

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

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D.V., Appellant)	
)	
and)	
)	Docket No. 17-1842
)	Issued: August 10, 2018
DEPARTMENT OF VETERANS AFFAIRS,)	
ANN ARBOR VETERANS ADMINISTRATION)	
MEDICAL CENTER, Ann Arbor, MI, Employer)	
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Appearances:
Alan J. Shapiro, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 29, 2017 appellant, through counsel, filed a timely appeal from a June 2, 2017 merit decision and an August 3, 2017 nonmerit 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that his lumbar and left leg conditions were causally related to the accepted factors of his federal employment; 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).

FACTUAL HISTORY

On May 20, 2016 appellant, then a 45-year-old motor vehicle operator, filed an occupational disease claim (Form CA-2) alleging that he developed back and left leg conditions as a result of prolonged sitting required by his federal employment and due to performance of grounds maintenance duties. He noted that he first became aware of his condition on May 1, 2015 and that it was caused or aggravated by his federal employment November 12, 2015. Appellant noted that his left knee condition was not accepted by on OWCP under OWCP File No. xxxxxx784.³ The employing establishment noted that he was on light/restricted duty. No evidence was submitted with the claim.

By letter dated June 1, 2016, OWCP advised appellant of the deficiencies in his claim and requested that he submit additional factual and medical evidence. This included a rationalized medical report from his physician which contained an opinion as to how the claimed work factors caused, contributed to, or aggravated his diagnosed condition(s). OWCP afforded appellant 30 days to submit the requested information.

In a May 24, 2016 statement, appellant indicated that prolonged sitting activities caused his medical conditions. He stated that he had worked in grounds and transportation since September 2010. However, appellant further indicated that his job changed in January 2015 which increased his driving duties and caused him to sit for three to four hours. He alleged that the increased sitting caused radiculopathy of the lumbar region and neurogenic claudication and right and left knee pain and swelling. Appellant stated that the onset of his knee issues occurred during the recovery of his radiculopathy, sciatica condition. In May 1, 2015, he noticed sudden leg tiredness and heaviness after driving long periods of time with no breaks.

In a September 7, 2012 report, Dr. Christopher Luring, an osteopath and Board-certified physiatrist, noted a three-week history of acute onset numbness of the left leg while performing squats for exercise. He diagnosed chronic L5 right radiculopathy and an acute S1 radiculopathy on the left. A mild peripheral neuropathy related to a history of diabetes was also provided.

A September 13, 2012 computerized tomography (CT) scan of appellant's lumbar spine noted scoliosis and multilevel degenerative changes most significantly at L3-4 and L4-5 with moderate central canal narrowing. A May 6, 2014 magnetic resonance imaging (MRI) scan of appellant's lumbar spine revealed multilevel degenerative changes most significantly at L3-4 and

³ Under OWCP File No. xxxxxx784, OWCP accepted the condition of lumbar radiculopathy on January 25, 2016.

L4-5. A September 30, 2015 MRI scan of the lumbar spine noted multilevel degenerative changes most significantly at L3-4 through L5-S1 levels and mild-to-moderate spinal canal stenosis at L3-4.

In an October 30, 2015 report, Dr. Heidi Haapala, a Board-certified physiatrist, diagnosed left S1 radiculopathy with mild ongoing denervation based on an electromyogram (EMG). She noted that a previous right L5 radiculopathy was not evident on examination, but indicated that there was a peroneal neuropathy at or below the fibular head with mild ongoing denervation vs. incomplete healing of prior L5 radiculopathy.

A November 3, 2015 x-ray of appellant's left knee indicated early tricompartmental osteoarthritis, a joint effusion, and a small-to-moderate plantar calcaneal spur. A November 3, 2015 x-ray of left lower extremity noted sclerosis and mild cortical remodeling in the tibia.

A November 18, 2015 MRI scan of appellant's left lower extremity indicated moderate joint effusion, patellofemoral osteoarthritis, and a diffuse posterior calf muscle edema, and a T2 lobular marrow lesion.

In November 27, 2015 and February 21, 2016 reports, Dr. Michael Clay, a Board-certified internist, provided updates on appellant's lumbar radiculopathy claim. He also indicated that appellant's gait had changed as a result of his back pain and leg weakness, which could flare-up the left knee arthritis. Because of appellant's knee pain and swelling, Dr. Clay opined that appellant should work in a sedentary, clerical-type position that did not require physical labor, lifting, or frequent standing or walking.

In a December 9, 2015 employing establishment work capacity evaluation form, Dr. Clay indicated that appellant developed left knee pain from a September 25, 2015 injury.

By decision dated July 7, 2016, OWCP denied appellant's claim, finding that he had not established causal relationship between the prolonged sitting activities that he claimed were the cause of his medical conditions. It noted that since he had an accepted claim for lumbar radiculopathy under OWCP File No. xxxxxx784, any claim for additional medical conditions as a consequence of that accepted condition must be addressed under that claim.

