United States Department of Labor
Employees' Compensation Appeals Board

K.F., Appellant	)	
and	)	**Docket No. 17-1700**
	)	**Issued: February 12, 2018**
DEPARTMENT OF DEFENSE, EDUCATION ACTIVITY, Camp Lejeune, NC, Employer	)	

Appearances:
Daniel F. Read, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 1, 2017 appellant, through counsel, filed a timely appeal from a June 21, 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 a lumbar condition causally related to the accepted February 13, 2015 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.*

FACTUAL HISTORY

On February 20, 2015 appellant, then a 52-year-old custodial worker, filed a traumatic injury claim (Form CA-1) alleging that he injured his lower back in the performance of duty on February 13, 2015. He indicated that he was moving computers when he felt pain in his lower back and right leg. Appellant further indicated that a physician characterized it as an exacerbation of a prior back injury.[3] He stopped work on February 18, 2015 and returned to work on February 23, 2015.[4] Appellant received continuation of pay for his brief absence from work.

In a February 18, 2015 report, Dr. James Gargett, an attending Board-certified emergency medicine physician, indicated that appellant reported pain in his lower back, which radiated to his right lower extremity, after lifting computers on February 13, 2015. He diagnosed low back strain. Dr. Gargett noted that, considering appellant worked as a custodian and was not able to do desk work, he needed to rest at home for three days. He indicated, "This is exacerbation of prior injury to back."

In a duty status report (Form CA-17) dated February 18, 2015, Dr. Gargett listed the date of injury as February 13, 2015 and the mechanism of injury as moving computers. He provided a diagnosis due to injury of lumbar strain and indicated that appellant could return to regular work on February 23, 2015.

Beginning in July 2016, appellant submitted a number of additional medical reports in support of his claim for a February 13, 2015 work injury.[5]

In a June 2, 2015 report, Dr. Brian Battersby, Jr., an attending Board-certified orthopedic surgeon, noted that appellant presented complaining of low back pain due to an injury that occurred at work. He listed aggravating factors as bending and lifting. Dr. Battersby diagnosed degeneration of lumbar or lumbosacral intervertebral disc, lumbar sprain, lumbosacral spondylosis without myelopathy, and backache (unspecified). He advised appellant to return for follow-up care in six months.

In an October 6, 2015 report, Dr. Battersby again noted that appellant presented complaining of low back pain due to an injury that occurred at work. He diagnosed chronic pain

[3] Appellant previously injured his lower back in the performance of duty on August 20, 2009 (OWCP File No. xxxxxx682), October 31, 2012 (OWCP File No. xxxxxx987), and January 9, 2014 (OWCP File No. xxxxxx620). OWCP accepted each of the prior traumatic injury claims for lumbar sprain.

[4] Appellant returned to his regular work on February 23, 2015, but later began working modified duty.

[5] On July 7, 2016 appellant filed a claim for a recurrence of disability (Form CA-2a) beginning September 30, 2015 due to his February 13, 2015 work injury. He indicated that he was working with restrictions up until September 30, 2015 when he was told that the employing establishment was no longer able to accommodate him because he was a liability due to his repeated back injuries. Appellant advised that his medical condition had not changed and that his back continually hurt. In a July 7, 2016 letter, counsel argued that appellant's work stoppage in September 2015 constituted a recurrence of disability because the employing establishment sent him home due to "multiple previous back injuries." The Board notes that appellant's work stoppage in September 2015 is not the subject of the present appeal.

syndrome, degeneration of lumbar or lumbosacral intervertebral disc, lumbar sprain, and lumbosacral spondylosis without myelopathy. Dr. Battersby recommended that appellant undergo back surgery, but appellant did not wish to pursue surgery.

In a December 16, 2015 form report, Dr. Battersby noted that appellant could not lift over 25 pounds. In a December 23, 2015 letter, he indicated that he was currently treating appellant for a "low back work[ers'] comp[ensation] injury." Dr. Battersby described appellant's symptoms and advised that he placed appellant on a permanent restriction of lifting no more than 25 pounds.

