United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
	)	**Docket No. 17-1132**
and	)	**Issued: November 22, 2017**
DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND, Norfolk, 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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 2, 2017 appellant, through counsel, filed a timely appeal from a February 27, 2017 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.

ISSUE

The issue is whether appellant met his burden of proof to establish an injury causally related to an accepted November 23, 2014 employment incident.

[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.*

On appeal counsel contends that OWCP's decision is contrary to fact and law.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the prior decision are incorporated herein by reference. The facts relevant to the instant appeal are set forth below.

On December 11, 2014 appellant, then a 59-year-old first assistant engineer, filed a traumatic injury claim (Form CA-1) alleging that on November 23, 2014 he injured his lower back at work when he slipped on fuel oil that had spilled on a deck. He stopped work on November 25, 2014.

OWCP initially denied the claim by decision dated February 20, 2015. It found that appellant had failed to establish a factual basis for his claim and had not provided medical evidence sufficient to establish that the alleged November 23, 2014 employment incident caused a diagnosed medical condition. Appellant requested a review of the written record. By decision dated August 19, 2015, an OWCP hearing representative affirmed the February 20, 2015 decision as modified.[4] He found that appellant had established that the November 23, 2014 incident occurred as alleged, but he had not established that a diagnosed medical condition was causally related to the accepted employment incident.

On February 10, 2016 appellant, through counsel, appealed to the Board. By decision dated June 3, 2016, the Board affirmed the August 19, 2015 decision, finding that appellant had failed to submit rationalized medical opinion evidence to establish that the accepted November 23, 2014 employment incident had caused or contributed to the claimed back injury.[5]

OWCP received progress notes and industrial work status reports dated June 29 to November 30, 2016 in which Dr. Peter B.T. Lum, an attending Board-certified physiatrist, noted a history of the November 23, 2014 employment incident, reported findings on physical examination, and reviewed diagnostic test results. Dr. Lum assessed lumbar muscle strain, lumbosacral joint sprain, neck muscle strain, neck sprain, cervical vertebral subluxation, lumbosacral vertebral subluxation at the L5-S1 level, and lumbar radiculopathy. He opined that based on the history, mechanism of injury, and his examination, appellant's injury was more than likely caused by the alleged work incident and therefore was an industrial-related injury. Dr. Lum placed appellant off work and released him to return to modified work on intermittent dates through February 11, 2017. He advised that if modified activity was not accommodated by the employing establishment then he considered appellant to be temporarily and totally disabled from his regular work.

[3] Docket No. 16-0606 (issued June 3, 2016).

[4] In the August 19, 2015 decision, OWCP's hearing representative noted that appellant had filed a prior claim assigned OWCP File No. xxxxxx181 for a back condition.

[5] *Supra* note 3.

By letter dated January 3, 2017, appellant, through counsel, requested reconsideration on January 3, 2017. He submitted a December 10, 2016 report from Dr. Neil Allen, Board-certified in internal medicine and neurology. Dr. Allen noted a history of the November 23, 2014 work incident and reviewed appellant's medical records.[6] He requested that appellant's claim be updated to include strain/sprain of the cervical spine and aggravation of lumbar spondylosis with radiculopathy. Dr. Allen related that appellant had denied symptoms related to these conditions before the November 23, 2014 trauma and that the incident was a rapid acceleration and deceleration event resulting in the overstretching of ligaments and musculature of the cervical and lumbar spines, beyond their normal range, resulting in injury. As a result of the November 23, 2014 work incident, he diagnosed cervical spine sprain/strain. Typical symptoms for muscle strains and joint sprain included swelling, tenderness, and painful and/or reduced range of motion. Dr. Allen maintained that appellant's medical records reflected consistent documentation of cervical spine tenderness and reduced and painful range of motion. He asserted that age-related changes in his spine, combined with the November 23, 2014 work incident, contributed to the manifestation of a symptomatic lumbar spondylosis.

In support of his opinion, Dr. Allen referenced a study from The Journal of Biomechanics titled "Lumbar facet pain: Biomechanics, neuroanatomy and neurophysiology" (September 1996). Based on the study's findings, Dr. Allen advised that the facet joint was a heavily innervated area subject to high stress and strain. He related that the resulting tissue damage or inflammation was likely to cause the release of chemicals irritating to the nerve endings in these joints, resulting in low back pain. Dr. Allen noted that appellant described a slipping incident that caused a forceful lumbar extension event resulting in maximal loading and injury to the facet joints of the spine. He advised that inflammation within the injured joints could also result in compression of adjacent neural structures and the manifestation of radicular symptoms such as those described by appellant and documented on examination. Typical symptoms in a case of a symptomatic lumbar spondylosis included low back pain and lower extremity radicular symptoms, which were appellant's complaints as documented by his treating physicians. In addition, he had lumbar facet and paraspinal tenderness, diminished reflexes on the right, and reduced lumbar range of motion due to pain on examination as expected. Dr. Allen advised that these findings were consistent with lumbar spondylosis with radiculopathy. He concluded that appellant's injuries, resulting from the acute trauma he suffered while on duty on November 23, 2014 were both reasonable and expected based upon the mechanism described by him and documented within medical records dating back to November 2014.

