

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

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| W.G., Appellant |) | |
| |) | |
| and |) | Docket No. 17-0529 |
| |) | Issued: March 22, 2018 |
| DEPARTMENT OF HOMELAND SECURITY, |) | |
| FEDERAL EMERGENCY MANAGEMENT |) | |
| AGENCY, Washington, DC, Employer |) | |
| |) | |

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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 10, 2017 appellant, through counsel, filed a timely appeal from a December 7, 2016 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 establish a work-related injury to his right index finger on July 13, 2015.

FACTUAL HISTORY

On July 28, 2015 appellant, then a 64-year-old disaster survivor assistant, filed a traumatic injury claim (Form CA-1) alleging that on July 13, 2015 he sustained injury to the index finger of his right hand while in the performance of duty. He indicated that on the afternoon of July 13, 2015 his right index finger became painful and his condition worsened through that afternoon and evening. Appellant noted that he went to the emergency room that evening, but the injury was not deemed identifiable by the emergency room physician.³ He stopped work on July 13, 2015.

In a July 19, 2015 report, Dr. Scott T. Croft, an attending Board-certified orthopedic surgeon, noted that appellant had a chief complaint of right index finger infection. He indicated that appellant reported having pain in his right index finger several weeks ago over the dorsum of the hand between the metacarpophalangeal joint and distal interphalangeal joint. Appellant also reported that he scraped the area after the onset of pain. Dr. Croft noted that appellant was seen the prior day in the emergency room and that the pain, swelling, and redness of the right index finger had increased since then. He provided an impression of right index finger infection and noted his concern that appellant had lymphangitis.

In a development letter dated August 6, 2015, OWCP requested that appellant submit additional factual and medical evidence to support his claim.

In a September 1, 2015 statement, appellant indicated that, beginning on July 13, 2015, he worked throughout the day in the small towns of Lusk and Manville, Wyoming. He noted that he went door to door, visiting residences and businesses to help get disaster survivors registered with the employing establishment so that they could apply for financial assistance due to damage caused by flooding. Appellant advised that these premises were not in pristine condition and he posited that “damaged homes and debris provide excellent places for dangerous species of spiders to thrive.” To get to the survivors, he walked through previously flooded and otherwise damaged areas to arrive at the homes and businesses. Appellant indicated that this constituted a work factor which made the job more injury-prone than a desk job. He noted that, while he did not remember the moment of getting bitten by a spider or other creature, he did remember that his right index finger began hurting so much during that workday that he went to the emergency clinic in Lusk, Wyoming, to check out the problem.

In an August 20, 2015 report, Dr. Croft noted that when he first encountered appellant he had marked swelling over the right index finger metacarpophalangeal joint and it was unclear whether this swelling was due to an insect bite, infection, or gout. He discussed the findings of a magnetic resonance imaging (MRI) scan and the surgical treatment provided on July 21, 2015 in the form of debridement and exploration of the wound/infection area. Dr. Croft noted in

³ Appellant indicated that he was prescribed steroids to reduce swelling and that when he woke up on July 15, 2015 the finger was considerably swollen and throbbing.

conclusion, “It is my medical opinion that the patient’s condition was solely and directly related to his employment. Appellant had no other injury or preexisting condition that impacted this finger infection.” Dr. Croft indicated that appellant might have sustained an insect bite while in the field which then became secondarily infected with bacteria, although he added that this could not be known for certain. He indicated that appellant might also have sustained a minor cut or abrasion to the finger or a sliver in the finger while in the field in Wyoming that then developed into a complex infection.

In his report dated August 31, 2015, Dr. Jeffrey Y. Liang, an attending Board-certified internist, indicated that appellant was a patient of his who reported to have sustained a spider bite to his right hand while working in Wyoming in July 2015. He noted that appellant was transferred back to Peoria, IL, under his care, and was hospitalized from August 14 to 20, 2015. Dr. Liang noted that appellant was on intravenous antibiotics for treatment of a Methicillin-resistant Staphylococcus aureus (MRSA) infection and now had a bone infection which was confirmed by x-ray testing. He indicated that, due to these complications and the fact that he was on intravenous antibiotics, appellant was unable to work, at least until November 30, 2015.

Appellant also submitted extensive documents regarding his hospitalization in July 2015, including the findings of bloodwork and diagnostic testing.

