United States Department of Labor
Employees' Compensation Appeals Board

J.O., Appellant	)	
and	)	**Docket No. 18-0057**
	)	**Issued: May 29, 2018**
OFFICE OF PERSONNEL MANAGEMENT, BOYERS HUMAN RESOURCES SERVICES TEAM, Boyers, PA, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 9, 2017 appellant, through counsel, filed a timely appeal from a July 31, 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 met his burden of proof to establish that his diagnosed lumbar conditions were causally related to the accepted November 20, 2014 employment incident.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 26, 2014 appellant, then a 50-year-old legal administrative specialist filed a claim for traumatic injury (Form CA-1) alleging that on November 20, 2014, while he was in the employing establishment nurse's office, he fell over a chair while putting on his left boot. He indicated that he injured his left leg, knee, and back.

By decision dated March 27, 2015, OWCP denied the claim finding that appellant had not established that the incident occurred as alleged. Appellant, through counsel, requested a hearing before an OWCP hearing representative on April 6, 2015. By decision dated January 4, 2016, OWCP's hearing representative found that appellant had not established that the alleged injury occurred in the performance of duty.

In a November 26, 2014 attending physician's report (Form CA-20), Jason R. Fantini, P.A. a certified physician assistant indicated that appellant's lumbar spinal pain secondary to discogenic syndrome with lower extremity radiculopathy had been exacerbated since he tripped over a chair on November 20, 2014. He opined that appellant's back and left leg pain had been aggravated by the employment incident.

Reports from Dr. Mark R. LoDico, a Board-certified anesthesiologist, dated December 3, 2014, and January 29 and February 17, 2015 were received. In the December 3, 2014 report, Dr. LoDico diagnosed lumbar and cervical spine pain, as well as lower extremity radiculopathy. He noted that appellant had a history of back surgeries in 1990 and 2004 and had an intrathecal morphine pump implanted in 2004. X-rays of appellant's back and hip did not show any fractures. Dr. LoDico noted that appellant had requested a month off work, but was only approved for 10 days of leave by the employing establishment. In a February 17, 2015 report, Dr. LoDico indicated that the February 5, 2015 magnetic resonance imaging (MRI) scan showed a mild flattening of the anterior subarachnoid space at L3-4, and, at L4-5, a mild-to-moderate posterior protrusion of the disc greater on the right with foraminal encroachment bilaterally. Overall, he opined that the MRI scan was similar to the prior MRI scan of February 3, 2014. At L5-S1 a left broad-based disc and spur complex with mild left foraminal encroachment and slight posterior displacement of the left S1 nerve root was seen. Again, Dr. LoDico opined that the MRI scan was unchanged from prior MRI scan of February 3, 2014. An impression of lumbar spine pain with features of discogenic syndrome, lower extremity radiculopathy was provided. A copy of the February 5, 2015 MRI scan was also submitted.

[3] Docket No. 16-0636 (issued October 18, 2016).

On March 5, 2015 Dr. LoDico countersigned the November 26, 2014 Form CA-20 from Mr. Fantini, his certified physician assistant. He also indicated, in a March 5, 2015 work capacity evaluation (Form OWCP-5c), that appellant was able to work with restrictions and a functional capacity evaluation (FCE) would be performed.

In a March 10, 2015 report, Dr. David M. Sack, a Board-certified internist and gastroenterologist, acting as an employing establishment physician, reviewed appellant's claim. He indicated that the fall appeared to have occurred as a result of a personal medical issue and should be considered as incidental, therefore not related to his employment. Dr. Sack noted that appellant had a long-standing and severe lumbar condition that had required an indwelling morphine pump for 10 years and that there were no changes on the most recent MRI scan when compared to one done a year ago. Thus, he concluded that there was no aggravation or exacerbation. Dr. Sack also noted that appellant's claim appeared to be based primarily on pain.

In an October 1, 2015 report, Dr. Richard Plowey, a Board-certified neurologist and pain specialist, diagnosed lumbar radiculopathy and pain due to tripping over a chair in the nurse's office.

In a November 20, 2015 statement, the employing establishment asserted that Dr. Plowey's report failed to explain how appellant's medical condition changed/worsened due to the alleged work injury on November 20, 2014.

