United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 16-0777**
	)	**Issued: January 3, 2017**
DEPARTMENT OF VETERANS AFFAIRS, BOSTON MEDICAL CENTER, Boston, MA, Employer	)	

Appearances:
John L. Whitehouse, 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 March 8, 2016 appellant, through counsel, filed a timely appeal of a February 4, 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 over the merits of this case.

[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 met his burden of proof to establish a concussion causally related to an accepted March 17, 2015 employment incident.

FACTUAL HISTORY

On March 18, 2015 appellant, then a 47-year-old investigator, filed a traumatic injury claim (Form CA-1) alleging that on March 17, 2015 he sustained a severe concussion, dizziness, confusion, and injuries to his neck, back, and left eye as a result of boxes falling on his head and neck at work. He indicated that two boxes fell from a bookcase onto his head and neck and caused him to fall forward onto his face. Appellant stopped work on March 17, 2015.

Appellant's coworker provided a witness statement dated March 17, 2015. He stated that he was in appellant's office that day at approximately 8:00 a.m., looking at wall jacks for computer connections when two boxes fell from the top of a bookcase and landed on appellant's head and shoulder area forcing appellant to fall to the floor. The coworker noted that appellant declined assistance, but he informed appellant that he would report the incident to appellant's supervisor.

Appellant was treated at urgent care by Dr. Stephan Gaehde, a Board-certified internist. In a March 17, 2015 note, Dr. Gaehde related that appellant was at work that day when he bent over and hit his head on the bottom of a shelf, causing files and books to fall on the back of his head. Appellant complained of left-sided head pain, feeling nauseated, and confusion. Upon examination, Dr. Gaehde observed a pink oval, around a 15-millimeter size contusion above appellant's left eyebrow and swelling over his left forehead. He opined that appellant sustained a head trauma with fall and elevated blood pressure.

Dr. Glenn Nuttall, a Board-certified internist, also treated appellant and, in a March 17, 2015 note, described that appellant was at work that day when a bookshelf fell on his head. Upon examination, he observed erythema and swelling over the left forehead and supple, full range of motion of the neck. Neurologic examination demonstrated clear speech and intact sensation of the upper and lower extremities. Dr. Nuttall indicated that appellant sustained a concussion. He recommended a computerized tomography (CT) scan.

A March 17, 2015 CT scan report of the brain by Dr. Joan Cheng, a Board-certified diagnostic radiologist, revealed no acute intracranial abnormality and mild soft tissue swelling overlying the left supraorbital region without evidence of underlying fracture.

In a March 17, 2015 work status note, a physician with an illegible signature noted that appellant was examined in urgent care on that day and would be out of work until March 23, 2015.

Appellant underwent a CT head scan from Dr. Wesley Rosario-Medina, a Board-certified diagnostic radiologist, who indicated, in a March 18, 2015 report, that he saw no abnormal brain attenuation and no evidence of bleeding, mass effect, or fluid collection. Dr. Rosario-Medina concluded that there was no acute abnormality.

Dr. Glenn A. Tucker, a Board-certified internist, began to treat appellant and reported on March 19, 2015 that appellant would not be released to return to work until his examination on March 23, 2015.

In a March 23, 2015 report, Dr. Tucker related that on March 17, 2015 appellant was at work when boxes fell on his head and back. He related that appellant experienced vomiting and was treated at occupational health. Appellant went home for a day, but went to urgent care when he started vomiting again. Dr. Tucker reviewed appellant's history and conducted an examination. He opined that appellant had a cerebral laceration and contusion, without mention of open intracranial wound, with concussion. Dr. Tucker reported that appellant's continued fatigue and poor short-term memory were concerning. He recommended a magnetic resonance imaging (MRI) scan.

Dr. Tucker provided a March 23, 2015 letter, which mentioned that he examined appellant that day and observed that appellant had fatigue and short-term memory loss from the prior week's accident. He reported that appellant was not able to return to work until further evaluation.

In a March 24, 2015 MRI scan report, Dr. Rosario-Medina noted a history of concussion, trouble remembering, headache, and blurry left eye. He reported a normal examination study.

