

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

_____)	
H.R., Appellant)	
)	
and)	Docket No. 18-0640
)	Issued: December 6, 2018
U.S. POSTAL SERVICE, TRENTON)	
PROCESSING & DISTRIBUTION CENTER,)	
Trenton, NJ, Employer)	
_____)	

Appearances:
*Thomas R. Uliase, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 5, 2018 appellant, through counsel, filed a timely appeal from an October 19, 2017 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 expand the acceptance of his claim to include the additional lumbar conditions as causally related to the accepted August 8, 2016 employment injury.

FACTUAL HISTORY

On August 9, 2016 appellant, then a 62-year-old electronic technician, filed a traumatic injury claim (Form CA-1) alleging that he sustained a low back strain on August 8, 2016 when he bent over to fix a printer at work.³ He stopped work on October 9, 2016. OWCP accepted the claim for aggravation of lumbar strain and paid appellant wage-loss compensation and medical benefits on the supplemental rolls.

In a September 30, 2016 patient visit note, Dr. Thomas K. Bills, an attending orthopedic surgeon, noted appellant's chief complaint of lumbar radiculopathy. He discussed his examination findings and diagnosed lumbar radiculopathy. In an October 14, 2016 patient visit note, Dr. Bills noted that appellant was being reevaluated for his lumbar radiculopathy. Examination findings were provided and the diagnosis of lumbar radiculopathy was again noted. Dr. Bills related that appellant was currently performing temporary light-duty work with restrictions at the employing establishment due to back pain. He spoke to appellant's physical therapist and it was noted that he had plateaued with physical therapy. Dr. Bills asked appellant whether he could return to work and appellant responded no. He recommended obtaining an updated lumbar magnetic resonance imaging (MRI) scan, referring appellant for pain management, and considering epidural injections as appellant had a herniated disc in active radiculopathy.

In a prescription note dated October 14, 2016, Dr. Bills diagnosed back pain and referred appellant to Dr. Gautam H. Kothari, a Board-certified physiatrist. In an MRI scan order dated October 14, 2016, he requested a lumbar spine MRI scan to evaluate appellant's herniated nucleus pulposus and other intervertebral disc disorders, lumbar region.

In an October 27, 2016 patient visit note, Dr. Kothari related a history of the August 2016 work-related injury. He reported physical examination findings and reviewed the results of a 2014 lumbar MRI scan. Dr. Kothari diagnosed lumbar facet syndrome and lumbar disc disease from L3-4 through L5-S1. In an undated note he repeated his diagnoses and placed appellant off work beginning October 24, 2016.

OWCP, by development letter dated December 8, 2016, advised appellant that the medical evidence submitted was insufficient to establish that his newly diagnosed lumbar conditions were caused or aggravated by the accepted employment injury. It requested that he submit a medical

³ Appellant has two prior claims with OWCP. In a claim assigned File No. xxxxxxx564, OWCP accepted that appellant sustained an open wound of the scalp and postconcussion syndrome on March 21, 2005 after he walked into a low-hung air handler during a workplace drill exercise. Appellant later filed a claim for a back injury he sustained on May 11, 2008. OWCP assigned that claim File No. xxxxxx388. The record does not indicate OWCP's disposition of this claim. In a claim assigned File No. xxxxxx058, OWCP accepted that appellant sustained a sprain of the back, lumbar region on February 10, 2014. Appellant stopped work on February 10, 2014 and was released to return to light-duty work on March 24, 2014.

report from his attending physician including a history of the injury, examination findings, a diagnosis, and a rationalized opinion explaining how the reported work incident caused or aggravated his additional medical conditions. OWCP afforded appellant 30 days to submit the requested evidence.

In a note dated December 8, 2016, Dr. Kothari reported physical examination findings, reviewed the results of a November 29, 2016 lumbar MRI scan, and diagnosed bilateral L5 radiculopathy and L5-S1 spondylolisthesis. He reiterated his prior assessment of lumbar facet syndrome.

