United States Department of Labor
Employees' Compensation Appeals Board

M.E., Appellant	)	
and	)	**Docket No. 19-1000**
	)	**Issued: November 12, 2019**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Philadelphia, PA, Employer	)	

Appearances:
Jason S. Lomax, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 8, 2019 appellant, through counsel, filed a timely appeal from an October 9, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] 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.

[2] Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from October 9, 2018, the date of OWCP's last decision, was April 7, 2019, which is a Sunday. Pursuant to 20 C.F.R. § 501.3(f)(2), when the last day of the period so computed is a Saturday, Sunday, or Federal holiday, the period runs to the close of the next business day, which would be Monday, April 8, 2019. The appeal was received on Monday, April 8, 2019, rendering it timely.

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury causally related to his accepted August 4, 2014 employment incident.

FACTUAL HISTORY

On August 19, 2014 appellant, then a 43-year-old park ranger, filed a traumatic injury claim (Form CA-1) alleging that, on August 4, 2014, he sustained an injury to his right arm and shoulder while in the performance of duty. He maintained that the injury occurred when he was bench pressing weights during an efficiency battery test required by his job.[5] Appellant did not stop work at that time.

On November 10, 2014 Dr. Mark Kurd, a Board-certified orthopedic surgeon, performed an unauthorized anterior cervical and discectomy surgery at C5-6 and C6-7.

By decisions dated March 27, 2015 and May 2, 2016, OWCP denied appellant's claim for an August 4, 2014 employment injury because, although he had established the occurrence of the August 4, 2014 employment incident as alleged, he did not meet his burden of proof by submitting medical evidence sufficient to establish an injury causally related to the accepted employment incident.

OWCP had referred appellant to Dr. Steven Valentino, a Board-certified orthopedic surgeon, for a second opinion examination and requested that he provide an opinion regarding whether appellant sustained an injury causally related to his accepted August 4, 2014 employment incident. In a February 10, 2015 report, Dr. Valentino determined that appellant did not sustain an injury causally related to his August 4, 2014 employment incident. He found that appellant's continuing problems were due to the underlying degenerative disc disease of his cervical spine. In a December 4, 2015 report, Dr. Kurd determined that the August 4, 2014 employment incident aggravated appellant's preexisting degenerative disc disease with associated upper extremity radiculopathy. OWCP later requested a supplemental report from Dr. Valentino in order to clarify his February 10, 2015 report, and he prepared a March 22, 2016 report in which he again opined that appellant did not sustain an injury causally related to his August 4, 2014 employment incident.

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that following the October 9, 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.*

[5] Appellant initially claimed injury to his right shoulder, but later maintained that he also sustained a cervical injury on August 4, 2014.

On May 13, 2016 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review, which was held on January 12, 2017.

By decision dated March 29, 2017, OWCP's hearing representative determined that there was a conflict in the medical opinion evidence between Dr. Valentino and Dr. Kurd regarding whether appellant sustained injury due to the accepted August 4, 2014 employment incident and remanded the case to OWCP for further development including referral to an impartial medical specialist. On remand OWCP referred appellant to Dr. Richard G. Schmidt, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding the matter. It provided Dr. Schmidt with a detailed list of questions to be answered.

In a June 28, 2017 report, Dr. Schmidt discussed appellant's factual and medical history and detailed the findings of his physical examination. He noted that on August 12, 2014, which would have been eight days after the August 4, 2014 employment incident, a medical examination indicated tenderness in appellant's right scapular area and right shoulder area with a restriction of motion. The impression at that time was trapezius strain/sprain. Dr. Schmidt indicated that he reviewed the history of the August 4, 2014 employment incident with appellant and noted that appellant reported that he did not slip or lose control of the weights he was lifting. He advised that an August 13, 2014 report indicated that x-rays of the cervical spine showed no acute bony abnormalities, but loss of the normal cervical lordosis and degenerative disc disease with anterior osteophytes involving the C5-6 level.

