010 and February 19, 2013 OWCP decisions that pertains to File No. xxxxxx139, finding that the February 2010 motor vehicle accident did not occur in the performance of duty. In *D.T.*, Docket No. 13-1376 (issued February 11, 2014), the Board affirmed OWCP's denial of the claim, finding that the accident did not occur in the performance of duty as appellant was not authorized to have driven the vehicle off postal premises.

[8] An April 28, 2010 cervical spine MRI scan showed disc bulging at C4-5 and C6-7 with thecal sac impingement. A June 28, 2012 report from Dr. Joseph Mormino, a Board-certified neurosurgeon, diagnosed herniated discs at C4-5, C6-7, and exacerbation of a preexisting cervical condition. Dr. Mormino attributed her condition to the February 12, 2010 automobile accident.

On March 25, 2011 OWCP obtained a second opinion from Dr. Stanley Askin, a Board-certified orthopedic surgeon, who opined that the March 6, 2006 injury had no effect on appellant's preexisting cervical spine condition.[9]

OWCP found a conflict of medical opinion between Dr. Ross, for appellant, and Dr. Askin, for the government. To resolve the conflict, it selected Dr. Thomas O'Dowd, a Board-certified orthopedic surgeon, who provided a December 13, 2011 report finding that test results and a lack of clinical findings established that accepted right shoulder injury had resolved. Dr. O'Dowd stated that appellant's cervical spine condition was unrelated to the March 2006 injury.

In a May 10, 2012 report, Dr. Ross continued to diagnose right shoulder impingement, a herniated cervical disc, and a history of left lateral epicondylitis beginning in March 2012. On July 17, 2012 she noted a new right shoulder injury, aggravated by a recent long distance drive.

On April 18, 2013 OWCP obtained an updated second opinion from Dr. Kenneth Heist, an osteopath Board-certified in orthopedic surgery, who reviewed the medical record and statement of accepted facts. On examination, Dr. Heist observed a normal lordotic curvature of the cervical spine, full range of cervical motion without spasm, no evidence of cervical radiculopathy, full motion of the right shoulder, normal strength and muscle bulk in the right arm, negative impingement signs, and point tenderness over the right acromioclavicular joint. He diagnosed a healed right shoulder sprain, status-post right shoulder arthroscopy, and a healed cervical sprain "not work related." Dr. Heist explained that appellant had mild age-related changes of the cervical spine, without radiculopathy. The bulging discs seen on MRI scan were normal for age and not indicative of pathology. Dr. Heist stated that based on his review of the medical record, there was "no reported cervical injury following the incident of March 6, 2006. [Dr. Heist did not] feel [appellant's] neck complaints [were] related to the condition of right shoulder sprain." He noted that it was "highly unlikely that [appellant] would have permanently injured his neck during a session of physical therapy" as appellant alleged.

On May 23, 2013 Dr. O'Shea performed C4-5 and C5-6 cervical discectomies and fusion. Appellant was involved in a motor vehicle collision on June 27, 2013. He submitted emergency room discharge instructions and imaging study tracking forms. These documents did not contain a diagnosis. Dr. Susan I. Moreno, an attending Board-certified physiatrist, provided pain management through September 2013.

On August 12, 2013 appellant filed a claim for a recurrence of disability commencing May 23, 2013, the date of the cervical discectomy and fusion. He asserted that he sustained a traumatic cervical spine injury on March 6, 2006 when the brick column fell on his right shoulder and arm.

By decision dated October 9, 2013, OWCP denied the claim for a recurrence as well as expansion of the claim for a cervical spine injury. It found that Dr. Heist provided a detailed

[9] In a January 30, 2012 addendum, Dr. Askin explained that he needed to review MRI scans to determine if appellant had residuals of the accepted right shoulder injury and biceps tendon rupture. Dr. O'Dowd did not address the cervical condition.

explanation finding that appellant's cervical spine complaints were not related to the accepted March 6, 2006 right shoulder sprain.

In an October 15, 2013 letter, counsel requested an oral hearing, later changed to a request for review of the written record. He also submitted additional evidence.