On February 18, 2016 appellant filed an appeal with the Board from an OWCP decision dated January 4, 2016 which had denied on the basis of fact of injury. By decision dated October 18, 2016, the Board found that appellant's November 20, 2014 fall over a chair in the employing establishment's nurse's office did in fact occur in the performance of duty under the personal comfort doctrine. The case was remanded to OWCP to address the issue of causal relationship between the accepted November 20, 2014 employment incident and appellant's alleged medical conditions. Following the Board's decision, no additional evidence was received.

By decision dated December 16, 2016, OWCP denied appellant's traumatic injury claim. It found that the medical evidence submitted was insufficient to establish causal relationship between appellant's conditions of lumbar discogenic syndrome and lower extremity radiculopathy and the employment incident.

On December 27, 2016 OWCP received appellant's December 23, 2016 request for a telephonic hearing before an OWCP hearing representative. A telephonic hearing was held May 22, 2017. Counsel discussed the medical evidence of file. He contended that pain can be compensable as the Department of Labor had mandated the use of ICD-10, which indicated that low back pain was an accepted occupational injury.[4] Counsel argued that by requiring a rationalization from the physician involved biomechanical engineering which was beyond that

[4] The International Statistical Classification of Diseases and Related Health Problems (also known by the acronym ICD) is a health care classification system. ICD 10-diagnostic code includes radiculopathy of the lumbar region, lumbosacral region, and thoracolumbar region.

scope of medicine and raised the bar on appellant's burden of proof. He thus concluded that the medical evidence which diagnosed radiculopathy was sufficient to establish appellant's claim.

Subsequent to the hearing, OWCP received a June 29, 2017 report from Dr. Mark M. Mitros, a Board-certified physiatrist. Dr. Mitros reported that appellant had a long history of low back and lower extremity pain. He noted that on November 20, 2014, appellant tripped over a chair and fell while at work and that this exacerbated his low back and left lower extremity pain. Dr. Mitros discussed appellant's medical treatment and indicated that the May 29, 2015 electromyogram/nerve conduction study of the lower extremities was normal. He reported that the February 5, 2015 lumbar MRI scan was significant for disc desiccation at L4-5 with moderate posterior protrusion of the disc greater on the right; foraminal encroachment was noted bilaterally; and, at L5-S1, there was mild left foraminal encroachment and left S1 nerve root was slightly dyspneic. Dr. Mitros diagnosed low back pain secondary to discogenic syndrome and lower extremity radiculopathy. He concluded, "upon review of multiple office notes and report of the patient that he had an exacerbation of his original pain during a work-related injury of November 20, 2014 I do report that his exacerbation of pain was due to the work-related injury. His pain has now returned to baseline to the point it was prior to [his] work-related injury."

By decision dated July 31, 2017, an OWCP hearing representative affirmed the prior decision. The hearing representative found that while counsel argued that pain was a valid diagnosis of the mandated ICD-10, FECA did not recognize pain as a diagnosed medical condition.

LEGAL PRECEDENT

A claimant seeking benefits under FECA 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 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.[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,

[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 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.*

but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[8]

Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, 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]

The fact that a condition manifests itself during a period of employment is insufficient to establish causal relationship.[10] Temporal relationship alone will not suffice.[11] Entitlement to FECA benefits may not be based on surmise, conjecture, speculation, or on the employee's own belief of a causal relationship.[12]

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.[13]

ANALYSIS

The Board finds that appellant failed to meet his burden of proof to establish that his diagnosed lumbar conditions were causally related to the accepted November 20, 2014 employment incident.

Appellant has alleged that he sustained an injury on November 20, 2014, when he fell over a chair while putting on his left boot in the nurse's office at the employing establishment. OWCP accepted that the November 20, 2014 employment incident occurred in the performance of duty as alleged. However, it denied appellant's traumatic injury claim finding that the medical evidence of record was insufficient to establish a causal relationship between appellant's diagnosed conditions and the accepted employment incident.

Appellant submitted several reports from Dr. LoDico. However, it is not the number of reports, but the care of analysis manifested and the medical rationale provided in the reports that determines the probative value of the evidence.[14] Dr. LoDico diagnosed appellant with lumbar

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

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

[10] 20 C.F.R. § 10.115(e).