Dr. Bills, in a note dated December 6, 2016, again examined appellant and restated his diagnosis of lumbar radiculopathy.

By decision dated January 10, 2017, OWCP denied expansion of the acceptance of appellant's claim to include the additional lumbar conditions. It found that the medical evidence of record was insufficiently rationalized to establish that his newly diagnosed lumbar conditions were causally related to the accepted August 8, 2016 employment injury.

A January 4, 2017 lumbar electromyogram/nerve conduction velocity (EMG/NCV) study performed by Dr. Frank J. Colarusso, a Board-certified physiatrist, indicated that the study was most consistent with a peripheral neuropathy, peroneal neuropathy, and Charcot-Marie-Tooth (CMT) variant. Dr. Colarusso observed that an underlying chronic L5 radiculopathy without denervation could not be ruled out.

In a patient visit note dated January 9, 2017, Steven C. Kwasniewski, a certified physician assistant, discussed examination findings and diagnosed bilateral L5 radiculopathy, L5-S1 spondylolisthesis, and lumbar facet syndrome.

Dr. Kothari, in notes dated January 27, February 24, and March 24, 2017, reported examination findings, reiterated his diagnoses of bilateral L5 radiculopathy and L5-S1 spondylolisthesis.

In orders dated March 24 and May 2, 2017, Dr. Kothari requested physical therapy two to three times a week for four to six weeks to treat appellant's diagnosed bilateral L5 radiculopathy and L5-S1 spondylolisthesis.

In a March 8, 2017 patient visit note, Mr. Kwasniewski noted a history of the August 8, 2016 employment injury and again examined appellant. He diagnosed low back pain and radiculopathy following the August 8, 2016 employment injury.

Dr. Bills, in notes dated April 24 and May 22, 2017, again examined appellant and reiterated his prior diagnoses of lumbar strain, lumbar pain, and lumbar radiculopathy.

On June 15, 2017 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion to determine appellant's current disability status. In a June 30, 2017 report, Dr. Askin related a history that appellant sustained low back injuries in 1976 and 2008 at work. He also related a history of the 2014 and August 8, 2016 employment-related

back injuries. Dr. Askin noted appellant's current symptoms and medical history and reviewed the medical record. On physical examination, he reported essentially normal findings with the exception of sensitivity/pain in the left lower lumbar area that was not tender to touch and pain on range of motion testing and on straight leg raising on the left. Dr. Askin opined that appellant's accepted condition of aggravation of a lumbar strain had resolved. He explained that appellant's subjective complaints of lower back pain were not supported by his objective findings and review of diagnostic test results. Dr. Askin indicated that the EMG study suggested that he had a peripheral neuropathic problem that had nothing to do with work. He related that CMT disease was ordinarily a genetically determined condition. Dr. Askin further related that appellant did not have any clinical features of true lumbar radiculopathy at the present time as there was no atrophy, dermatomal sensory loss, clinical weakness, or even a true positive straight leg raising at the time he presented for this examination. He maintained that an alternative explanation for appellant's complaints was his underlying lumbar spine degenerative joint disease which caused him to experience back pain while bending over the wrong way and lifting in an awkward position or lifting something heavy. Dr. Askin further maintained that such pain was consistent with the natural history of degenerative disc disease which was for episodic backaches that ordinarily responded to baseline independent of any treatment. He advised that appellant had no lingering aggravation of his baseline condition. There was no evidence to support that his work-related condition was still active or causing any objective imperfection as he had no atrophy, clinical weakness, sensory abnormality, or even a true positive straight leg raising.

Dr. Askin observed that appellant had degenerative disc disease. He further observed that appellant had no acceleration of a preexisting condition. Appellant's accepted aggravation had clearly been temporary in nature as he no longer had any manifestations of the condition. Regarding appellant's prognosis, he related that to the extent that he observed proper body mechanics in the course and scope of expected employment activities, he should be able to avoid further episodes of back pain going forward. Dr. Askin noted that his physical therapy and epidural steroid injections had no proven efficacy and advised that such further medical treatment was not necessary as appellant had no lumbar radiculopathy or disc herniation. He concluded that he could return to his date-of-injury, limited-duty job, eight hours a day.

