United States Department of Labor
Employees' Compensation Appeals Board

B.M., Appellant	)	
and	)	**Docket No. 15-1233**
	)	**Issued: October 1, 2015**
DEPARTMENT OF HOMELAND SECURITY, WASHINGTON FIELD OFFICE, Chantilly, VA, Employer	)	

Appearances:
Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 12, 2015 appellant, through counsel, filed a timely appeal from an April 14, 2015 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 the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that his shoulder condition was causally related to factors of his federal employment.

FACTUAL HISTORY

On April 10, 2014 appellant, then a 45-year-old supervisory federal air marshal, filed an occupational disease claim (Form CA-2) alleging right shoulder pain that radiated to his right

[1] 5 U.S.C. § 8101 *et seq.*

hand while participating in squad training on April 7 and 8, 2014.[2] He did not immediately stop work, but did miss intermittent periods before stopping work completely on June 1, 2014.

Within an April 16, 2014 letter, OWCP informed appellant that the evidence of record was insufficient to support his claim. It advised him to provide a medical report containing a physician's opinion supported by a medical explanation as to how work factors caused or aggravated a diagnosed condition. A similar developmental letter was sent to the employing establishment.

In an April 22, 2014 attending physician's report with a preprinted date of April 10, 2014 (Form CA-20), Dr. Michael Kavanagh, a Board-certified orthopedic surgeon, related that appellant injured his right shoulder while sparring and listed the date of injury as April 18, 2014.[3] The report indicates that x-rays were negative for fracture. Dr. Kavanagh diagnosed rotator cuff dysfunction and possible herniated nucleus pulposus (HNP) at the cervical spine. He noted that appellant was performing light-duty work due to back surgery and checked the box marked "yes" to reflect the condition was caused or aggravated by "sparring/punching" in the course of his employment.

An incident report dated April 15, 2014 reflects that appellant "did not feel well" after squad training in defensive measures on April 7, 2014. Appellant additionally reported feeling a "pop" in his left shoulder while performing pull-ups on April 8, 2014.

In an April 22, 2014 report, Anushaya Fitzgerald, a physician assistant, noted that appellant, while performing physical training, "punched with [his] right arm and felt something painful in his shoulder." The next day, appellant noticed increased pain from the shoulder blade radiating down to the hand when he did pull-ups. Ms. Fitzgerald noted that Dr. Ian Wattenmaker, a Board-certified orthopedic surgeon, had performed a discectomy and laminectomy on appellant's L4-5 and L5-S1 a couple weeks ago. She noted examination findings and diagnosed radicular pain and numbness in the right arm and rotator cuff dysfunction, noting that a differential diagnosis would include cervical spine HNP versus a brachial plexus injury and rotator cuff injury. Ms. Fitzgerald ordered a right shoulder magnetic resonance imaging (MRI) scan and arthrogram.

Dr. Wattenmaker, in an April 24, 2014 status report, diagnosed appellant with stenosis HNP and L5 radiculopathy, noting that she had undergone an L4-5 revision laminectomy on April 16, 2014. He advised that she was at risk for recurring disc herniation.

In a May 29, 2014 report, Dr. Kavanagh reviewed a May 23, 2014 MRI scan, which revealed a labral tear and no full thickness rotator cuff tears. He advised that appellant's symptoms were primarily neurologic. In an attending physician's report of the same date, Dr. Kavanagh reported that appellant was injured on April 8, 2014 from sparring/pull-ups. He diagnosed cervical spine HNP and checked a box "yes" to indicate that appellant's condition was

[2] On April 9, 2014 appellant had completed a Transportation Security Administration Form 1178 and a FECA rights and responsibilities acknowledgement.

[3] Dr. Kavanagh mistakenly listed the date of injury as April 18, 2014.

caused or aggravated by his employment. On May 30, 2014 Dr. Kavanagh indicated that appellant was limited in the physical activities that he could perform.

On July 8, 2014 OWCP denied appellant's claim, finding the evidence was insufficient to establish that the events occurred as alleged.

