

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

C.T., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS BENEFITS ADMINISTRATION)
REGIONAL OFFICE, Oakland, CA, Employer)

**Docket No. 16-1222
Issued: March 9, 2017**

Appearances:

*Daniel M. Goodwin, Esq., for the appellant¹
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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 17, 2016 appellant, through counsel, filed a timely appeal from a January 4, 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 he developed a lumbar condition causally related to factors of his federal employment.

FACTUAL HISTORY

On January 26, 2015 appellant, then a 44-year-old veterans rating service representative, filed an occupational disease claim (Form CA-2) alleging that he developed degenerative joint disease of the lumbar spine as a result of his federal employment duties. He first became aware of his condition and of its relationship to his employment on October 1, 2009. Appellant notified his supervisor on March 13, 2015. On the reverse side of the claim form appellant's supervisor stated that, beginning December 29, 2014, appellant teleworked and only came into the office one day a week.

In an accompanying narrative statement, appellant reported that he began working for the employing establishment in August 2009 at which time he was provided a standard sized chair and desk. He explained that, because he was 6 foot 5 inches and 215 pounds, he requested a chair that would fit him better as he experienced lumbar pain and discomfort in the chair he was provided. Appellant noted that his job entailed sitting for eight hours per day and prior to working for the employing establishment he had never worked an office job. He reported that, despite trying other chairs that were in his office, he could not find one that suited his size, and his requests for a properly fitting chair went unanswered. Appellant noted that the chair he was provided was adjustable up to 21 inches from the floor whereas the ergo metric evaluation found that his chair base should be 24 to 25 inches off the ground. He further reported that he had no significant or chronic back problems and stated that sitting for eight hours per day in a chair that was significantly too small caused his chronic back problem.

By letter dated March 19, 2015, appellant's supervisor related that appellant received all the appropriate equipment identified during a workstation ergonomic evaluation conducted on September 10, 2012. He stated that appellant received a chair that met his needs for an adjustable workstation, an ergonomic keyboard and mouse, dual monitors, and Dragon software. The supervisor further explained that appellant currently teleworked and was only required to come into the office one day a month.

By letter dated April 6, 2015, the employing establishment controverted the claim relating that every attempt had been made to accommodate appellant.

In an August 12, 2014 diagnostic report, Dr. Tereasa Simonson, a Board-certified diagnostic radiologist, reported that an x-ray of the lumbar spine revealed mild facet hypertrophy at the lower two lumbar levels.

In a September 12, 2014 medical report, Dr. Juon-kin K. Fong, a Board-certified orthopedic surgeon, reported that the August 12, 2014 x-ray of the lumbar spine was remarkable for mild facet changes with narrowing of the neuroforaminae at L4-5-S1. He explained that the presence of these hypertrophic changes in the facets suggested early degenerative joint disease of the facets due to activities such as prolonged sitting and repetitive bending and lifting. Dr. Fong

reported that increasing the load on these structures would precipitate inflammation of the facet joints leading to localized muscle spasm and pain with decreased motion and activity tolerance. He noted that appellant's work required prolonged sitting at ergonomically inadequate workstations (due to his height), thus increasing the pressure in the lower spine. As such, the combination of the prolonged sitting and poor ergonomics precipitated appellant's back injury and symptoms.

By letter dated April 20, 2015, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the medical and factual evidence necessary and was afforded 30 days to submit the requested evidence.

In a March 12, 2013 diagnostic report, Dr. George D. Chu, a Board-certified diagnostic radiologist, reported that an x-ray of the lumbar spine revealed mild degenerative facet changes of the lower lumbar spine, no significant degenerative disc disease, trace dextroscoliosis, and no evidence of acute vertebral body compression fracture.

On May 15, 2015 appellant responded to OWCP's request for additional evidence. He stated that he had not received medical treatment for his lower back condition until March 12, 2013 when an x-ray revealed mild degenerative facet changes of the lower lumbar spine and trace dextroscoliosis. Appellant argued that the employing establishment ignored his requests for ergonomic accommodations despite numerous complaints. He reported that his ergonomic evaluation was not conducted until September 10, 2012 and that he was not provided with all of the recommended accommodations. Appellant stated that an electric height adjustable workstation was recommended so that he could stand while working, but this equipment was not provided until eleven months after the recommendation. In support of his claim, he submitted e-mails which documented his requests for the equipment.

