United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 19-1024**
	)	**Issued: October 18, 2019**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION HEALTHCARE SYSTEM -- JEFFERSON BARRACKS, St. Louis, MO, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On April 10, 2019 appellant, through counsel, filed a timely appeal from a February 6, 2019 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 to review the merits of this case.[3]

ISSUE

The issue is whether appellant has met his burden of proof to establish a traumatic injury in the performance of duty on May 11, 2017, as alleged.

FACTUAL HISTORY

On May 22, 2017 appellant, then a 43-year-old plumber, filed a traumatic injury claim (Form CA-1) alleging that he was "guessing" that he "pulled a muscle in shoulder" on May 11, 2017 while in the performance of duty. On the claim form he explained that he was cabling the sewer main in Building 60 and that as he was pulling and pushing on the cable he called for help at 9:30 a.m. because he injured his right shoulder. Appellant noted that help did not show up until 11:30 a.m. On the reverse side of the claim form the employing establishment noted that he had been injured in the performance of duty and that the information he had provided was accurate.

OWCP thereafter received medical evidence. In a progress note dated May 18, 2017, Melissa E. Nixon, a Board-certified nurse practitioner from the employing establishment health unit, first noted that appellant was "unable to give mechanism of injury, just started to have pain in [right] shoulder on way home from work one week ago." She also indicated that appellant denied trauma or a work injury, noting that he only performed "normal job functions which included occasional lifting of heavy cables." When Ms. Nixon inquired whether his condition was work related, she noted that he "changed [his] story" to indicate that his shoulder started hurting during the workday. She advised appellant that he could go seek treatment with his "Veteran or Private Provider" and if it was determined that the injury that occurred "without trauma" was work related he could return to her office for treatment, but that "without a mechanism of injury" it could be very difficult to sustain a workers' compensation claim. Ms. Nixon related that he became angry and walked toward the door shouting that he was going to have his lawyer contact her. She contacted appellant's supervisor and advised that she consulted with an employing establishment physician regarding the incident and conveyed that appellant could file a claim, but there was no mechanism other than performance of normal duties.

Dr. Robert A. Sciortino, an attending Board-certified orthopedic surgeon, indicated in a progress note dated June 8, 2017, that appellant related a history of an employment-related injury to his right shoulder a few weeks prior while working on some sort of drain machinery at work. He discussed findings on examination and diagnosed right shoulder pain and cervicobrachial

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that, following the February 6, 2019 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*.

syndrome. Dr. Sciortino explained that the current problem is more related to the cervical spine and, as such, he recommended physical therapy and referral to a cervical spine specialist.

Physical therapy notes listed the date of injury as May 11, 2017, documented therapy commencing June 15, 2017, and provided diagnoses of cervicobrachial syndrome, cervicalgia, and right shoulder pain.

Appellant filed several claims for compensation (Forms CA-7) for leave without pay (LWOP) from June 25 to July 19, 2017 to attend physical therapy appointments.

OWCP, in a development letter dated July 31, 2017, informed appellant that his claim was initially accepted as a minor injury, but was being reopened for review of the merits because a claim for wage-loss compensation had been received. It requested that he respond to an attached questionnaire and provide medical evidence to establish a diagnosed condition as a result of the alleged employment incident. OWCP afforded appellant 30 days to respond.

On August 4, 2017 appellant filed an additional CA-7 form for compensation for LWOP on July 27, 2017 for a doctor appointment.

Dr. Sciortino, in a progress note dated July 27, 2017, reiterated his prior diagnosis of cervicobrachial syndrome. He also provided an impression of cervical radiculopathy and recommended a magnetic resonance imaging (MRI) scan.

In an attending physician's report (Form CA-20) dated August 15, 2017, Dr. Sciortino noted a history of injury that appellant injured his right shoulder at work. He again diagnosed right shoulder pain and cervicobrachial syndrome. Dr. Sciortino checked a box marked "yes" indicating that the diagnosed conditions were caused or aggravated by an employment activity. He noted that physical therapy had not helped and that appellant needed the previously requested MRI scan to evaluate his cervical spine problems.

