United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 17-1838**
	)	**Issued: July 17, 2018**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, L.B. PEARSON INTERNATIONAL AIRPORT Toronto, Canada, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 29, 2017 appellant, through counsel, filed a timely appeal from a May 16, 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.

[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 has met his burden of proof to establish an occupational disease causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On July 11, 2016 appellant, then a 37-year-old U.S. customs and border patrol officer, filed an occupational disease claim (Form CA-2) alleging that, beginning May 17, 2015, he developed an acute exacerbation of his lumbosacral symptoms which he attributed to working a fast-paced schedule with less frequent standing and position breaks and working beyond scheduled lunch breaks due to staffing shortages. OWCP assigned the occupational disease claim File No. xxxxxx289.

On May 17, 2015 appellant filed a traumatic injury claim (Form CA-1) alleging that on that day he injured his back when he attempted to sit in a chair which broke. Under File No. xxxxxx932 OWCP accepted the claim for thoracic or lumbosacral neuritis or radiculitis, lumbar sprain, and lumbago. Appellant received compensation for temporary total disability until he returned to work on November 16, 2015 in a full-time limited-duty capacity. On December 11, 2015 he began working a reduced schedule of three days a week.[3]

By development letter dated July 28, 2016, OWCP advised appellant of the factual and medical evidence needed to establish his claim. It noted that he should submit a rationalized medical opinion explaining how his limited-duty assignment contributed to or aggravated his medical condition. OWCP afforded appellant 30 days to submit the requested information.

In a July 21, 2016 report, Dr. Rogers reviewed a July 7, 2016 magnetic resonance imaging (MRI) scan of the lumbar spine and diagnosed left lumbar disc herniation at L4-L5 with compression of the thecal sac greater on left side. He noted that appellant indicated that he was able to work every other day. Dr. Rogers continued appellant on his previous work restrictions of working no more than eight hours a day three days a week.

A copy of the July 7, 2017 MRI scan of appellant's lumbar spine noted a slight interval increase in size of broad-based disc herniation L4-L5.

In an August 25, 2016 report, Dr. Anthony M. Leone, a Board-certified orthopedic surgeon, opined that appellant's L5-S1 disc derangement with disc protrusion/herniation and proposed discectomy was causally related to the accepted May 17, 2015 employment injury. He further opined that, based on the size of the herniation, which had increased, appellant could not

[3] On February 5, 2016 appellant filed a Form CA-2a, claiming a recurrence of disability beginning December 11, 2015. By decision dated March 11, 2016, OWCP denied the recurrence claim as the medical evidence of record did not support increased disability due to the accepted condition. It indicated that the recurrence date of December 11, 2015 corresponded with a December 11, 2015 report from Dr. Roger W. Rogers, an osteopath and orthopedic surgeon, who indicated that appellant was proceeding with lumbar partial discectomy surgery, which had not been determined to be work related.

return to full duty until he had surgery to remove the herniation. Dr. Leone provided work restrictions.

By decision dated August 29, 2016, OWCP denied appellant's occupational disease claim. It found that appellant had not identified or substantiated the alleged employment factors for the claimed new injury. OWCP also noted that there was no medical evidence submitted which established that a diagnosed medical condition was causally related to new work factors.

On September 9, 2016 counsel requested a telephonic hearing with an OWCP hearing representative. The telephonic hearing was held on April 4, 2017. During the hearing, appellant testified that he returned to light-duty full-time work on November 16, 2015 following his May 17, 2015 employment-related traumatic injury. The modified position was in Toronto, Canada and he was paid a housing allowance to offset the lower salary. Appellant stated that he had to return to work to maintain eligibility for the housing allowance. He indicated that his physician reduced his hours to three days a week in December 2015. Appellant stated that OWCP denied his claim for wage-loss compensation for two days a week in its March 11, 2016 recurrence decision. He indicated that he attributed his occupational disease claim to long days of standing, frequent reaching, bending, lifting, and searching travelers' baggage and possessions. Appellant testified that his work duties restricted his ability to move around and adjust positions as needed. He noted that he worked eight-hour days when he returned to work in November 2015. Appellant stated that he used his private insurance for his December 22, 2015 back surgery. Three weeks after the surgery, he returned to light duty and was released to full duty five weeks later.

September 23, 2016 electromyogram and nerve conduction velocity (EMG/NCV) studies showed findings indicative of a bilateral L5 radiculopathy.

In a September 16, 2016 report, Dr. Daniella Grandrimo, a Board-certified internist also Board-certified in hospice and palliative medicine, reviewed appellant's medical history and his position description. She opined that appellant was unable to safely perform all the duties of his position.