On July 6, 2015 appellant responded to an OWCP development questionnaire. He reported that, from the beginning of his employment, he was required to sit down to use the computer workstation, which did not fit his body due to his height. Appellant opined that his chair was too small for his frame and caused his lower back injury. He explained that, initially, he would sit for 8 hours per day, 5 days per week, with 20 hours of mandatory overtime per month, for over a year. On days of mandatory overtime appellant had to sit in the inadequate chair for 10 hours per day. He reported that, currently, he was accommodated with the adjustable height desk recommended by the ergonomic evaluation so he could alternate between standing and sitting. Appellant explained that both his office desk and home desk were adjustable. He reported that he began teleworking on December 24, 2014. For the first few months, appellant was required to come into the office once a week while his current schedule required him to come in once a month. He reported no prior injury to his back. Appellant noted having previously filed a workers' compensation claim for his cervical spine and right ulnar nerve.³

In support of his claim, appellant submitted medical reports dated May 26 and July 2, 2015 from Dr. Fong. Dr. Fong reported that appellant had previously been evaluated on June 30 and August 19, 2014 for back complaints from prolonged sitting at his job. He noted that

³ The Board notes that the record contains no other information pertaining to OWCP File No. xxxxxx391.

appellant was 6 foot 5 inches, but his workstation chair was only 23 inches high, causing him to sit in an awkward position with his back and neck significantly flexed in order to work at his desk. Dr. Fong noted that, on June 30, 2014, appellant's examination revealed muscle spasm in the lower back in the paravertebral muscles, along with some decrease in flexion. An August 12, 2014 x-ray of appellant's lumbar spine revealed mild facet changes with narrowing of the neuroforaminae at L4-5-S1, but with very wide foramina so that the narrowing was unlikely to lead to any neurologic issues. Dr. Fong explained that the presence of these hypertrophic changes in the facets suggested early degenerative disc disease of the facets due to activities such as prolonged sitting, especially in an ergonomically poor position as appellant was, along with repetitive bending and lifting. He reiterated that increasing the load on these structures would precipitate inflammation of the facet joints leading to localized muscle spasm and pain with decreased motion and activity tolerance. Dr. Fong advised that such activities should be modified to prevent worsening. He noted that appellant's work required prolonged sitting at ergonomically inadequate workstations (due to his height), thus increasing the pressure in the lower spine. As such, the combination of the prolonged sitting and poor ergonomics precipitated appellant's lumbar spine facet degenerative disc disease and was the reason he was having continued back dysfunction. Dr. Fong opined that, with reasonable medical probability, there had been no previous aggravation, either temporary or permanent, because appellant had no symptoms that could have been aggravated prior to the work exposure as discussed above.

By decision dated July 10, 2015, OWCP denied appellant's claim finding that the medical evidence of record failed to establish that his diagnosed back conditions were causally related to his federal employment duties.

On October 9, 2015 appellant, through counsel, requested reconsideration of OWCP's decision. Counsel noted that an October 9, 2015 medical report from Dr. Fong established appellant's occupational disease claim. He further argued if the work-related conditions contributed to his condition, then the injury should be considered employment related.

In the October 9, 2015 medical report, Dr. Fong repeated the assertions and findings made in his prior reports. In addition, he noted that studies have revealed that sitting in improper positions, as when a chair is too low, can increase pressure on the lumbar spine to three times the body weight, accelerating degenerative changes to the spine. In terms of when the ergonomic adjustments were made, Dr. Fong noted that the employing establishment did not accommodate appellant's ergonomic requests until November 2013, approximately 16 months since the onset of his symptoms, leaving him exposed to the same substandard conditions that prompted the onset of his symptoms in 2011.

By decision dated January 4, 2016, OWCP denied modification of the July 10, 2015 decision, finding that the medical evidence of record failed to establish that appellant's diagnosed lumbar condition was causally related to his accepted federal employment duties.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 filed within the applicable time

limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴ These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

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 conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁶ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁷

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.⁸ The opinion of the physician 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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of 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.⁹

ANALYSIS

OWCP denied appellant's claim as the evidence of record failed to establish causal relationship between his employment duties as a veteran's rating service representative and his

⁴ Gary J. Watling, 52 ECAB 278 (2001); Elaine Pendleton, 40 ECAB 1143, 1154 (1989).

⁵ Michael E. Smith, 50 ECAB 313 (1999).

⁶ Elaine Pendleton, *supra* note 4 at 1143 (1989).

⁷ See Roy L. Humphrey, 57 ECAB 238, 241 (2005); Ruby I. Fish, 46 ECAB 276, 279 (1994).

⁸ See 20 C.F.R. § 10.110(a); John M. Tornello, 35 ECAB 234 (1983).