On July 18, 2016 counsel requested a telephonic hearing before an OWCP hearing representative, which was held on March 20, 2017. Appellant stated that the current claim was filed as his knee injury was never incorporated into his first back injury claim.⁴ He indicated that, grounds maintenance work, using the leaf blower, and sitting for long periods of time all exacerbated his back condition. Appellant noted that he was currently working at a desk, where he answered the telephone and did paperwork. He indicated that he was under the care of Dr. Clay.

A duplicate copy of Dr. Haapala's October 30, 2015 report along with duplicative copies of diagnostic testing previously of record were received.

⁴ Counsel indicated that he was going to file a formal request to expand the acceptance of the other claim to include the left knee condition.

In a July 27, 2016 report, Dr. Egger, a Board-certified physiatrist, noted a history of an acute S1 radiculopathy with severe left lower extremity weakness in October 2015 and left knee pain. An assessment of left knee pain due to patellofemoral syndrome was provided along with an explanation as to how the alteration in appellant's gait mechanics from the acute S1 radiculopathy led to the current knee dysfunction.

In an October 2, 2016 report, Dr. Clay noted that appellant went to the emergency room on September 25 and 27, 2015 with back pain and left leg pain. He saw appellant on September 30, 2015 for worsening pain in the back which went down the left leg, which appellant attributed to carrying a 40-pound leaf blower on his back, a new work activity for him. Dr. Clay diagnosed acute left S1 radiculopathy on chronic right L5 radiculopathy which he opined was due to the described work activities. He noted that appellant had a preexisting back condition that had flared before in winter 2013/2014.

By decision dated June 2, 2017, an OWCP hearing representative affirmed the July 7, 2016 decision finding that there was no medical evidence of record which attributed appellant's current condition to the accepted employment factor of prolonged sitting. The hearing representative noted that appellant has an accepted claim for lumbar radiculopathy under OWCP File No. xxxxxx784. Since it appeared that appellant was alleging a consequential knee condition which arose as a result of gait changes due to his accepted back injury, he was advised that the knee condition should be pursued under his accepted injury claim.

On July 19, 2017 appellant requested reconsideration. Counsel asserted that Dr. Clay's October 2, 2016 medical report was not previously considered.

Evidence received in support of the request included duplicative copies of evidence previously of record.⁵

By decision dated August 3, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim. It determined that, as he had neither raised substantive legal questions nor included new and relevant evidence not previously considered, merit review was not warranted.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁶ 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 the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability

⁵ This included May 6, 2014 and September 30, 2015 MRI scan reports of the lumbar spine, Dr. Clay's October 2, 2016 report and Dr. Haapala's October 30, 2015 report.

⁶ *Supra* note 2.

or specific condition for which compensation is claimed is causally related to the employment injury.⁷

OWCP's regulations define an occupational disease as "a condition produced by the work environment over a period longer than a single workday or shift."⁸ To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁹

Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue.¹⁰ 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.¹¹ 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).¹²

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish causal relationship between the accepted federal employment factors and his lumbar and left leg conditions.

In a September 7, 2012 report, Dr. Luring diagnosed chronic L5 right radiculopathy and an acute S1 radiculopathy on the left. A mild peripheral neuropathy related to a history of diabetes was also noted. This report is of diminished probative value as Dr. Luring provides no opinion as to whether appellant's diagnosed conditions were caused or contributed to by the accepted factors of appellant's federal employment. The Board has held that medical evidence that does not offer

⁷ *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

⁸ 20 C.F.R. § 10.5(q).

⁹ *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

¹⁰ *Robert G. Morris*, 48 ECAB 238 (1996).

¹¹ *Victor J. Woodhams*, 41 ECAB 345, 352 (1989)

¹² *Id.*

any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹³

Similarly, in her October 30, 2015 report, Dr. Haapala diagnosed left S1 radiculopathy with mild ongoing denervation based on EMG and a peroneal neuropathy at or below the fibular head with mild ongoing denervation *vs.* incomplete healing of prior L5 radiculopathy. However, she did not offer any opinion regarding the cause of appellant's medical conditions.¹⁴ Thus, this report is insufficient to establish appellant's claim.

