United States Department of Labor
Employees' Compensation Appeals Board

D.E., Appellant	)	
and	)	**Docket No. 15-124**
	)	**Issued: March 13, 2015**
DEPARTMENT OF AGRICULTURE, RANGER DISTRICT, Superior, MT, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 22, 2014 appellant filed a timely appeal of the September 24, 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury in the performance of duty.

FACTUAL HISTORY

On August 5, 2009 appellant, then a 44-year-old forestry technician supervisor, filed a traumatic injury claim alleging that on August 2, 2009 he sustained a low back injury as a result

[1] 5 U.S.C. §§ 8101-8193.

of digging a line for approximately seven hours and moving heavy supplies. He did not stop work but was placed on light duty.

In an August 5, 2009 report, a physician assistant noted that appellant experienced back soreness while digging lines and doing heavy lifting while trying to contain a wildfire. On physical examination, he found vertebral point tenderness at L4-5 and paraspinal muscle tenderness greater on the left than the right in the low back. The physician assistant advised that an x-ray showed no acute pathology and diagnosed lumbar strain/sprain. In an August 5, 2009 report, Dr. Ralph E. Sievers, a Board-certified diagnostic radiologist, advised that a lumbar spine x-ray revealed mild dextroscoliosis apex at L3, mild facet hypertrophy at multiple levels, and moderate/mild degenerative remodeling change of both sacroiliac joints.

In an August 8, 2009 report, a physician assistant advised that appellant was injured while digging fire lines. He diagnosed low back sprain/strain and checked a box marked "yes," indicating that appellant's condition was caused or aggravated by employment activities. In an August 11, 2009 report, a physician assistant advised that appellant was experiencing back pain. On physical examination, he advised that appellant was nontender to palpation and had full range of motion without pain in flexion, extension, and rotation to right and left, as well as side bending to right and left. The physician assistant opined that appellant's lumbar strain was resolved.

The claim was essentially dormant until appellant filed a December 3, 2013 notice of recurrence. Appellant advised that he sustained a recurrence for which he first sought medical treatment on November 13, 2013. He advised that his back went out numerous times following his original injury and that he had been limited in his ability to fight wildfires and run chainsaws. Appellant stated that he was certain that his current condition was related to his original injury because the pain had been the same since that injury. He returned to work on November 26, 2013.

On November 13, 2013 a physician assistant advised that appellant had been experiencing back pain for the past 10 to 14 days. He noted that appellant could not recall anything specific that caused the pain and that there was no previous injury. Appellant also related that he had undergone physical therapy five or six years previously. In a November 17, 2013 hospital report, a registered nurse diagnosed low back pain and lumbar sprain. In an accompanying hospital report, Dr. Jon Gildea, an emergency medicine physician, advised that appellant had complained of low back pain for the past two weeks and that it had started at home. He noted that appellant had sharp achy pain that radiated to his hips. Dr. Gildea diagnosed low back pain and lumbar strain.

In a November 19, 2013 report, Dr. Paul Eiken, a Board-certified diagnostic radiologist, advised that appellant was experiencing lumbar pain. An x-ray of the lumbar spine revealed mild degenerative changes at L3-4 and L5-S1. In a November 19, 2013 report, a physician assistant assessed acute low back pain. He noted that appellant had been experiencing back trouble off and on for the past 10 years. A physician assistant also noted that appellant underwent physical therapy for his previous back injury. He advised that appellant was worried that something was torn or pinched. A November 25, 2013 low back magnetic resonance imaging (MRI) scan from Dr. Justin O. Lamb, a Board-certified osteopath specializing in

radiology, noted a large diffuse disc bulge at L5-S1 with a superimposed broad-based paracentral disc protrusion contacting the right descending S1 nerve root and mildly compressing the right anterior margin of the thecal sac. An MRI scan also showed severe bilateral neural foraminal canal narrowing and disc material contacting the bilateral exiting L5 nerve roots.

By letter January 15, 2014, OWCP notified appellant that evidence was insufficient to establish that the alleged August 2, 2009 work incident occurred as alleged and did not contain a physician's opinion as to how the work incident resulted in the diagnosed condition. It informed him that initially a limited amount of medical expenses had been administratively paid because his injury appeared to be minor and it had not been challenged by the employing establishment. However, OWCP would now review the merits of his original claim because he was claiming a recurrence. Appellant was advised of the type of factual and medical evidence needed to establish his claim.

In a January 7, 2014 report, Dr. Chriss A. Mack, a Board-certified neurosurgeon, advised that appellant was a firefighter who had a long history of episodic back pain. He noted that on November 17, 2013 appellant had an onset of back pain that was fairly typical for him, but was somewhat worse. Appellant related that two weeks after his initial onset of back pain he began to experience right buttock and right hamstring pain that radiated the length of his leg. On physical examination, Dr. Mack noted that appellant had full range of motion in his back and no spinous process tenderness to palpation or percussion. He advised that a magnetic resonance imaging (MRI) scan was performed which revealed that a broad-based right paracentral L5-S1 disc was deflecting the right S1 nerve root. Dr. Mack assessed advanced degenerative disc changes as evidenced by grade 2 modic changes at L5-S1 and opined that this was most likely the cause of appellant's worsening back, right buttock, and hamstring pain. He also assessed endplate disc protrusion at the superior endplate at L5 at the L4-5 level. Dr. Mack recommended conservative management and home stretching.

