

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

M.B., Appellant)	
)	
and)	Docket No. 19-0485
)	Issued: August 22, 2019
DEPARTMENT OF THE NAVY,)	
PORTSMOUTH NAVAL SHIPYARD,)	
Portsmouth, NH, Employer)	
)	

Appearances:
Appellant, pro se
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 January 3, 2019 appellant filed a timely appeal from a December 6, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ 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 The Board notes that appellant submitted additional evidence after OWCP rendered its December 6, 2018 decision. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to expand the acceptance of his claim to include a traumatic brain injury (TBI) causally related to his November 18, 2014 employment injury.

FACTUAL HISTORY

On November 19, 2014 appellant, then a 29-year-old electrician helper, filed a traumatic injury claim (Form CA-1) alleging that on November 18, 2014 he sustained a respiratory injury, reactive airway disease, shortness of breath, chest pain, and burning in his eyes when he was exposed to smoke and particles from welding, grinding, smoldering, and painting without adequate ventilation. He stopped work on November 19, 2014 and returned to work the next day. Appellant subsequently stopped work again on February 18, 2015 and did not return.

OWCP accepted appellant's claim for pneumonitis due to acute smoke inhalation. It subsequently expanded acceptance of his claim to include reactive airways dysfunction syndrome (RADS), an exacerbation of chronic rhinitis, and other diseases of the larynx. OWCP paid appellant wage-loss compensation on the supplemental rolls effective February 18, 2015, and on the periodic rolls effective November 15, 2015.

Appellant received treatment on November 18, 2014 for reactive airway disease and smoke inhalation. On January 12, 2015 Dr. Daniel Kim, an osteopath, treated him for respiratory problems following his employment exposure. In a review of symptoms, he noted that appellant related that he had difficulty remembering things. Dr. Kim diagnosed RADS, cough, a history of obstructive sleep apnea, sinus congestion, and hoarseness.³

On January 27, 2016, Dr. John P. Brennan, a Board-certified internist and pulmonologist, diagnosed post-traumatic stress disorder (PTSD) due to appellant's November 18, 2014 employment injury. He indicated that appellant had not complained of memory loss or other types of neurological impairment.

In a clinic note dated February 4, 2016, Dr. Wassfy Hanna, a Board-certified psychiatrist, obtained a history of appellant experiencing poor concentration, anger, and the need to be vigilant following his employment injury.

In a psychological profile dated September 6, 2016, Dr. Robert Su Prescott, a psychologist, discussed appellant's history of a respiratory injury on November 18, 2014 and noted that he related that "[appellant's] attention and memory have worsened since the work accident. [Appellant] reports that he gets distracted, cannot multitask and will misplace things." Dr. Prescott diagnosed PTSD and recommended against "further evaluative studies at this time."

³ Appellant has continued to receive treatment from Dr. Kim for his respiratory condition through 2018.

On January 5, 2017 OWCP referred appellant to Dr. Mitchell P. Pulver, a Board-certified psychiatrist, for a second opinion evaluation regarding whether the acceptance of his claim should be expanded to include PTSD.

In a report dated February 20, 2017, Dr. Pulver reviewed appellant's history of an employment injury on November 18, 2014 while working on a submarine in a confined space that filled with toxic fumes. He related, "[Appellant] has been diagnosed with a lung and upper respiratory disorder due to his industrial accident in 2014. He also probably sustained some brain damage due to the accident, which caused impaired concentration and memory." Dr. Pulver diagnosed PTSD due to the November 2014 employment injury.

Based on Dr. Pulver's report, on March 2, 2017 OWCP expanded acceptance of appellant's claim to include PTSD.

On December 7, 2017 appellant requested that OWCP expand acceptance of his claim to include a TBI based on Dr. Pulver's finding that he may have sustained brain damage from his injury.

In a development letter dated January 10, 2018, OWCP advised appellant of the type of evidence required to support that the acceptance of his claim should be expanded to include his recent diagnosis of a TBI, including a rationalized medical report explaining how the diagnosed condition was caused or aggravated by his accepted employment injury. It afforded him 30 days to submit the necessary evidence.

In a January 26, 2018 response, appellant asserted that OWCP should expand acceptance of his claim to include a TBI based on Dr. Pulver's finding that he had probably sustained brain damage due to his November 18, 2014 employment injury.

On May 25, 2018 OWCP referred appellant to Dr. George Neal, a Board-certified neurologist, for a second opinion examination regarding the issue of whether the acceptance of his claim should be expanded to include a TBI. It provided Dr. Neal with a statement of accepted facts (SOAF) containing a history of injury and the accepted conditions.

In a report dated June 15, 2018, Dr. Neal reviewed appellant's history of injury and the medical reports of record. He discussed appellant's complaints of memory problems beginning immediately following the injury and also problems with concentration, distraction, and difficulty learning. Dr. Neal noted that appellant had been shot in the head when young and that the bullet had not been removed. On examination he found normal attention, concentration, and remote memory. Dr. Neal diagnosed central sleep apnea unrelated to the November 18, 2014 employment injury. He related:

"In terms of cognitive complaints, the claimant reports cognitive complaints at the time of the original injury that persist to the present time. These symptoms are likely to be explained on the basis of [PTSD] as there is no history of a neurologic injury. If cognitive problems were secondary to that injury, one would expect there to have been significant evidence of hypoxic encephalopathy at the time, which the records do not reveal."