On August 25, 2017 Dr. Sciortino ordered a cervical spine MRI scan to rule out a herniated disc.

OWCP received daily notes from the same physical therapists who reiterated the date of injury as May 11, 2017 and their diagnoses of cervicobrachial syndrome, cervicalgia, and right shoulder pain.

By decision dated September 1, 2017, OWCP accepted that the May 11, 2017 employment incident occurred as alleged. However, it denied appellant's traumatic injury claim finding that the medical evidence of record failed to establish a medical diagnosis in connection with the accepted May 11, 2017 employment incident.

On February 26, 2018 appellant, through counsel, requested reconsideration and submitted a February 5, 2018 report from Dr. Sonjay J. Fonn, a neurosurgeon. Dr. Fonn noted that appellant reported a history of injury on May 11, 2017 when he was cabling a sewer line for over four hours when the cable wrapped around his right arm and pulled him down. He noted treatment of appellant for neck pain commencing December 8, 2017. Dr. Fonn referenced his prior examination findings and discussed his current examination findings. He opined that the May 11,

2017 employment injury could have either directly caused or aggravated a preexisting condition. Dr. Fonn related that it was his understanding that a job description of appellant's position as a plumber involved a lot of heavy lifting, bending, stooping, and twisting motions of the head and neck, which could aggravate or directly cause abnormal pressure on the annular fibers causing a disc bulge/herniation of the cervical spine and thereby impingement of the existing neuro elements.

By decision dated March 15, 2018, OWCP affirmed, with modification, its prior decision finding that appellant had not factually established the occurrence of the May 11, 2017 employment incident as his statements were inconsistent. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive medical evidence from Dr. Fonn. In a January 10, 2018 follow-up post procedure visit report, Dr. Fonn noted that appellant was status post cervical epidural steroid injection at the C6-7 level administered on January 3, 2018. He diagnosed cervical herniated nucleus pulposus without myelopathy, cervical pain, cervical radiculopathy, and cervical spine spondylosis without myelopathy. Dr. Fonn advised that appellant had no work restrictions. In a report dated January 15, 2018, he noted that he administered an epidural steroid injection to treat appellant's diagnosis of C4-5 cervical radiculopathy.

On June 12, 2018 appellant, through counsel, requested reconsideration of the March 15, 2018 decision. Counsel submitted a narrative statement dated May 10, 2018 in which appellant denied Ms. Nixon's statements that he had not sustained a traumatic injury. He provided a timeline of events which indicated, among other things, a history of injury that at 7:00 a.m. on May 11, 2017 when he was sent to cable a sewer line in a flooded kitchen. Appellant worked on this job until noon. During the process of cabling the sewer line, a cable wrapped around his arm and yanked him down into a drain around 9:30 a.m. Appellant immediately called for help, but no one showed up to help until 11:30 a.m. In the meantime, he continued to cable the drain line in attempts to open the line. Appellant thought he had just pulled a muscle as his entire body was very sore. On May 12, 2017 he continued to cable the sewer line. Appellant's entire body continued to be sore. He returned to work on May 15, 2017 with continuing pain. Appellant did not seek treatment at the employee health unit on May 15, 2017 because his supervisor was not at work and it was required to obtain permission from a supervisor before going to the health unit. First thing in the morning on May 16, 2017, he reported his injury to his supervisor and was treated in the employee health unit on that day. Appellant related that Ms. Nixon told him that, if his injury occurred in the normal course of work, it would not be covered under workers' compensation. He claimed that he was in Ms. Nixon's office for less than five minutes, she had not examined him, and he had not explained the incident. Appellant noted his further course of medical treatment commencing June 8, 2017 when he was examined by Dr. Sciortino.

