United States Department of Labor
Employees' Compensation Appeals Board

M.D., Appellant	)	
and	)	**Docket No. 17-0086**
	)	**Issued: August 3, 2017**
FEDERAL DEPOSIT INSURANCE CORPORATION, Arlington, VA, 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:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 20, 2016 appellant, through counsel, filed a timely appeal from an August 24, 2016 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 to consider the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish an injury in the performance of duty on February 20, 2015, as alleged.

[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.*

FACTUAL HISTORY

On June 9, 2015 appellant, then a 57-year-old financial analyst, filed a traumatic injury claim (Form CA-1) alleging that at 9:00 a.m. on February 20, 2015 he was walking from his car, which was parked near the bottom of the ramp of the employing establishment parking garage between the first and second floors, when he tripped on a strip of concrete. He explained that he then rapidly flew forward, head first, into a concrete staircase. Appellant alleged that he sustained a large bruise on his upper right arm, skinned both of his knees, and experienced right forearm cramps, sore right thigh, soreness in his back, as well as a tingling sensation in his fingers and right hand for two days. The employing establishment controverted appellant's claim, alleging that appellant was walking from his car to the office elevator on his morning commute when the incident occurred. Appellant did not stop work.

On February 20, 2015 a representative of the employing establishment sent appellant a memorandum which indicated that he was sorry to hear that appellant may have had an employment-related injury. He also provided appellant with instructions for filing a claim.

By letter dated June 25, 2015, OWCP informed appellant that further information was necessary to support his claim, including evidence supporting that he was injured in the course of employment and medical evidence. It also asked him to respond to certain questions. OWCP afforded appellant 30 days to submit the information.

OWCP also requested information from the employing establishment. In a response received by OWCP on July 24, 2015, the employing establishment indicated that it had assigned appellant a parking space in the garage. It confirmed that it leased the building and the underground parking area where the incident occurred and contracted with building management to maintain the facility. The employing establishment noted that, in the sense that it assigned parking spots based on established policy and procedures, including seniority it controlled the parking facilities. Appellant was responsible for paying for his parking.

By decision dated July 28, 2015, OWCP denied appellant's claim. It determined that appellant had not met the factual component of his claim in that he had not established that the events occurred as alleged. OWCP noted that he had failed to provide a detailed description when asked for additional information regarding the parking lot, previous injuries, the effects of the injury, the delay in filing the claim, and a response to the employing establishment's challenge. It also found that appellant failed to submit medical evidence establishing a medical diagnosis in connection with the alleged incident. OWCP concluded that appellant had not established that he sustained an injury in the performance of duty.

By letter received by OWCP on June 7, 2016, appellant, through counsel, requested reconsideration. In support of his claim, appellant submitted the results of multiple objective diagnostic studies. A February 25, 2015 computerized tomography (CT) scan of the lumbar spine was interpreted by Dr. Neal Desai, a Board-certified radiologist, who compared it to a March 31, 2014 CT scan, and found a stable examination. He found status post posterior spinal fusion L4-S1 with mild lucency surrounding the S1 transpedicular screw which may be due to loosening, mild grade 1 anterolisthesis L4-L5; multilevel degenerative changes, most pronounced at L5-S1; and noted incidentally fatty liver and bilateral nephrolithiasis.

In a March 3, 2015 report, Dr. Kemesha L. Delisseer, a Board-certified physiatrist, noted that she administered a successful, fluoroscopically-guided diagnostic left and right S1 transforaminal epidural steroid injection.

In a March 20, 2015 report, Dr. Michael Jay, a Board-certified radiologist, found a study of the lumbar spine showed stable postsurgical and degenerative changes and grade 1 anterolisthesis at L4-L5 measures approximately seven millimeters and no evidence of dynamic instability. On June 7, 2016 Dr. Michael Staloch, a Board-certified radiologist, interpreted a magnetic resonance imaging (MRI) scan as showing no substantial change compared to the December 5, 2013 MRI scan of the lumbar spine. He noted that there was mild L3-L4 central canal narrowing and multilevel degenerative disc disease changes.

In a May 17, 2016 report, Dr. Maria S. Babcock, an osteopath, described appellant's fall of February 20, 2015. She noted that, after the fall, he had experienced increased pain on right leg and back. Dr. Babcock also discussed appellant's preexisting condition, noted that the fall aggravated the preexisting condition, and also injured his surgical fusion. She opined that appellant needed urgent surgery. Dr. Babcock diagnosed lumbar disc displacement, lumbar radiculopathy, sacroiliac joint pain, and lumbago and concluded that these conditions were "the direct and proximate cause" of the described events "based on reasonable medical probability."

By decision dated August 24, 2016, OWCP denied modification of its July 28, 2015 decision. It determined that appellant still had not responded to OWCP's questions or established that the event occurred as alleged. OWCP noted that appellant had not provided a detailed description when asked for additional information with regard to the parking lot, any previous injuries, the effects of the injury, the delay in filing the claim, and a response to the agency challenge. It further noted that, although appellant had submitted medical evidence, this evidence did not establish a diagnosed medical condition causally related to the employment injury or event.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of proof to establish 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

In order to determine whether an employee actually sustained an 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, which must be considered in

[3] *Supra* note 2.

[4] *Jussara L. Arcanjo*, 55 ECAB 281, 283 (2004).

conjunction with one another. The first component to be established is that the employee actually experienced the employment incident or exposure which is alleged to have occurred.[5] In order to meet his burden of proof to establish the fact that he sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he actually experienced the employment injury or exposure at the time, place, and in the manner alleged.[6]

The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.[7] In the course of employment relates to the elements of time, place, and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his or her master's business, at a place when he or she may reasonably be expected to be in connection with his or her employment, and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto. As to the phrase in the course of employment, the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to and from work, before or after working hours or at lunch time, are compensable.[8]

Whether an injury occurs in the performance of duty is a preliminary issue before the merits of the claim are adjudicated.[9]

The second component appellant must establish is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[10] The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is 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.[11]

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[5] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (August 2012).