Appellant continued to be treated by Dr. Tucker. In records dated April 7 and 14, 2015, Dr. Tucker indicated that appellant was seen for follow up after a head injury at work. He related appellant's current complaints of daily headaches, poor memory, delayed processing of information, and difficulty completing tasks. Dr. Tucker discussed appellant's history and provided examination findings. He diagnosed other and unspecified cerebral laceration and contusion, without mention of open intracranial wound, with concussion. Dr. Tucker explained that he agreed with the diagnosis of concussion, even though the CT and MRI scan did not show it. He indicated that appellant had continued symptoms relating to the head injury sustained at work. Dr. Tucker also noted that given appellant's ongoing mental status change, he should have a neuropsychological evaluation. He advised that appellant was not able to return to work.

By letter dated April 14, 2016, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested that he submit additional evidence to substantiate that the March 17, 2015 incident occurred as alleged and to establish that he sustained a diagnosed condition as a result of the alleged incident. Appellant was afforded 30 days to submit the additional evidence. A similar letter was also sent to the employing establishment requesting witness statements from anyone with knowledge of the March 17, 2015 work event.

Appellant filed a claim for wage-loss compensation (Form CA-7) for the period May 12 to 15, 2015.

In an April 23, 2015 outpatient neuropsychological consultation report, Dr. Paul F. Malloy, a clinical neuropsychologist, examined appellant for cognitive problems subsequent to a head injury at work. He described the March 17, 2015 employment incident and discussed the medical treatment appellant received. Dr. Malloy related that appellant's wife reported a clear decline in cognitive functioning, increased depression, and apathy following the accident. He

indicated that appellant complained of occasional headaches, easy fatigue, and persistent cognitive difficulties. Dr. Malloy reviewed appellant's medical history and provided his findings on examination of cognitive and behavioral functioning. He opined that, given the results of his examination and description of appellant's symptoms, appellant had some mild cognitive decline experienced from the injury. Dr. Malloy reported that appellant's prognosis for a complete recovery was good.

Dr. Tucker continued to treat appellant and, in an April 27, 2015 letter, he described the March 17, 2015 employment incident. He related that appellant was seen in the emergency room and that his examination was consistent with a severe concussion. Dr. Tucker discussed the medical treatment that appellant received and noted that head CT and MRI scans did not show injury. He reported that appellant continued to have impaired cognition and may not return to work before June 27, 2015. Dr. Tucker opined that appellant had continued memory and cognitive impairment after sustaining a severe concussion at work.

On May 1, 2015 OWCP received appellant's response to OWCP's development letter. Appellant stated that he suffered a severe concussion on March 17, 2015 and suffered various issues with his recollection of details, memory, and severe head pressure. He indicated that the coworker had provided a witness statement to his supervisor. Appellant reiterated that he had very little recollection regarding the fine details of the injury and did not remember much from that day. He reported that he remembered that his coworker was in his office helping to move computers and telephone systems to their new offices down the hall. Appellant was attempting to get wall jack information off of the wall box located under his desk and when he bent down he hit a large, black bookcase located behind him. He indicated that this was when things got fuzzy, but he remembered being on the floor and going to occupational health. Appellant noted that he had not suffered any similar disabilities or symptoms before the injury and that he had not sustained any previous head injuries.

A workers' compensation program specialist at the employing establishment indicated in a May 12, 2015 letter that the employing establishment was questioning appellant's entitlement to workers' compensation benefits. She asserted that there was nothing in the medical evidence which offered positive objective diagnostic evidence or findings to support any other diagnosis associated with the incident that occurred on March 17, 2015 at work.

In a decision dated May 15, 2015, OWCP denied appellant's claim. It accepted that the March 17, 2015 incident occurred as alleged. However, OWCP denied appellant's claim finding that the medical evidence of record was insufficient to establish that his diagnosed conditions were causally related to the March 17, 2015 employment incident.

On June 10, 2015 OWCP received appellant's request for a hearing before an OWCP hearing representative.

OWCP received hospital emergency records dated March 18, 2015 by Dr. Elyssa A. Pellish, Board-certified in emergency medicine. Dr. Pellish described the March 17, 2015 incident and related that MRI and CT scans were normal. She reviewed appellant's history and provided physical examination findings. Appellant resubmitted Dr. Malloy's April 23, 2015 report.