On July 22, 2014 appellant requested an oral hearing. He also submitted additional medical evidence. In a June 27, 2014 report, Dr. Kavanagh reported that appellant had neck pain, right arm numbness and tingling, increasing hand weakness, and right hand diffuse weakness and reiterated the diagnosis of right shoulder labrum tear and cervical spine HNP and that appellant's condition was caused or aggravated by his employment.

On June 30, 2014 Dr. Kavanagh found appellant capable of performing limited duties, such as answering telephones, using a computer, and greeting visitors. He found appellant unable to work until an August 1, 2014 appointment. Dr. Kavanagh continued to submit updated work status reports consistent with his earlier findings.

In a July 29, 2014 report, Dr. Raymond Chang, Board-certified in diagnostic radiology and neuroradiology, found a mild disc bulging at C2-3 and C3-4 and mild diffuse disc bulging and uncovertebral and facet joint hypertrophy with severe right, and mild left, neural foraminal stenosis at C5-6.

Dr. Wattenmaker, in an August 28, 2014 prescription note, declared that appellant was unable to work until further examination regarding his arm pain.

An oral hearing was held on February 12, 2015. Appellant testified that he was required to participate in squad training for 40 hours per quarter. On April 7, 2014 during squad training, he experienced shoulder pain after striking a heavy bag. While performing pull-ups on April 8, 2014, appellant felt a "pop" and significant pain in his shoulder. He confirmed undergoing surgery on April 16, 2014 for a preexisting lower back condition.

Subsequent to the hearing, appellant provided evidence from Dr. Ali Moshirfar, a Board-certified orthopedic surgeon, to whom appellant was referred by Dr. Kavanagh. By report dated September 24, 2014, Dr. Moshirfar related that appellant presented with right-sided neck and trapezial pain, and radiculopathy in the right arm and forearm. Appellant attributed his conditions to training and sparring on April 8, 2014. Dr. Moshirfar noted that appellant was recovering from lumbar disc surgery. Upon reviewing a July 29, 2014 MRI scan, he observed, at C5-6, a disc osteophyte complex with a slight disc bulge causing moderate right foraminal narrowing and mild left foraminal narrowing. Physical examination revealed slightly limited cervical range of motion and mild evidence of trapezial and paraspinal muscular tightness. Dr. Moshirfar diagnosed pain in limb, displacement of cervical intervertebral disc without myelopathy, cervicalgia, and brachial neuritis or radiculitis not otherwise specified. OWCP received similar follow-up reports from him dated October 22 and 29, and November 25, 2014.

Dr. Moshirfar, in October 31, 2014 work status notes, advised that appellant was not medically cleared to perform physical activity. He diagnosed cervical disc herniation, radiculopathy, and weakness. On the same date, in an attending physician's report,

Dr. Moshirfar checked a box "yes" to indicate that appellant's condition was caused by work activity and noted that appellant had a strenuous and difficult job.

On December 1, 2014 Dr. Moshirfar performed a C5-6 anterior cervical discectomy and right foraminal decompression and foraminotomy. He saw appellant for postsurgery follow-up examinations on December 17, 2014, January 7 and 28, and February 10, 2015. Appellant continued to show moderately limited cervical range of motion and mild evidence of trapezial and paraspinal muscular tightness. Dr. Moshirfar diagnosed cervical spondylosis without myelopathy, displacement of cervical intervertebral disc without myelopathy, cervicalgia, brachial neuritis or radiculitis, and lumbago.

In a February 4, 2015 cervical spine MRI scan report, Dr. Jeffrey Troy, Board-certified in diagnostic radiology and neuroradiology, diagnosed multilevel degenerative disc disease with grossly mild canal stenosis, and multilevel neural foraminal encroachment on the right at C5-6 and on the left at C3-4 and C4-5.

