

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

W.S., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Jackson, MS, Employer**

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**Docket No. 15-1271
Issued: October 5, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 19, 2015 appellant filed a timely appeal from a March 26, 2015 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 case.

ISSUE

The issue is whether appellant met his burden of proof to establish an injury causally related to a July 10, 2014 employment incident.

FACTUAL HISTORY

On July 15, 2014 appellant, then a 44-year-old medical supply technician, filed a traumatic injury claim (Form CA-1) alleging that on July 10, 2014 he aggravated a preexisting

¹ 5 U.S.C. § 8101 *et seq.*

low back and neck condition performing “repetitive bending and lifting of scopes....” He stopped work on July 10, 2014. The employing establishment controverted the claim and argued that the injury resulted from his willful misconduct, intoxication, or intent to injure himself or others. It stated, “[Appellant] did not follow facility policies/procedures[;] it is stated by other employees that [he] removed the ergonomically placed sink grate risers from the sinks when he was reprocessing the scopes. The purpose of the risers [is] to prevent any staff from having to repeatedly bend in order to reprocess the scopes.”

In a statement dated July 14, 2014, Joe Yawn, a supervisor, related that on July 10, 2014 appellant sought treatment from the employing establishment’s clinic because his back hurt “from bending over the sink....” He related that risers were placed to raise the depth of the sinks, but that coworkers had claimed that appellant had not used the risers.

By letter dated July 28, 2014, OWCP requested additional factual and medical information from appellant, including a detailed report from his attending physician addressing the causal relationship between any diagnosed condition and the identified work incident. It also advised that the employing establishment had controverted the claim based on willful misconduct because he removed risers from the sink that were present to prevent injury.

On July 14, 2014 Dr. David Melvin Walker, a Board-certified psychiatrist who works for the employing establishment, diagnosed neck spasms, back strain and spasms, and a reoccurrence of a back injury. He provided work restrictions.

In a progress report dated July 15, 2014, Dr. Walker evaluated appellant for increased back pain and right hip pain that worsened with activity. He diagnosed back strain, a reoccurrence of a back injury, and back and neck spasms. Dr. Walker advised that appellant could work with restrictions.

On July 17, 2014 Dr. Walker discussed appellant’s complaints of increased pain in his low back and right hip radiating into his right leg. He stated, “[Appellant] reports that his right leg gave way over the weekend and he suffered a fall and fractured the fifth metacarpal bone in [his] right hand.” Dr. Walker diagnosed lumbar and thoracic strain and spasm and hip pain. He opined that appellant should not work until July 21, 2014.

In a report dated July 21, 2014, Dr. Walker evaluated appellant for recurrence of back pain and spasms from [a] previous injury. He referred appellant for diagnostic studies and found that he could work with restrictions.

A July 23, 2014 magnetic resonance imaging (MRI) scan study of the thoracic spine revealed a right foraminal disc protrusion causing neuroforaminal narrowing on the right at T10-11 that was moderate-to-severe and degenerative disc disease at multiple levels in the cervical and thoracolumbar spine. An MRI scan study of the lumbar spine showed mild disc desiccation.

By letter dated July 31, 2014, the employing establishment formally controverted the claim, alleging that the evidence did not support the occurrence of the incident and that the medical evidence was insufficient to support that the work incident aggravated a preexisting

condition. It further maintained that appellant's injury was the result of willful misconduct as he did not follow established policy.

On August 8, 2014 Dr. Walker indicated that appellant had been off work for the past two weeks as there was no work available within his restrictions. He noted that he related that bending, stooping, and lifting caused muscle spasms and pain. Dr. Walker diagnosed muscle spasm and lumbar strain and found that appellant had work restrictions.

On August 11, 2014 a physician found that appellant was totally disabled from August 11 to 26, 2014. On August 27, 2014 the same physician advised that appellant could perform light-duty work beginning September 2, 2014.²

In a statement received August 14, 2014, appellant described the process of decontaminating medical scopes. He noted that the risers were "not permanently attached in the sink and must be repeatedly removed after the washing of a scope." After appellant drained and cleaned the sink, he put back in the riser, noting that the riser "must be removed before water can be added or taken away." He stated, "Each scope requires a minimum of 25 minutes to clean, which is also the amount of time I am bent over in a sink. This is a commercial deep bottom sink...." Appellant related, "After three consistent days of bending and lifting for over 4 hours continuously, I reinjured my back. The risers weigh greater than 25 pounds that I have to repeatedly remove to perform my duties."

By decision dated August 28, 2014, OWCP accepted that the events of July 10, 2014 occurred as alleged, but denied appellant's claim as the medical evidence was insufficient to establish a diagnosed condition as a result of the accepted work incident.