Dr. Schmidt indicated that Dr. Kurd had opined that an August 14, 2014 magnetic resonance imaging (MRI) scan demonstrated a congenital cervical stenosis. Appellant had a disc osteophyte complex at C5-6 and C6-7 which at C5-6 caused compression of the C6 nerve root and at C6-7 caused some central stenosis. Dr. Schmidt indicated that this was an important piece of information because a disc osteophyte complex at C5-6 and C6-7 was a chronic degenerative change. He noted that an October 10, 2014 MRI scan showed cervical stenosis with radiculopathy and opined that these findings were chronic and degenerative in nature and did not provide an indication of an acute cervical disc herniation. Dr. Schmidt noted that an August 14, 2014 MRI scan showed spondylosis and degenerative disc disease of the cervical spine made worse by congenital cervical spinal canal stenosis. He advised that his impression was that appellant clearly had a chronic degenerative condition of the cervical spine and noted, "I cannot correlate the procedure that was done to the episode of August 4, 2014." Dr. Schmidt opined that the November 10, 2014 cervical surgery was indicated because appellant was developing symptoms of myelopathy which had since been corrected.

By decision dated August 24, 2017, OWCP determined that appellant did not meet his burden of proof to establish an injury causally related to his accepted August 4, 2014 employment incident. It found the special weight of the medical evidence rested with the June 28, 2017 report of Dr. Schmidt, the impartial medical specialist.

On August 29, 2017 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review.

Prior to hearing being held, OWCP's hearing representative issued a January 3, 2018 decision by which the August 24, 2017 decision was set aside. She remanded the case to OWCP

for further development of the medical evidence. The hearing representative determined that it was necessary for Dr. Schmidt to provide a supplemental report because he did not adequately address all of the questions posed by OWCP in its referral. She indicated that Dr. Schmidt should be advised that the fact that appellant's cervical degeneration might have been preexisting did not necessarily preclude him from receipt of benefits under FECA and that it is not necessary to prove a significant contribution of employment factors to a condition for the purpose of establishing causal relationship. Rather, if the medical evidence revealed that an employment factor contributed in any way to the employee's condition, such condition would be considered employment related under FECA. The hearing representative noted that Dr. Schmidt primarily referenced appellant's cervical degeneration, but indicated that he must also address the other diagnoses of record including cervical stenosis, spondylosis, radiculopathies, and disc herniations. She maintained that Dr. Schmidt must specifically explain what effect, if any, the August 4, 2014 employment incident had on these conditions.[6] The hearing representative indicated that Dr. Schmidt must review both the opinions of Dr. Kurd and Dr. Valentino and address any points of disagreement with their opinions. After carrying out this development, OWCP was to issue a *de novo* decision regarding appellant's claim for an August 4, 2014 employment injury.

On January 31, 2018 OWCP requested that Dr. Schmidt provide a supplemental report which addressed the concerns expressed by OWCP's hearing representative in her January 3, 2018 decision.

In a February 28, 2018 supplemental report, Dr. Schmidt indicated that he had reviewed the additional evidence that OWCP provided him, including July 5, 2013 and August 18, 2016 MRI scans of the right shoulder, x-rays of the cervical spine obtained between August 17, 2016 and January 20, 2017, and an August 18, 2016 MRI scan of the cervical spine. He noted that appellant had a chronic long-standing degenerative condition of his cervical spine. Dr. Schmidt opined that appellant's November 10, 2014 cervical surgery was indicated because he was developing myelopathy symptoms, but advised that he could not correlate this surgery to the August 4, 2014 employment incident. He maintained that he saw no evidence that the August 4, 2014 employment incident resulted in any direct cause, aggravation, acceleration, or precipitation of the diagnoses of cervical disc degeneration at C5-6 and C6-7, cervical stenosis, cervical spondylosis, or herniated discs at C5-6 and C6-7 with radiculopathies.

Dr. Schmidt indicated that the August 18, 2016 MRI scan of the cervical spine demonstrated multilevel disc degenerative disease, greatest at C5-6 where there was a central disc protrusion deforming the cord, and bilateral moderate-to-marked neuroforaminal stenosis at C7-T1. He opined that these findings would constitute degenerative changes. Dr. Schmidt indicated that it was clear from the July 5, 2013 MRI scan of the right shoulder that, prior to the August 4, 2014 employment incident, appellant had a low-lying acromion with a high-grade intrasubstance tear and low-grade intrasubstance tear of the infraspinatus tendon at the critical zone. He advised that a high-grade intrasubstance tear at the insertional supraspinatus tendon (meaning dimensions of 12 by 10 millimeters) would be a lesion that typically would be addressed with surgical

[6] The hearing representative indicated that Dr. Schmidt should be provided an opportunity to review certain medical evidence before rendering his supplemental opinion, including July 5, 2013 and August 18, 2016 MRI scans of the right shoulder, x-rays of the cervical spine obtained between August 17, 2016 and January 20, 2017, and an August 18, 2016 MRI scan of the cervical spine.

intervention. Dr. Schmidt noted, "Thus, I do not believe that the medical evidence supports a work[-]related right shoulder injury."

