United States Department of Labor
Employees' Compensation Appeals Board

T.W., Appellant	)	
and	)	**Docket No. 18-1436**
	)	**Issued: April 10, 2019**
DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS, Jersey City, NJ, Employer	)	

Appearances:
Thomas R. Uliase, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 19, 2018 appellant, through counsel, filed a timely appeal from a May 9, 2018 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 that his thoracic and lumbar spine conditions were causally related to the accepted November 30, 2016 employment incident.

FACTUAL HISTORY

On December 14, 2016 appellant, then a 39-year-old deckhand, filed a traumatic injury claim (Form CA-1) alleging that, on November 30, 2016, he sustained a thoracic herniated disc at T7-8 when bending over to remove a line while in the performance of duty. He notified his supervisor, stopped work, and sought emergency medical treatment on the date of the incident.[3]

On the date of injury, the employing establishment issued a properly executed Form CA-16, authorization for examination, which indicated that appellant was authorized to seek medical treatment for his November 30, 2016 injury with Susan Maykish, a nurse practitioner.

By development letter dated December 27, 2016, OWCP notified appellant that his claim was initially administratively handled to allow medical payments, as it appeared to involve a minor injury resulting in minimal or no lost time from work. However, the merits of his claim had not been formally considered and his claim had been reopened for consideration of the merits because he had not returned to work in a full-time capacity. OWCP informed him that the evidence of record was insufficient to establish his traumatic injury claim. Appellant was advised of the medical and factual evidence required to establish his claim and was afforded 30 days to submit the additional evidence.

In support of his claim, appellant submitted handwritten progress notes dated December 9 through 21, 2013 which are largely illegible and document treatment for his November 2013 employment injury, treatment notes dated December 1 and 9, 2016 from Ms. Maykish, and a December 19, 2016 magnetic resonance imaging (MRI) scan of the lumbar spine.

In a March 9, 2016 report, Dr. Carmen M. Renna, Board-certified in internal medicine, noted appellant's complaints of chronic back pain which intermittently worsened. In a January 10, 2017 report, she reported that appellant had experienced intermittent back pain since his November 2013 employment injury. Dr. Renna reported a recent acute exacerbation resulting in severe recurrent back pain radiating into both thighs. She diagnosed back pain of lumbosacral region with sciatica.

In a December 22, 2016 medical report, Dr. Joelle Rehberg, Board-certified in sports medicine, noted that appellant complained of dull lower back and bilateral leg pain following a November 30, 2016 injury when he was working on a boat and bent over to release a line. She

[3] The record reflects that appellant has two prior traumatic injury claims. On December 3, 2013 appellant filed a Form CA-1 and reported a November 29, 2013 back injury after he bent over to pick up a rubber block, OWCP File No. xxxxxx243. The claim was accepted for sprain of back, lumbar region. On July 24, 2015 appellant filed another Form CA-1 reporting a July 14, 2014 back injury after he lifted a steel plate on a flexi float, OWCP File No. xxxxxx570. The claim was accepted for sprain of back.

noted active problems for restless leg syndrome, acute sacroiliitis, muscle spasm, lumbar back pain with radiculopathy, and herniated disc. Dr. Rehberg also noted chronic back pain. She diagnosed low back pain, most likely sacroiliac in nature and restricted appellant from working. Physical therapy was recommended.

By decision dated January 27, 2017, OWCP denied appellant's claim finding that the evidence of record failed to establish that his diagnosed medical conditions were causally related to the accepted November 30, 2016 employment incident.

On February 22, 2017 appellant, through counsel, requested a review of the written record before an OWCP hearing representative.

In support of his claim, appellant submitted a February 6, 2017 electromyogram (EMG) and nerve conduction velocity (NCV) study of the lower extremities, a computerized tomography (CT) scan of the thoracic spine, and a CT scan of the thoracic spine.

In medical reports dated January 26 to June 29, 2017, Dr. Marc A. Cohen, a Board-certified orthopedic surgeon, reported that appellant was referred for evaluation of his back condition. He noted a 2013 employment injury when appellant bent down to pick up a rubber hose and presented to the hospital for a herniated disc at T7-8. Appellant had been treated with conservative care and subsequently released to work. Dr. Cohen noted an exacerbation occurred in 2015 along with a more recent exacerbation on November 30, 2016 when appellant was untying a rope and had to seek emergency medical treatment. He reported that a December 19, 2016 MRI scan of the lumbar spine showed evidence of degeneration at L2-3 and L4-5. Dr. Cohen also noted that a repeat MRI scan of the thoracic spine revealed a left herniated disc at T7-8 with some impingement on the spinal cord, and to a smaller degree T8-9. He diagnosed bilateral neurological radiculopathy and disc herniation at T7-8 and restricted appellant from returning to work.