In a July 25, 2016 development letter, OWCP requested that appellant submit additional factual and medical evidence within 30 days. Appellant did not respond.

In a September 13, 2016 decision, OWCP denied appellant's claim for an alleged February 13, 2015 employment injury. It accepted that the incident occurred as alleged and that a medical condition had been diagnosed. However, OWCP denied appellant's traumatic injury claim finding the evidence insufficient to establish that the diagnosed medical condition was causally related to the accepted employment incident.

Appellant submitted treatment notes, dated April 2 and June 3, 2014, in which Dr. Battersby detailed his back symptoms. Dr. Battersby diagnosed several back conditions, including degeneration of lumbar or lumbosacral intervertebral disc, lumbar sprain, backache (unspecified), and lumbosacral spondylosis without myelopathy. In an April 7, 2016 report, he noted that appellant presented complaining of low back pain due to an injury that occurred at work.[6]

In a September 16, 2016 letter, counsel referenced Dr. Battersby's reports dated between 2014 and 2016 and asserted that these reports supported that appellant's back condition was essentially unchanged throughout this period and that there were "no acute new reports of injury."

Appellant disagreed with the September 13, 2016 decision and requested a telephone hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on May 10, 2017, counsel argued that the present claim constitutes a flare-up of appellant's prior injury claim from January 9, 2014 (OWCP File No. xxxxxx620). He asserted that the case file for (OWCP File No. xxxxxx620) should be combined with the case file for the present claim (OWCP File No. xxxxxx296) and that the present claim should be accepted for chronic lumbar sprain.

Appellant testified that on February 13, 2015 he was handling and distributing computers that were in boxes weighing around 20 pounds. He delivered the boxes on dollies and lifted the boxes off of the dollies to place them in classrooms. Appellant indicated that he lifted approximately 25 boxes on February 13, 2015.[7] The hearing representative noted that he had

[6] This report appears to be missing one or more pages.

[7] Appellant also asserted that the employing establishment sent him home on September 30, 2015 because he was a liability due to his prior work injuries. He indicated that he did not return to work after September 30, 2015.

filed a notice of recurrence (Form CA-2a) for a claimed recurrence of disability beginning September 30, 2015, but she advised him that his initial claim for a February 13, 2015 employment injury must first be adjudicated before the recurrence of disability claim could be considered.[8]

In a June 21, 2017 decision, OWCP's hearing representative affirmed the September 13, 2016 decision. The hearing representative accepted the occurrence of an employment incident on February 13, 2015 in the form of lifting/handling boxes filled with computers and pushing carts loaded with these boxes, but she found that appellant failed to submit medical evidence establishing that his diagnosed lumbar conditions were causally related to the accepted employment incident. She indicated that, while the January 9, 2014 employment injury and the claimed February 13, 2015 employment injury both involved the lumbar spine, they still were considered separate and distinct injuries. The hearing representative noted that the fact that appellant had an approved claim from 2014 for a lumbar sprain/strain did not automatically mean that the instant case should be approved for a low back condition without medical evidence to support it. She further indicated that there were no provisions under FECA for approving a recurrence of disability when the original claim is denied.

LEGAL PRECEDENT

A claimant seeking benefits under FECA[9] 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.[10]

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.[11] The second component is whether the employment incident caused a personal injury.[12] An employee may establish that an injury occurred in the performance of duty

[8] After the hearing, appellant submitted a May 3, 2017 magnetic resonance imaging scan of his lumbosacral and lower thoracic spine showing facet arthropathy and mild spondylosis.

[9] *Supra* note 2.