Mr. Kwasniewski, in notes dated July 10 and 21, 2017, again diagnosed lumbar strain and restated his prior assessment of lumbar radiculopathy.

On August 17, 2017 appellant, through counsel, requested reconsideration of the January 10, 2017 decision and submitted additional evidence. In an August 3, 2017 statement, appellant detailed the history of his August 8, 2016 injury and medical treatment. He noted that he had filed three prior claims for back injuries sustained at work.

In letters dated April 24 and August 3 and 16, 2017, Dr. Bills noted a history of his treatment of appellant, including his examination findings, and appellant's medical treatment. He again noted his prior diagnoses of lumbar strain and lumbar radiculopathy. Dr. Bills related that his diagnosis had not changed to lumbar facet syndrome. He maintained that appellant's accepted 2014 work-related lumbar injury was exacerbated by the August 8, 2016 employment injury. Dr. Bills opined that the exacerbation on August 8, 2016 resulted in a lumbar strain and lumbar radiculopathy, which had been unresponsive to physical therapy and epidural steroid injections. He advised that, as appellant remained symptomatic of his lumbar radiculopathy, further medical

treatment was required which included receiving medically necessary epidural injections performed by Dr. Kothari. In his August 16, 2017 letter, Dr. Bills related that his opinion on causal relationship was based on the fact that appellant had reported increased pain in his back and down his legs. He noted that appellant had previous back and leg pain and objective findings included the presence of paravertebral muscle spasm in the lumbar spine. Dr. Bills related that his neurological examination on initial evaluation was intact. He observed that appellant's repeated MRI scan performed subsequent to the August 8, 2016 work injury did not reveal a new herniated disc at any level or other new changes in comparison to a previously performed MRI scan. Dr. Bills also observed that he incorrectly noted that the EMG/NCV referenced in his previous report was performed on August 8, 2016 rather than January 4, 2017. He maintained that this study was consistent with a right-sided L5 lumbar radiculopathy. Dr. Bills referenced his prior report, noting that appellant had not responded well to conservative course of physical therapy and medications and that he had continuing worsening symptoms. He maintained that these symptoms precluded him from returning to work.

Dr. Bills, in a September 29, 2017 duty status report (Form CA-17) described clinical findings of back pain with radiculopathy. He diagnosed a lumbar spine injury due to his August 8, 2016 employment injury.

In a November 29, 2016 lumbar MRI scan report, Dr. Jeffrey J. Mathews, a Board-certified radiologist, provided an impression of chronic degenerative endplate changes at L5-S1. He found no lumbar spinal stenosis.

By decision dated October 19, 2017, OWCP reviewed the merits of appellant's claim, but denied modification of the January 10, 2017 decision. It found that the weight of the medical opinion evidence rested with the opinion of Dr. Askin who opined that appellant had not developed additional conditions causally related to the accepted August 8, 2016 employment injury.

LEGAL PRECEDENT

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁴ To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting causal relationship.⁵ Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.⁶ 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 nature of the relationship between the diagnosed condition and the specific employment factors identified

⁴ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁵ *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

⁶ *D.E.*, 58 ECAB 448 (2007); *Mary J. Summers*, 55 ECAB 730 (2004).

by the employee.⁷ Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.⁸

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish additional lumbar conditions causally related to the accepted August 8, 2016 employment injury.

OWCP accepted that appellant's accepted August 8, 2016 employment injury caused an aggravation of a prior lumbar strain. It relied on the June 30, 2017 report of the second opinion physician, Dr. Askin, to deny appellant's claim for additional lumbar conditions including bilateral L5 lumbar radiculopathy, lumbar facet syndrome, L5-S1 spondylolisthesis, and lumbar disc disease at L3-4 through L5-S1.