In a December 9, 2015 work capacity evaluation form, Dr. Clay indicated that appellant developed left knee pain from a September 25, 2015 injury. However, as no description of the injury was provided, this evidence is of little probative value in the current claim.¹⁵

Several additional reports were received from Dr. Clay. In his February 21 and November 27, 2016 reports, Dr. Clay specifically indicated that he was providing an update on appellant's lumbar radiculopathy claim. He also indicated that appellant's gait had changed as a result of his back pain and leg weakness, which could flare-up the left knee arthritis. Dr. Clay provided work restrictions.¹⁶ His reports, however, did not provide a rationalized opinion regarding the effects of prolonged sitting or appellant's ground maintenance duties, as alleged in this claim, on his conditions.¹⁷ Where there is medical evidence of a preexisting condition involving the same part of the body as the claimed employment injury, the issue of causal relationship invariably requires inquiry into whether there was employment-related aggravation, acceleration, or precipitation of the underlying condition.¹⁸ Accordingly, the physician must provide a rationalized medical opinion which differentiates between the effects of the work-related injury or disease and the preexisting condition.¹⁹ As Dr. Clay did not provide such an opinion, these reports are insufficient to establish appellant's claim.

In his October 2, 2016 report, Dr. Clay noted evaluating appellant on September 30, 2015 for worsening back pain which went down the left leg. He diagnosed acute left S1 radiculopathy on chronic right L5 radiculopathy which he opined that was due to appellant's use of a 40-pound leaf blower. Although Dr. Clay provided an affirmative opinion which supported causal

¹³ *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

¹⁴ *Id.*

¹⁵ *Supra* note 9.

¹⁶ To the extent appellant is claiming an additional condition as a consequence of his accepted lumbar radiculopathy, this evidence must be filed under OWCP File No. xxxxxx784.

¹⁷ *See supra* note 13.

¹⁸ *A.W.*, Docket No. 17-0285 (issued May 25, 2018).

¹⁹ *Id.*

relationship, he did not provide a rationalized medical opinion on causal relationship with respect to the leaf blower activity, which appellant asserted was a work factor in his hearing testimony.²⁰

In a July 27, 2016 report, Dr. Egger provided an assessment of left knee pain due to patellofemoral syndrome. He discussed that alteration in appellant's gait mechanics from the acute S1 radiculopathy led to the current knee dysfunction.²¹ Dr. Egger, however, did not discuss or mention the effects of prolonged sitting or his grounds maintenance duties on appellant's conditions. Therefore, his report is of limited probative value.²²

Appellant also submitted a series of diagnostic examination testing reports, which included a CT scan and a lumbar spine and lower extremity MRI scan and x-rays of the left lower extremity, from 2012 through 2015. While the interpreting physicians provided medical diagnoses from the diagnostic testing reports, they did not provide an opinion on the cause of his diagnosed conditions. As such, they are of limited probative value.²³

Appellant's belief that employment activities caused or aggravated his condition is insufficient, by itself, to establish causal relationship.²⁴ As noted, the issue of causal relationship is a medical one and must be resolved by probative medical opinion from a physician.²⁵ The Board finds, therefore, that appellant has not met his burden of proof to establish his claim.

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

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.²⁶ Section 10.608(b) of OWCP's regulations provide that, when an application for reconsideration does not meet at least one of the three

²⁰ *C.M.*, Docket No. 14-0088 (issued April 18, 2014) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

²¹ *See supra* note 13.

²² *See supra* note 13.

²³ *See L.A.*, Docket No. 16-1352 (issued August 28, 2017) (diagnostic testing reports, including MRI scan reports, are of limited probative value as they do not specifically address causal relationship).

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

²⁵ *See Y.G.*, Docket No. 17-1209 (issued August 25, 2017).

²⁶ 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141, 146 (2007).

requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.²⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP.²⁸ While counsel asserted that the October 2, 2016 medical report of Dr. Clay was not previously considered, the record reflects that the report was previously of record and considered by OWCP's hearing representative in the June 2, 2017 decision. Furthermore, appellant has not submitted relevant and pertinent new evidence not previously considered by OWCP. The underlying issue in this case is whether he submitted sufficient medical evidence which addressed whether prolonged sitting caused his current conditions. In support of his request, appellant submitted copies of May 6, 2014 and September 30, 2015 MRI scan reports of the lumbar spine and Dr. Haapala's October 30, 2015 and Dr. Clay's October 2, 2016 reports, which were previously of record and considered. Evidence which is duplicative, cumulative, or repetitive in nature is insufficient to warrant reopening a claim for merit review.²⁹ A claimant may obtain a merit review of an OWCP decision by submitting relevant and pertinent new evidence. In this case, appellant failed to submit relevant and pertinent new medical evidence addressing the underlying issue.

The Board accordingly finds that appellant has not met the requirements of 20 C.F.R. § 10.606(b)(3) and OWCP properly denied merit review.

On appeal counsel argues that OWCP's decisions are contrary to fact and law. However, the Board has explained why the evidence in this case is insufficient to establish appellant's claim.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that his lumbar or left leg conditions were causally related to the accepted factors of his federal employment. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²⁷ *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

²⁸ *See J.F.*, Docket No. 16-1233 (issued November 23, 2016).

²⁹ *Denis M. Dupor*, 51 ECAB 482 (2000).

ORDER

IT IS HEREBY ORDERED THAT the August 3 and June 2, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 10, 2018
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