United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 18-0685**
	)	**Issued: October 26, 2018**
DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, Louisville, KY, Employer	)	

Appearances:
Martin Kaplan, 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 February 12, 2018 appellant, through counsel, filed a timely appeal from an October 4, 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 the 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 aggravation of preexisting bipolar disorder as a consequence of an accepted aggravation of cervical spondylosis with myelopathy.

FACTUAL HISTORY

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

On April 13, 2006 appellant, then a 47-year-old general supply specialist, filed a traumatic injury claim (Form CA-1) alleging that he struck his head on a roll cage cross bar while climbing onto a forklift that day at work, causing injuries to his head, neck, and shoulders. OWCP accepted the claim for aggravation of cervical spondylosis with myelopathy. On January 22, 2007 appellant underwent an authorized anterior cervical discectomy and fusion.[4]

Dr. Michael Casnellie, a Board-certified orthopedic surgeon, noted in an August 7, 2007 report that appellant had a prior history of anxiety, had recently been diagnosed with bipolar disorder, and had a pituitary tumor removed. In a report dated December 2, 2013, Dr. Jason M. Meckler, a Board-certified neurologist, diagnosed a recent traumatic brain injury sustained in a fall, which resulted in cognitive dysfunction, anxiety, depression, and depression with somatization.

In a letter dated January 13, 2015, counsel requested that the acceptance of appellant's claim be expanded to include aggravation of preexisting bipolar disorder. He submitted a report dated December 30, 2014 from Dr. Frank Deland, a Board-certified psychiatrist. Dr. Deland opined that he could not determine whether the accepted neck injury caused appellant's bipolar disorder, but that the stress of the injury and subsequent disability exacerbated or triggered his underlying mood instability.

OWCP, by decision dated April 21, 2015 and affirmed by its hearing representative on October 8, 2015, denied expansion of the acceptance of appellant's claim as the evidence of record was insufficient to establish that his psychiatric condition was caused or aggravated by the accepted employment injuries.

On March 11, 2016 appellant appealed to the Board.[5] By decision and order issued October 26, 2016,[6] the Board affirmed OWCP's October 8, 2015 decision, finding that the medical

[3] Docket No. 16-0811 (issued October 26, 2016).

[4] On July 21, 2013 OWCP granted appellant a schedule award for four percent permanent impairment of the left arm.

[5] During the pendency of the prior appeal, appellant submitted a July 6, 2016 report from Michael Gilbert, a physician assistant. Appellant also provided a report of cervical spine x-rays performed on May 15, 2015.

[6] *Supra* note 3.

evidence of record contained insufficient rationale to establish causal relationship. The Board explained that the need for medical rationale is particularly important where the medical record indicates that appellant had a history of anxiety at the time of his employment injury and that he had a subsequent, nonoccupational traumatic brain injury.

On June 9, 2017 appellant, through counsel, requested reconsideration. Counsel asserted that additional medical evidence from Dr. Deland was sufficient to establish causal relationship.

In an April 11, 2017 report, Dr. Deland noted that he had been treating appellant for bipolar disorder since May 2007. He explained that the stress of the accepted cervical spine injury caused mood instability with periods of intense depression. Dr. Deland opined that the accepted employment injury did not cause appellant's bipolar disorder but "certainly had a negative impact on his abilities to maintain a stable mood." He asserted that, within reasonable probability, appellant's accepted injury "was very detrimental to his well-being and a proximate cause for his mood instability that ultimately brought him to my attention." Appellant displayed "easy irritability, psychomotor agitation, grandiosity," and pressured speech. His anxiety and manic symptoms interfered with work and interpersonal relationships, which led to additional instability. Dr. Deland concluded that appellant's "mood instability during the time in question was in part triggered by the previously mentioned injury and negatively impacted his ability to work."

