United States Department of Labor
Employees' Compensation Appeals Board

T.C., Appellant	)	
and	)	**Docket No. 16-0586**
	)	**Issued: August 9, 2016**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SAFETY ADMINISTRATION-FEDERAL AIR MARSHAL SERVICE, El Segundo, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 8, 2016 appellant, through counsel, filed a timely appeal from a November 23, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury on October 16, 2014 causally related to the accepted employment incident.

FACTUAL HISTORY

On October 27, 2014 appellant, then a 54-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that on October 16, 2014 he sustained left-side cervical nerve impingement. He indicated that he had previously been to his neurologist on August 31, 2014 for tingling in his left hand and was diagnosed with left-sided cervical nerve impingement.[3] Appellant's supervisor noted on the claim form that the injury occurred in the performance of duty.

An October 28, 2014 magnetic resonance imaging (MRI) scan from Dr. Kamron Izadi, a neuroradiologist, showed degenerative changes of the cervical spine with moderate-to-severe left-sided neural foraminal stenosis, mild spinal stenosis at C5-6 with mild-to-moderate bilateral neural foraminal stenosis.

In an October 29, 2014 e-mail, Gerardo Gonzalez[4] stated that on October 16, 2014 appellant participated in a Mission Ready Physical Assessment (MRPA), which consisted of pull-ups, push-ups, sit-ups, and a mile and a half run. Appellant had informed him on October 23, 2014 of an injury and reported that appellant had experienced soreness in his neck, shoulder, and arm area after the test. Mr. Gonzalez indicated that everyone who was present at the assessment, including the instructor, were witnesses to appellant's participation.

By a November 3, 2014 e-mail message to Douglas M. Flynn, an employing establishment injury compensation specialist, appellant indicated that he saw his physician on October 22, 2014 and reported the injury to his supervisor on October 23, 2014. He was taken off flight status and remained home until October 27, 2014, at which time he submitted the (Form CA-1). Appellant explained that he did not participate in any activities that could have caused or aggravated his condition other than MRPA, pull-ups, push-ups, and sit-ups. He stated, "If anything, lifting my carry-on luggage into and out of the overhead storage on the aircraft I was working on probably aggravated my condition."

In a November 14, 2014 attending physician's report (Form CA-20), Dr. Lokesh S. Tantuwaya, a Board-certified neurological surgeon, indicated that appellant reported a date of injury of October 16, 2014 at which time he was performing his fitness-ready test. Appellant began to experience neck and arm pain after performing pull-ups and continued the test and did push-ups, and a run. He developed radiating pain into his left arm the next day. Dr. Tantuwaya diagnosed cervical disc displacement and cervical spinal stenosis and checked the box marked "yes" as to whether the conditions were caused or aggravated by an employment factor.

[3] Under file number xxxxxx933, appellant filed a traumatic injury for a March 8, 2005 event alleging back and neck injury. The case was never formally adjudicated and was administratively closed upon receipt.

[4] The record is unclear as to whether Mr. Gonzalez is a coworker.

On November 14, 2014 OWCP received a copy of an October 17, 2014 limited-duty job offer.

In a November 18, 2014 report, Dr. Tantuwaya noted that appellant was employed as a Federal Air Marshal for 12 years and worked 8 to 10 hours per day for a total of 40 to 50 hours per week. He noted that in 2005, appellant had sustained a work-related cervical injury, but was treated with medication and the condition resolved. Dr. Tantuwaya described appellant's work duties. He reported that over the summer appellant began experiencing numbness in his left hand and forearm and his physician ordered an electromyogram (EMG) and nerve conduction velocity study. Appellant went to physical therapy and his symptoms resolved. He reported to have been injured on October 16, 2014 while performing his fitness-ready test. Appellant began experiencing pain in his neck and arm after doing pull-ups, push-ups, and a run. The next day, he had radiating pain in the left upper extremity. Appellant went to his physician, who ordered an x-ray and an MRI scan, and diagnosed him with C7 cervical radiculopathy and a cervical disc protrusion. Dr. Tantuwaya recommended anterior and posterior cervical decompression and fusion at the C5-6 and C6-7 level with an anterior C5-6 and C6-7 cervical decompression and interbody fusion followed by C6-7 left-sided cervical facetectomy/foramenotomy with a C6 to T1 fusion. He opined that "based on the information currently available to me this injury did arise out of and during the course of his employment; therefore, this injury is an industrial injury, and is compensable."

In a December 16, 2014 report, Dr. Tantuwaya noted appellant's continued complaints of left arm and neck pain, which included increased left-sided neck stiffness and more numbness in the left arm, with less pain. He suggested that this was likely indicative of further nerve root damage. Dr. Tantuwaya recommended surgical intervention and that appellant continue modified duty. He also opined that the injury arose out of and during the course of appellant's employment.

By letter dated January 5, 2015, OWCP advised appellant of the deficiencies in his claim and requested additional factual and medical evidence, including a detailed narrative report from his physician, which included a history of the injury and a medical explanation with objective evidence of how the reported work incident caused or aggravated the claimed conditions. Appellant was afforded 30 days to submit such evidence.

In January 27, 2015 progress and attending physician's reports, Dr. Tantuwaya continued to diagnose cervical disc displacement and cervical spinal stenosis attributable to the work injury.

By decision dated February 19, 2015, OWCP denied the claim as appellant had not established fact of injury. It found that the evidence of record was insufficient to establish that the event(s) occurred as alleged. OWCP found that appellant had not clarified whether the injury was traumatic or occupational, and had not described how the injury occurred. It also noted that there was no medical evidence in file which contained a diagnosis that could be connected to a work event.

