United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 16-0547**
	)	**Issued: November 18, 2016**
DEPARTMENT OF THE ARMY, TRAINING & DOCTRINE COMMAND, Kandahar Province, Afghanistan, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 3, 2016 appellant, through counsel, filed a timely appeal from a December 2, 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 case.

ISSUE

The issue is whether appellant met his burden of proof to establish an employment-related injury on July 14, 2012.

[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.*

On appeal counsel asserts that, if not for the work situation, the injury would not have occurred.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as outlined in the Board's prior decisions are incorporated herein by reference. The facts relevant to the present appeal are set forth below. On August 9, 2012 appellant, then a 58-year-old social scientist, filed a traumatic injury claim, alleging that on July 14, 2012 he sustained mono-peripheral neuropathy of the lower left leg and foot. He was treated by an Army medic that day, but did not receive treatment from a physician until July 20, 2012. Appellant was medically evacuated to the United States on August 15, 2012. In reports dated January 15 and 16, 2013, Dr. Paul M. Joslin, an attending Board-certified internist, described the history of injury. He diagnosed left lower extremity paresis and numbness, lumbar radiculopathy, and cerebrovascular disease. Dr. Joslin indicated that it was most likely that appellant's left lower extremity paresis, sensory deficit, and foot drop were caused by an ischemic cerebrovascular accident in the right middle cerebral artery distribution, due to dehydration and hypovolemia in combination with extreme heat while on patrol in Afghanistan. He also indicated that appellant's left lower extremity weakness, numbness, and foot drop could be due to lumbar radiculopathy which would presumably be caused by disc bulging related to carrying an 80- to 100-pound pack. Dr. Joslin opined that this was a less likely explanation, in light of the absence of focal disc protrusion, spinal stenosis or foraminal encroachment shown on a September 11, 2012 lumbar magnetic resonance imaging (MRI) scan. He concluded that appellant had recovered completely. By decision dated February 28, 2013, OWCP denied the claim finding the medical evidence insufficient to establish causal relationship. Appellant appealed to the Board.

In a March 19, 2014 decision, the Board found the opinions of Dr. Joslin to be sufficiently well rationalized to require further development of the medical evidence.[4] It remanded the case for referral to an appropriate Board-certified specialist for an examination, diagnosis and a rationalized opinion as to whether appellant established that employment factors caused or aggravated his back or left lower extremity condition.

Subsequent to the Board's March 19, 2014 decision, OWCP asked that the employing establishment provide additional information, and referred appellant to Dr. John J. Sand, a Board-certified neurologist, for a second opinion evaluation. In reports dated May 21, July 2, and 28, 2014, Dr. Sand described physical examination findings. He opined that uncertainty remained as to a diagnosis of either stroke or radiculopathy or both, but that the findings on examination and the sudden onset of appellant's symptoms were more suggestive of stroke and were therefore unrelated to appellant's employment. In a September 3, 2014 merit decision, OWCP found that, based on Dr. Sand's opinion, appellant had not established a work-related medical condition. Appellant filed an appeal with the Board on November 21, 2014.

[3] Docket No. 13-1409 (issued March 19, 2014); Docket No. 15-0296 (issued April 9, 2015)

[4] Docket No. 13-1409 (issued March 19, 2014).

In an April 9, 2015 decision,[5] the Board found a conflict in medical evidence existed between Dr. Joslin and Dr. Sand as to whether appellant's diagnosed condition was caused or aggravated by the July 14, 2012 incident.

Following remand from the Board's April 9, 2015 decision, on October 8, 2015, OWCP referred appellant to Dr. Irving Wolfe, an osteopath who is a Board-certified neurologist, for an impartial evaluation. In a November 5, 2015 report, Dr. Wolfe reviewed the statement of accepted facts and list of definitions provided by OWCP. He reported appellant's description of the events of July 14, 2012 and thereafter, and described the record chronologically, including medical reports and correspondence from appellant regarding the events of July 14, 2012 and his medical condition thereafter. Dr. Wolfe described physical examination findings of decreased strength of extension of the second, third, fourth, and fifth toes, explaining that these were innervated by the deep peroneal nerve, and that appellant had no weakness of extension of the left great toe, also innervated by the deep peroneal peripheral nerve (primarily L5 nerve root innervated muscle). He reported that appellant demonstrated no diminished sensation in the left leg, was able to heel walk and toe walk, and had normal eversion and inversion of the left foot. Pin sensation to the lower extremities was equal and symmetric bilaterally, and straight leg raising in a sitting position revealed no radicular irritation pattern.