Appellant submitted reports by Dr. Tucker dated May 12 and June 23, 2015. Dr. Tucker noted that appellant showed slow improvement, but still had difficulty with completing tasks. He mentioned that appellant wanted to return to work, but he was unsure if appellant would be able to perform the tasks. Dr. Tucker reviewed appellant's history and conducted an examination. He diagnosed other and unspecified cerebral laceration and contusion, without mention of open intracranial wound, with concussion unchanged from previous appointment. Dr. Tucker opined that appellant may need to work with a regular schedule for his remaining symptoms to improvement. He believed that appellant would not be physically able to return to the field work of surveillance.

A hearing was held on November 20, 2015. Counsel was present. He described the March 17, 2015 employment incident and discussed the medical treatment appellant received. Counsel noted that appellant was initially examined in urgent care for confusion and nausea and was diagnosed with concussion by Dr. Natal. Dr. Nuttall related that appellant was examined in the emergency room twice before he was treated by Dr. Tucker. Counsel indicated that Dr. Tucker diagnosed cerebral laceration and contusion with concussion. He noted that appellant was examined and diagnosed on three separate occasions with a concussion resulting from the trauma that was reported to the doctors. Counsel further noted that appellant experienced symptoms such as nausea, dizziness, neck pain, and vomiting, which were common symptoms for someone who sustained a concussion. He also asserted that a concussion would not necessarily show up on a diagnostic examination, which was why appellant's diagnostic examinations were normal. Counsel noted that there was only one cause for a concussion, which was a blow to the head very similar to what happened to appellant on March 17, 2015. He asserted that the facts and circumstances strongly supported a finding that that there was a direct connection between the diagnosed concussion and the trauma appellant sustained.

In a December 14, 2015 letter, counsel requested that OWCP consider a December 4, 2015 report by Dr. Tucker that he had enclosed. He described the March 17, 2015 employment incident and the medical treatment that appellant received. Counsel indicated that OWCP's claims examiner demonstrated a lack of understanding of concussions when he denied appellant's traumatic injury claim by noting that appellant's CT and MRI scans examinations were normal. He asserted that all of the symptoms that appellant exhibited were the result of head trauma and were recognized as being consistent with a concussion as recognized by the three physicians that examined appellant. Counsel requested that OWCP refer appellant's case to a district medical adviser or second opinion physician in order to determine whether appellant's diagnosed conditions were causally related to the accepted head trauma on March 17, 2015.

Dr. Tucker treated appellant and, in a December 4, 2015 letter, he described that on March 17, 2015 appellant was struck on the head and upper back when boxes fell on him at work. He related that appellant was examined by occupational health and taken to urgent care where he was diagnosed with a concussion. Dr. Tucker noted that he initially examined appellant on March 23, 2015 for complaints of fatigue and short-term memory loss. He diagnosed cerebral laceration and contusion with concussion. Dr. Tucker related that he examined appellant again on April 7, 2015 for complaints of daily headaches, poor memory, delayed processing of information, difficulty completing tasks, and depression. He again noted diagnoses of cerebral laceration and contusion with concussion and advised that appellant

remained disabled from work. Dr. Tucker opined, to a reasonable degree of medical certainty, that appellant's concussion was directly related to the trauma on March 17, 2015. He related that appellant had no history of a head trauma until he was struck on the head by falling boxes on March 17, 2015. Dr. Tucker noted that since then appellant suffered multiple symptoms, including head and neck pain, nausea, dizziness, swelling, vomiting, confusion, fatigue, short-term memory loss, and depression, which were all symptoms of a concussion. He further noted that appellant was diagnosed with a concussion within hours of the March 17, 2015 incident and that there was no other reported incident or event which would account for appellant's diagnosis.

By letter dated December 22, 2015, an employing establishment official commented on the hearing transcript and asserted that the May 15, 2015 denial decision should be affirmed. She alleged that there was insufficient evidence to support that appellant sustained any diagnosed condition causally related to the March 17, 2015 incident. The employing establishment official also noted that appellant provided various accounts regarding what exactly had occurred on March 17, 2015 and that he had initially refused medical treatment at urgent care. The employing establishment submitted various e-mails between appellant and his supervisor regarding his claim for workers' compensation and screenshots of postings and comments from appellant's social media page.

