United States Department of Labor
Employees' Compensation Appeals Board

E.M., Appellant	)	
	)	
and	)	**Docket No. 17-1683**
	)	**Issued: January 4, 2019**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Loma Linda, CA, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 31, 2017 appellant, through counsel, filed a timely appeal from a May 15, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

[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.

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.[3]

ISSUE

The issue on appeal is whether appellant has met his burden of proof to establish a recurrence of disability on June 26, 2016 causally related to his August 6, 2012 employment injury.

FACTUAL HISTORY

OWCP accepted that on August 6, 2012 appellant, then a 56-year-old maintenance mechanic supervisor, was attempting to reposition a caulking gun on a high overhead shelf and it got caught on a 32-pound case which fell on his left shoulder while in the performance of duty. It accepted his traumatic injury claim (Form CA-1) for a closed fracture of the distal clavicle. Appellant stopped work following the injury, but returned to modified work on March 25, 2013.[4] OWCP paid wage-loss compensation on the supplemental rolls commencing September 21, 2012.

In a letter dated June 15, 2016, counsel requested that the acceptance of appellant's claim be expanded to include the condition of moderately displaced, ununited fracture of the distal clavicle of the left shoulder. He submitted supporting medical documentation from Dr. Reed Liang, an internist. In a May 12, 2016 report, Dr. Liang noted appellant's history of an employment-related injury on August 6, 2012. He noted that, despite treatment, appellant continued to suffer from constant pain and achiness in his left shoulder area. Additionally, Dr. Liang indicated that appellant had decreased range of motion and had undergone occupational therapy including the use of a bone stimulator to assist the healing process. He noted that a left shoulder x-ray of May 11, 2016 revealed a moderately displaced ununited fracture involving the distal clavicle with no change since November 25, 2014, and no maximum medical improvement. Dr. Liang explained that over time, appellant's function and pain improved, but not enough for him to return to his date-of-injury position as a mason. He indicated that appellant was placed on permanent light duty with no heavy lifting of his left shoulder due to limited range of motion and because the fracture had not healed "well." Dr. Liang indicated that appellant was requesting disability retirement, which he fully supported.

In a letter dated June 20, 2016, counsel again requested that the acceptance of appellant's claim be expanded to include post-traumatic stress disorder (PTSD), panic disorder, and insomnia,

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[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that following the May 15, 2017 decision, OWCP received additional evidence. 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 evidence for the first time on appeal. *Id.*

[4] The record reflects that appellant was offered limited duty in the administrative office on March 25, 2013 for eight hours per day. Appellant's duties included filing, answering telephones, taking messages, faxing, photocopying, work order distribution, sorting mail, data entry, typing routine memos, and other routine office functions.

and submitted additional evidence in support of his request. He argued that an attached report by Dr. Dawn M. White, a psychiatrist, supported expansion of the claim

In a June 6, 2016 report, Dr. White noted that he had treated appellant since November 10, 2014 for PTSD, panic disorder, and insomnia. She noted that he was originally hired as a mason, but a work-related injury resulted in his being unable to continue in this capacity. Dr. White advised that alternate, less physically taxing work positions were tried, but resulted in a worsening of appellant's mental health condition. She explained that he had a progressive worsening of his symptoms due to job-related stressors, which caused further activation of his PTSD. Dr. White noted that dealing with angry, upset, at times hostile veterans caused activation of appellant's own anxiety and resulted in increased insomnia, panic, and reactivation or traumatic memories. She explained that "his sense of anxiety and impending doom made staying centralized in a closed office uncomfortable and at times panic producing." Furthermore, Dr. White noted that appellant would find his anxiety increasing to the point of needing to leave the environment, which could be perceived as work avoidance rather than a mental health-related issue. She opined that this resulted in interpersonal issues with coworkers and supervisors and further exacerbated his condition. Dr. White added that, despite removing appellant from duties requiring customer interaction, his anxiety continued to be heightened and his panic attacks continued. She noted that accommodations failed to stop his deterioration. Dr. White added that as a result appellant was requesting disability retirement, which she fully supported.