In a January 27, 2014 statement, in response to OWCP questions, appellant stated that his current condition was related to his original injury because he experienced the same sharp shooting pain in his lower back region that he experienced with his original August 2, 2009, injury. He also noted that his pain was so severe that he was unable to get out of bed for two weeks. Appellant reported that he was currently working light duty. He stated that he had similar symptoms with a prior back injury for which he had filed a traumatic injury claim on June 11, 2004.

In a January 28, 2014 report, Dr. Roger Pafford, Board-certified in family medicine, advised that on August 2, 2009 appellant was working for the employing establishment digging a line on a fire when his back went out. He advised that appellant experienced pain in the lumbar spine and the paraspinal muscles. Dr. Pafford noted that new symptoms emerged in November 2013, which appellant described as pain in the upper right buttock and nerve shocks down the back of his right leg. He reported findings on examination and assessed low back pain potentially associated with radiculopathy. Dr. Pafford detailed appellant's treatment history and advised that the evaluation and medical management, performed by the physician assistant, who saw appellant in 2013, was appropriate. He also advised that he agreed with the assessment and plans made by the physician assistant. Dr. Pafford opined that "based on the history, findings, reported mechanism of injury, and objective radiographic findings noted, it was reasonable to

assume that appellant's symptoms were explained by his history of work-related injury on August 2, 2009." He stated that appellant denied any intervening injury "although he was seen again on August 10, 2010 for an exacerbation of his lumbar pain symptoms. No new mechanism of injury was discovered according to that note."[2]

By decision dated February 21, 2014, OWCP denied appellant's claim because medical evidence was not sufficient to establish that a physician diagnosed a condition in connection with the claimed event. It also advised that, since his claim for a traumatic injury had not been accepted, appellant's recurrence claim was also denied.

On March 11, 2014 appellant requested review of the written record and advised that he had submitted medical evidence in support of his claim. He also indicated that he had difficulty finding physicians to treat him that were covered by his health insurance network. Accompanying this statement, appellant submitted various other claim forms he had filed with OWCP. This included a June 11, 2004 traumatic injury claim for a low back injury.[3]

In an August 13, 2014 statement, Jim Ward, a manager, for the employing establishment detailed appellant's previous work-related back injuries and advised that the statements made in the notice of traumatic injury were true to the best of his knowledge.

By decision dated September 24, 2014, an OWCP hearing representative affirmed the February 21, 2014 denial of appellant's traumatic injury claim.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim by the weight of reliable, probative, and substantial evidence,[4] including that he or she is an "employee" within the meaning of FECA and that he or she filed his or her claim within the applicable time limitation.[5] The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.[6]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at

[2] The August 10, 2010 treatment note is not in the record.

[3] Claim files for these other matters are not presently before the Board.

[4] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[5] *R.C.*, 59 ECAB 427 (2008).

[6] *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

the time, place, and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[7]

Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, 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

The evidence supports that the claimed incident of digging lines and moving supplies occurred on August 2, 2009 as alleged; therefore, the first component of fact of injury is established. However, the medical evidence is insufficient to establish that the employment incident on August 2, 2009 caused appellant's lower back injury.

In his January 28, 2014 report, Dr. Pafford advised that on August 2, 2009 appellant was working for the employing establishment digging a line on a fire when his back went out. He advised that appellant was experiencing pain in the lumbar spine and the paraspinal muscles on both sides of the lumbar spine. Dr. Pafford noted that new symptoms emerged in November 2013, which included pain in the upper right buttock and nerve shocks down the back of his right leg. He opined that it was reasonable to assume that the August 2, 2009 work-related injury caused appellant's symptoms based on the history, findings, reported mechanism of injury, and radiographic findings. Dr. Pafford asserted that appellant did not have an intervening injury. The Board finds, however, that he did not adequately explain how the established 2009 work incident caused or contributed to appellant's diagnosed back sprain/strain. The Board has held that a physician must accurately describe appellant's work duties and medically explain the pathophysiological process by which these duties would have caused or aggravated his condition.[9] Furthermore, 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] Because Dr. Pafford did not provide a sufficient explanation of how the August 2, 2009 work incident caused or contributed to an injury, his report is insufficient to establish appellant's claim.

In his January 7, 2014 report, Dr. Mack advised that appellant had a long history of episodic back pain. He noted that on November 17, 2013 appellant had an onset of back pain. This report is insufficient to establish appellant's claim because it does not address the original August 2, 2009 incident as a cause of a diagnosed condition. Dr. Gildea's November 17, 2013

[7] *T.H.*, 59 ECAB 388 (2008).

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

[9] *Solomon Polen*, 51 ECAB 341 (2000) (rationalized medical evidence must relate specific employment factors identified by the claimant to the claimant's condition, with stated reasons by a physician). *See also S.T.*, Docket No. 11-237 (issued September 9, 2011).

[10] *Paul Foster*, 56 ECAB 208 (2004).

report also did not relate any diagnosed condition to the August 2, 2009 incident. Likewise, reports of diagnostic testing from physicians are also insufficient to establish the claim because they do not offer an opinion on causal relationship.[11]

Appellant submitted several reports from physician assistants and nurses. These reports are insufficient to establish the claim because physician assistants and nurses are not physicians as defined under FECA.[12]

On appeal, appellant argues that initially he was not advised that he needed to submit medical evidence from a physician and that he has since submitted medical evidence from physicians. The Board finds the medical evidence insufficient to establish that the August 2, 2009 incident caused a back condition.

Appellant may submit new evidence or argument as part of a formal 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 did not establish that he sustained a traumatic injury on August 2, 2009.

[11] *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[12] *Sean O'Connell*, 56 ECAB 195 (2004); *A.C.*, Docket No. 08-1453 (issued November 18, 2008). Under FECA, a "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2). *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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