United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 19-1279**
	)	**Issued: December 30, 2019**
DEPARTMENT OF VETERANS AFFAIRS, WESTERN NEW YORK HEALTHCARE SYSTEM, Batavia, NY, 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
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 21, 2019 appellant, through counsel, filed a timely appeal from an April 25, 2019 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 an injury causally related to the accepted June 25, 2013 employment incident.

FACTUAL HISTORY

On July 11, 2013 appellant, then a 55-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on June 25, 2013 he sustained injuries to his right shoulder and arm, as well as his right knee and ankle when he caught a veteran who fell backwards while exiting a shuttle while in the performance of duty. He did not stop work.

On July 17, 2013 appellant sought medical treatment at the employing establishment facility and was assigned to modified work in housekeeping. OWCP closed the claim upon receipt as it was considered a minor injury.

In a July 25, 2013 medical report, Dr. Elizabeth Nolan, an orthopedic surgeon specialist, noted that appellant's right shoulder pain over the right trapezius and inferior parascapular area was worsening. She discussed magnetic resonance imaging (MRI) scan results of shoulder arthrogram, which were indicative of a slap tear and cervical spine MRI scan which was significant for mild-to-moderate multilevel discogenic disease of the cervical spine.

OWCP thereafter received approximately four-hundred pages of VA medical records dating back to 2010. Numerous progress reports of varying dates were signed by a nurse practitioner and/or chiropractor.

The chiropractic records indicated that appellant received ongoing chiropractic care from Dr. Andrew Dunn, a chiropractic practitioner. In a report dated September 30, 2013, Dr. Dunn noted diagnoses of mild-to-moderate multilevel discogenic disease most severe at C4-5 and C5-6, with severe spinal canal narrowing at C4-5; multilevel neural foraminal narrowing; severe at C4-5 bilaterally, C5-6 on the right, and C6-7 on the left.

In an August 20, 2018 development letter, OWCP advised appellant that, when his claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work and, since the employing establishment had not controverted continuation of pay or challenged the case, a limited amount of medical expenses were administratively approved and paid. It noted that it had reopened the claim for formal consideration because he had filed a claim for a traumatic injury. OWCP informed appellant of the type of factual and medical evidence necessary to establish his claim and afforded him 30 days to submit the necessary evidence. Appellant did not submit any further evidence.

By decision dated October 3, 2018, OWCP denied the claim finding that the medical evidence of record was insufficient to establish that a medical condition was diagnosed in connection with the June 25, 2013 employment incident.

On October 9, 2018 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. A telephonic hearing was held on February 13, 2019 during which appellant testified that he had service-connected medical problems involving his left knee, left

foot, and right knee prior to working at the employing establishment. He noted that he injured his knee during a snowstorm in 2010 and was treated by the employing establishment. Appellant also indicated that he had an employment-related right shoulder injury on June 16, 2010 which OWCP accepted under File No. xxxxxx091.[3] He testified that on June 25, 2013 a sizeable gentleman was leaving the shuttle bus and he could not support his weight when he reached the last step. Appellant indicated that he injured his right knee and shoulder when he pushed the gentlemen, who was holding the handrails, and "kind of sat him on his leg," which was fully extended. He explained that he pushed the gentleman and bent him and his knee to the point where the gentleman could stand up on his own. Appellant indicated that he received treatment at the VA and continued to work after the injury. He confirmed that he was no longer working and was receiving social security disability benefits, as well as a VA pension and Federal Employee Retirement System compensation.

Post-hearing OWCP received December 16 and 23, 2010 and January 24, 2011 reports from a nurse practitioner and physical therapists pertaining to appellant's right knee.

OWCP also received an undated note from Dr. Patrick Hlubik, a Board-certified orthopedic surgeon, noting that appellant would be undergoing right knee surgery on April 14, 2017 for right knee medial meniscus tear.