In a January 3, 2017 report, Dr. Michael R. Stoffman, a Board-certified neurosurgeon, indicated that appellant was able to return to work on January 16, 2017 in a light-duty capacity with restrictions following his left L4-L5 miscrodiscectomy of December 22, 2016. In a February 8, 2017 report, he related that appellant could return to work with no restrictions on February 20, 2017. In an April 12, 2017 report, Dr. Stoffman noted that appellant had returned to full-duty work. He diagnosed other intervertebral disc displacement, lumbar region, and radiculopathy, lumbar region causally related to the May 17, 2015 work injury. Dr. Stoffman indicated that appellant should continue his activity level as his pain would continue to improve with time.

By decision dated May 16, 2017, OWCP's hearing representative affirmed OWCP's August 29, 2016 decision, as modified. The hearing representative found that appellant had established fact of injury as he had substantiated the implicated employment factors. However, the claim remained denied because the medical evidence of record was insufficient to establish that appellant's repetitive employment duties caused or contributed to an occupational disease. The hearing representative additionally noted that, since appellant's May 17, 2015 traumatic back

injury had been referenced in the present claim, the current claim should be administratively combined with OWCP File No.xxxxxx289.[4]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[5] 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 and 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 or specific condition for which compensation is claimed is causally related to the employment injury.[6]

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."[7] 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.

Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue.[8] 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.[9] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by

[4] OWCP administratively combined the files, with File No. xxxxxx289, the occupational disease claim, serving as the master file number.

[5] *Id.*

[6] *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

[7] 20 C.F.R. § 10.5(q).

[8] *Robert G. Morris*, 48 ECAB 238 (1996).

[9] *Victor J. Woodhams*, 41 ECAB 345, 352 (1989)

medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).[10]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an occupational disease causally related to the accepted factors of his federal employment.

OWCP accepted appellant's May 17, 2015 traumatic injury claim, File No. xxxxxx932, for thoracic or lumbosacral neuritis or radiculitis, lumbar sprain, and lumbago. Appellant eventually returned to light-duty work and then part-time work. He was subsequently diagnosed with a herniated disc at L4-L5, which several doctors opined was due to the May 17, 2015 employment-related traumatic injury and caused the need for the L5-S1 surgery, which appellant underwent on December 22, 2016. OWCP, however, did not accept the condition of herniated disc at L4-L5 and denied authorization of the surgery.

Appellant subsequently filed the current occupational disease claim. He claimed that the acute exacerbation of his lumbosacral symptoms began in May 2015 as a result of standing, frequent reaching, bending, lifting, and searching travelers' baggage and possessions. Appellant noted that he worked eight-hour workdays in November 2015. OWCP denied the occupational disease claim as the medical evidence failed to provide sufficient medical rationale which explained how the accepted employment factors resulted in the diagnosed conditions.

A review of the medical evidence submitted indicates that appellant's physicians have either attributed appellant's herniated disc and his other lumbar conditions to his traumatic injury claim under OWCP File No. xxxxxx932 or failed to provide an opinion which discussed how appellant's limited-duty assignment caused or contributed to his back condition and which explained the nature and extent of the contribution. Drs. Stoffman, and Leone only noted the May 17, 2015 employment injury. Drs. Rogers and Grandrimo did not provide an opinion regarding the cause of appellant's diagnosed conditions. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition it is of limited probative value on the issue of causal relationship.[11] Additionally, none of the medical evidence differentiates the objective findings attributable to the occupational disease claim from those attributable to the traumatic injury, or which differentiates between the effects of the employment-related injury and the preexisting condition. 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.[12] Thus, these reports are insufficient to establish appellant's claim.

[10] *Id.*

[11] *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).

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

OWCP also received diagnostic test reports. While these reports provided medical diagnoses, they are of limited probative value as there is no opinion provided regarding the cause of appellant's diagnosed conditions.[13]

Appellant's own belief that his return to work exacerbated his back condition which resulted in surgery is insufficient, by itself, to establish causal relationship.[14] As noted, the issue of causal relationship is a medical one and must be resolved by probative medical opinion from a physician.[15] The Board thus finds that appellant has not met his burden of proof to establish his claim.

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.

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 an occupational disease causally related to the accepted factors of his federal employment.

[13] *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).

[14] 20 C.F.R. § 10.115(e); *Phillip L. Barnes*, 55 ECAB 426, 440 (2004).

[15] *See Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 17, 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