United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 18-1679**
	)	**Issued: May 6, 2019**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PATROL, Pharr, TX, Employer	)	

Appearances:
Appellant, pro se
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 2, 2018 appellant filed a timely appeal from a July 16, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the July 16, 2018 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 additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury on May 8, 2018 in the performance of duty, as alleged.

FACTUAL HISTORY

On May 8, 2018 appellant, then a 53-year-old supervisory customs and border patrol officer, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he experienced back pain and right leg tingling while walking to his supervisor's office while in the performance of duty. He did not stop work.

In a May 9, 2018 attending physician's report (Form CA-20), Dr. Jorge E. Tijmes, a Board-certified orthopedic surgeon, noted a May 8, 2018 date of injury and related that appellant developed back pain after standing for more than four hours. He diagnosed lumbar strain and checked a box marked "yes," indicating that the diagnosed condition was caused or aggravated by the employment activity. Dr. Tijmes explained that long periods of standing, walking, or sitting can exacerbate back pain. In a separate encounter note dated May 9, 2018, he diagnosed lumbar sprain.

A May 9, 2018 narrative report signed by Sofia C. Luna, a physician assistant, noted that appellant was evaluated that day for low back pain complaints. Appellant related that, on May 8, 2018, he developed pain during his work shift when he was required to stand for more than six hours. Physical examination findings were detailed and a lumbar spine x-ray interpretation reviewed. Diagnoses included low back pain and back strain. Appellant was referred for physical therapy.

In a May 30, 2018 report, Dr. Alex Flores, an examining chiropractor, diagnosed low back pain and lumbar ligament sprain. Appellant related that his job was normally sedentary, but that he had stood for approximately six hours on May 8, 2018. He took a break to sit down and, after sitting for approximately two hours, he felt a sharp shooting pain and had difficulty standing up. Physical examination findings were detailed.

In a development letter dated July 16, 2018, OWCP noted that when appellant's claim was first received it appeared to be a minor injury that resulted in minimal lost time from work and was therefore administratively approved for a payment of a limited amount of medical expenses. It informed him that evidence of record was insufficient to establish his claim. OWCP advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. It afforded appellant 30 days to submit the necessary evidence.

Dr. Tijmes, in a June 6, 2018 report, noted that appellant was seen again on June 1, 2018 for a May 8, 2018 injury. He noted physical examination findings and diagnosed lumbar sprain.

In a June 17, 2018 statement, appellant responded to OWCP's development questionnaire. He described the events on May 8, 2018, explaining that he was assigned to check documents at a pre-pedestrian post for approximately four hours, supervise officers assigned to passengers for about two hours, and then return to check documents at the pre-primary post. While supervising

officers, appellant developed lower back pain. He developed sudden sharp lower back pain while walking to his supervisor's office after being relieved at 2:00 p.m. from the pre-primary post. Appellant related that correcting his posture to stand in an upright position was painful.

By decision dated July 16, 2018, OWCP denied appellant's claim finding he had failed to establish the factual portion of his claim. Specifically, it found that he failed to clearly identify what aspect or factor of the act of supervising employees caused a lower back injury. OWCP further found that the medical evidence of record was insufficiently rationalized to establish a diagnosed medical condition causally related to the employment incident.

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,[3] 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 to the employment injury.[4] 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.[5]

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. Generally, 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.[6] The second component is whether the employment incident caused a personal injury.[7]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. An employee has not met his or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast serious doubt on an employee's statements in determining whether a *prima facie* case has been established. However, an employee's

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

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

[5] *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).

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

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

statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[8]

Rationalized medical opinion evidence is required to establish causal relationship. 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.[9]

ANALYSIS

The Board finds that appellant has established that the May 8, 2018 incident occurred at the time, place, and in the manner alleged.

In a June 13, 2018 development letter, OWCP requested that appellant respond to its questionnaire and provide detailed information concerning the job activities he believed contributed to his alleged lumbar condition. Appellant responded to OWCP's request and submitted his own supplemental statement, as well as medical evidence, which described that on May 8, 2019 he stood for four hours checking documents at a pre-primary post, sat for two hours while supervising officers, and then stood again for two hours at the pre-primary post. He developed back pain while sitting, and then developed sharp back pain at the end of his shift as he walked to his supervisor's office, and also experienced back pain while correcting his posture to stand in an upright position. Appellant's history of the events of May 8, 2018 is consistent with the history he provided his medical providers, who noted that appellant usually performed sedentary duties, but developed back pain on May 8, 2018 after standing for six hours. As he has identified the mechanism of injury, the Board finds that appellant has sufficiently described the events of May 8, 2018. There are no such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[10]

The Board further finds, however, that appellant has not established that the accepted employment incident of May 8, 2018 caused his lumbar sprain.

Appellant was treated by Dr. Tijmes on May 9 and June 1, 2018, and he diagnosed lumbar sprain. While in his May 9, 2018 attending physician's report (Form CA 20) he indicated by checking a box marked "yes," that appellant's history of standing for four hours caused his lumbar sprain, the Board has held that a physician's opinion on causal relationship which consists of checking "yes" to a form question, without explanation or rationale, is of diminished probative value and is insufficient to establish a claim.[11] While he added that long periods of standing,

[8] *See L.G.*, Docket No. 18-1050 (issued March 1, 2019).

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

[10] *Supra* note 7.

[11] *E.V.*, Docket No. 17-0037 (issued November 3, 2017).

walking or sitting can exacerbate back pain, this opinion is speculative and equivocal in nature.[12] This report is therefore of diminished probative value regarding the issue of causal relationship.

In his additional reports dated May 9 and June 1, 2018, Dr. Tijmes diagnosed lumbar sprain, but offered no opinion regarding causal relationship. 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.[13] These reports, therefore, are insufficient to establish appellant's claim.

In a May 9, 2018 report, Ms. Luna, a physician assistant, noted a diagnosis of back strain. This report does not constitute competent medical evidence because a physician assistant is not considered a "physician" as defined under FECA.[14] Under FECA the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by the applicable state law.[15] Consequently, the medical findings and/or opinions of a physician assistant will not suffice for purposes of establishing entitlement to compensation benefits.[16]

Dr. Flores, a chiropractor, reported on May 30, 2018 that appellant was treated for lumbar ligament strain. Section 8101(2) of FECA[17] provides that the term physician, as used therein, includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation, as demonstrated by x-ray to exist and subject to regulation by the Secretary.[18] Since Dr. Flores did not diagnose subluxation based upon x-ray evidence, he is not a qualified physician under FECA.[19] Thus, his report is of no probative value and is insufficient to establish causal relationship.[20]

The Board finds that appellant has not submitted rationalized, probative medical evidence sufficient to establish that his lumbar sprain was causally related to the accepted May 8, 2018 employment incident. Appellant, therefore, has not met his burden of proof.

[12] *See J.R.*, Docket No. 18-0206 (issued October 15, 2018).

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

[14] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

[15] 5 U.S.C. § 8101(2).

[16] *S.C.*, Docket No. 18-1242 (issued March 13, 2019).

[17] 5 U.S.C. § 8101(2).

[18] *See* 20 C.F.R. § 10.311; *M.B.*, Docket No. 17-1378 (issued December 13, 2018).

[19] *R.H.*, Docket No. 18-1544 (issued March 4, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367-68 (2000).

[20] *T.C.*, Docket No. 18-1498 (issued February 13, 2019).

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 established that the May 8, 2018 employment incident occurred at the time, place, and in the manner alleged. However, he has not met his burden of proof to establish that his lumbar strain was causally related to the accepted May 8, 2018 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2018 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: May 6, 2019
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board