United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 18-0146**
	)	**Issued: August 16, 2018**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Alexandria Bay, NY, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 26, 2017 appellant, through counsel, filed a timely appeal from an August 23, 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 the claim.[3]

[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.*

[3] The record provided to the Board includes evidence received after OWCP issued its August 23, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from considering this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant met his burden of proof to establish a lumbar condition causally related to the accepted September 28, 2016 employment incident.

FACTUAL HISTORY

On September 28, 2016 appellant, then a 44-year-old customs and border control officer, filed a traumatic injury claim (Form CA-1) alleging that he sustained a back injury that day while participating in self-defense tactics training. He stopped work that day. No evidence was submitted with appellant's claim.

In an October 3, 2016 development letter, OWCP requested additional factual and medical evidence. Appellant was afforded 30 days to submit the necessary evidence.

The employing establishment provided an authorization for examination and/or treatment (Form CA-16) dated September 28, 2016. Linda M. Dietsche, a nurse practitioner, filled out Part B of the form on September 29, 2015. She provided diagnoses of lower muscle sprain and S1 joint lumbar sprain and indicated that appellant was unable to work. Ms. Dietsche noted that appellant had a history of lower back pain with degenerative joint disease of the spine dating back to 2015.

In an October 5, 2016 note, Jessica L. Robbins, a registered physician assistant, advised that appellant was unable to work and that he was being referred to an orthopedic group. In her report of October 5, 2016, she noted that he injured his back while in a self-defense class for work while doing stretches. Ms. Robbins noted that appellant was obese, had degenerative disc disease, and had experienced similar back pain two years ago for which he underwent physical therapy. She provided an assessment of strain of muscle, fascia, and tendon of the lower back. Ms. Robbins opined that appellant was totally disabled from work as a result of the September 28, 2016 employment injury.

On October 13, 2016 Dr. Richard J. Distefano, a Board-certified orthopedic surgeon, reported that appellant was engaged in self defensive tactics/ground fighting when he experienced low back, bilateral buttocks pain. The lumbar spine x-rays were noted as having no fractures, dislocations, or other significant abnormalities. Dr. Distefano provided an assessment of acute lumbar herniated nucleus pulposus (HNP) at L5-S1. He opined that appellant was totally disabled from work as a result of his work injury. In November 8 and 14, 2016 attending physician's reports (Form CA-16), Dr. Distefano opined that appellant's acute HNP lumbar spine was due to the September 28, 2016 work injury and that he was totally disabled from work. Progress notes which indicated that appellant was totally disabled were also submitted.

A November 10, 2016 magnetic resonance imaging (MRI) scan of appellant's lumbosacral spine indicated that there was central canal stenosis and foraminal narrowing at the L3-4 and L4-5 levels without encroachment to the exiting lumbar nerve roots. Comparisons were made with a previous lumbar spine series performed on October 13, 2016.

In a November 10, 2016 report, Dr. Distefano reported examination findings and indicated that the November 10, 2016 lumbar MRI scan showed left L4-5 protrusion. He continued to opine

that appellant's acute lumbar HNP at L4-5 was due to the employment incident and that appellant was totally disabled.

On November 21, 2016 appellant underwent a sacroiliac joint injection performed by Dr. Bhupinder Bolla, a Board-certified anesthesiologist. In a November 21, 2016 report, Dr. Bolla indicated that the onset of appellant's back pain began on September 28, 2016 and was precipitated by a work-related ground fighting training when appellant flipped another trainee on the ground, spun around, and felt a pop in his back. He noted that appellant indicated that he had intermittent back pain for years prior to the incident, but the pain was now constant and more severe. Dr. Bolla reported examination findings, reviewed diagnostic studies, and provided an assessment of sacroiliitis not elsewhere classified, spinal stenosis of lumbar region, spondylosis without myelopathy or radiculopathy, lumbar region, lumbar spondylosis without myelopathy, and other intervertebral disc degeneration and displacement, lumbosacral and lumbar region. In a separate November 21, 2016 note, he indicated, by circling "yes" to a question, whether the incident appellant described was the competent medical cause of his injury. Copies of an incomplete doctor's initial report and referral form dated November 21, 2016 signed by Dr. Bolla were also provided.

OWCP also received appellant's October 24, 2016 supplemental statement and the employing establishment's October 19, 2016 response.

By decision dated December 23, 2016, OWCP accepted that the September 28, 2016 employment incident occurred as alleged. It denied the claim, however, finding that the medical evidence submitted was insufficient to establish that appellant's diagnosed conditions were causally related to the accepted employment incident.

