United States Department of Labor
Employees' Compensation Appeals Board

G.G., Appellant	)	
and	)	**Docket No. 18-0550**
	)	**Issued: October 1, 2018**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Ronkonkoma, NY, Employer	)	

Appearances:
David A. Testone, 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 January 19, 2018 appellant, through his representative, filed a timely appeal from a September 1, 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 to consider the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish a back condition causally related to the accepted January 23, 2016 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 18, 2016 appellant, then a 63-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that, on January 23, 2016, he sustained a compression fracture of his lumbar spine after lifting equipment at work. He did not stop work.

In support of his claim, appellant submitted duty status reports (CA-17 forms) dated February 3 and 17 and March 15, 2016 from Dr. Ronald R. Bernardini, a chiropractor. On the CA-17 forms Dr. Bernardini noted a January 23, 2016 injury date, provided work restrictions, and diagnosed spinal dislocation. Physical findings included severe lower spinal compression factures and neck pain. Dr. Bernardini also noted discal disease under the section titled, "other disabling conditions."

A March 10, 2016 magnetic resonance imaging (MRI) scan of the lumbar spine revealed upper lumbar dextroscoliosis and disc bulges at L1-2, L2-3, L3-4, L4-5, and L5-S1.

A cervical MRI scan performed on March 10, 2016 revealed cervical lordosis, a disc bulge at C6-7, and disc herniations at C3-4, C4-5, and C5-6.

In a March 23, 2016 attending physician's report (Form CA-20), Dr. Bernardini noted an injury date of January 23, 2016 and diagnosed lumbar subluxation dysfunction compression fracture, cervical segmental dysfunction, and thoracic dysfunction. Physical findings included neurological issues and acute compression fracture with discal trauma. Dr. Bernardini opined that the twisting and lifting 250 pounds caused the diagnosed medical conditions.

In a development letter dated April 6, 2016, OWCP advised appellant of the type of factual and medical evidence needed to establish his claim. It noted that under FECA, a chiropractor would only be considered a "physician" if he diagnosed a subluxation based upon x-ray evidence. OWCP afforded appellant 30 days to submit the necessary evidence.

Dr. Bernardini, in a February 3, 2015 case history form, noted that appellant was seen for complaints of neck and back pain. Appellant stated that the pain had been present for a week and that he had backaches, neck pain, and sinus trouble. He also related that he had been involved in a minor automobile accident in the past five years.

A February 3, 2016 lumbar x-ray interpretation revealed multilevel discogenic degenerative disease, facet arthrosis, demineralized bones with dextrocurvature, mild L2 endplate depression, which might be indicative of a mild compression fracture of indeterminate age.

In patient care reexamination and clinical guideline form reports dated February 19, March 14, and April 5, 2016, Dr. Bernardini detailed treatment provided for appellant's complaints of neck, mid back, and lower back pain.

In a February 3, 2016 report, Dr. Bernardini diagnosed discal lesions, soft tissue trauma, neurological impairment, sciatic neuritis, intersegmental dysfunction along with arthritic, and calcific arthritic degeneration which he attributed to the accepted January 23, 2016 work incident. Physical findings were provided. Dr. Bernardini reported that no diagnostic testing had been performed, but testing would follow. He advised that appellant was totally disabled.

In an April 5, 2016 Form CA-17, Dr. Bernardini provided work restrictions and reiterated diagnoses and findings from prior reports.

In an April 25, 2016 Form CA-17, Dr. Bernardini noted an injury date of January 23, 2016 and listed work restrictions.

By decisions dated May 17 and 18, 2016, OWCP denied appellant's claim. It found that the medical evidence submitted was insufficient to establish a diagnosed medical condition causally related to the accepted January 23, 2016 work incident.

On a form dated May 27, 2016, appellant requested both an oral hearing and review of the written record by an OWCP hearing representative.

In a June 13, 2016 Form CA-17 duty status report, Dr. Bernardini diagnosed spinal subluxation, which he attributed to the claimed January 23, 2016 work injury. Other disabling conditions included discal issues. Dr. Bernardini indicated that appellant was capable of working with restrictions.

On July 12, 2016 appellant requested reconsideration and submitted a June 22, 2016 report by Dr. Bernardini in support thereof. He withdrew his request for an oral hearing.

In a June 22, 2016 report, Dr. Bernardini noted that appellant denied any preexisting back condition. He observed the lack of any evidence of a preexisting back condition in appellant's medical history. Thus, Dr. Bernardini opined that the diagnosed condition had been caused by the accepted January 23, 2016 work incident. He explained that the diagnosed subluxation was supported by lumbar spinal rotation and compression fractures and nerve compression found by diagnostic testing.

By decision dated November 18, 2016, OWCP denied modification of the May 18, 2016 decision, finding that the medical evidence of record was insufficient to establish a diagnosed condition causally related to the accepted January 23, 2016 employment incident.