In a June 7, 2016 handwritten report, Dr. White noted that appellant was unable to participate in a customer service-related job as dealing with occasional angry or upset customers resulted in activation of his PTSD and further worsening. Additionally, she noted that it caused a significant increase in anxiety, irritability, panic, decreased sleep, and avoidance. Dr. White explained that requiring appellant to continuously work in an activating environment would cause continued activation of his PTSD and further related psychological and physical damage from stress. A note from the employing establishment indicated that appellant's PTSD, was chronic and began while in service as a marine and fluctuated in severity from moderate to severe.

On June 23, 2016 appellant filed a claim for compensation (Form CA-7) requesting total disability compensation benefits for the period June 26, 2014 through July 8, 2016. The employing establishment confirmed that he had returned to work on March 25, 2013 with restrictions and that there was no medical support for the claimed period of disability. Appellant filed additional claims for disability compensation benefits. In his August 29, 2016 claim for disability for the period August 20 to September 2, 2016, the employing establishment noted that he had recently filed for disability retirement.

In a development letter dated June 28, 2016, OWCP advised appellant of the additional factual and medical information needed to establish his claim for a recurrence. It explained that following the original injury, he returned to work on March 25, 2013 and continued working until June 26, 2016,[5] when he stopped work completely. OWCP explained that the evidence included a report from Dr. Liang that indicated that appellant could continue with light duty and a report from Dr. White that indicated that appellant had PTSD and that dealing with Veterans' complaints

[5] Although OWCP indicated June 26, 2014, it was later clarified that the proper date was June 26, 2016.

activated his symptoms. It noted that this evidence was insufficient to establish his claim for a recurrence because it had not received evidence that demonstrated he could not work in the limited-duty position offered by the employing establishment. OWCP suggested that, if additional work exposures caused his preexisting PTSD to worsen, then the exposure would be the basis for an occupational disease claim. It advised appellant of the additional factual and medical evidence needed to support his claim for a recurrence, to include providing responses to a questionnaire, and requested that he submit such evidence within 30 days.

On August 5, 2016 OWCP received appellant's responses to its questionnaire. Appellant indicated that he had returned to work for one hour per day, but his arm was still broken. He advised that office work caused his pain to increase and that he never healed, only worsened. Appellant denied any other injuries and advised that his PTSD had increased. Regarding bridging the timeline and all periods of disability from his work injury, appellant responded "none," and that no doctors were available until May 11, 2016.

By decision dated August 31, 2016, OWCP denied appellant's claim for a recurrence of disability as the evidence of record was insufficient to establish a return or increase of disability due to his accepted condition of closed fracture of the left clavicle. It noted that he had failed to establish that he had a return or increase of disability due to a consequential injury or condition stemming from the accepted condition.

In a letter dated September 7, 2016, counsel requested a telephonic hearing, which was held on April 12, 2017. During the hearing, appellant testified that he had no doctor for two and a half years and his arm was hurting. When asked if it was his arm or the panic attacks that were keeping him off work, appellant responded, "both." He confirmed that he stopped work in June 2016. Appellant also denied that his limited-duty position was withdrawn and explained that it was suggested that he put in for medical retirement. Counsel also indicated that OWCP issued its decision prematurely before adequately developing the claim to include his PTSD and insomnia, which were consequential conditions.

In an August 29, 2016 report, Dr. White explained that appellant had preexisting PTSD related to military service. She noted that he was working as a mason when he sustained an on-the-job injury. Dr. White advised that afterwards appellant was placed in a desk job in finance. She explained the conditions of the new job included dealing with customers and hostile interactions, which caused his PTSD symptoms to increase. Dr. White diagnosed PTSD and panic disorder. She opined that the "facts of injury are more likely than not the cause of the diagnosis" that she cited. Dr. White indicated that, while there might be other causes, one of the causes was, more likely than not, the activities of work described by appellant.

In a September 21, 2016 report, Dr. James D. Matiko, an orthopedic surgeon, noted the history of appellant's accepted employment injury. He noted that appellant was released as permanent and stationary in March 2013 with permanent restrictions. Dr. Matiko noted that, while appellant related that he continued to have pain, he did not see a physician until May 2016 through his private insurance. He noted that at that time, appellant saw Dr. Liang, who advised him that the fracture had not healed. Dr. Matiko diagnosed status post fracture distal left clavicle on August 2012, probable nonunion fracture distal left clavicle, and left shoulder rotator cuff

tendinopathy. Regarding appellant's work status, he noted that appellant had not worked since June 20, 2016 and was applying for medical retirement.