In a June 30, 2017 report, Dr. Askin reviewed the SOAF and the medical record. He noted appellant's history, which included back injuries sustained at work in 1976 and 2008 and the accepted February 10, 2014 and August 8, 2016 employment-related back injuries. Dr. Askin also noted his current symptoms and provided essentially normal physical examination findings with the exception of sensitivity/pain in the left lower lumbar area that was not tender to touch and pain on range of motion testing and on straight leg raising on the left. He attributed appellant's lumbar degenerative disc disease to his age. Dr. Askin explained that an EMG/NCV study suggested that he had a nonwork-related peripheral neuropathic problem and CMT, which was ordinarily a genetically determined condition. He further explained that appellant did not have clinical features of true lumbar radiculopathy as there was no atrophy, dermatomal sensory loss, clinical weakness, or even a true positive straight leg raising at the time of his examination. Dr. Askin found that the accepted aggravation of lumbar strain had resolved, and based on his examination findings and review of the EMG/NCV study, there was no evidence of lumbar radiculopathy. He concluded that appellant did not require further medical treatment. Dr. Askin opined that appellant could return to his date-of-injury limited-duty job on a full-time basis.

The Board finds that Dr. Askin's opinion represents the weight of the medical evidence in this case. Dr. Askin provided a detailed medical report reviewing appellant's medical treatment and the evidence of record. He unequivocally opined that appellant had not sustained lumbar radiculopathy as a result of the August 8, 2016 employment injury and provided a well-reasoned medical explanation supporting his findings. Dr. Askin's opinion was also based on an accurate background.⁹

In reports dated April 24 and August 3 and 16, 2017, he opined that appellant's 2014 work-related back injury was exacerbated by the August 8, 2016 work-related injury, which resulted in a consequential lumbar strain and lumbar radiculopathy and his disability for work. Dr. Bills

⁷ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (2005).

⁸ *V.W.*, 58 ECAB 428 (2007); *Ernest St. Pierre*, 51 ECAB 623 (2000).

⁹ *A.C.*, Docket No. 16-1670 (issued April 6, 2018); *N.P.*, Docket No. 15-1580 (issued September 1, 2016); *see also Melvina Jackson*, 38 ECAB 443 (1987).

maintained that his opinion on causal relationship was based on appellant's complaint of increased pain in his back and down his legs and objective findings that supported the presence of paravertebral muscle spasm in the lumbar spine. He noted that a repeat MRI scan that was performed subsequent to the August 8, 2016 work injury did not reveal a new herniated disc at any level or other new changes in comparison to a previously performed MRI scan. Dr. Bills also noted that the January 4, 2017 EMG/NCV was consistent with right-sided L5 lumbar radiculopathy. He maintained that appellant's continuing worsening of symptoms, which had not responded well to a conservative course of physical therapy and medications, precluded him from returning to work. The Board finds that, while Dr. Bills has provided an opinion that the August 8, 2016 employment injury contributed to appellant's lumbar strain and lumbar radiculopathy, he has not provided sufficient medical rationale in support of his opinion. The Board has held that a medical report is of no probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale.¹⁰ Dr. Bills failed to provide sufficient medical explanation of how appellant's diagnosed lumbar conditions and disability were a natural consequence of the August 8, 2016 employment injury.¹¹ His remaining reports addressed the above-noted diagnoses and appellant's disability from work, but again offered no opinion as to the cause of the diagnosed conditions and resultant disability. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹² Therefore, the Board finds that Dr. Bills' reports are insufficient to establish appellant's claim.