In a June 29, 2017 medical report, Dr. Cohen discussed the findings of the February 6, 2017 lumbar and thoracic CT myelogram. He further reported that the EMG testing on that date revealed bilateral L5-S1 radiculopathy. Dr. Cohen diagnosed thoracic disc herniation at T7-8, with neurodiagnostic testing of a thoracic myelogram CT showing significant worsening of his prior 2013 and 2015 employment injury. He reported that appellant, through the course of his employment, when bending to untie a line, caused a significant amount of flexion in the thoracic spine and his disc herniation to significantly worsen. Dr. Cohen restricted appellant from returning to work.

In a June 5, 2017 medical report, Dr. John Knightly, a Board-certified neurosurgeon, noted review of appellant's thoracic CT scan which revealed minimal disc protrusion and some degree of cord flattening, mild kyphosis, and what appeared to be loss of lordosis in the neck. The CT scan of the lumbar spine revealed mild degenerative changes with minimal bulging. Dr. Knightly noted the active problems of chronic back pain, restless leg syndrome, acute sacroiliitis, muscle spasm, lumbar back pain with radiculopathy, and herniated disc. He diagnosed chronic back pain which appeared to be myofascial as there was no evidence of instability.

By decision dated July 18, 2017, OWCP's hearing representative affirmed the January 27, 2017 decision, finding that the evidence of record was insufficient to establish that the diagnosed

medical conditions were causally related to the accepted November 30, 2016 employment incident.

On July 27, 2017 appellant, through counsel, requested reconsideration of OWCP's decision and resubmitted Dr. Cohen's June 29, 2017 medical report.

In a May 22, 2017 report, Dr. Andrew Sim, Board-certified in pain medicine, discussed the findings of appellant's diagnostic studies and provided bilateral sacroiliac joint injections. He diagnosed lumbar radiculopathy, sacroiliitis, lumbar degenerative disc disease, thoracic disc herniation, and lumbar spondylosis.

In support of his claim, appellant also submitted a February 6, 2017 lumbar and thoracic myelogram study, an April 24, 2017 operative report for sacroiliac joint injections, and a July 3, 2017 operative report for a lumbosacral medial branch block with fluoroscopic guidance.

By decision dated October 25, 2017, OWCP denied modification of the July 18, 2017 decision, finding that the evidence of record was insufficient to establish that the diagnosed medical conditions were causally related to the accepted November 30, 2016 employment incident.

On January 26, 2018 appellant, through counsel, requested reconsideration.

In a November 18, 2017 medical report, Dr. Vincent K. McInerney, a Board-certified orthopedic surgeon, reported that appellant was evaluated for low back and bilateral leg pain. He reviewed his history and prior medical reports, noting several injuries while at work as a boat pilot and deckhand. Dr. McInerney reported that the first episode was in 2013 when appellant bent down to pick up a rubber block trailer while at work and experienced sharp pain in his lower thoracic and upper lumbar area. Appellant was told that he had T7-8 disc herniation which was tolerable and improved with physical therapy treatments. He continued to work as a deckhand through 2013 and sustained a second episode of back and leg pain in 2015 when he was lifting a steel plate. Dr. McInerney reported that, on November 30, 2016, appellant had another injury when he was bending over to untie a line and could not stand due to sharp pain in his lower back and left leg area. He diagnosed T8-9 thoracic disc herniation which was consistent with appellant's signs and symptoms. Dr. McInerney noted an assessment for herniation of intervertebral disc of thoracic spine without myelopathy and restricted appellant from returning to work.

In a January 25, 2018 narrative report, Dr. Cohen reported that on November 30, 2016 appellant bent over to work a line and felt a pop in his back when he stood up, rendering him unable to walk. A February 6, 2017 MRI scan of the thoracic spine revealed T7-8 left-sided herniated disc with significant superior extrusion which was seen in association with spondylosis. Dr. Cohen noted significant cord impingement which appeared to be flattened by the disc herniation. He reported that this was in contrast to his July 17, 2011 thoracic MRI scan from his prior work injury which showed a left T7-8 herniation with mild deformity. Dr. Cohen explained that this objectively confirmed a significant change from appellant's prior thoracic work injury as the disc fragment had become extruded and was causing cord impingement.