By decision dated September 14, 2015, OWCP denied appellant’s claim for a work-related injury on July 13, 2015 noting that he did not submit sufficient evidence in support of his claim.⁴

Appellant requested a telephone hearing with a representative of OWCP’s Branch of Hearings and Review, which was held on June 8, 2016.

Appellant submitted a July 5, 2016 report in which Dr. Liang noted that appellant presented to his office on August 10, 2016 with a wound to his right hand that he sustained while in Wyoming for work. Dr. Liang indicated that appellant was initially treated in the emergency room in Lusk, Wyoming on July 13, 2015. He advised that, by the time he saw him, appellant had lost a great deal of tissue and the wound had been cultured positive for MRSA, a serious infection that was difficult to treat. Dr. Liang noted, “In my opinion, this wound could be the result of an insect bite, but I have no way of knowing if that was the cause. Spider bites can cause tissue to slough, and a secondary infection with MRSA could occur. I just cannot say that a spider bite was the cause when the spider was not seen.”

By decision dated July 28, 2016, OWCP’s hearing representative affirmed the September 14, 2015 decision denying appellant’s claim for a work-related injury on July 13, 2015. In denying appellant’s claim, he indicated that the medical reports of record contained speculative opinions regarding the cause of appellant’s right index finger injury. The hearing representative noted, “Although the evidence of record establishes that the claimant suffered from a finger

⁴ OWCP indicated that an employment factor had been established, but did not identify the specific employment factor that it found had been established. It noted that appellant did not submit sufficient medical evidence to establish his claim.

infection which could have been caused by a spider bite, the evidence of record does not establish that he sustained an injury causally related to his employment on July 13, 2015.”

Appellant requested reconsideration of his claim and submitted additional evidence in support thereof. In an e-mail dated July 8, 2016, Dr. Croft indicated that he was the treating orthopedic surgeon for appellant. He noted that, as to the causation, there is no way to determine whether this infection was caused by an insect bite or another invasive action such as a cut or a sliver. Dr. Croft noted that, if one assumes that the patient did sustain a spider bite, it is reasonable to assume to a reasonable degree of medical certainty that this type of severe infection could have resulted.

By decision dated December 7, 2016, OWCP denied modification of the July 28, 2016 decision. It noted that the medical evidence of record did not contain a well-rationalized medical opinion from a treating physician based on an accurate and complete factual and medical background establishing that appellant’s right index finger infection was causally related to his employment on July 13, 2015.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim 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 and/or specific condition for which compensation is claimed are causally related to the employment injury.⁵ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.⁷ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁸

⁵ C.S., Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989). A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas an occupational disease refers to an injury produced by employment factors which occur or are present over a period longer than a single workday or work shift. 20 C.F.R. §§ 10.5 (q), (ee); *Brady L. Fowler*, 44 ECAB 343, 351 (1992).

⁷ *Julie B. Hawkins*, 38 ECAB 393 (1987). An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee’s statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

⁸ *John J. Carlone*, 41 ECAB 354 (1989).

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 by the claimant.⁹

ANALYSIS

On July 28, 2015 appellant filed a traumatic injury claim alleging that on July 13, 2015 he sustained injury to the index finger of his right hand. He indicated that in the afternoon of July 13, 2015 the index finger of his right hand became painful and his condition worsened through the afternoon and evening, at which point he visited the emergency room. Appellant noted that the condition of his right index finger became progressively worse, including becoming infected with MRSA, and that he had to undergo surgical intervention. OWCP denied appellant's claim for a July 13, 2015 injury noting that he did not submit a nonspeculative medical report relating his right index finger condition to specific work factors.

The Board finds that appellant did not meet his burden of proof to establish a work-related injury to his right index finger on July 13, 2015. Appellant submitted medical reports positing several different possible causes for his infected right index finger. However, all of these reports are of limited probative value with respect to appellant's claimed July 13, 2015 injury because they are speculative and equivocal with respect to the cause of his right index finger condition. The Board has held that an opinion which is equivocal or speculative is of limited probative value regarding the issue of causal relationship.¹⁰

In an August 20, 2015 report, Dr. Croft noted, "It is my medical opinion that the patient's condition was solely and directly related to his employment. He had no other injury or preexisting condition that impacted this finger infection." However, Dr. Croft rendered this opinion equivocal in nature when he proceeded to speculate about the cause of appellant's right index finger condition. He indicated that appellant might have sustained an insect bite while in the field which then became secondarily infected with bacteria, although he added that this could not be known for certain. Dr. Croft noted that appellant might also have sustained a minor cut or abrasion to the finger or a sliver in the finger while in the field in Wyoming that then developed into a complex infection.