[6] *Linda S. Jackson*, 49 ECAB 486 (1998).

[7] *A.K.*, Docket No. 16-1133 (issued December 19, 2016).

[8] *Narbik A. Karamian*, 40 ECAB 617, 218 (1989). The Board has also applied this general rule of workers' compensation law in circumstances where the employee was on an unauthorized break. *See Eileen R. Gibbons*, 52 ECAB 209 (2001).

[9] *P.L.*, Docket No. 16-0631 (issued August 9, 2016).

[10] *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

[11] *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

ANALYSIS

OWCP denied appellant's claim, finding that appellant had not established that his injury occurred at work as alleged due to his failure to respond to OWCP's queries. As previously noted the initial question is whether appellant's accident occurred in the performance of duty.[12]

For an employee with fixed hours and a fixed workplace, an injury that occurs on the employing establishment premises when the employee is going to or from work is compensable.[13] Therefore, it is important to determine whether the location of the incident is considered to be part of the premises of the employing establishment. The Board has explained the factors which determine whether a parking lot used by employees may be considered a part of the employing establishment's premises. These factors include whether the employing establishment contracted for the exclusive use by its employees of the parking area, whether parking spaces on the lot were assigned by the employing establishment to its employees, whether the parking areas were checked to see that no unauthorized cars were parked in the lot, whether parking was provided without cost to the employees, whether the public was permitted to use the lot, and whether other parking was available to the employees.[14]

Herein, OWCP properly asked the employing establishment to provide further information about the parking facility. The employing establishment indicated that it leased the office building, which included the underground parking area where the incident occurred, and contracted with a building management firm to work with it to maintain the facility. The employing establishment noted that the parking facilities were under its control in so much as it assigned parking spaces based on seniority and availability. Based upon these facts, the Board finds that the evidence of record is sufficient to establish that the parking garage was part of the employing establishment's premises.[15]

The Board further finds that appellant has established that the incident occurred as alleged. 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.[16] There are no substantial inconsistencies in the claim that would contradict

[12] *Supra* note 8.

[13] *I.F.*, Docket No. 12-192 (issued September 26, 2013).

[14] *G.E.*, Docket No. 14-843 (issued September 23, 2014). The facts in the current case are similar to the Board's decision in *G.E.* In that case, claimant alleged that while walking up a slanted driveway in a parking garage, she scraped her right knee and middle toe. OWCP had determined that the employing establishment did not own, operate, or control the parking garage which was shared with other building tenants, and that accordingly appellant's injury did not occur on federal property. However, the Board reversed this determination. The Board determined that the parking garage was leased by the employing establishment for the use of its employees, that appellant had a parking decal which the security guards checked to ensure that only authorized spaces were used, and that the employing establishment recommended that employees park there for their safety and convenience as there was limited on-street parking which was considered unsafe. Accordingly, the Board found that the parking garage was part of the employing establishment premises.

[15] *Id.*

[16] *P.H.*, Docket No. 15-1519 (issued December 22, 2015).

appellant's allegations with regard to the accident in question. Although appellant delayed filing his claim for over three months after the February 20, 2015 date of the alleged injury, the record does contain a memorandum from the employing establishment dated February 20, 2015 expressing concern regarding the injury and providing appellant with instructions with regard to filing a claim. Therefore, the Board finds that the employment incident occurred as alleged.

However, the Board finds that appellant has not submitted sufficient medical evidence to establish that the accepted employment incident caused or contributed to a diagnosed medical condition and resultant employment injury.[17] None of the diagnostic studies nor the report by Dr. Delisser address the cause of appellant's condition. As such these opinions are insufficient to establish causal relationship.[18]

Dr. Babcock opined that appellant's fall of February 20, 2015 aggravated his preexisting condition and also injured his spinal fusion. He diagnosed, among other things, lumbar disc displacement. Dr. Babcock does not provide any rationalized explanation for her conclusions. A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimant's accepted incident resulted in a diagnosed condition is not sufficient to meet appellant's burden of proof.[19] The Board finds that Dr. Babcock did not provide a rationalized medical opinion explaining how appellant's trip and fall on February 20, 2015 would have physiologically caused the diagnosed condition.[20] A rationalized medical opinion is especially necessary in light of appellant's preexisting degenerative condition.[21]

An award of compensation may not be based on surmise, conjecture, speculation, or on the employee's own belief of causal relationship.[22] Appellant's honest belief that the February 20, 2015 employment incident caused a medical injury is not in question. That belief, however sincerely held, does not constitute medical evidence to establish causal relationship.[23]

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 has established that the employment incident occurred as alleged, and that he was in the performance of duty at the time of the incident. However,

[17] *J.P.*, Docket No. 16-0954 (issued December 13, 2016).

[18] *See G.M.*, Docket No. 14-2057 (issued May 12, 2015).

[19] *See R.E.*, Docket No. 14-868 (issued September 24, 2014).

[20] *J.B.*, Docket No. 16-1192 (issued December 6, 2016).

[21] *K.K.*, Docket No. 16-1642 (issued February 22, 2017).

[22] *D.D.*, 57 ECAB 734 (2006).

[23] *H.H.*, Docket No. 16-0509 (issued September 16, 2016).

appellant has not met his burden of proof to establish an injury causally related to the February 20, 2015 employment incident, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 24, 2016 is affirmed, as modified.

Issued: August 3, 2017
Washington, DC

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

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

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