Dr. Neal noted that neuropsychological testing had not been undertaken and that, consequently, appellant's "cognitive complaints have not been substantiated or differentiated from psychological causes of the complaints." He concluded that appellant had no "work-related conditions of neurologic origin."

On July 24, 2018 appellant questioned whether Dr. Neal was provided with the complete medical record and noted that he could have obtained neuropsychological testing.

By decision dated December 6, 2018, OWCP denied appellant's request to expand the acceptance of his claim to include TBI causally related to the November 18, 2014 employment injury. It found that Dr. Neal's opinion constituted the weight of the evidence and established that he had not sustained an employment-related neurological condition.

LEGAL PRECEDENT

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁴

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁵ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.⁶ 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).⁷

ANALYSIS

The Board finds that appellant has not met his burden of proof to expand the acceptance of his claim to include a TBI causally related to his November 18, 2014 employment injury.

OWCP accepted that appellant sustained pneumonitis due to acute smoke inhalation, RADS, an exacerbation of chronic rhinitis, other diseases of the larynx, and PTSD on November 18, 2014 while in the performance of duty. By decision dated December 6, 2018, it denied his request to expand the acceptance of his claim to include a TBI.

In support of his request for claim expansion, appellant asserted that medical evidence supported his complaints of memory problems subsequent to the employment injury. On January 12, 2015 Dr. Kim discussed his complaints of difficulty with his memory. He diagnosed

⁴ *R.J.*, Docket No. 17-1365 (issued May 8, 2019); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁵ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

⁶ *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁷ *Id.*

RADS, cough, a history of sleep apnea, sinus congestion, and hoarseness. On February 4, 2016 Dr. Hanna noted that appellant asserted that he had reduced concentration and anger subsequent to his work injury. In a report dated September 6, 2016, Dr. Prescott related that he believed that appellant's memory and attention span had decreased after the November 18, 2014 employment injury. He diagnosed PTSD. As none of these physicians diagnosed a TBI as a result of the November 18, 2014 employment injury, or addressed the relevant issue of claim expansion, their opinions are insufficient to meet appellant's burden of proof.⁸

OWCP referred appellant to Dr. Pulver, a Board-certified psychiatrist, to determine whether it should expand acceptance of appellant's claim to include PTSD. In a report dated February 20, 2017, Dr. Pulver discussed appellant's history of lung and respiratory problems after exposure to toxic fumes while working on a submarine. He related that appellant had "probably sustained some brain damage due to the accident." Dr. Pulver diagnosed PTSD. However, his opinion that appellant probably sustained brain damage is speculative in nature and thus of diminished probative value.⁹ Additionally, Dr. Pulver is not a specialist in the appropriate field of medicine to diagnose a neurological condition.¹⁰

OWCP further developed the issue of whether the acceptance of appellant's claim should be expanded to include a TBI by referring him to Dr. Neal, a Board-certified neurologist. On June 15, 2018 Dr. Neal discussed appellant's November 18, 2014 employment injury and subsequent complaints of difficulty with concentration, memory, and learning. He obtained a history of appellant being shot in the head when young. On examination, Dr. Neal found that appellant's remote memory, concentration, and attention were normal. He diagnosed sleep apnea unrelated to appellant's employment injury. Dr. Neal attributed appellant's cognitive symptoms to PTSD, providing as a rationale that there was no evidence of significant hypoxic encephalopathy at the time of injury. He further noted that testing had not differentiated whether his complaints were psychological or physiological. Dr. Neal opined that appellant had no neurological condition causally related to the employment injury. His opinion is based on a proper factual and medical history. Dr. Neal thoroughly reviewed that history and accurately summarized the relevant medical evidence.¹¹ As noted, he explained that appellant had no symptoms of significant hypoxic encephalopathy at the time of injury and thus found that he had not sustained a TBI as a result of the November 18, 2014 employment injury. Dr. Neal is a specialist in the appropriate field. His opinion is, consequently, entitled to the weight of the evidence and establishes that appellant failed to sustain a TBI causally related to his accepted employment injury.¹²

⁸ See S.S., Docket No. 11-1579 (issued April 24, 2012).

⁹ D.C., Docket No. 18-1358 (issued June 13, 2019).

¹⁰ See generally O.S., Docket No. 18-1549 (issued February 7, 2019) (finding that a report from a psychologist was not probative regarding appellant's foot condition as he was not a specialist in the appropriate field of medicine).

¹¹ C.B., Docket No. 18-0633 (issued November 16, 2018).

¹² *Id.*

The Board thus finds that appellant has not met his burden of proof to establish that the acceptance of his claim should be expanded to include a TBI.

On appeal appellant asserts that OWCP erred in giving less weight to Dr. Pulver because he used the word “probably” to describe causation. He questions why OWCP failed to inform Dr. Neal that he could obtain any necessary testing and asserted that he did not base his findings on a complete record or SOAF. As discussed, however, Dr. Pulver’s opinion is of diminished probative value as it is speculative in nature.¹³ Additionally, while Dr. Neal indicated that appellant had not undergone cognitive testing, he did not find that under the circumstances he required such testing for a diagnosis, and provided rationale for his conclusion that appellant had no neurological condition resulting from his accepted employment injury.

Appellant may submit new evidence or argument at any time with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that the acceptance of his claim should be expanded to include a TBI causally related to his November 18, 2014 employment injury.

¹³ See *supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the December 6, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 22, 2019
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
Employees' Compensation Appeals Board