Dr. Wolfe disagreed with Dr. Joslin's opinion that appellant had a cerebrovascular accident (stroke) of the right middle cerebral artery distribution, opining that a stroke would cause weakness in the left face and left arm to a greater extent than of the left leg, and appellant's medical records did not indicate any weakness of the left face or left arm. Dr. Wolfe noted his review of the magnetic resonance imaging (MRI) and magnetic resonance angiography (MRA) scan discs. He advised that the MRA scan showed no abnormalities, and that the foci seen on the brain MRI scan were most suggestive of mild-to-moderate chronic small vessel ischemic changes of age, agreeing with the reviewing radiologist.[6] Dr. Wolfe further noted that no disc protrusion, extrusion, stenosis, or neural foraminal encroachment was identified on the lumbar MRI scan, and that a September 5, 2015 electrodiagnostic study reported L5 radiculopathy. He opined that, as the result of the July 14, 2012 incident, appellant sustained left-sided common peroneal neuropathy, site nonspecific.

Dr. Wolfe advised that, at the time of his November 5, 2015 examination, appellant endorsed symptoms of numbness of the left leg with the inability to dorsiflex or evert the left foot. Appellant reported no other symptoms involving his arm or legs, or cognitive impairments such as confusion or disorientation or difficulties with memory or attention. Dr. Wolfe noted that on July 20, 2012 a Dr. Duckworth had documented weakness of the left leg due to appellant's inability to dorsiflex and evert his left foot. He described the physiology of a stroke. Dr. Wolfe opined that, after his review of the medical records and his face-to-face evaluation with appellant on November 5, 2015, there was no medical evidence which suggested that appellant had a stroke which would cause an upper motor neuron pattern of weakness as opposed to a lower motor neuron pattern of weakness, noting that there were no MRI scan findings of a stroke which would clinically result in appellant's presenting symptoms. Dr. Wolfe explained that the October 26, 2012 brain MRI scan findings were most suggestive of mild-to-moderate

[5] Docket No. 15-0296 (issued April 9, 2015).

[6] Copies of the reports of these studies are not found in the case record before the Board.

chronic small vessel ischemic changes for age, a common finding in the brains of people 55 to 60 years old. He explained that appellant's risk factors for these MRI scan changes were his weight, his male gender, and his age, none of which were the result of the events of July 14, 2012. Dr. Wolfe concluded that "the incidents that occurred on July 14, 2012, did not aggravate or cause a stroke (blood oxygen decrease to the brain) and did not cause any of [appellant's] symptoms which occurred on July 14, 2012."

By decision dated December 2, 2015, OWCP denied modification of its prior decisions. It credited the opinion of Dr. Wolfe and found that the events of July 14, 2012 did not cause or aggravate a stroke and did not cause any of his symptoms that occurred on July 14, 2012.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained 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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[7]

OWCP regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury 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.[8] 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. 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 for which compensation is claimed. 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 medical evidence required to establish a causal relationship is rationalized medical evidence.[10] 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.[11] Neither the mere fact that a disease or condition manifests itself during a period

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

[8] 20 C.F.R. § 10.5(ee) (1999, 2011); *Ellen L. Noble*, 55 ECAB 530 (2004).

[9] *Id.*

[10] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[11] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

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.[12]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[13] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination, and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[14] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15]

ANALYSIS

The Board finds this case is not in posture for decision. OWCP found that on July 14, 2012 appellant was laden with body armor and a pack on a hot day in Hutal, Afghanistan. He had left lower extremity paresthesias and immobility of his left foot when he stood after sitting for about 45 minutes. Appellant could not receive medical care from a physician for a number of days due to his remote location that required waiting for a military convoy to transport him to a Forward Operating Base for medical treatment, and then further time passed until he was transferred stateside for further medical treatment.

In its April 9, 2015 decision, the Board found that a conflict in medical evidence had been created between the opinions of Dr. Joslin and Dr. Sand and, following remand, OWCP referred appellant to Dr. Wolfe for an impartial evaluation.

In his November 5, 2015 report, Dr. Wolfe stated in his medical opinion that "[appellant's] diagnosis as the result of his accident on July 14, 2012, while performing his job duties as a social scientist as an employee of the [employing establishment] on July 14, 2012, is that of left-sided common peroneal neuropathy, site nonspecific." Later in the same report, he opined that "the incidents that occurred on July 14, 2012 did not aggravate or cause a stroke (blood oxygen decrease to the brain) and did not cause any of [appellant's] symptoms which occurred on July 12, 2012. The Board finds these opinions to be inconsistent.

When OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires

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

[13] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[14] 20 C.F.R. § 10.321.

[15] *V.G.*, 59 ECAB 635 (2008).

clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.[16]

For the above-described reasons, the opinion of Dr. Wolfe is in need of clarification and elaboration. To resolve the continuing conflict in medical opinion, the case will be remanded to OWCP for referral of the case record and a statement of accepted facts to Dr. Wolfe, and for another physical examination of appellant if necessary, for a supplemental report in which he fully explains his diagnosis of left-sided common peroneal neuropathy, whether it or any other condition was caused by the accepted events of July 14, 2012, whether the condition/conditions continue, and whether appellant had or has any disability as defined by FECA due to the diagnosed condition. After this and such further development as deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has a current diagnosed condition or residuals due to a July 14, 2012 incident.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: November 18, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[16] *I.H.*, Docket No. 08-1352 (issued December 24, 2008).