United States Department of Labor
Employees' Compensation Appeals Board

T.S., Appellant	)	
and	)	**Docket Nos. 17-1592 & 17-1629**
DEPARTMENT OF JUSTICE, U.S. MARSHALS SERVICE, Washington, DC, Employer	)	**Issued: November 13, 2017**

Appearances:
Appellant, pro se
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 July 17, 2017 appellant filed a timely appeal from an April 14, 2017 merit decision and a May 3, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a cervical condition causally related to the July 6, 2015 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case was previously before the Board.[2] On July 10, 2015 appellant, a 54-year-old marshal, filed a claim for recurrence of disability (Form CA-2a) for medical treatment only under OWCP File No. xxxxxx200. He had previously injured his neck and left upper extremity on January 6, 1997, which OWCP accepted for neck sprain and left elbow/forearm contusion. On his Form CA-2a, appellant identified July 6, 2015 as the date of recurrence and explained that the pain in his neck, left arm, and hand "came back a day after [he] was moving some boxes around at work." Based on appellant's description of events, OWCP treated his recurrence claim as a claim for a new traumatic injury.

Appellant submitted medical evidence indicating that the July 6, 2015 employment incident aggravated an underlying cervical condition, which produced left arm pain. His treating physician, Dr. David C. Waters, a Board-certified neurosurgeon, diagnosed left C8 radiculopathy and recommended surgical intervention. In a November 17, 2015 report, Dr. Waters indicated that appellant's July 6, 2015 work activities aggravated his underlying cervical condition.

By decisions dated November 9, 2015 and April 4, 2016, OWCP denied appellant's traumatic injury claim finding that the medical evidence submitted was insufficient to establish causal relationship between appellant's condition and the employment incident.

On August 30, 2016 appellant requested reconsideration and purportedly submitted new medical evidence from his treating physician. However, there was no indication that OWCP received any additional evidence subsequent to its April 4, 2016 decision. OWCP denied appellant's request for reconsideration by decision dated September 14, 2016. When the case was on prior appeal on January 25, 2017, the Board had affirmed OWCP's September 14, 2016 nonmerit decision.[3] The facts and circumstances of the case as set forth in the Board's January 25, 2017 decision are incorporated herein by reference.

On January 30, 2017 appellant requested reconsideration and submitted a May 3, 2016 report from Dr. Waters who diagnosed left C8 radiculopathy. Dr. Waters noted that appellant had C8 radiculopathy since a motor vehicle accident in January 1997 and then experienced recurrent symptoms after stacking and unloading luggage while at work in May 2007. Dr. Waters reported that appellant was symptom-free until 2013 when he was "carrying boards on his left shoulder at home [and] he began to have recurrent symptoms." He further indicated that appellant was diagnosed as having a pinched bone in his neck and his symptoms resolved after five months. Appellant had no symptoms between 2013 and July 2015. Dr. Waters noted that on July 6, 2015 appellant was moving two 41-pound ammunition boxes from the floor at his work location and placing them over his shoulder in a turning motion toward the left. While doing this, he felt some discomfort, sudden onset of pain in the upper scapula, and by the next day, he had pain radiating down his left arm with an electric current, which fit with the C8 nerve root distribution. Dr. Waters found that appellant had consistent C8 medical problems and

[2] Docket No. 17-0291 (issued January 25, 2017).

[3] *See supra* note 2.

opined that his persistent left C8 radiculopathy was aggravated by the July 6, 2015 work incident.

By decision dated April 14, 2017, OWCP denied modification of its prior decision because the medical evidence of record failed to establish a causal relationship between appellant's cervical condition and the July 6, 2015 employment incident.

On April 20, 2017 appellant again requested reconsideration. In support of his request, he submitted an April 20, 2017 narrative statement. Appellant reiterated the factual history of his claim and argued that Dr. Waters had in fact provided medical rationale in his May 3, 2016 report, which appellant resubmitted.

By decision dated May 3, 2017, OWCP denied appellant's request for reconsideration without a merit review. It found that no new evidence had been submitted and the May 3, 2016 report from Dr. Waters was repetitious.