OWCP received an additional progress note dated January 25, 2017 from Dr. Lum who restated the history of the November 23, 2014 work incident, examined appellant, and reviewed diagnostic test results. Dr. Lum reiterated his diagnoses of lumbar muscle strain, lumbosacral joint sprain, and lumbosacral vertebral subluxation at the L5-S1 level. He also reiterated his opinion that appellant's injury was "more than likely caused by the … alleged work injury and therefore is an industrial-related injury." Dr. Lum found that appellant was fit for duty. In an industrial work status report also dated January 25, 2017, he released appellant to return to work at full capacity.

[6] There is no indication that Dr. Allen examined appellant.

By decision dated February 27, 2017, OWCP denied modification of its denial of appellant's traumatic injury claim. It found that the medical evidence submitted was insufficient to establish an injury causally related to the accepted November 23, 2014 employment incident.

LEGAL PRECEDENT

An employee 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[7] 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.[8]

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.[9] There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged.[10]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[11] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[12] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.[13]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a traumatic injury caused or aggravated by the accepted November 23, 2014 employment incident. Appellant has failed to submit sufficient medical evidence to establish a back injury causally related to the accepted employment incident.

Appellant submitted a December 10, 2016 report from Dr. Allen who related a history of the accepted November 23, 2014 employment incident and reviewed appellant's medical

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

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

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

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

[11] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

[12] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[13] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

records. Dr. Allen advised that appellant's claim should be accepted for cervical spine strain/sprain and aggravation of lumbar spondylosis. He opined that the diagnosed conditions were caused by the work incident and age-related changes in the spine. Although Dr. Allen's report contains an accurate description of the November 23, 2014 employment incident and an affirmative statement of causation, it is based upon an inaccurate history, as he recites a history of a "denial of symptoms related to [diagnosed] conditions prior to the acute trauma sustained on November 23, 2014." However, the record establishes a prior claim[14] for a spinal condition, which includes treatment with Dr. Joseph G. Morelli, D.C., for multiple spinal subluxations and a claimed period of total disability. Medical opinions based on an inaccurate history are of little probative value.[15]

Furthermore, Dr. Allen did not conduct a physical examination.[16] Instead, he relied on medical literature and the examination findings of appellant's treating physicians in attributing appellant's medical conditions to the accepted work incident. Dr. Allen also did not adequately explain how the referenced medical literature applied to appellant's situation.[17] The Board finds that, although Dr. Allen provided some support for causal relationship, this report is insufficient to establish the claim as he failed to provide an accurate medical history as to appellant's prior spinal conditions and claimed disability.

The remaining medical evidence is also insufficient to establish a causal relationship between appellant's alleged injury and the November 23, 2014 employment incident. Dr. Lum's progress notes found that appellant had lumbar muscle strain, subsequent, lumbosacral joint sprain, subsequent, neck muscle strain, subsequent, neck sprain, subsequent, and cervical vertebral subluxation, subsequent, lumbosacral vertebral subluxation at the L5-S1 level, and lumbar radiculopathy. He opined that his injury was "more than likely" due to the accepted November 23, 2014 work incident. However, Dr. Lum's opinion on causal relation is speculative. The Board has held that medical opinions which are speculative or equivocal are of diminished probative value.[18] Furthermore, a mere conclusion without the necessary rationale explaining how work activities could result in the diagnosed condition is insufficient to meet appellant's burden of proof.[19] The Board finds that Dr. Lum's reports fail to establish causal relationship between the accepted incident and the diagnosed conditions.

[14] *Supra* note 4.

[15] *See Douglas M. McQuaid*, 52 ECAB 582 (2001).

[16] *See Michael S. Mina*, 57 ECAB 379 (2006) (the opportunity for and thoroughness of examination is one of the factors used to determine the weight to be given to a medical report).

[17] *See Roger G. Payne*, 55 ECAB 535 (2004) (excerpts from publications have little probative value in resolving medical questions unless a physician shows the applicability of the general medical principles discussed in the articles to the specific factual situation in a case).

[18] *See S.E.*, Docket No. 08-2214 (issued May 6, 2009) (the Board has generally held that opinions such as the condition is probably related, most likely related, or could be related are speculative and diminish the probative value of the medical opinion); *Cecilia M. Corley*, 56 ECAB 662 (2005) (medical opinions which are speculative or equivocal are of diminished probative value).

[19] *See D.P.*, Docket No. 17-0148 (issued May 18, 2017); *Beverly A. Spencer*, 55 ECAB 501 (2004).

Appellant's belief that the accepted employment incident caused or aggravated his condition is insufficient, by itself, to establish causal relationship.[20] The issue of causal relationship is a medical one and must be resolved by a probative medical opinion from a physician. The Board finds that there is insufficient medical evidence of record to establish a back injury causally related to the November 23, 2014 employment incident. Appellant, therefore, did not meet his burden of proof.

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 failed to meet his burden of proof to establish a back injury causally related to the accepted November 23, 2014 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 22, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[20] 20 C.F.R. § 10.115(e); *Phillip L. Barnes*, 55 ECAB 426, 440 (2004).