By decision dated March 9, 2018, OWCP denied appellant's claim for an injury due to his accepted August 4, 2014 employment incident. It determined that the special weight of the medical opinion evidence with respect to this matter rested with the June 28, 2017 and February 28, 2018 reports of Dr. Schmidt, the impartial medical specialist.

On March 13, 2018 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on August 6, 2018, counsel argued that Dr. Schmidt's supplemental report dated February 28, 2018 did not sufficiently address the concerns raised in the January 3, 2018 decision of OWCP's hearing representative.

By decision dated October 9, 2018, OWCP's hearing representative affirmed the March 9, 2018 decision.

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,[7] 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.[8] 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.[9]

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.[10] The second component is whether the employment incident caused a personal injury.[11]

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

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

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

[9] *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).

[10] *B.P.*, Docket No. 16-1549 (issued January 18, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

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

nature of the relationship between the diagnosed condition and the specific employment incident.[12] Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[13]

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[14] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15]

ANALYSIS

The Board finds that the case is not in posture for decision.

The Board finds that OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Kurd, an attending physician, and Dr. Valentino, an OWCP referral physician, regarding whether appellant sustained an injury due to the accepted August 4, 2014 employment incident. OWCP properly referred appellant to Dr. Schmidt for an impartial medical examination and an opinion regarding the matter.[16]

In a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical opinion evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[17] If a given impartial medical specialist is unable to clarify or elaborate on his or her original report or if his or her supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his or her rationalized medical opinion on the issue.[18]

With regard to the initial referral action, Dr. Schmidt produced a June 28, 2017 report in which he determined that appellant did not sustain an injury causally related to his accepted

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

[13] *J.L.*, Docket No. 18-1804 (issued April 12, 2019).

[14] 5 U.S.C. § 8123(a).

[15] *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

[16] *See supra* note 15.

[17] *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

[18] *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

August 4, 2014 employment incident. By decision dated January 3, 2018, a representative of OWCP's Branch of Hearings and Review remanded the case to OWCP for further development of the medical evidence. She determined that it was necessary for Dr. Schmidt to provide a supplemental report because he did not adequately address all of the questions posed by OWCP in its referral. The hearing representative noted, *inter alia*, that Dr. Schmidt primarily referenced appellant's cervical degeneration, but indicated that he must also address the other diagnoses of record including cervical stenosis, spondylosis, radiculopathies, and disc herniations. She maintained that Dr. Schmidt must specifically explain what effect, if any, the August 4, 2014 employment incident had on these conditions. The hearing representative indicated that Dr. Schmidt must review both the opinions of Dr. Kurd and Dr. Valentino and address any points of disagreement with their opinions.

OWCP then requested that Dr. Schmidt provide a supplemental report addressing these concerns. He prepared a February 28, 2018 report in which he again determined that appellant did not sustain an injury causally related to his accepted August 4, 2014 employment incident. The Board has reviewed both Dr. Schmidt's June 28, 2017 and February 28, 2018 reports and notes that Dr. Schmidt's February 28, 2018 supplemental report did not adequately address the concerns raised by OWCP's hearing representative. In both reports, Dr. Schmidt concluded that appellant had degenerative disc disease of the cervical spine that was not aggravated by the August 4, 2014 employment incident. However, he did not adequately discuss the nature of the August 4, 2014 employment incident and whether it was related to the preexisting conditions. In addition, Dr. Schmidt did not adequately respond to the instruction to review both the opinions of Dr. Kurd and Dr. Valentino and address any points of disagreement with their opinions.

For the above-described reasons, the opinion of Dr. Schmidt is still in need of clarification and elaboration, despite the fact that OWCP had requested and received a supplemental report from him. Therefore, in order to resolve the continuing conflict in the medical opinion evidence, the case shall be remanded to OWCP for referral of appellant to a new impartial medical specialist for examination and an opinion regarding whether he sustained injury causally related to the accepted August 4, 2014 employment incident.[19] After such further development as OWCP deems necessary, a *de novo* decision shall be issued regarding this matter.

CONCLUSION

The Board finds that the case is not in posture for decision.

[19] *See supra* notes 18 and 19.

ORDER

IT IS HEREBY ORDERED THAT the October 9, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: November 12, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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