By decision dated February 4, 2016, an OWCP hearing representative affirmed the May 15, 2015 decision in part and modified it in part. She determined that the evidence was sufficient to establish a causal relationship between appellant's diagnosed forehead contusion and the March 17, 2015 employment incident and remanded the case for OWCP to accept the claim for contusion of the left forehead. The hearing representative also found that the evidence failed to establish that appellant's concussion was causally related to the March 17, 2015 employment incident.[3]

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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[5] including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.[6]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether "fact of injury" has been established.[7]

[3] The record reveals that on March 9, 2016 OWCP issued a decision accepting appellant's claim for left forehead contusion.

[4] *Supra* note 2.

[5] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[6] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.[8] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[9] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability or condition relates to the employment incident.[10]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.[11] The opinion of the physician must be based on a complete factual and medical background of the employee, 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.[12] The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[13]

While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.[14]

ANALYSIS

Appellant alleged that on March 17, 2015 he sustained a concussion and injuries to his neck, back, and left eye in the performance of duty. OWCP accepted that the employment incident occurred as alleged and that appellant sustained a contusion of the forehead. It denied appellant's claim finding the medical evidence of record insufficient to establish that his concussion was causally related to the March 17, 2015 employment incident

The Board finds that this case is not in posture for decision.

Appellant submitted various reports and letters by Dr. Tucker dated March 19 to December 4, 2015. In a March 23, 2015 report, Dr. Tucker related that on March 17, 2015 appellant experienced vomiting at work when boxes fell onto his head and back. He provided physical examination findings and diagnosed cerebral laceration and contusion, without open

[8] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

[9] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[10] *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[11] *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

[12] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

[13] *James Mack*, 43 ECAB 321 (1991).

[14] *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

intracranial wound, with concussion. Dr. Tucker reported again, in an April 27, 2015 letter, that appellant had continued memory and cognitive impairment after sustaining a severe concussion at work. He advised that appellant remain off work. In a December 4, 2015 letter, Dr. Tucker opined that appellant's concussion was directly related to the March 17, 2015 trauma. He explained that appellant had no history of head trauma and that, since the March 1, 2015 work accident, appellant suffered from multiple symptoms, including head and neck pain, nausea, dizziness, swelling, vomiting, confusion, fatigue, short-term memory loss, and depression, which were all symptoms of a concussion. The Board notes that, although these reports do not provide medical rationale explaining how the accepted employment incident caused or contributed to his head contusion and concussion, they strongly suggest and support a relationship between the accepted March 17, 2015 employment incident and appellant's head injury.[15]

The Board finds that, while the reports from Dr. Tucker are not completely rationalized, they are consistent in indicating that appellant sustained a cerebral laceration and contusion with concussion on March 17, 2015 and are not contradicted by any substantial medical or factual evidence of record.[16] Dr. Tucker's opinion is also supported by the March 17, 2015 note of Dr. Gaehde, who described the March 17, 2015 incident and opined that appellant sustained a head trauma with fall and elevated blood pressure. Although these reports are insufficient to meet appellant's burden of proof to establish a claim, they raise an uncontroverted inference between appellant's diagnosed head injury and the accepted March 17, 2015 employment incident, and thus, they are sufficient to require OWCP to further develop the medical evidence.[17]

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.[18] While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.[19] Thus, the Board will remand the case to OWCP for further development to obtain a rationalized medical opinion as to whether appellant's head condition is causally related to the employment incident and thereafter to issue a *de novo* decision on whether he sustained an injury causally related to the March 17, 2015 employment incident, as alleged.

CONCLUSION

The Board finds that this case is not in posture for decision.

[15] *See L.F.*, Docket No. 14-1906 (issued August 13, 2015) (the Board determined that reports by a claimant's treating physician strongly supported a relationship between the employment incident and diagnosed condition and remanded the case for OWCP to further develop the medical evidence).

[16] *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

[17] *Richard E. Simpson*, 55 ECAB 490, 500 (2004); *John J. Carlone*, *supra* note 9.

[18] *See Vanessa Young*, 56 ECAB 575 (2004).

[19] *Supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2016 merit decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: January 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