Dr. Ross provided progress notes from September 18, 2012 to March 4, 2014, diagnosing multilevel cervical and lumbar disc protrusions, cervical facet arthropathy from C2-4, radiculopathy into the right arm, a labral tear of the right shoulder, a possible right biceps tendon tear, right shoulder impingement, and bilateral elbow pain.

Dr. Moreno provided pain management from June 2013 to May 2014.

A January 8, 2014 functional capacity evaluation demonstrated that appellant could perform full-time work at the medium physical demand level.

By decision dated July 7, 2014, an OWCP hearing representative affirmed the October 9, 2013 decision, finding that appellant had not established that the March 6, 2006 incident caused a cervical spine injury. She found that the additional reports from Dr. Ross and Dr. Moreno submitted after the October 9, 2013 decision did not address causal relationship. The hearing representative further found that as the cervical spine condition remained denied, he had not established continuing disability on and after May 23, 2013 due to the claimed neck condition.

LEGAL PRECEDENT -- ISSUE 1

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[10]

Causal relationship is a medical issue that must be established by rationalized medical opinion evidence.[11] 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. 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.[12] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[13]

[10] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[11] *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005).

[12] *Leslie C. Moore*, 52 ECAB 132 (2000).

[13] *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

ANALYSIS -- ISSUE 1

Appellant has cervical spine problems dating back to January 2000, and imaging studies which show a C7-T1 disc bulge and degenerative disc disease at C5-6. He claimed that he sustained a traumatic cervical spine injury on March 6, 2006 in the same incident which caused the accepted right shoulder injury. September 2007 imaging studies showed cervical disc protrusions from C3 to C7 that were not present on the January 2000 studies. Alternatively, appellant alleged that physical therapy on March 24, 2008 caused an onset of neck pain. He thus provided an inconsistent history of injury, attributing his symptoms to a preexisting condition, the March 6, 2006 incident, and a March 2008 physical therapy session. These conflicting accounts cast doubt on the veracity of appellant's claim.[14]

Appellant's physicians attributed appellant's cervical spine conditions to a variety of causes. Dr. Ponzio, an attending Board-certified orthopedic surgeon, stated that he was "unable to relate his neck pain to" the accepted March 6, 2006 right shoulder injury, as his cervical complaints did not begin until March 2008. Dr. Arino, an attending Board-certified anesthesiologist, noted that appellant did not experience neck pain until March 19, 2008 while lifting a weight in physical therapy. Dr. O'Shea, an attending Board-certified neurosurgeon, also attributed appellant's cervical presentation to the March 2008 physical therapy session. As the physical therapy was for an accepted injury, a consequential injury could be compensable under FECA.[15] However, none of these physicians provided medical rationale explaining how and why lifting a two-pound weight as part of physical therapy would cause any of appellant's neck injuries or conditions. Therefore, their opinions are insufficient to meet appellant's burden of proof.[16]

Dr. Ross, an attending Board-certified orthopedic surgeon, opined on March 1, 2009 that appellant's cervical injuries were "directly related" to the March 6, 2006 accident, because 2007 imaging studies showed additional disc herniations from September 2000 studies. However, the Board has held repeatedly that a temporal relationship alone is insufficient to establish causal relationship.[17]

Dr. Rushton, an attending Board-certified orthopedic surgeon, noted that appellant had neck pain beginning with the 2006 work injury. However, he did not opine that the incident caused any medical condition. Dr. Mormino, a Board-certified neurosurgeon, attributed appellant's cervical disc herniations to a February 12, 2010 motor vehicle accident, which was not accepted as employment related.

OWCP accorded the weight of the medical evidence to Dr. Heist, a Board-certified orthopedic surgeon, who submitted an April 18, 2013 report, based on a statement of accepted facts, the medical record, and a thorough clinical examination. Dr. Heist explained that appellant

[14] *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[15] *See Carlos A. Marrero*, 50 ECAB 117 (1998).