In a February 18, 2015 report, Dr. Moshirfar noted first seeing appellant in the latter part of 2014 with complaints of neck pain with radicular symptoms going down the right arm and hand. He related that most people of appellant's age would have some degree of disc degeneration. However, Dr. Moshirfar observed that appellant's condition at C5-6 indicated severe right-sided neural foraminal stenosis, correlating with the radicular symptomatology. He reported that appellant was asymptomatic prior to April 8, 2014 and opined that the force of the pull-ups placed additional stress on the cervical spine, thereby damaging the cervical spine or aggravating the degenerative condition causing severe arm pain and weakness that necessitated surgery. Dr. Moshirfar advised that, if such a condition had existed before the pull-up event, the radicular symptoms would have existed before such event. He stated that this event aggravated the foraminal stenosis which may have existed to an extent but was asymptomatic before the pull-up event. Dr. Moshirfar related that the force of performing pull ups increased the inflammation causing pressure on the nerve root which manifested itself with the radicular symptoms. When conservative treatment did not alleviate the condition, he performed a fusion at C5-6. Dr. Moshirfar advised that appellant had continued postsurgical complaints of weakness and discomfort. In February 18, 2015 work status notes, he advised that appellant was unable to engage in regular or light-duty work. In an attending physician's report dated February 18, 2015, Dr. Moshirfar checked a box "yes" to indicate that appellant's condition was caused by work activity and noted that appellant had a strenuous job.

Dr. Kavanagh, in a February 19, 2015 report, noted that a May 23, 2014 MRI scan revealed degenerative changes in appellant's right shoulder. He diagnosed superior labral tear from anterior to posterior (SLAP) tear of the superior labrum and tendinitis. Dr. Kavanagh opined that when appellant struck the heavy bag on April 7, 2014, it was "more than likely" the "beginning of the diagnosed tear, as well as the [tendinitis] or inflammation." According to him, the pull-ups on April 8, 2014, would have caused additional stress on appellant's right shoulder and neck, causing further "damage to the tear and [tendinitis]. Dr. Kavanagh noted that "additional stress would have been placed on [appellant's] cervical spine" because the damaged shoulder was unable to absorb the stress of the pull-ups.

By decision dated April 14, 2015, OWCP's hearing representative found that the employment events occurred as alleged, but denied the claim finding that the medical evidence was insufficient to establish that the work events caused the claimed conditions.

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 the reliable, probative, and substantial evidence,[4] including that he or she is an employee within the meaning of FECA[5] and that he or she filed his or her claim within the applicable time limitation.[6] 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.[7]

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[8]

Causal relationship is a medical issue[9] and the medical evidence generally required to establish causal relationship is rationalized medical evidence. 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 employee.[10]

ANALYSIS

OWCP accepted that appellant participated in squad training, performing striking exercises and pull-ups, on April 7 and 8, 2014. The Board finds, however, that the medical evidence of record is insufficient to establish a causal relationship between appellant's cervical and right upper extremity injuries and his accepted employment activities on April 7 and 8, 2014.

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

[5] *See M.H.*, 59 ECAB 461 (2008); *see* 5 U.S.C. § 8101(1).

[6] *R.C.*, 59 ECAB 427 (2008); *see* 5 U.S.C. § 8122.

[7] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[8] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

[9] *Mary J. Briggs*, 37 ECAB 578 (1986).

[10] *Victor J. Woodhams*, 41 ECAB 345 (1989).

In a February 19, 2015 report, Dr. Kavanagh diagnosed tendinitis and a SLAP tear of the superior labrum. He opined that the pull-ups on April 8, 2014, caused "additional strain on the shoulder which was already damaged … from the previous day." Dr. Kavanagh went on to state that appellant's action of striking a heavy bag on April 7, 2014 was "more than likely" the beginning of the diagnosed tear.[11] By framing his opinion in speculative terms, his report does not definitively convey when or how appellant suffered injury. It is unclear if appellant sustained tendinitis and the SLAP tear from a traumatic event on April 8, 2014 or from an occupational disease on April 7 and 8, 2014. Moreover, while Dr. Kavanagh noted that degenerative changes in appellant's right shoulder made him "susceptible to the injury," he did not opine whether the degenerative condition affected the injury. Because his opinion is equivocal and not fully rationalized, it is insufficient to establish appellant's claim.