Dr. Matiko continued to treat appellant on November 22, 23, and 29, 2016, for his left clavicle and rotator cuff. In the November 22, 2016 report, he noted that a magnetic resonance imaging (MRI) scan of the left shoulder, obtained on November 6, 2016, revealed supraspinatus tendinosis and distal clavicle nonunion. Dr. Matiko explained that appellant had type III acromial morphology and that in all probability it would continue to be symptomatic so he wished to proceed with a diagnostic left shoulder arthroscopy with rotator cuff debridement versus repair and subacromial decompression. He advised that he was nontender over the acromioclavicular joint and over the aforementioned ununited distal clavicle fracture and advised that no surgical intervention would be undertaken with respect to his clavicle. He advised that regarding work status appellant was "permanent and stationary."

OWCP received a November 6, 2016 MRI scan read by Dr. Shobi Zaidi, a diagnostic radiologist, which revealed a chronic nonunited, comminuted fracture of the distal clavicle at the level of the coracoclavicular ligaments, no acute ligament injury, no evidence of acromioclavicular joint injury, tendinosis of the distal supraspinatus tendon, small nondisplaced tear of the anterior superior labrum, and undersurface bony remodeling of the distal acromion, and degenerative changes at the acromioclavicular joint, increasing the risk for subacromial impingement.

By decision dated January 17, 2017, OWCP expanded the acceptance of appellant's claim to include the additional conditions of superior glenoid labrum lesion of left shoulder and sprain of unspecified parts of left shoulder girdle.

Dr. Matiko provided a March 24, 2017 operative report, in which he performed a left glenohumeral arthroscopy and subacromial bursoscopy, arthroscopic debridement of partial articular supraspinatus tendon tear, and left endoscopic subacromial decompression.

By decision dated May 15, 2017, OWCP's hearing representative affirmed the August 31, 2016 decision. He noted that the claim was initially accepted for the condition of a closed fracture of the left distal clavicle, but had been expanded to include additional left shoulder conditions on January 17, 2017. The hearing representative explained that, if appellant's worsening PTSD and panic attacks were caused by factors of his employment, then it would be considered to be a new work-related injury, as a recurrence did not include a work stoppage caused by a condition, which resulted from a new injury, even if it involved the same part of the body, previously injured, or by renewed exposure to the causative agent of a previously suffered occupational disease. He noted that, if a new exposure or injury had occurred, a Form CA-1 or CA-2 should be completed accordingly. The hearing representative found that appellant had not met his burden to submit medical evidence which established that his accepted medical conditions materially worsened, without intervening factors, such that he was unable to work beginning June 26, 2016. He also noted that OWCP should consider making a formal determination in response to appellant's request with regard to additional accepted conditions.

LEGAL PRECEDENT

Section 10.5(x) of OWCP's regulations provides that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. The term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[6]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative, and substantive evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements.[7]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence.[8] This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.[9] The physician's opinion must be based on a 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.[10]

An award of compensation may not be based on surmise, conjecture, or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.[11]

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[6] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[7] *Richard E. Konnen,* 47 ECAB 388 (1996); *Terry R. Hedman,* 38 ECAB 222, 227 (1986).

[8] *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

[9] *Duane B. Harris*, 49 ECAB 170, 173 (1997).

[10] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

[11] *Walter D. Morehead*, 31 ECAB 188 (1986).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability on June 26, 2016 causally related to his August 6, 2012 employment injury.

Appellant has not alleged a change in the nature and extent of his light-duty job requirements. Therefore, he must thus provide medical evidence establishing that he was disabled due to a worsening of his accepted work-related conditions.[12] The Board finds that appellant did not submit medical evidence to support that he was disabled due to a worsening of his accepted work-related conditions on or after June 26, 2016.

The Board has held that the issue of disability from work can only be resolved by competent medical evidence.[13] Whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.[14] The record does not contain a medical opinion of sufficient rationale to establish that appellant was disabled from work commencing June 26, 2016 causally related to his August 6, 2012 employment injury.

