

**United States Department of Labor
Employees' Compensation Appeals Board**

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G.O., Appellant)	
)	
and)	Docket No. 16-1113
)	Issued: January 10, 2017
U.S. POSTAL SERVICE, VANDERVEER)	
STATION, Brooklyn, NY, Employer)	
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Appearances: *Case Submitted on the Record*
*Thomas R. Uliase, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 2, 2016 appellant, through counsel, filed a timely appeal from a January 29, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 that bilateral hernias were a consequence of a May 20, 1999 employment injury.

On appeal counsel asserts that the statement of accepted facts (SOAF) provided to Dr. Howard Beaton, a Board-certified surgeon, was incomplete because it did not include the fact that appellant had hernia repairs in 2002 and 2004 and thus, as the physician's report is based on an inaccurate medical history, it should be discounted. He further asserts that the opinion of Dr. Michael J. Katz, an attending Board-certified orthopedic surgeon, is sufficient to establish causal relationship. Counsel concludes that, at a minimum, a conflict in medical evidence has been created between the opinions of Dr. Beaton and Dr. Katz.

FACTUAL HISTORY

On May 20, 1999 appellant, then a 36-year-old building equipment mechanic, fell from a ladder while climbing down from a roof after repairing an air-conditioner. He stopped work that day and has not returned. Appellant received continuation of pay and was placed on the periodic compensation rolls in August 1999. He remains on the periodic rolls to date. An OWCP Non-Fatal Summary indicated that on May 25, 1999 the claim was accepted for cervical sprain, lumbar sprain, left wrist sprain, open wound to the face, and injury to nerve with approved surgery.

In an undated report, received by OWCP on February 28, 2011, Dr. Timothy T. Robinson, an attending Board-certified family physician, noted diagnoses of fracture of orbital socket and nerve damage of the right eye; cervical and lumbar spine disc bulges; left wrist nonunion fracture of scaphoid bone resulting in reconstructive surgery; hernias with two unsuccessful surgeries for repair; arthralgias of the neck, back, shoulder, bilateral wrists, hips, knees, and ankles; and right-sided dental damage. He advised that all diagnoses were directly related to the May 20, 1999 employment injury, which resulted in chronic pain, instability, and unreliability. Dr. Robinson concluded that appellant could not work. On October 4, 2012 he diagnosed low back, left wrist, and neck pain, and abdominal hernias. Dr. Robinson continued to advise that appellant could not work and that vocational rehabilitation could be considered.

In a November 19, 2012 report, Dr. Mary Ann Hopkins, a Board-certified surgeon, noted appellant's complaint of recurrent right and left inguinal and umbilical hernias. She reported that he had a right inguinal hernia repaired twice in the mid-2000s. Physical examination demonstrated left inguinal and umbilical hernias and possible recurrent right inguinal hernia. Dr. Hopkins recommended laparoscopic surgical repair. On December 12, 2012 she indicated that appellant could not participate in a functional capacity evaluation because he could not lift due to the diagnosed hernias.³

³ Appellant was referred for vocational rehabilitation on October 25, 2012. In January 2013, vocational rehabilitation was placed in interrupted status pending hernia surgery.

On September 30, 2013 Dr. Katz noted diagnoses of left wrist fracture cervical and lumbar spine derangement, and advised that appellant was totally disabled and needed hernia surgery. On March 25, 2014 Dr. Robinson agreed that appellant was totally disabled.

In reports dated April 2 and 3, 2014 report, Dr. Alex M. Stone, a Board-certified surgeon, noted that appellant fell off a roof and injured his back, head, and torso, and that this was followed by bilateral inguinal hernias and an umbilical hernia, which were employment related. He described appellant's complaints of swelling in the left groin and pain in the right groin. Dr. Stone diagnosed multiple recurrent hernias. An April 28, 2014 computerized tomography (CT) scan of the abdomen and pelvis demonstrated bilateral recurrent inguinal hernias. On May 14, 2014 Dr. Stone advised that he would proceed with left inguinal hernia repair and requested authorization.

By letter dated May 22, 2014, OWCP informed appellant that it could not authorize the surgery because the record of evidence failed to establish the need for the procedure due to factors of employment.

In correspondence dated May 27, 2014, appellant described the employment injury and his current medical condition. He noted that he had a right hernia repairs on April 12, 2004 and on November 13, 2006 a second hernia repair on the right. Appellant attached copies of medical reports dated from 1999 to present.

In a June 2, 2014 report, Dr. Katz noted first seeing appellant on October 22, 2012. He reported a history that appellant injured his neck, back, and left wrist on May 20, 1999, which resulted in five surgeries to the left wrist. Dr. Katz related appellant's report of back, abdominal, groin, and testicular pain since the fall at work, advising that appellant initially associated this with his back pain, but that it "was actually a hernia that happened as a result of the fall" which became strangulated in 2004 and required emergency surgery, noting that this was done under his private health insurance because he could not wait for authorization. He noted that appellant subsequently suffered recurrences and now required further surgery. Dr. Katz opined that appellant's back spasm caused further exacerbation of the hernia condition. He concluded that it appeared that his fall caused the initial hernia with his back condition making his hernia condition worse. Dr. Katz requested authorization for the hernia surgery because it was causally related to his May 20, 1999 employment injury.