[10] 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

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

[12] *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.*

as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[13]

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.[14]

ANALYSIS

Appellant filed a traumatic injury claim alleging that he sustained a work-related injury on February 13, 2015. He claimed that he was lifting/handling boxes filled with computers and pushing carts loaded with these boxes when he felt pain in his low back which radiated into his right lower extremity. OWCP denied appellant's claim for a February 13, 2015 work injury in decisions dated September 13, 2016 and June 21, 2017. It accepted the occurrence of an employment incident on February 13, 2015 as alleged and that a medical diagnosis had been provided. However, OWCP found that appellant failed to submit medical evidence establishing a causal relationship between the diagnosed lumbar condition(s) and the accepted employment incident.

The Board finds that appellant has not met his burden of proof to establish an injury due to the accepted February 13, 2015 employment incident.

In a February 18, 2015 report, Dr. Gargett indicated that appellant reported pain in his lower back, which radiated to his right lower extremity, after lifting computers on February 13, 2015. He diagnosed low back strain. Dr. Gargett noted that, considering, appellant worked as a custodian and was not able to do desk work, he needed to rest at home for three days. He indicated, "This is exacerbation of prior injury to back." In a duty status report dated February 18, 2015, Dr. Gargett listed the date of injury as February 13, 2015 and the mechanism of injury as moving computers. He provided a diagnosis due to injury of lumbar strain and indicated that appellant could return to regular work on February 23, 2015.

The Board notes that the submission of these reports do not establish appellant's claim for a February 13, 2015 work injury. While Dr. Gargett suggested a connection between moving computers on February 13, 2015 and the diagnosed lumbar strain, his reports are of limited probative value because he did not provide adequate medical rationale in support of his opinion. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how an employment activity could have caused or aggravated a medical condition.[15] Dr. Gargett did not describe the February 13, 2015 employment incident in any detail or explain how it could have caused the diagnosed medical

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

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

[15] *See Y.D.*, Docket No. 16-1896 (issued February 10, 2017); *D.R.*, Docket No. 16-0528 (issued August 24, 2016).

condition. His reports are of limited probative value on the relevant issue of this case for the further reason that he did not provide a detailed factual and medical history.[16]

In June 2 and October 6, 2015, and April 7, 2016 reports, Dr. Battersby noted that appellant presented complaining of low back pain due to an injury that occurred at work. In his June 2 and October 6, 2015 reports, he diagnosed such conditions as degeneration of lumbar or lumbosacral intervertebral disc, lumbar sprain, lumbosacral spondylosis without myelopathy, backache (unspecified), and chronic pain syndrome. However, the submission of these reports do not establish appellant's claim for a February 13, 2015 work injury. Dr. Battersby's reports are of no probative value on causal relationship because he did not provide any opinion on the cause of the diagnosed conditions.[17]

On appeal, counsel argues that the present claim constitutes a flare-up of appellant's prior employment injury from January 9, 2014 (OWCP File No. xxxxxx620). He asserts that the case file for (OWCP File No. xxxxxx620) should be combined with the current case record (OWCP File No. xxxxxx296) and that the present claim should be accepted for a chronic lumbar sprain. The Board notes, however, that counsel has not adequately articulated why combining these case files would be appropriate in the present case. As noted by OWCP's hearing representative in her June 21, 2017 decision, appellant's January 9, 2014 employment-related traumatic injury is a separate and distinct injury from his claimed February 13, 2015 traumatic injury, and therefore, combining the case files would not be necessary to render a reasoned decision regarding his claim for a February 13, 2015 injury.[18]

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 a lumber condition causally related to the accepted February 13, 2015 employment incident.

[16] *See supra* note 12.

[17] *See Charles H. Tomaszewski*, 39 ECAB 461 (1988) (finding that medical evidence which does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship). In December 16 and 23, 2015 reports, Dr. Battersby indicated that appellant could not lift more than 25 pounds, but he did not indicate that this restriction was necessitated by a February 13, 2015 work injury. Appellant also submitted reports of Dr. Battersby from 2014, but these reports are not relevant to the injury that was alleged to have occurred on February 13, 2015.

[18] *See supra* note 14 at Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5 (June 2011).

ORDER

IT IS HEREBY ORDERED THAT the June 21, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 2018
Washington, DC

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

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

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