By decision dated April 25, 2019, an OWCP hearing representative modified the prior decision to find that a medical diagnosis had been established. The hearing representative denied the claim, however, finding that the medical evidence of record was insufficient to establish how the accepted June 25, 2013 employment incident caused or aggravated appellant's diagnosed medical conditions.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 timely filed within the applicable time limitation period of FECA,[4] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related

[3] Under OWCP File No. xxxxxx091, OWCP accepted a right shoulder strain. On July 15, 2015 appellant underwent right shoulder arthroscopy with acromioplasty/subacromial decompression, superior labrum anterior posterior debridement, and long head biceps tenodesis. On November 20, 2018 he received a schedule award for 17 percent permanent impairment of the right upper extremity.

[4] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

to the employment injury.[5] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

To determine if an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. 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.[7] The second component is whether the employment incident caused a personal injury.[8]

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.[9] 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 incident.[10]

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.[11]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an injury causally related to the accepted June 25, 2013 employment incident.

In a July 25, 2013 report, Dr. Nolan diagnosed right shoulder slap tear and discogenic cervical spine disease. However, she offered no opinion regarding the cause of these diagnosed conditions. Medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.[12]

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[5] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

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

[8] *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

[9] *G.N.*, Docket No. 18-0403 (issued September 13, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[10] *S.S.*, Docket No. 18-1488 (issued March 11, 2019).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(e) (January 2013); *see R.J.*, Docket No. 19-0593 (issued September 9, 2019).

[12] *A.S.*, Docket No. 19-0915 (issued November 22, 2019); *see L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

OWCP also received an undated medical report from Dr. Hlubik indicating that appellant would be undergoing surgery on April 14, 2017 for right knee medial meniscus tear. However, Dr. Hlubik also did not offer an opinion regarding the cause of this condition, and his opinion is therefore of no probative value regarding the issue of causal relationship.[13]

The Board notes that none of the chiropractic reports from Dr. Dunn constitute probative medical evidence, as a chiropractor is only considered a physician for purposes of FECA if he diagnoses subluxation based upon x-ray evidence.[14] As Dr. Dunn did not diagnose a spinal subluxation based upon x-ray evidence, he is not considered a physician under FECA and his reports do not constitute competent medical evidence.

Appellant submitted multiple notes signed solely by a nurse practitioner or physical therapist. Nurse practitioners and physical therapists are not physicians as defined under FECA and accordingly, any reports which are not cosigned by a physician, do not constitute medical evidence and have probative medical value.[15]

Appellant also submitted several diagnostic studies. However, diagnostic studies lack probative value as they do not address whether an employment incident caused the diagnosed condition.[16]

As appellant has not submitted a rationalized medical opinion establishing that his diagnosed conditions were causally related to or aggravated by the accepted June 25, 2013 employment incident, the Board finds that he has not met his burden of proof to establish an employment-related traumatic injury.

On appeal counsel asserts that OWCP's decision is contrary to law and fact. However, there is no rationalized medical opinion, based upon a proper factual and medical background, which explains how the June 25, 2013 employment incident either caused or aggravated appellant's diagnosed conditions.

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.

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[13] *Id.*

[14] Section 8101(2) of FECA provides that the term physician include chiropractors only if the treatment consists of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2). *See T.T.*, Docket No. 18-0838 (issued September 19, 2019); *Thomas W. Stevens*, 50 ECAB 288 (1999); *George E. Williams*, 44 ECAB 530 (1993).

[15] *See A.R.*, Docket No. 18-1728 (issued March 19, 2019); *T.T.*, Docket No. 08-2067 (issued June 9, 2009); *see also David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA. Consequently, their medical findings and/or opinions are of no probative value and will not suffice for purposes of establishing entitlement to FECA benefits.

[16] *F.S.*, Docket No. 19-0205 (issued June 19, 2019).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury causally related to or aggravated by the accepted June 25, 2013 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the April 25, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 30, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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