[16] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[17] *Louis R. Blair, Jr.*, 54 ECAB 348 (2003).

had typical age-related changes of the cervical spine which were unrelated to the March 6, 2006 accident or other aspects of his federal employment. He noted that the imaging studies documented idiopathic degeneration and not a traumatic pathology. The Board finds that Dr. Heist's opinion is sufficiently rationalized to represent the weight of the medical evidence in this case. OWCP's July 7, 2014 decision denying appellant's cervical spine injury claim is proper under the law and facts of this case.

On appeal, counsel asserts that the medical evidence, in particular Dr. Ross' March 1, 2009 report, supports a causal relationship between the claimed cervical spine injury and the accepted right shoulder injury. He asserts that OWCP has not obtained a rationalized opinion on the causal relationship of the claimed cervical spine injury to the accepted right shoulder injury. Counsel contends that Dr. Heist's opinion was insufficiently rationalized to represent the weight of the medical evidence. He asserts that OWCP erred in failing to identify a conflict in the medical evidence between Drs. Heist and Ross and referral of the matter to a referee" specialist. Counsel requests that the Board vacate OWCP's July 7, 2014 decision. As stated above, however, Dr. Ross did not explain how and why the March 6, 2006 incident or sequelae of the accepted right shoulder injury would cause the claimed cervical spine injury. Appellant's physicians submitted insufficient rationale to establish a causal relationship between work factors and the claimed cervical spine injury. Their opinions are of insufficient weight to create a conflict with that of Dr. Heist.

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.

LEGAL PRECEDENT -- ISSUE 2

OWCP's implementing regulations define a "recurrence of disability" as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[18] This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury is withdrawn or when the physical requirements of such an assignment are altered such that they exceed the employee's physical limitations.[19] Appellant has the burden of establishing that there was no medically appropriate light duty available for the claimed period.[20]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to

[18] 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2(b) (June 2013). *See also Philip L. Barnes*, 55 ECAB 426 (2004).

[19] *J.F.*, 58 ECAB 124 (2006).

[20] *Id*.

establish by the weight of the reliable, probative, and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[21] This includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[22] An award of compensation may not be made on the basis of surmise, conjecture, speculation, or on appellant's unsupported belief of causal relation.[23]

ANALYSIS -- ISSUE 2

Appellant claimed a recurrence of disability commencing May 23, 2013, the date of the cervical spine fusion. As set forth above, OWCP did not accept that he sustained a cervical spine injury in the performance of duty. The surgery performed to address that nonoccupational injury is also unrelated to appellant's federal employment. Therefore, any period of disability related to the cervical fusion was not compensable. Appellant has not established a recurrence of disability in this regard.

The Board notes that none of appellant's physicians opined that the accepted right shoulder injury spontaneously worsened on and after May 23, 2013.[24] Rather, appellant submitted June 27, 2013 emergency room forms indicating he was injured in a motor vehicle accident. This implicates an intervening cause, breaking the chain of causation from the accepted right shoulder injury.[25] Under these circumstances, OWCP properly denied appellant's claim for recurrence of disability.

CONCLUSION

The Board finds that appellant has not established a cervical spine injury in the performance of duty. The Board further finds that he has not established a recurrence of disability on and after May 23, 2011 due to a cervical spine injury.

[21] *Albert C. Brown*, 52 ECAB 152 (2000); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

[22] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *see Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[23] *Patricia J. Glenn*, 53 ECAB 159 (2001); *Ausberto Guzman*, 25 ECAB 362 (1974).

[24] *Ronald A. Eldridge*, *supra* note 23.

[25] *See Carlos A. Marrero*, 50 ECAB 117 (1998) (the Board found that the claimant's use of an exercise machine constituted an intervening cause of appellant's disability and thus OWCP properly denied appellant's claim for recurrence of disability); *Clement Jay After Buffalo*, 45 ECAB 707 (1994) (the Board found that the claimant's knee injury sustained while playing basketball broke the legal chain of causation from an accepted knee injury sustained in the performance of his duties as a firefighter).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 7, 2014 is affirmed.

Issued: July 28, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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