By decision dated May 9, 2018, OWCP affirmed the October 25, 2017 decision, finding that the evidence of record was insufficient to establish that the diagnosed medical conditions were causally related to the accepted November 30, 2016 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 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 on a traumatic injury or an occupational disease.[6]

In order to determine whether an employee actually sustained an 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 which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[7] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.[8] The opinion of the physician must be based on the 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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[9]

[4] *Supra* note 2.

[5] *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *Gary J. Watling*, 52 ECAB 278 (2001).

[6] *Michael E. Smith*, 50 ECAB 313 (1999).

[7] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[8] *J.P.*, Docket No. 18-1165 (issued January 15, 2019).

[9] *James Mack*, 43 ECAB 321 (1991).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that his thoracic and lumbar spine conditions were causally related to the accepted November 30, 2016 employment incident.[10]

In medical reports dated January 26, 2017 to January 25, 2018, Dr. Cohen diagnosed thoracic disc herniation at T7-8 and bilateral neurologic L5-S1 radiculopathy. While he provided firm medical diagnoses, he failed to provide a fully-rationalized opinion regarding the cause of these conditions.[11] Dr. Cohen indicated that bending to untie a line resulted in a significant amount of flexion in the thoracic spine, causing his disc herniation to significantly worsen. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain sufficient medical rationale explaining how a given medical condition/disability was related to employment factors.[12] Thus, while he had some understanding of the November 30, 2016 employment incident, his statement on causation failed to provide a sufficient explanation as to the mechanism of injury pertaining to this claim, namely, how bending over and then standing up would cause or aggravate appellant's thoracic disc herniation and L5-S1 radiculopathy.

The Board also notes that Dr. Cohen acknowledged a prior T7-8 disc herniation when discussing appellant's 2013 and 2015 work-related injuries to the lumbar and thoracic spine. 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] Dr. Cohen opined that the February 6, 2017 MRI scan of the thoracic spine revealed a worsening of his T7-8 disc herniation when compared to the July 17, 2011 study because the disc fragment had become extruded and was causing cord impingement. While he compared the two studies, the changes alone are insufficient to establish a new work-related injury. Therefore, the Board finds that Dr. Cohen failed to discuss whether appellant's preexisting injury had progressed beyond what might be expected from the natural progression of that condition.

The reports of Drs. Menna, Knightly, Rehberg, Sim, and McInerney are also insufficient to establish appellant's claim as these physicians provided medical diagnoses with no opinion regarding the cause of the diagnosed conditions. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[14] These reports, therefore, are insufficient to establish appellant's claim.

[10] *See Robert Broome*, 55 ECAB 339 (2004).

[11] *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

[12] *See Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

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

[14] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

The remaining evidence of record is also insufficient to establish causal relationship between appellant's diagnosed conditions and the accepted November 30, 2016 employment incident. Appellant submitted progress notes from Ms. Maykish, a nurse practitioner. These documents do not constitute competent medical evidence because nurse practitioners are not considered physicians as defined under FECA.[15] As such, this evidence is also insufficient to meet appellant's burden of proof.

The diagnostic reports dated December 19, 2016 and February 6, 2017 simply interpreted imaging studies, but did not provide an opinion regarding the cause of the reported conditions. Diagnostic studies lack probative value as they do not address whether the employment incident caused any of the diagnosed conditions.[16]

The fact that a condition manifests itself during a period of employment is insufficient to establish causal relationship.[17] Temporal relationship alone will not suffice. Entitlement to FECA benefits may not be based on surmise, conjecture, speculation, or on the employee's own belief of a causal relationship.[18] In the instant case, the record lacks rationalized medical evidence establishing causal relationship between the November 30, 2016 employment incident and his diagnosed thoracic and lumbar conditions.[19] Thus, appellant has not met his burden of proof.[20]

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

[15] *See A.L.*, Docket No. 18-1465 (issued February 14, 2019); *M.M.*, Docket No. 17-1641 (issued February 15, 2018); *K.J.*, Docket No. 16-1805 (issued February 23, 2018) (nurse practitioners are not considered physicians as defined under FECA); *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] *T.C.*, Docket No. 18-1498 (issued February 13, 2019).

[17] *Daniel O. Vasquez*, 57 ECAB 559 (2006).

[18] *D.D.*, 57 ECAB 734 (2006).

[19] *See J.S.*, Docket No. 17-0507 (issued August 11, 2017).

[20] The record contains a Form CA-16 signed by the employing establishment official on November 30, 2016 for treatment pertaining to the employment injury. When the employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the CA-16 Form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c); *Tracy P. Spillane*, 54 ECAB 608 (2003).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that his thoracic and lumbar spine conditions were causally related to the accepted November 30, 2016 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 10, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board