United States Department of Labor
Employees' Compensation Appeals Board

W.R., Appellant	)	
and	)	**Docket No. 16-1251**
	)	**Issued: April 21, 2017**
DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS, Covington, VA, Employer	)	

Appearances:
Appellant, pro se
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 25, 2016 appellant filed a timely appeal from a March 28, 2016 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.[2]

ISSUE

The issue is whether appellant met his burden of proof to establish an injury in the performance of duty on July 21, 2015.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The record provided the Board includes evidence received after OWCP issued its March 28, 2016 decision. However, the Board is precluded from reviewing evidence that was not part of the record at the time OWCP issued its final decision. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On September 2, 2015 appellant, then a 60-year-old dam operator, filed a traumatic injury claim (Form CA-1) alleging that on July 21, 2015 he injured his lower back while lifting a shop-vac full of water and calcium debris. He and another employee were reportedly working in tandem to lift the shop-vac over a chain-link gate. Appellant claimed to have felt a sharp pain in his lower back and right hip. He stopped work on July 21, 2015, and resumed work on July 23, 2015. Appellant described his injury as a lower back strain and suspected a protruding disc. He noted that he first received medical care for his claimed injury on July 23, 2015.

In a July 28, 2015 report, Dr. Barry S. Brown, an internist, noted that last week appellant was lowering a shop-vac and felt a sharp pain in his right lower back area. He noted that when appellant went to pick it up again, he had significant pain in the right back. Appellant reportedly went to the emergency department for treatment, and since then his condition had not changed. Dr. Brown indicated that appellant had very minimal radiculopathy. He examined appellant, provided findings, and diagnosed back pain, musculoskeletal strain, and asthma.

In an August 19, 2015 report, Dr. Brown noted that appellant came in with a chief complaint of a cough and back pain and had an underlying history of asthma and hyperlipidemia. He advised that appellant continued to have significant pain with no improvement. Dr. Brown noted that appellant had radiculopathy down both legs with some dorsiflexion, extension, and significant pain worsening. He examined appellant and diagnosed low back pain -- acute problem, asthma -- uncontrolled, and gastroesophageal reflux disease (GERD).

An August 25, 2015 lumbar magnetic resonance imaging (MRI) scan read by Dr. Michael Hollander, a Board-certified diagnostic radiologist, revealed multilevel degenerative disease and "likely" impingement on the right S1 nerve root at the L5-S1 level.

Dr. Brown continued to treat appellant and he submitted reports dated August 25 and September 11, 2015. In the August 25, 2015 report, he noted that appellant was diagnosed with lumbosacral disc disease. In his September 11, 2015 follow-up report, Dr. Brown diagnosed degenerative disc disease with abnormal MRI scan, back pain, asthma, dyslipidemia, and GERD.

OWCP also received September 23, 2015 follow-up treatment notes from a nurse practitioner ("LNP-C").

In a September 30, 2015 report, Dr. Hollander noted that appellant had a successful translaminar epidural injection at L5-S1.

In a letter dated February 25, 2016, OWCP requested that appellant provide additional evidence in support of his claim. Appellant was advised to respond to questions in an attached questionnaire. Specifically, OWCP requested that appellant explain what he was doing at the time the injury occurred and to provide a detailed description as to how the injury occurred. With regard to lifting, it requested that appellant describe the object handled, its weight, and what he did with it. OWCP also explained that the medical evidence of record only contained a diagnosis of pain, which was not a valid diagnosis. It further noted that the reports were signed by either a physician assistant or a nurse, both of which are not considered physicians under

FECA. OWCP informed appellant of the type of evidence needed to support his claim and requested that he submit such evidence within 30 days.

OWCP received an August 25, 2015 MRI scan patient profile safety sheet, signed by appellant, who noted that the reason for the examination was "lifting injury [July 25, 2015]…."

Appellant did not specifically respond to OWCP's February 25, 2016 request for additional information regarding the alleged July 21, 2015 lifting incident.

By decision dated March 28, 2016, OWCP denied appellant's claim because he failed to establish fact of injury. It noted that appellant did not respond to its February 25, 2016 request for factual information. OWCP also noted that the medical evidence of record was insufficient as there was no rationale to support causal relationship.

LEGAL PRECEDENT

A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.[3]

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 in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[4] The second component is whether the employment incident caused a personal injury.[5]

OWCP cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place, and in the manner alleged.[6] An injury need not be confirmed by an eyewitness, but the employee's statements must be consistent with surrounding facts and circumstances and his subsequent course

[3] 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

[4] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s). *Id.* Certain health care providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[6] *Supra* note 4.

of action.[7] Circumstances such as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may cast doubt on an employee's statements regarding the alleged employment injury.[8]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that he was injured in the performance of duty on July 21, 2015. The record does not support his allegation that a specific employment event occurred, which caused an injury. Appellant claimed to have injured his lower back lifting a full shop-vac over a chain-link gate. He was reportedly working in tandem with another employee at the time of the alleged July 21, 2015 incident.

On February 25, 2016 OWCP informed appellant and requested the type of evidence needed to support his claim that he injured his lower back at work on July 21, 2015. This was to include a detailed description of how the injury occurred. This is particularly important where appellant's only description of the incident is from his September 2, 2015 traumatic injury claim form. He did not submit any further description of how the claimed injury occurred. Without a detailed description of the circumstances of the alleged injury, appellant's claim lacks specificity regarding the claimed mechanism of injury.[9] Although he was reportedly working with another employee at the time of the alleged July 21, 2015 lifting incident, appellant did not submit a witness statement. There is also reference to appellant having sought treatment in the emergency department (ED) on or about July 23, 2015, but such treatment records are not part of the record and it is unclear what history of injury appellant reported at the time. Lastly, the August 25, 2015 MRI scan safety sheet indicated that the reported lifting injury occurred on "[July 25, 2015]," rather than July 21, 2015 as appellant reported on his Form CA-1. In the absence of necessary factual evidence, appellant failed to establish a *prima facie* claim.

The Board, therefore, concludes that appellant has failed to meet his burden of proof to establish a traumatic injury in the performance of duty on July 21, 2015 because he failed to adequately establish that the claimed incident occurred as alleged. Where a claimant does not establish an employment incident alleged to have caused his or her injury, it is unnecessary to consider the medical evidence with respect to causal relationship.[10]

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.

[7] *See Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

[8] *See Constance G. Patterson*, 42 ECAB 206 (1989).

[9] *See M.F.*, Docket No. 10-1514 (issued March 11, 2011); *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006).

[10] *See S.P.*, 59 ECAB 184 (2007).

CONCLUSION

The Board finds that appellant did not met his burden of proof to establish an injury in the performance of duty on July 21, 2015.

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2017
Washington, DC

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

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

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