LEGAL PRECEDENT -- ISSUE 1

A claimant 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, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.[4]

To determine if an employee sustained a traumatic 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 that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[5] The second component is whether the employment incident caused a personal injury.[6] An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[7]

[4] 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

[5] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue. *Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s). *Id.*

[7] *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

The fact that a condition manifests itself during a period of employment is insufficient to establish causal relationship.[8] Temporal relationship alone will not suffice.[9] Entitlement to FECA benefits may not be based on surmise, conjecture, speculation, or on the employee's own belief of a causal relationship.[10]

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.[11]

ANALYSIS -- ISSUE 1

OWCP accepted that the July 6, 2015 employment incident occurred as alleged, and also accepted that there was a medical diagnosis in connection with the employment incident. However, it denied appellant's traumatic injury claim finding that the medical evidence was insufficient to establish a causal relationship between the diagnosed condition and the accepted employment exposure. The issue is whether appellant's new cervical condition resulted from the July 6, 2015 employment incident. The Board finds that appellant failed to meet his burden of proof to establish causal relationship.

In a November 17, 2015 report, Dr. Waters indicated that appellant's July 6, 2015 work activities aggravated his underlying cervical condition. He explained that appellant was moving boxes at work and he had another episode of severe left C8 radicular symptoms. However, Dr. Waters did not adequately explain how the July 6, 2015 employment incident aggravated appellant's preexisting cervical condition. A physician's opinion on causal relationship must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).[12]

In his May 3, 2016 report, Dr. Waters diagnosed left C8 radiculopathy. He noted that appellant had C8 radiculopathy since a January 1997 motor vehicle accident, and then experienced recurrent symptoms after stacking and unloading luggage at work in May 2007. Dr. Waters also reported that appellant was symptom-free until 2013 when he was carrying boards on his left shoulder at home and began to have recurrent symptoms. At that time, appellant was diagnosed with a pinched bone in his neck, and his symptoms reportedly resolved after five months. Dr. Waters noted that on July 6, 2015 appellant was moving two 41-pound ammunition boxes from the floor at his work location and placing them over his shoulder in a turning motion toward the left. While doing this, he felt some discomfort, sudden onset of pain in the upper scapula, and by the next day, he had pain radiating down his left arm with an electric

[8] 20 C.F.R. § 10.115(e).

[9] *See D.I.*, 59 ECAB 158, 162 (2007).

[10] *See M.H.*, Docket No. 16-0228 (issued June 8, 2016).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

[12] *Victor J. Woodhams*, *supra* note 6.

current, which fit with the C8 nerve root distribution. Dr. Waters opined that appellant's persistent left C8 radiculopathy was aggravated by the July 6, 2015 work incident. The Board finds that Dr. Waters failed to provide sufficient medical rationale explaining how moving boxes at work on July 6, 2015 either caused or contributed to appellant's condition. As noted, a physician's opinion must be supported by medical rationale, explaining the nature of the relationship between the diagnosed conditions and appellant's specific employment factor(s).[13] The need for rationale is particularly important as the evidence indicates that appellant had a preexisting cervical condition and prior, intervening injuries in 2007 and 2013.[14] Thus, the Board finds that Dr. Waters' latest report is similarly insufficient to establish that appellant sustained an employment-related injury on July 6, 2015.

As appellant has not submitted any rationalized medical evidence to support his claim that he sustained a cervical injury causally related to the July 6, 2015 employment incident, he has failed to meet his burden of proof to establish entitlement to compensation benefits.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[15] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[16] One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.[17] A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.[18] When a timely application for reconsideration does not meet

[13] *Victor J. Woodhams*, *supra* note 6.

[14] *See supra* note 11.

[15] This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[16] 20 C.F.R. § 10.607.

[17] *Id*. at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System; *see* Chapter 2.1602.4b.

[18] 20 C.F.R. § 10.606(b)(3).

at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.[19]

ANALYSIS -- ISSUE 2

Appellant's April 20, 2017 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. He submitted an April 20, 2017 narrative statement reiterating the factual history of his claim and arguing that OWCP did not reference any of Dr. Waters' May 3, 2016 report wherein he provided medical rationale to support his opinion. The Board finds, however, that he has not advanced a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

With respect to the third requirement under section 10.606(b)(3), appellant has not submitted any relevant and pertinent new evidence. He resubmitted a May 3, 2016 report from Dr. Waters, but the Board finds that the submission of this evidence did not require reopening appellant's case for merit review because appellant had submitted the same evidence, which was previously reviewed by OWCP in its April 14, 2017 decision. As the report repeats evidence already in the case record, it is duplicative and does not constitute relevant and pertinent new evidence.[20]

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(3), and properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a cervical condition causally related to a July 6, 2015 employment incident. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[19] *Id*. at § 10.608(a), (b).

[20] *See D.K.*, 59 ECAB 141 (2007).

ORDER

IT IS HEREBY ORDERED THAT the May 3 and April 14, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 13, 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