In a January 4, 2017 report, Dr. Thomas J. Dowling, an examining Board-certified orthopedic surgeon, diagnosed low back discogenic pain, L3-4 and L4-5 herniated nucleus pulposus, and lumbar spinal stenosis. He noted appellant's history of a lifting injury at work with no abatement in pain following the incident.[3] Dr. Dowling noted no history of back issue, noted a March 10, 2016 MRI scan, and provided examination findings. He concluded further review was required to determine the etiology of appellant's symptoms and appropriate type of treatment.

On January 24, 2017 appellant, through his representative, requested reconsideration. The representative asserted that OWCP incorrectly found that appellant had a preexisting back condition.

By decision dated April 13, 2017, OWCP denied modification of its prior decision.

[3] The report notes January 23, 2016 under "D/A," but in the narrative history of injury the date is noted as January 26, 2016.

On June 7, 2017 appellant requested reconsideration. His representative asserted that OWCP failed to follow mandated OWCP procedure and improperly denied the claim.

On August 9, 2017 OWCP received progress notes dated February 28 and June 27, 2013, March 10 and, May 16, 2014, November 5, 2015, and May 9, 2016. The signature on the forms is illegible and there is no diagnosis noted on any of the forms.

By decision dated September 1, 2017, OWCP denied modification of its April 13, 2017 decision, finding that appellant had not established that his diagnosed medical condition was causally related to the accepted employment incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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 filed within the applicable time limitation, that an injury was sustained while 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.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on 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 must first be determined whether fact of injury has been established.[7] First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.[8] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[9]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[10] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is causal relationship between the employee's diagnosed condition and the compensable employment factors.[11] The opinion of the physician must be based on a complete

[4] *Supra* note 2.

[5] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[6] *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[7] *B.F.*, Docket No. 09-60 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 5.

[8] *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

[9] *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 5.

[10] *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

[11] *J.J.*, Docket No. 09-27 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

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 by the employee.[12]

Where there is medical evidence of a preexisting condition involving the same part of the body as the claimed employment injury, the issue of causal relationship invariably requires inquiry into whether there was employment-related aggravation, acceleration, or precipitation of the underlying condition.[13] Accordingly, the physician must provide a rationalized medical opinion which differentiates between the effects of the work-related injury or disease and the preexisting condition.[14] Such evidence will permit the proper kind of acceptance, such as whether the employment-related aggravation was temporary or permanent.[15]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a back condition causally related to the accepted January 23, 2016 employment incident.

Dr. Dowling, in a January 4, 2017 report, diagnosed low back discogenic pain, L3-4 and L4-5 herniated nucleus pulposus, and lumbar spinal stenosis. He opined that further review was required to determine the cause of the diagnosed conditions. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[16] As Dr. Dowling offered no opinion as to the cause of the diagnosed conditions, his opinion is insufficient to support appellant's burden.

Appellant also submitted reports and CA-17 forms from Dr. Bernardini, a chiropractor. In his April 5, 2016 report, Dr. Bernardini specifically noted that no diagnostic testing had been performed. He did not provide explanation in any of his reports that a subluxation had been diagnosed based upon x-ray evidence. Dr. Bernardini's reports therefore are of diminished probative medical value as he is not considered a physician under FECA due to his failure to diagnose spinal subluxation based upon x-ray evidence.[17]

[12] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(e) (January 2013). *See A.W.*, Docket No. 17-285 (issued May 25, 2018)

[14] *Id.*

[15] *Id.*

[16] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[17] Section 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulations by the secretary. *R.M.*, 59 ECAB 690 (2008); *Pamela K. Guesford*, 53 ECAB 726 (2002); *see Merton J. Sills*, 39 ECAB 572, 575 (1988).

The remaining medical evidence of record, including diagnostic test reports, is of limited probative value and insufficient to establish the claim as this evidence does not specifically address whether appellant's diagnosed conditions are causally related to the accepted January 23, 2016 work incident.[18]

The record before the Board is without rationalized medical evidence establishing that appellant sustained a back condition causally related to the accepted January 23, 2016 employment incident. OWCP advised appellant that it was his responsibility to provide a comprehensive medical report which described his symptoms, test results, diagnosis, history of treatment, and the physician's opinion, with medical reasons, on the cause of his conditions. Appellant has failed to submit appropriate medical documentation in response to OWCP's request. The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference of causal relation.[19] An award of compensation may not be based on surmise, conjecture, speculation, or on the employee's own belief of causal relation.[20]

The Board thus finds that the medical evidence of record is insufficient to establish that appellant sustained a back condition causally related to the accepted January 23, 2016 employment incident.

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 back condition causally related to the accepted January 23, 2016 work incident.

[18] *See K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006); *Linda I. Sprague*, 48 ECAB 386 (1997) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[19] *L.D.*, Docket No. 09-1503 (issued April 15, 2010); *D.I.*, 59 ECAB 158 (2007); *Daniel O. Vasquez*, 57 ECAB 559 (2006).

[20] *S.S.*, 59 ECAB 315 (2008); *J.M.*, 58 ECAB 303 (2007); *Donald W. Long*, 41 ECAB 142 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 1, 2017 is affirmed.

Issued: October 1, 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