OWCP, by decision dated February 6, 2019, denied modification of the March 15, 2018 decision, again finding that the factual component of fact of injury had not been established. It found that appellant's inconsistent statements cast serious doubt on the validity of his claim.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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,[5] 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.[6] 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.[7]

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.[8] 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.[9] The second component is whether the employment incident caused a personal injury.[10] An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[11]

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

[4] *Supra* note 2.

[5] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

[7] *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).

[8] *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[9] *See M.F.*, Docket No. 18-1162 (issued April 9, 2019); *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[10] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue. *Robert G. Morris*, 48 ECAB 238 (1996). 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. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). 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). *Id*.

[11] *D.D.*, Docket No. 18-0648 (issued October 15, 2018); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

action.[12] The employee has not met his or her burden of proof of establishing 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 case has been established. An employee's 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.[13]

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence supporting such causal relationship.[14] Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.[15] The opinion of the physician 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 employee.[16] 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.[17]

ANALYSIS

The Board finds that appellant has met his burden of proof to establish that the May 11, 2017 employment incident occurred in the performance of duty, as alleged.

Appellant indicated on his claim form that he injured his right shoulder on May 11, 2017 when he was cabling the sewer main in Building 60 and that as he was pulling and pushing on the cable he called for help at 9:30 a.m. because he injured his right shoulder. He noted that help did not show up until 11:30 a.m. The claim form was signed by appellant's supervisor who acknowledged that the employment incident had occurred in the performance of duty.

The Board finds that, in comparing the claim form with the medical records and appellant's written statement, he has provided a consistent account of the time, place, and manner of injury. He has consistently described a right upper extremity injury, working with cables to unplug a drain on the morning of May 11, 2017. Appellant has provided a consistent account of the mechanism

[12] *See M.F., supra* note 9; *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

[13] *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

[14] *J.L.*, Docket No. 18-0698 (issued November 5, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

[15] *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[16] *L.D., id.; see also Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[17] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

of injury that has not been refuted by evidence contained in the record.[18] In his treatment with a nurse practitioner, Ms. Nixon, at the employing establishment he explained that he sought treatment following a work injury on May 11, 2017. Although Ms. Nixon reported that appellant changed his story, her note supports that appellant consistently explained that he was using cables to unplug a drain while at work, which was part of his normal job duties. Her note, and her belief that appellant changed his story, is insufficient to overcome the consistent explanation appellant provided since the incident.

As set forth above, a claimant's statement that an injury occurred at a given time, place, and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[19] Having found no convincing evidence of inconsistency, the Board finds that appellant has established that the May 11, 2017 employment incident occurred in the performance of duty, as alleged.

As appellant has established that the May 11, 2017 employment incident factually occurred, the question becomes whether this incident caused his cervical spine conditions as diagnosed by Drs. Fonn and Sciortino.[20] The Board will therefore remand the case for consideration of the medical evidence on the issue of causal relationship. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met his burden of proof to establish an injury causally related to the accepted employment incident.[21]

CONCLUSION

The Board finds that appellant has met his burden of proof to establish fact of injury. The case is not in posture for decision, however, with regard to the issue of causal relationship.

[18] *See A.R.*, Docket No. 18-0924 (issued August 13, 2019); *J.L.*, Docket No. 17-1712 (issued February 12, 2018). *see also S.W.*, Docket No. 17-0261 (issued May 24, 2017) (the Board found that OWCP improperly determined that the alleged employment incident did not occur when appellant provided consistent accounts of the claimed incident and there was no evidence to refute her detailed description).

[19] *A.C.*, Docket No. 18-1567 (issued April 9, 2019); *Gregory J. Reser*, 57 ECAB 277 (2005).

[20] *See C.M.*, Docket No. 19-0009 (issued May 24, 2019).

[21] *Supra* note 15; *see also Betty J. Smith*, 54 ECAB 174 (2002).

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 18, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board