On January 19, 2017 appellant requested reconsideration.

In a January 12, 2017 report, Dr. Distefano indicated that on September 28, 2016 appellant felt pain while doing self-defensive tactics/ground fighting. He indicated that appellant had flipped another trainee and felt sharp pain. Dr. Distefano opined that "I do feel that the injury on September 28, 2016 while [appellant] was doing self -defense tactics/ground fighting was the complement producing injury that resulted in his L4-5 disc herniation, resulting in his present pain complaints and resulting in his present disability."

By decision dated January 26, 2017, OWCP denied modification of its previous decision.

On May 5, 2017 appellant, through counsel, requested reconsideration. Counsel argued that the medical evidence of record and Dr. Distefano's new report of March 16, 2017 established causal relationship.

In a March 16, 2017 report, Dr. Distefano noted that appellant was under his orthopedic care for an L4-5 disc herniation. He indicated that he reviewed appellant's medical records, history, and performed a physical examination. Dr. Distefano opined that appellant's self-defense tactics during training caused the L4-5 disc herniation when he flipped another participant on September 28, 2015. He explained that the flipping action would have caused the necessary force to cause the L4-5 disc herniation and that the disc herniation was the direct and natural consequence from appellant's self-defense maneuver of flipping his opponent. Dr. Distefano

indicated that the disc herniation, which was diagnosed by MRI scan lumbar spine on November 10, 2016, was not degenerative in nature, but a consequence of appellant's physical maneuvering on September 28, 2016. He noted that appellant did not suffer any intervening injuries to his lumbar spine since the September 28, 2016 work incident. Dr. Distefano also noted that, prior to the September 28, 2016 work injury, appellant had no back complaints and was asymptomatic.

By decision dated August 23, 2017, OWCP denied modification of its prior decision. It again found that appellant had not submitted rationalized medical evidence sufficient to establish causal relationship between his diagnosed lumbar conditions and the accepted employment incident.

LEGAL PRECEDENT

A claimant seeking benefits under FECA[4] 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.[5]

To determine whether 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.[6] The second component is whether the employment incident caused a personal injury.[7] 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.[8]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[9] The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the

[4] *Supra* note 2.

[5] 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver,* 48 ECAB 232, 235-36 (1996).

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

[7] *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 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.*

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

[9] *I.R.,* Docket No. 09-1229 (issued February 24, 2010); *D.I.,* 59 ECAB 158 (2007).

nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[10]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that his lumbar conditions were causally related to the accepted September 28, 2016 employment incident.

Medical evidence submitted to support a claim for compensation should reflect a correct factual and medical history, and the physician should offer a medically-sound explanation of how the claimed work event caused or aggravated the claimed condition.[11] No physician did so in this case.

Appellant submitted several narrative reports from Dr. Distefano. In his October 13, 2016 report, Dr. Distefano reported that appellant was doing self-defensive tactics/ground fighting when he experienced low back, bilateral buttock pain. He provided an assessment of acute lumbar HNP at L5-S1. Dr. Distefano opined, in his October 13 and November 16, 2016 reports and in November 8 and 14, 2016 Form CA-16 reports, that appellant's acute lumbar HNP was due to the September 28, 2016 work injury. However, Dr. Distefano failed to explain with medical rationale how engaging in self-defensive tactics/ground fighting caused or aggravated appellant's lumbar spine condition. Without explaining how physiologically the act of engaging in self-defensive tactics/ground fighting caused or contributed to the diagnosed condition, Dr. Distefano's opinion is of limited probative value.[12] A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimant's accepted exposure resulted in the diagnosed condition is insufficient to meet appellant's burden of proof.[13] Furthermore, the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the back condition had been caused by the identified employment factor, is sufficient to establish causal relationship.[14]

In his January 12, 2017 report, Dr. Distefano explained that on September 28, 2016 appellant felt pain when he flipped another officer during self-defensive tactics/ground fighting. The Board notes that pain is a symptom and not a compensable medical diagnosis.[15] Dr. Distefano diagnosed L4-5 disc herniation which he opined resulted from the self-defensive tactics ground fighting appellant had performed. However, he again failed to provide a rationalized discussion which explained how the self-defensive tactics/ground fighting could have caused, aggravated or contributed to the diagnosed L4-5 disc herniation. Thus, Dr. Distefano's opinion is of insufficient

[10] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *supra* note 7.

[11] *D.D.*, Docket No. 13-1517 (issued April 14, 2014).