In attending physician's reports dated April 22 to September 29, 2014, Dr. Kavanagh noted appellant's history of injury as sparring/pull-ups. He diagnosed right shoulder labrum tear and cervical HNP and checked "yes" that the condition was caused or aggravated by employment. The Board has held that a checkmark or affirmative notation in response to a form question on causal relationship is insufficient to establish causal relationship.[12] Other medical reports completed by Dr. Kavanagh, dated May 29 and June 27 2014, provided diagnoses and examination findings. However, these reports failed to offer any opinion as to the cause of appellant's condition. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[13] Accordingly, Dr. Kavanagh's reports are insufficient to establish appellant's claim.

In a February 18, 2015 statement, Dr. Moshirfar diagnosed right-sided neural foraminal stenosis with radicular symptomatology. Based on appellant's history, he noted that appellant was asymptomatic prior to performing pull-ups on April 8, 2014. Dr. Moshirfar opined that stress from the pull-ups damaged the cervical spine or aggravated his degenerative condition. The Board initially notes that by not mentioning the April 7, 2014 incident in which appellant struck a heavy bag and allegedly experienced right shoulder pain Dr. Moshirfar provided an incomplete history. Without an accurate history of injury, this report is not based upon a complete and factual background and is therefore of limited probative value in establishing appellant's claim.[14] Furthermore, the Board has held that an opinion that a condition is causally related because the employee was asymptomatic before the injury is insufficient, without adequate rationale, to establish causal relationship.[15] While Dr. Moshirfar provided some additional support, he did not explain his conclusions in a rationalized manner. In one instance, he opined that appellant did not suffer right-sided neural foraminal stenosis prior to April 8,

[11] *See T.H.*, Docket No. 15-311 (issued June 2, 2015) (physician's opinion that employee's injury was "most likely" attributable to work factors was considered speculative and insufficient to establish claim); *Ricky E. Storms*, 52 ECAB 349 (2001) (medical opinions which are speculative or equivocal in character have little probative value).

[12] *See e.g., M.D.*, Docket No. 14-1981 (issued June 24, 2015).

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

[14] *B.H.*, Docket No. 10-907 (issued November 9, 2010).

[15] *T.M.*, Docket No. 08-975 (issued February 6, 2009).

2014; in another, he stated that the foraminal stenosis "may have existed to an extent." In this case, the need for a clear rationale is particularly important given appellant's underlying cervical disc degeneration.

In October 31, 2014 and February 18, 2015 attending physician's reports, Dr. Moshirfar checked "yes" to the question of whether appellant's conditions were work related. As noted, a checkmark or affirmative notation in response to a form question on causal relationship is not sufficient to establish causal relationship. Dr. Moshirfar did not address the specific factors of employment that he believed caused appellant's condition or present a detailed reasoning to support his opinion.[16] His September 24, 2014 report, relates that appellant complained of neck and arm pain which appellant attributed to training and sparring on April 8, 2014. The Board finds that Dr. Moshirfar merely conveyed the history of injury as reported by appellant. A physician's opinion regarding causal relationship that appears to be primarily based on appellant's own representations rather than on objective medical findings is of limited probative value.[17] Other reports from Dr. Moshirfar are of limited probative value as they do not address whether appellant's employment caused or contributed to the diagnosed conditions.[18]

The remainder of the medical evidence is insufficient to discharge appellant's burden of proof as it does not offer any opinion regarding the cause of his conditions.[19]

OWCP also received an April 22, 2014 report completed by a physician assistant. Such reports are entitled to no probative weight as physician assistants are not considered physicians as defined under FECA.[20]

On appeal, counsel contends that Drs. Moshirfar and Kavanagh sufficiently articulated that appellant's injuries were work related. While counsel correctly asserts that it is not necessary that a physician's opinion be so conclusive as to suggest causal connection beyond all possible doubt,[21] as explained above, the reports of Drs. Moshirfar and Kavanagh are insufficient to establish appellant's claim. The Board finds that OWCP properly denied appellant's 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.

[16] *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).

[17] *See C.G.*, Docket No. 14-1430 (issued November 7, 2014).

[18] *See supra* note 12.

[19] *See id.*

[20] The term 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. § 8102(2); *Lyle E. Dayberry*, 49 ECAB 369 (1998).

[21] *Kenneth J. Deerman*, 34 ECAB 641 (1983).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that his claimed injuries were causally related to his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the April 14, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 1, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board