In June 2014, OWCP referred appellant to Dr. Arnold Goldman, a Board-certified orthopedic surgeon. The SOAF provided to Dr. Goldman indicated that the accepted conditions were "left wrist sprain, open wound to the face, and injury to the nerve" as arising out of the May 20, 1999 employment injury. Dr. Goldman was asked to provide an opinion on whether appellant continued to have disabling residuals of the accepted conditions or concurrent nonwork-related disability.

In a July 7, 2014 report, Dr. Goldman noted his review of the SOAF and medical evidence, and described physical examination findings, noting marked limitation of range of motion of the left wrist, and a marked left inguinal hernia on the left. He diagnosed

cervical and lumbosacral sprains, status post left wrist fusion, and bilateral inguinal herniorrhaphies. Dr. Goldman advised that the diagnosed cervical and lumbosacral sprains were also directly related to the May 20, 1999 injury and opined that appellant continued to have a marked disability with regard to the left wrist. He deferred comment regarding the hernias to an appropriate specialist and concluded that appellant could work in a sedentary capacity with regard to his orthopedic condition. In an attached work capacity evaluation (Form 5c), Dr. Goldman provided restrictions to appellant's physical activity.

In reports dated September 22, 2014, Dr. Katz noted his review of Dr. Goldman's report and magnetic resonance imaging (MRI) scans of December 1999. He described physical examination findings and diagnosed status post left wrist fracture, cervical and lumbar spine derangement, and status post bilateral herniorrhaphies with recurrent hernias. Dr. Katz repeated his opinion that appellant's inguinal hernias were caused by his fall and that he needed hernia surgery. He advised that appellant's neck, back, and left shoulder conditions appeared permanent, that he was totally disabled due to pain, and needed hernia surgery.

On September 24, 2014 counsel requested that appellant's claim be expanded to include the hernias and that OWCP authorize surgery for these conditions. On October 27, 2014 he forwarded operative reports dated April 12, 2004 and November 13, 2006, in which Dr. Andrew Y. Lo, a surgeon, performed right inguinal hernia repair and a recurrent right inguinal hernia repair respectively. Also forwarded was a May 10, 2005 CT scan of the abdomen and pelvis that demonstrated recurrent right inguinal hernia.

In November 2014, OWCP referred appellant to Dr. Beaton for a second opinion evaluation. Dr. Beaton was specifically asked to advise whether the claim should be expanded to include the diagnosed hernias and lumbar and cervical disc herniations. An October 30, 2014 SOAF provided that the accepted conditions were left wrist sprain, open wound to the face, and injury to the nerve as arising out of the May 20, 1999 employment injury.⁴ In a November 18, 2014 report, Dr. Beaton noted his review of the SOAF and medical record. He described the employment injury and appellant's medical and surgical history, including that Dr. Lo repaired right inguinal hernias in 2004 and 2006, and that appellant now had similar pain, and a bulge in his left groin. Dr. Beaton reported examination findings of a large bulge in the left groin consistent with an inguinal hernia. He diagnosed left inguinal hernia and recurrent right inguinal hernia, on CT scan only.

Dr. Beaton opined that surgical repair of the left inguinal hernia was medically indicated and that the right inguinal hernia did not warrant surgery at that time. He opined that appellant's hernias were not related to his May 20, 1999 fall and injury because he did not report pain in his right groin at that time, and there was no medical

⁴ The record contains two SOAFs dated October 30, 2014. Each stated "This SOAF supersedes any and all prior SOAFs." One additionally included a description of the physical requirements of the building equipment mechanic position. Otherwise they are identical, including the list of accepted conditions described above.

record of hernia until 2004, five years after the work injury. Dr. Beaton disagreed with Dr. Katz' opinion that the hernias were caused by the 1999 employment injury, concluding that without some documentation of a hernia being present much closer in time to the employment injury, it was his opinion that neither the right nor left inguinal hernias were work related. In an attached work capacity evaluation, Dr. Beaton advised that, with regard to the hernia, appellant could not perform heavy lifting, but could work eight hours a day.

In a March 21, 2015 report, Dr. Katz repeated his previous conclusions. He noted his review of additional medical records and referenced a July 1, 1999 report in which Dr. Michael Brooks noted lower back pain that radiated around to the lower abdomen in the area of a 1980 stab wound; reports from Dr. Robinson who reported appellant's complaint of back pain radiating to the groin on October 7, 1999; and January 28 and March 7, 2000 notes in which Dr. Peter D. Stein, Board-certified in orthopedic and hand surgery, advised appellant to see a spine surgeon with regard to his back pain and testicular symptoms. Dr. Katz further referenced a January 17, 2001 report from Dr. Kiril Kiproviski, a Board-certified neurologist, who noted appellant's complaint of unrelieved lower back pain that radiated into the right buttock and groin, and notes from Brenda Caron, a nurse, who indicated that appellant had low back pain radiating to the right groin. He opined that these reports clearly showed that appellant had abdominal/groin/testicular pain since the May 20, 1999 employment injury and maintained that the resultant inguinal hernia condition should be accepted. Dr. Katz concluded that the May 20, 1999 fall caused the initial hernia with appellant's back condition making this condition worse. He requested that hernia surgery be authorized.