In a disability certificate dated August 15, 2014, received by OWCP on September 30, 2013, Dr. Walker found that appellant could return to work with restrictions.

In a report dated August 28, 2014, Dr. Robert Smith, a Board-certified neurosurgeon, advised that he was treating appellant for "an exacerbation of his chronic pain...." He found that x-rays revealed chronic strain of the lumbar spine and degenerative changes. Dr. Smith related that it "would be helpful to all concerned if [appellant] could have some job assignment that did not involve excessive stooping, lifting and bending...."

In a statement dated September 20, 2014, appellant asserted that on July 10, 2014 he injured his back, right shoulder, arms, and legs cleaning a colon scope. He described the process of cleaning the scope, noting that he had to lift a heavy grate to add or drain water from the sink and that he had to bend over the sink cleaning the scope for prolonged periods of time. Appellant related that while cleaning the fifth scope on July 10, 2014 he experienced significant pain in his back, legs, and shoulder. He promptly informed his supervisor of the incident. Appellant indicated that he had a prior accepted claim for a lumbar strain on May 13, 2009, assigned file number xxxxxx632.³ He asserted that processing scopes aggravated his prior injury

² The name of the physician is not legible.

³ The record indicates that OWCP accepted that appellant sustained lumbar sprain under file number xxxxxx632.

and that he sustained an occupational disease. Appellant also related that on July 13, 2014 he experienced pain and spasms on the right side of his body which resulted in him falling and fracturing his hand. After he fractured his hand, the employing establishment did not have work available within his restrictions.

On September 23, 2014 appellant requested a review of the written record by an OWCP hearing representative.

By decision dated March 26, 2015, the hearing representative affirmed the August 28, 2014 decision. She noted that in an August 14, 2014 statement appellant related that he aggravated a preexisting condition after three days of bending and lifting, which would constitute a claim for an occupational disease. The hearing representative determined, however, that he subsequently specified that repetitive bending and lifting grates and scopes on July 10, 2014 resulted in his back injury. She found that the employing establishment had not established that appellant's actions regarding the use of the risers constituted negligence and determined that the factual evidence supported that the incident occurred as alleged. The hearing representative concluded, however, that the medical evidence was insufficient to demonstrate that the July 10, 2014 work incident caused or aggravated a diagnosed condition.

On appeal appellant contends that Dr. Walker was not his attending physician, but instead only treated him as he was injured at work. He argues that OWCP should accept his claim because he received treatment through the employee health service.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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.⁵ 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.⁶

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁷ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition

⁴ *Supra* note 1.

⁵ *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

⁶ *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁷ *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

for which compensation is claimed.⁸ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.⁹

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. 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.¹⁰

ANALYSIS

The Board notes that appellant attributed the claimed aggravation of a preexisting back and neck condition to bending and lifting over the course of more than one work shift and to repetitive bending and lifting cleaning scopes on July 10, 2014. Appellant however filed a traumatic injury claim for the July 10, 2014 work incident and OWCP adjudicated his claim as a traumatic injury. If he believes that he has sustained an aggravation of a back or neck condition or other injury due to events occurring over the course of more than one workday or shift, he should file an occupational disease claim.¹¹

Appellant alleged that he aggravated a preexisting neck and low back condition on July 10, 2014 performing repetitive bending and lifting of scopes. He subsequently maintained that he also injured his right shoulder, arms, and legs. Appellant stopped work on the date of injury. He sought medical treatment within five days of the July 10, 2014 incident. An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.¹² OWCP accepted the occurrence of the July 10, 2014 incident and the Board finds that there are no inconsistencies in the evidence sufficient to cast doubt on the validity of the claim.¹³

The employing establishment maintained that appellant's actions in removing risers from the sink constituted willful misconduct. An OWCP hearing representative, however, properly

⁸ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

⁹ *Id.*

¹⁰ *See I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹¹ A traumatic injury is defined as a "condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift." 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift." 20 C.F.R. § 10.5(q).

¹² *Caroline Thomas*, 51 ECAB 451 (2000).

¹³ *See Betty J. Smith*, 54 ECAB 174 (2002) (an employee has not met his or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim).

found that the employing establishment had not submitted any evidence supporting its allegation of willful misconduct. Willful misconduct is generally regarded as deliberate conduct involving premeditation, obstinacy, or intentional wrongdoing with the knowledge that it is likely to result in serious injury or conduct that is in wanton or reckless disregard of probable injurious consequences.¹⁴ An allegation of willful misconduct is an affirmative defense. The adjudicating agency has the burden, if it makes such an allegation, to prove that there was willful misconduct and that such misconduct caused the injury.¹⁵ Appellant explained that he removed the risers in order to drain and clean the sink while washing the scopes. The employing establishment has not disputed his contention that he had to repeatedly remove the risers in order to complete the washing of the scopes and thus has not supported its allegation of willful misconduct. The issue, consequently, is whether the medical evidence establishes that appellant sustained an injury as a result of this incident.