Counsel also provided a report indicating cervical spine x-rays performed on July 6, 2017 showed stable C4-5 and C5-6 anterior fusions. He also submitted a report dated July 6, 2017 signed by Michael Gilbert, a physician assistant.[7]

By decision dated October 4, 2017, OWCP denied modification of its prior decision, finding that the additional medical evidence submitted on reconsideration was insufficient to establish causal relationship between an aggravation of appellant's bipolar disorder and the accepted employment injury. It found that Dr. Deland's April 11, 2017 report did not explain how the accepted aggravation of cervical spondylosis with myelopathy aggravated appellant's preexisting bipolar disorder. OWCP further found that the x-ray report did not address the claimed emotional condition, and that the physician assistant's opinion was not competent medical evidence.

LEGAL PRECEDENT

The claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, establishing causal relationship. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.[8]

[7] Counsel also submitted a duplicate copy of Mr. Gilbert's July 6, 2016 report previously of record.

[8] *Charles W. Downey*, 54 ECAB 421 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.[9] Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[10]

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, *The Law of Workers' Compensation* notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of the claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[11]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that the diagnosed aggravation of his preexisting bipolar disorder was a consequence of the accepted aggravation of cervical spondylosis with myelopathy.

Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[12] The Board will, therefore, not review the evidence addressed in the prior appeal.

Pursuant to the present appeal, counsel provided a report dated April 11, 2017 from Dr. Deland, a Board-certified psychiatrist. Dr. Deland opined that the stress of the accepted aggravation of cervical spondylosis caused or triggered depression and mood instability. He noted that the negative impact on appellant's personal and professional relationships caused additional instability. However, Dr. Deland did not explain how the accepted April 13, 2006 employment injuries physiologically or psychologically caused the claimed aggravation of preexisting bipolar disorder.[13] The Board, therefore, finds that he provided insufficient rationale to establish a causal relationship between appellant's bipolar disorder and the accepted April 13, 2006 employment injuries.

Appellant also submitted reports of cervical spine x-rays obtained on May 15, 2015 and July 6, 2017. As these reports made no mention of the claimed aggravation of preexisting bipolar

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

[10] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[11] Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* § 3.05 (2014); *K.S.*, Docket No. 17-1583 (issued May 10, 2018).

[12] *See A.G.*, Docket No. 18-0281 (issued July 12, 2018).

[13] *See S.R.*, Docket No. 17-1118 (issued April 15, 2018).

disorder, it is irrelevant to the issue of causal relationship.[14] Additionally, appellant provided July 6, 2016 and July 6, 2017 reports from a physician assistant. This report was not countersigned or reviewed by a physician. Therefore, it does not constitute probative medical evidence as physician assistants are not considered physicians as defined under section 8102(2) of FECA.[15]

As set forth above, to establish a consequential injury the medical evidence must establish that the consequentially claimed condition was a direct and natural result of a compensable primary injury.[16] The medical evidence submitted on reconsideration does not contain sufficient rationale which explains how and why the accepted injury would cause the claimed psychiatric condition. Thus, as appellant has not established a consequential aggravation of preexisting bipolar disorder, he has failed to meet his burden of proof.[17]

On appeal, counsel contends that Dr. Deland's April 11, 2017 report was sufficient to meet appellant's burden of proof to establish causal relationship. As set forth above, Dr. Deland did not provide a rationalized opinion explaining how or why the accepted April 13, 2006 employment injury would have aggravated appellant's preexisting bipolar disorder.

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 established an aggravation of preexisting bipolar disorder as a consequence of the accepted aggravation of cervical spondylosis with myelopathy.

[14] *See S.G.*, Docket No. 17-1054 (issued September 14, 2017).

[15] As this report was not signed or countersigned by a physician, it does not constitute competent medical evidence under FECA as physician assistants are not considered physicians as defined under section 8102(2) of FECA. *E.T.*, Docket No. 17-0265 (issued May 25, 2018). *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

[16] *The Law of Workers' Compensation* § 3.05, *supra* note 11.

[17] *K.S.*, *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 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
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