By decision dated July 17, 2015, OWCP denied appellant's request to expand the accepted conditions for a consequential hernia condition. It found that the weight of the medical evidence rested with the opinion of Dr. Beaton who, while diagnosing a large left inguinal hernia, opined that this was not caused by the May 20, 1999 employment injury.

On July 28, 2015 appellant, through counsel, timely requested a hearing with OWCP's Branch of Hearings and Review. He submitted a September 21, 2015 report, in which Dr. Katz again reiterated his opinion that appellant had abdominal/groin/testicular pain since the May 20, 1999 work injury, stating that the right inguinal hernia was directly caused by the injury and was not a consequential injury. Dr. Katz related that, because appellant was not medically sophisticated, the significance of his abdominal and groin pain was not apparent to him at the time of his injury. He noted that appellant reported that he complained to numerous physicians about his abdominal and groin pain, which Dr. Beaton did not mention. Dr. Katz opined that the May 20, 1999 fall caused the initial right inguinal hernia and the subsequent need for two right inguinal hernia repairs. Appellant's back condition caused spasms and an awkward stance and gait, which caused a consequential left inguinal hernia which now required surgery. Dr. Katz requested authorization for the surgery.

In form reports dated September 30, 2015, Dr. Katz reiterated appellant's diagnoses. He noted that appellant was unable to sit or stand for long periods of time, needed hernia surgery, and was totally disabled.

Appellant was not present at the hearing, held on November 13, 2015. Counsel asserted that because injuries to appellant's groin were not initially addressed, he had to have additional hernia surgery. He discussed the medical evidence that described appellant's groin pain and other complaints. Counsel maintained that the reports of Dr. Katz were sufficient to establish causal relationship or, at a minimum, create a conflict in medical evidence.

By decision dated January 29, 2016, an OWCP hearing representative affirmed the July 17, 2015 decision denying expansion of the accepted conditions. While the hearing representative found Dr. Beaton's report of diminished probative value as the medical record reported right groin pain at an early date, the request for expansion was for a left hernia condition, and none of the contemporaneous medical reports described a hernia condition. As such, the hearing representative found that appellant failed to establish causal relationship.

LEGAL PRECEDENT

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.⁵

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.⁶

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁷ 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.⁸ Neither the mere fact that a disease or

⁵ Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* § 1300 (2010); see Charles W. Downey, 54 ECAB 421 (2003).

⁶ Charles W. Downey, *id.*

⁷ Jacqueline M. Nixon-Steward, 52 ECAB 140 (2000).

⁸ Leslie C. Moore, 52 ECAB 132 (2000); Gary L. Fowler, 45 ECAB 365 (1994).

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.⁹

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.¹⁰

ANALYSIS

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

The Board finds that the SOAF is defective because it did not include all of appellant's accepted conditions. As noted on a Non-Fatal Summary on May 25, 1999, OWCP indicated that the claim was accepted for cervical sprain, lumbar sprain, left wrist sprain, open wound to the face, and injury to nerve with approved surgery. The October 30, 2014 SOAF provided to Dr. Beaton indicated that the accepted conditions were "left wrist sprain, open wound to the face, and injury to the nerve" as arising out of the May 20, 1999 employment injury. It did not indicate that cervical and lumbar sprains had been accepted. Because the SOAF sent to Dr. Beaton was not accurate, the Board finds that the January 19, 2016 decision must be set aside and the case remanded to OWCP.¹¹

On remand OWCP should prepare a corrected SOAF that includes all accepted conditions. It shall forward this to Dr. Beaton and ask the second opinion physician to provide an opinion as to whether appellant's current hernia and spinal conditions are related to the June 20, 1999 work injury, noting the additional accepted conditions. If Dr. Beaton is unable to provide the requested opinion, OWCP should refer appellant for another second opinion evaluation. After this and such further development deemed necessary, OWCP should issue a *de novo* decision.¹²

CONCLUSION

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

⁹ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁰ *Donald E. Ewals*, 51 ECAB 428 (2000).

¹¹ *S.H.*, Docket No. 14-1280 (issued June 24, 2015).

¹² The Board notes that appellant has also requested that diagnosed disc herniations be accepted under this claim. The Board's jurisdiction extends only to the review of final decisions by OWCP. 20 C.F.R. § 501.2(c). As OWCP has not issued a decision regarding these conditions, the Board has no jurisdiction to review this request. *See E.L.*, 59 ECAB 405 (2008).

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2016 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: January 10, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board