On March 5, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative which was held on October 7, 2015. Appellant testified that, as

part of his quarterly fitness assessment, he had to do pull-ups, push-ups, sit-ups, and a mile and a half run. On October 16, 2014 he was on his second pull-up when he felt something in his arm. Appellant thought he had strained a muscle. The pain got progressively worse and he went to his physician on October 22, 2014. Appellant also testified as to his March 2005 injury to his neck and back and the tingling he experienced in his left upper extremity in the summer 2014. He indicated that he had a bone spur that was pushing on the nerve that exited the spinal canal and that he felt that performing pull-ups on October 16, 2014 had aggravated this. Appellant indicated that he underwent spinal surgery on May 29, 2015 and returned to full duty on August 19, 2015, but still had numbness in his thumb, index finger, and middle finger.

The hearing representative advised appellant that the factual description he provided of the October 16, 2014 injury was sufficient to support that it had occurred as alleged and the medical evidence on file provided a diagnosis for his claimed condition. Appellant was also advised that the medical evidence remained insufficient to establish the claim and it was imperative that his physician address his condition and explain how this was caused or aggravated by the work injury. If he had preexisting spinal stenosis and/or a bone spur, his physician would need to address whether the claimed work injury aggravated or accelerated either of these conditions. Appellant was requested to submit a copy of the May 29, 2015 operative report and EMG study that had been performed and treatment notes relative to the care he received in the summer 2014. He was afforded 30 days to submit additional evidence.

Duplicative evidence was received along with an October 22, 2014 cervical x-ray, which revealed bilateral neural foraminal encroachment and mild degenerative disc disease of C5-6.

By decision dated November 23, 2015, OWCP modified the prior decision to reflect that fact of injury was established, but it denied the claim on the basis that causal relationship was not established.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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]

In order to determine whether an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components that must be considered conjunctively. First, the employee must submit sufficient evidence to establish that he actually

[5] *Joe D. Cameron,* 41 ECAB 153 (1989).

[6] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

experienced the employment incident that is alleged to have occurred.[7] An employee has not met his burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[8] 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.[9]

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. 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.[10] Neither the 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 causal relationship.[11]

ANALYSIS

OWCP accepted that the October 16, 2014 work incident occurred as alleged and that a medical diagnosis had been provided. It denied the claim, however, as the medical evidence failed to establish a causal relationship between the October 16, 2014 incident and the claimed cervical and left upper extremity conditions. The Board finds that appellant has not established an injury on October 16, 2014 causally related to the accepted employment incident.

Appellant submitted several reports from Dr. Tantuwaya in which he diagnosed C7 cervical radiculopathy and a cervical disc protrusion and cervical spinal stenosis. Dr. Tantuwaya noted that appellant developed neck and arm pain following pull-ups on October 16, 2014. He also reported that in 2005, appellant had been treated for a neck condition which had resolved, but that appellant had been experiencing numbness in his left hand and forearm during the summer of 2014. Dr. Tantuwaya recommended that appellant undergo anterior and posterior cervical decompression and fusion at several levels of the cervical spine along with a C6 to T1 fusion. In his reports, he checked a box marked "yes" that the above-diagnosed conditions were caused or aggravated by employment. However, the Board has held that a checkmark, without supporting rationale, is of limited probative value, and insufficient to establish the claim.[12] Dr. Tantuwaya failed to provide a rationale medical opinion in any of his reports as to how the

[7] *Gary J. Watling*, 52 ECAB 278 (2001).

[8] *S.N.*, Docket No. 12-1222 (issued August 23, 2013); *Tia L. Love*, 40 ECAB 586, 590 (1989).

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

[10] *Solomon Polen*, 51 ECAB 341 (2000).

[11] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[12] *See D.S.*, Docket No. 15-1930 (issued January 30, 2016).

reported work incident caused or aggravated a medical condition. The Board has held that medical evidence which 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] A medical opinion is especially needed in the case as the record reflects that appellant had a prior history of neck injuries and possibly preexisting conditions of spinal stenosis and/or bone spur.[14] Accordingly, Dr. Tantuwaya's reports are of limited probative value.

The diagnostic testing of record is of diminished probative value and is insufficient to establish appellant's claim as none of the physicians provided an opinion on the cause of appellant's diagnosed conditions.[15]

Causal relationship is a medical question that must be established by probative medical opinion from a physician.[16] In this case, the Board finds that none of the medical evidence appellant submitted constitutes rationalized medical evidence, based upon a specific and accurate history of employment conditions, which are alleged to have caused or exacerbated his medical condition.[17] Accordingly, the Board finds that, while it is found that appellant has established fact of incident he has not established a causal relationship between the work incident and his diagnosed conditions.

On appeal, counsel contends that a physician need not use magic words regarding causation when the meaning is clear. However, as discussed above, appellant has not established a causal relationship between the October 16, 2014 work incident and his diagnosed conditions as none of the medical evidence he submitted constituted rationalized medical evidence, based upon a specific and accurate history of employment conditions, which substantiate that the employment incident caused or exacerbated his medical condition.

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.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish an injury on October 16, 2014 causally related to the accepted employment incident.

[13] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

[14] *See B.T.*, Docket No. 13-138 (issued March 20, 2013).

[15] *C.B.*, *supra* note 13; *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[16] *W.W.*, Docket No. 09-1619 (issued June 2010); *David Apgar*, 57 ECAB 137 (2005).

[17] *Patricia J. Bolleter*, 40 ECAB 373 (1988).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 23, 2015 is affirmed.

Issued: August 9, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board