The Board finds that appellant has not established that the July 10, 2014 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.¹⁶

On July 14, 2014 Dr. Walker diagnosed back strain, a recurrence of a back injury, and spasms of the back and neck. He found that appellant could work with limitations, but failed to address the cause of the diagnosed conditions. Dr. Walker's report is thus of little probative value.¹⁷

Dr. Walker evaluated appellant on July 15, 2014 for back and right hip pain. He diagnosed back strain, a recurrence of a back injury, and back and neck spasm. Dr. Walker provided a series of work restrictions. He did not, however, provide a description of the July 10, 2014 work incident. A physician's report is entitled to little probative value if not based on a full and accurate history.¹⁸ Additionally, Dr. Walker did not address the cause of the diagnosed conditions. While he noted a history of an unspecified prior back injury, he did not attribute any condition to the July 10, 2014 employment incident. Consequently, Dr. Walker's report is insufficient to meet appellant's burden of proof.¹⁹

Dr. Walker's July 17, 2014 report discussed appellant's symptoms of low back and right hip pain that radiating through his right leg. He noted that appellant had fallen and fractured a bone in his hand after his right leg "gave way." Dr. Walker diagnosed lumbar and thoracic strain and spasm and hip pain. He found that appellant was disabled from employment until

¹⁴ See *S.G.*, Docket No. 12-499 (issued September 6, 2013); *J.J.*, Docket No. 09-982 (issued January 6, 2010).

¹⁵ *Id.*

¹⁶ *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

¹⁷ Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship. *B.W.*, Docket No. 13-39 (issued February 7, 2013); *S.E.*, Docket No. 08-221 (issued May 6, 2009).

¹⁸ See *D.T.*, Docket No. 14-2024 (issued June 24, 2015).

¹⁹ See *Willie M. Miller*, 53 ECAB 697 (2002).

July 21, 2014. In his July 21, 2014 report, Dr. Walker evaluated appellant for recurrent back pain after an unspecified prior injury. He determined that appellant could work with restrictions. On August 8, 2014 Dr. Walker indicated that appellant was off work as there was no work available within his limitations. On August 15, 2014 he advised that appellant could work with restrictions. In his reports, Dr. Walker did not evidence knowledge of the July 10, 2014 employment incident or otherwise address causation. Without a detailed medical report describing the employment incident and explaining how and why the incident caused an aggravation of a preexisting back condition or other diagnosed condition as a result of the July 10, 2014 work incident, Dr. Walker's reports are of little probative value.²⁰

The August 11 and 27, 2014 reports of an unidentifiable physician are of no probative value, as the author cannot be readily identified as a physician.²¹

In his August 28, 2014 report, Dr. Smith evaluated appellant for an increase in chronic pain. He interpreted x-rays as showing chronic lumbar strain and degenerative arthritis. Dr. Smith related that appellant should work in a position that did not require prolonged bending, lifting, or stooping. He did not, however, address the cause of appellant's condition or in any way attribute a diagnosed condition to the July 10, 2014 work incident. Consequently, Dr. Smith's opinion is insufficient to meet appellant's burden of proof.²²

On appeal appellant contends that the fact that he was treated by Dr. Walker, who works for the employing establishment, establishes that appellant's condition was employment related. However, he has the burden to submit a well-reasoned medical report based on an accurate history explaining how the work incident caused a diagnosed medical condition.²³ The issue of causal relationship is a medical question that must be established by probative medical evidence from a physician.²⁴ Appellant failed to submit any evidence supporting that he sustained a back or neck condition caused or aggravated by the July 10, 2014 employment incident. Consequently, he did not meet his burden of proof to establish an employment-related traumatic injury.

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 and 20 C.F.R. §§ 10.605 through 10.607.

²⁰ See *W.S.*, Docket No. 14-1022 (issued July 1, 2014); *D.L.*, Docket No. 13-1226 (issued August 22, 2013).

²¹ See *Merton J. Sills*, 39 ECAB 572 (1988) (where the Board found that unsigned treatment notes could not be considered as probative evidence as they lacked proper identification).

²² *Id.*

²³ See *D.B.*, Docket No. 14-1815 (issued December 16, 2014).

²⁴ See *C.B.*, Docket No. 14-1973 (issued July 27, 2015).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury causally related to a July 10, 2014 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 5, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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