In a May 12, 2016 report, Dr. Liang noted that, despite treatment, appellant continued to suffer from constant pain and achiness in his left shoulder area. He indicated that appellant was placed on permanent light duty with no heavy lifting of his left shoulder due to limited range of motion and because the fracture had not healed "well." Dr. Liang indicated that appellant was requesting disability retirement, which he fully supported. However, he did not explain how appellant was disabled on or after June 26, 2016 due to a worsening of his accepted work-related conditions.[15] Without such an explanation, this report of Dr. Liang is insufficient to establish a recurrence of disability, as alleged.

In support of his claim for a recurrence of disability appellant submitted reports from Dr. White. In a June 6, 2016 report, Dr. White noted that she had treated appellant since November 10, 2014 for PTSD, panic disorder, and insomnia. However, no work-related mental health conditions have been accepted in the current claim. In her reports of June 7 and August 15 and 29, 2016, Dr. White fails to provide a medical opinion as to how appellant's accepted conditions had resulted in a recurrence of disability. While her reports may be supportive of mental health-related conditions, they lack probative value as to the issue of a recurrence of disability due to the accepted left shoulder conditions.[16]

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[12] *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[13] *R.C.*, 59 ECAB 546 (2008).

[14] *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *see also Sandra D. Pruitt*, 57 ECAB 126 (2005).

[15] *E.B.*, Docket No. 17-1467 (issued July 26, 2018); *see S.E.*, Docket No. 08-2214 (issued May 6, 2009); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

[16] *Id*.

In a September 21, 2016 report, Dr. Matiko diagnosed status post fracture distal left clavicle on August 2012, probable nonunion fracture distal left clavicle, and left shoulder rotator cuff tendinopathy. Regarding appellant's work status, he noted that appellant had not worked since June 20, 2016 and was applying for medical retirement. Dr. Matiko continued to treat appellant on November 22, 23, and 29, 2016, for his left clavicle and rotator cuff. In the November 22, 2016 report, he reviewed diagnostic reports and findings and explained that appellant wished to proceed with a diagnostic left shoulder arthroscopy with rotator cuff debridement versus repair and subacromial decompression at the very least. Dr. Matiko advised that appellant was nontender over the acromioclavicular joint and over the aforementioned ununited distal clavicle fracture and advised that no surgical intervention would be undertaken with respect to his clavicle. He advised that regarding work status appellant was "permanent and stationary." While he did note that appellant was unable to work after June 26, 2016, as a result of his August 6, 2012 employment injury, Dr. Matiko's opinion is conclusory in nature as he did not support his opinion with medical rationale. Consequently, the Board finds that these reports of Dr. Matiko are insufficient to establish appellant's claim for a recurrence of disability.[17]

OWCP also received a November 6, 2016 MRI scan read by Dr. Zaidi and a March 24, 2017 operative report from Dr. Matiko, who performed a left glenohumeral arthroscopy and subacromial bursoscopy, arthroscopic debridement of partial articular supraspinatous tendon tear, and left endoscopic subacromial decompression. However, these reports, are insufficient to establish appellant's claim for a recurrence of disability, as they do not specifically address how any condition on or after June 26, 2016 is causally related to the original employment injury.[18]

Consequently, appellant has not established that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the light-duty requirements which would prohibit him from performing the light-duty position he assumed after he returned to work.

On appeal counsel asserts that the claim was not adequately developed before the recurrence was denied. He argues that OWCP must expand the acceptance of appellant's claim. However, the sole issue on appeal is whether appellant has met his burden of proof to establish a recurrence of disability as alleged.

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 recurrence of disability on June 26, 2016 causally related to his August 6, 2012 employment injury.

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[17] *See J.J.*, Docket No. 15-1329 (issued December 18, 2015).

[18] The Board has held that diagnostic studies lack probative value as they do not address whether the employment incident caused any of the diagnosed conditions. *See J.S.*, Docket No. 17-1039 (issued October 6, 2017).

ORDER

IT IS HEREBY ORDERED THAT the May 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 4, 2019
Washington, DC

Christopher J. Godfrey, 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