The equivocal and speculative nature of Dr. Croft's opinion on causal relationship is also expressed in an e-mail dated July 8, 2016. Dr. Croft indicated that, as to causation, there is no way to determine whether appellant's finger infection was caused by an insect bite or another invasive action such as a cut or a sliver. He noted that, if one assumes that the patient did sustain a spider bite, it is reasonable to assume to a reasonable degree of medical certainty that this type of severe infection could have resulted.

⁹ See *I.J.*, 59 ECAB 408 (2008); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

¹⁰ See *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956).

In a July 5, 2016 report, Dr. Liang noted that appellant presented to his office on August 10, 2016 with a wound to his right hand that he sustained while in Wyoming for work. He indicated, “In my opinion, this wound could be the result of an insect bite, but I have no way of knowing if that was the cause. Spider bites can cause tissue to slough, and a secondary infection with MRSA could occur. I just cannot say that a spider bite was the cause when the spider was not seen.” This report also would not establish appellant’s claim for a July 13, 2015 work injury given its speculative and equivocal nature.

On appeal counsel argues that appellant’s claim for a July 13, 2015 work injury should be accepted under the principle of “neutral risk” as delineated in cases such as *Doyle W. Ricketts*.¹¹ In this case, the Board noted that Professor Larson, in his treatise *The Law of Workers’ Compensation*, had identified three types of risks: risks distinctly associated with the employment; risks personal to the claimant; and “neutral risks,” *i.e.*, risks having no particular employment or personal character. He further indicated that harms from the first risk are universally compensable and those from the second are universally noncompensable; harms from the third risk are the subject of controversy in modern compensation law but there is increased acceptance for finding an injury arose in the performance of duty when a condition of employment put the claimant in a position to be injured by the neutral risk.¹² The Board also noted in *Doyle W. Ricketts* that it has applied the positional risk doctrine, and has held that an injury arising in the course of employment from a neutral risk is compensable. The Board further noted that there are cases that a claimant could not identify the precise mechanism of injury, but the harm appeared to have been distinctly associated with the employment, rather than one that arose from a purely neutral risk and, therefore, the injury was of the type generally held to be compensable.¹³ With respect to the claimant in *Doyle W. Ricketts*, his claimed work injury was covered because the harm he had experienced appeared to have been distinctly associated with his employment in that he noticed a stinging sensation in the area of the claimed injury while at work, experienced apparent after effects shortly thereafter, and was later diagnosed as having a spider bite.¹⁴

The Board finds that the above-described coverage under the “neutral risk” theory is not applicable to the circumstances of appellant’s case. Coverage under this theory is dependent on some type of reasonably clear linkage between the neutral risk and the employment. There is no such indication in appellant’s case that the harm he encountered was distinctly associated with his employment. For example, appellant did not provide any indication that he observed spiders or other possible infecting creatures around the time he first felt pain in his right index finger. Nor did he indicate that he felt some acute stabbing pain or stinging sensation as might be expected from a spider bite or some other invasive action into the skin which could lead to infection, such as being pricked by a sliver or sustaining a cut. In the absence of such a link to the employment, appellant would have encountered a purely neutral risk which would not be covered under FECA.

¹¹ Docket No. 95-0435 (issued November 6, 1996).

¹² See A. Larson, *The Law of Workers’ Compensation*, sections 7.00, 7.30 (2016).

¹³ See *supra* note 11.

¹⁴ *Id.*

The Board finds that appellant has not submitted sufficient medical evidence relating his claimed right index finger condition to specific work factors and thus he has not met his burden of proof to establish his claim for a July 13, 2015 work injury.

Appellant may submit additional 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 did not meet his burden of proof to establish a work-related injury to his right index finger on July 13, 2015.

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 22, 2018
Washington, DC

Christopher J. Godfrey, 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