⁹ James Mack, 43 ECAB 321 (1991).

lumbar facet degenerative disc disease. The Board finds that this case is not in posture for decision and must be remanded for further development of the medical evidence.¹⁰

OWCP accepted that appellant engaged in prolonged sitting in his employment as a veterans rating service representative. The issue is whether appellant established that his employment caused a lumbar injury.

The Board finds that the medical evidence of record is sufficient to require further development of the case record. It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden of establishing entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹¹

In medical reports dated September 12, 2014 through October 9, 2015, Dr. Fong provided a detailed medical history, physical examination findings, and a review of diagnostic testing. The Board notes that, while none of his reports are completely rationalized, they are consistent in indicating that appellant sustained an employment-related injury.¹²

Dr. Fong described appellant's employment duties, noting that work required him to sit in a chair for prolonged periods of time. He explained that appellant was 6 foot 5 inches while his workstation chair was only 23 inches high, causing him to sit in an awkward position with his back and neck significantly flexed. Dr. Fong described appellant's physical examination findings, which revealed muscle spasm in the lower back in the paravertebral muscles, along with some decrease in flexion. He reviewed diagnostic testing, explaining that an August 12, 2014 x-ray of the lumbar spine revealed mild facet changes due to narrowing of the neuroforaminae at L4-5-S1. Dr. Fong explained that the presence of these hypertrophic changes in the facets suggested early degenerative disc disease of the facets due to activities such as prolonged sitting, especially in an ergonomically poor position as appellant was, along with repetitive bending and lifting. He explained that increasing the load on these structures would precipitate inflammation of the facet joints, leading to localized muscle spasm and pain with decreased motion and activity tolerance.

Dr. Fong noted that appellant's work required prolonged sitting at ergonomically inadequate workstations (due to his height), thus increasing the pressure in the lower spine. As such, the combination of the prolonged sitting and poor ergonomics precipitated appellant's lumbar spine condition was the cause of the continued back dysfunction. Dr. Fong further described the mechanism of injury by stating that sitting in improper positions, as when a chair is too low, can increase pressure on the lumbar spine to three times the body weight, accelerating degenerative changes to the spine. He explained that ergonomic adjustments were not made for

¹⁰ *J.C.*, Docket No. 12-0107 (issued May 24, 2012).

¹¹ *Phillip L. Barnes*, 55 ECAB 426 (2004); *William J. Cantrell*, 34 ECAB 1233 (1993); see also *Virginia Richard*, claiming as executrix of the estate of *Lionel F. Richard*, 53 ECAB 430 (2002); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

¹² *S.M.*, Docket No. 13-0534 (issued June 21, 2013); *Frank B. Gilbreth*, Docket No. 02-1310 (issued May 14, 2003).

some time, leaving appellant exposed to substandard conditions. Dr. Fong opined, with reasonable medical probability, that appellant had no symptoms that could have been aggravated prior to the work exposure.

While Dr. Fong did not fully describe the mechanism of the injury, he provided a clear opinion based on examination findings and an accurate factual and medical background, that prolonged sitting and poor ergonomics precipitated appellant's lumbar spine facet degenerative disc disease.¹³ He demonstrated an understanding of appellant's employment duties and discussed how these factors caused or aggravated his condition. Dr. Fong provided a medical history and based his findings on diagnostic testing and physical examination.¹⁴

Although Dr. Fong's reports are insufficient to meet appellant's burden of proof to establish his claim, they are sufficient to require OWCP to further develop the medical evidence and the case record.¹⁵

The Board will remand the case for further development of the medical evidence. On remand, OWCP should prepare a statement of accepted facts (SOAF) and provide a timeline as to when appellant received the various ergonomic equipment requested. It should then refer appellant, along with an updated SOAF and the case record, to an appropriate Board-certified physician to obtain a rationalized opinion as to whether his lumbar injuries are causally related to his federal employment duties, directly or through aggravation, precipitation, or acceleration.¹⁶ Following this and any other development deemed necessary, OWCP shall issue an appropriate merit decision on his occupational disease claim.

CONCLUSION

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

¹³ *R.W.*, Docket No. 08-0275 (issued June 3, 2008).

¹⁴ *L.R.*, Docket No. 12-0239 (issued August 17, 2012).

¹⁵ See *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁶ *P.A.*, Docket No. 09-0319 (issued November 23, 2009).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated January 4, 2016 is set aside and the case is remanded for further development consistent with this decision.

Issued: March 9, 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