Similarly, Dr. Kothari's reports dated October 27, 2016 to March 24, 2017 and undated report are insufficient to establish appellant's burden of proof. He diagnosed lumbar facet syndrome, lumbar disc disease from L3-4 through L5-S1, bilateral L5 radiculopathy, and L5-S1 spondylolisthesis. Dr. Kothari also advised that appellant could not work on intermittent dates. The Board notes, however, that these reports are of no probative value with regard to establishing causal relationship because Dr. Kothari did not provide an opinion relative to causal relationship between the diagnosed conditions and the accepted August 8, 2016 employment injury.¹³

Further, the November 29, 2016 and January 4, 2017 diagnostic test results from Dr. Mathews and Dr. Colarusso, respectively, are also insufficient to establish the claim as none of these reports contained an opinion on causal relationship between the diagnosed lumbar conditions and the August 8, 2016 accepted aggravation of lumbar sprain. The Board has held that diagnostic studies lack probative value as they do not address whether the employment incident caused any of the diagnosed conditions.¹⁴ Thus, the Board finds that this evidence is insufficient to establish appellant's burden of proof.

¹⁰ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹¹ *S.A.*, Docket No. 09-2339 (issued July 22, 2010).

¹² See *supra* note 10.

¹³ *Id.*

¹⁴ *E.A.*, Docket No. 18-0796 (issued November 7, 2018); see also *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

Appellant also submitted reports from a certified physician assistant and physical therapists. The Board has held that neither physician assistants nor physical therapists are considered physicians as defined under FECA.¹⁵ As such, this evidence has no probative value and is insufficient to meet appellant's burden of proof.

Appellant has the burden of proof to establish that his additional diagnosed conditions were causally related to the accepted injury through the submission of rationalized medical opinion evidence.¹⁶ He has not submitted evidence from a physician who, based on an accurate factual history, found that he had additional lumbar conditions causally related to his August 8, 2016 work injury and supports his or her opinion with medical reasoning. Consequently, appellant has not met his burden of proof. An award of compensation may not be based on surmise, conjecture, speculation, or on the employee's own belief of causal relation.¹⁷

On appeal counsel contends that Dr. Askin's opinion is not entitled to the weight of the medical evidence as OWCP provided him with an incomplete and incorrect SOAF and leading questions. He asserts that the SOAF did not include a description of all of the work duties performed by appellant on August 8, 2016. Counsel also asserts that the questions noted the employing establishment's challenge to appellant's claim which suggested that appellant was careless and contributed to his own injury. The Board finds, however, that the SOAF accurately identified the work duties to which appellant attributed his accepted August 8, 2016 employment-related lumbar condition as set forth in his traumatic injury claim form. The Board further finds that the questions posed to Dr. Askin were appropriate. Dr. Askin was asked to provide his opinion on whether appellant had any current or additional conditions causally related to the accepted work injury based on examination, whether the accepted condition had resolved, and whether appellant could return to his limited-duty electronic technician position. The Board finds that Dr. Askin's report indicates that he relied appropriately on a review of appellant's history and findings on examination in forming his opinion.

Counsel further contends on appeal that, Dr. Bills' reports represent the weight of the evidence or alternatively that a conflict exists between Dr. Bills and Dr. Askin regarding whether appellant sustained additional lumbar conditions as a result of his August 8, 2016 work injury. He maintains that OWCP should have referred the case to a referee physician to resolve the conflict pursuant to 5 U.S.C. § 8123(a). As found above, however, Dr. Bills' opinion that appellant's additional lumbar conditions were causally related to the accepted August 8, 2016 employment-related injury was not sufficiently rationalized while Dr. Askin's opinion that appellant did not sustain further lumbar conditions as a result of his accepted work injury was sufficiently

¹⁵ 5 U.S.C. § 8101(2) provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. See *Sean O Connell*, 56 ECAB 195 (2004) (physician assistants); *Jennifer L. Sharp*, 48 ECAB 209 (1996). See also *Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

¹⁶ *Supra* note 4.

¹⁷ *C.B.*, Docket No. 17-1499 (issued July 25, 2018); *D.D.*, 57 ECAB 734 (2006).

rationalized and represented the weight of the medical opinion evidence. Thus, the Board finds that there is no conflict in medical opinion between the two physicians.

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 expand the acceptance of his claim to include the additional lumbar conditions as causally related to the accepted August 8, 2016 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the October 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 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