[12] *See Lee R. Haywood*, 48 ECAB 145 (1996).

[13] *G.M.*, Docket No. 14-2057 (issued May 12, 2015); *Cecelia M. Corley*, 56 ECAB 662 (2005).

[14] *Daniel O. Vasquez*, 57 ECAB 559 (2006).

[15] *See G.C.*, Docket No. 17-0537 (issued July 20, 2017).

rationale to establish a back condition causally related to the September 28, 2016 accepted employment incident.[16]

In his March 16, 2017 report, Dr. Distefano related that, when appellant flipped another trainee, the necessary force was created to cause the L4-5 disc herniation. However, contrary to Dr. Distefano's comment that appellant had no back complaints and was asymptomatic prior to the September 28, 2016 employment incident, the record indicates that appellant had a preexisting lumbar condition.[17] Ms. Robbins, a physician assistant, reported in her October 5, 2015 report that appellant had similar back pain two years prior and had undergone physical therapy. Dr. Bolla also noted in his November 21, 2016 report that appellant had intermittent back pain for years prior to the September 28, 2016 work incident. As such, Dr. Distefano's opinion is insufficient to establish causal relationship as it is not based on a complete factual and medical background.[18]

In his November 21, 2016 reports, Dr. Bolla indicated that the onset of appellant's back pain began on September 28, 2016 and was precipitated by a work-related ground fighting training when appellant flipped another trainee and spun around while on the ground and felt a pop in his back. He noted that appellant had intermittent back pain for years prior to the incident, but the pain was now constant and more severe. Dr. Bolla provided an assessment of sacroiliitis not elsewhere classified, spinal stenosis of lumbar region, spondylosis without myelopathy or radiculopathy, lumbar region, lumbar spondylosis without myelopathy, and other intervertebral disc degeneration and displacement, lumbosacral and lumbar region. By circling "yes" he indicated that the incident appellant described was the competent medical cause of his injury. The Board has held that a checkmark or other marking on a form report, without supporting rationale, is of limited probative value, and is insufficient to establish the claim.[19] Dr. Bolla, however, failed to provide medical rationale explaining how the accepted employment incident on September 28, 2016 either caused or contributed to appellant's lumbar condition. As noted, a physician's opinion must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).[20] Again, the need for medical rationale is particularly important as the evidence of record indicates that appellant had a preexisting lumbar condition.[21] Thus, the Board finds that Dr. Bolla's November 21, 2016 reports are insufficient to establish that appellant sustained an employment-related injury on September 28, 2016.

[16] *Dennis M. Mascarenas,* 49 ECAB 215 (1997).

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

[18] *Victor J. Woodhams, supra* note 7.

[19] *See V.B.*, Docket No. 17-1847 (issued April 4, 2018).

[20] *Id.*

[21] *See supra* note 17.

Other diagnostic medical evidence of record, including the November 10, 2016 lumbar MRI scan, are of limited probative value and insufficient to establish the claim as they do not specifically address whether the diagnosed conditions were causally related to the September 28, 2016 employment incident. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[22]

The reports from Ms. Robbins, a physician assistant, and Ms. Dietsche, a registered nurse practitioner, are also of limited probative value on the issue of causal relationship. Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA.[23] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[24]

It is appellant's burden of proof to establish a diagnosed condition causally related to the accepted September 28, 2016 work incident. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.[25] As the medical evidence of record does not provide the necessary rationale based on a complete and accurate medical and factual background of appellant, explaining how and why the accepted September 28, 2016 work incident resulted in a diagnosed back condition, it is insufficient to establish an injury caused by this incident. Thus, the Board finds that appellant has failed to meet his burden of proof.[26]

On appeal counsel asserts that appellant does not need to rule out other causes of injury when the mechanism of injury is otherwise clear. For the reasons set forth above, the Board finds that appellant has not met his burden of proof to establish that his lumbar conditions are causally related to the accepted September 28, 2016 work incident.

[22] *Willie M. Miller*, 53 ECAB 697 (2002).

[23] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[24] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

[25] *Patricia J. Glenn*, 53 ECAB 159 (2001).

[26] The Board notes that the file contains a Form CA-16 authorization. A properly completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. On return of the case record OWCP should review the Form CA-16 to determine appellant's entitlement to medical expense. *See* 20 C.F.R. § 10.300(c); *Tracy P. Spillane*, 54 ECAB 608 (2003).

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 has not met his burden of proof to establish that his lumbar condition is causally related to the September 28, 2016 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 16, 2018
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board