[11] *See D.I.*, 59 ECAB 158, 162 (2007).

[12] *See M.H.*, Docket No. 16-0228 (issued June 8, 2016).

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

[14] *See Connie Johns*, 44 ECAB 560 (1993).

spinal pain, cervical spine pain, lumbar spinal pain secondary to discogenic syndrome, as well as lower extremity radiculopathy. Initially the Board notes that while counsel argues otherwise, it has consistently held that pain is a symptom and not a compensable medical diagnosis.[15] While Dr. LoDico opined that the employment incident aggravated or exacerbated appellant's diagnosed conditions, which included discogenic syndrome and lower extremity radiculopathy, he did not offer a rationalized medical explanation as to how physiologically falling over a chair would have caused or aggravated these diagnosed conditions. The Board has also consistently held that a medical opinion must explain how physiologically the movements involved in an employment incident caused or contributed to the diagnosed conditions.[16]

Dr. LoDico did not provide a conclusive, well-rationalized medical opinion which clearly explains the nature and extent of any aggravation of appellant's preexisting lumbar conditions. An opinion with respect to aggravation must differentiate between the effects of the work-related injury or disease and the preexisting condition.[17] The Board has held that the physician must clearly explain the nature and extent of any aggravation, including whether temporary or permanent.[18] In his December 3, 2014 report, Dr. LoDico indicated that appellant had preexisting back conditions, but he did not differentiate between appellant's preexisting back conditions and the conditions that were caused or aggravated by the November 20, 2014 employment incident. He also reported, in his February 17, 2015 report, that there had been no change in the recent lumbar MRI scan studies from the prior study performed one year earlier. This is in line with Dr. Sack's conclusion that there was no aggravation or exacerbation of appellant's preexisting lumbar condition as there were no changes on the most recent MRI scan when compared to one done a year prior. For these additional reasons, Dr. LoDico's reports are of diminished probative value.

The reports from Drs. Plowey and Mitros are similarly of limited probative value as they do not provide a rationalized opinion explaining how a diagnosed condition was causally related to the accepted employment incident.[19] In his October 1, 2015 report, Dr. Plowey opined that the November 20, 2014 work incident exacerbated appellant's low back and lower extremity pain as he had continued, increased low back pain. In his June 29, 2017 report, Dr. Mitros opined that the November 20, 2014 work injury had caused an exacerbation of pain and that the pain had just returned to a baseline point where it was prior to the work injury. As previously noted, pain is not a compensable diagnosis.[20] An award of compensation may not be based on surmise, conjecture, or speculation.[21] Without a rationalized medical explanation as to how a diagnosed medical

[15] *B.P.*, Docket No. 12-1345 (issued November 13, 2012); *C.F.*, Docket No. 08-1102 (issued October 2008).

[16] *L.B.*, Docket No. 17-1600 (issued March 9, 2018).

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

[18] *See R.H.*, Docket No. 15-1785 (issued January 29, 2016).

[19] *Supra* note 9.

[20] *See supra* note 15.

[21] *D.I.*, 59 ECAB 158 (2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

condition was causally related to the accepted employment incident, these reports are of limited probative value.[22]

The diagnostic reports of record are of diminished probative value. Diagnostic test reports are not probative to the issue of causal relationship as they do not offer any opinion regarding the cause of an employee's condition.[23]

As appellant has not submitted any rationalized medical evidence to support his claim that he sustained an injury causally related to the accepted November 20, 2014 employment incident, he has failed to meet his burden of proof to establish entitlement to compensation benefits.

On appeal counsel argues that appellant's physician described a compensable injury -- discogenic syndrome and lower extremity radiculopathy. As discussed, however, he has the burden to furnish reasoned medical evidence supporting that the November 20, 2014 work incident caused or aggravated these diagnosed condition.[24] The medical evidence of record is insufficient to meet appellant's burden of proof.[25]

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 diagnosed lumbar conditions were causally related to the accepted November 20, 2014 employment incident.

[22] *Supra* note 9.

[23] *S.S.*, Docket No. 16-1760 (issued January 23, 2018).

[24] *See S.C.*, Docket No. 17-0490 (issued June 27, 2017).

[25] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the July 31, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 29, 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