United States Department of Labor
Employees' Compensation Appeals Board

J.P., Appellant	)	
and	)	**Docket No. 19-1206**
	)	**Issued: February 11, 2020**
DEPARTMENT OF THE NAVY, NAVAL FACILITIES ENGINEERING COMMAND, Great Lakes, IL, Employer	)	

Appearances:
Stephanie N. Leet, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 10, 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish a lumbar condition causally related to the accepted July 12, 2014 employment incident.

[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.*

FACTUAL HISTORY

On October 16, 2014 appellant, then a 55-year-old brick mason, filed a traumatic injury claim (Form CA-1) alleging that on July 12, 2014 he experienced pain down his entire lower back and the back side of both his legs when he lifted bricks off the back of a dump truck while in the performance of duty.[3] He did not stop work.

On November 12, 2014 appellant underwent a lumbar spine magnetic resonance imaging (MRI) scan by Dr. Edward St. Ville, a Board-certified diagnostic radiologist, who reported mild multifactorial central canal stenosis at L2-3, moderate multifactorial central canal stenosis at L3-4, broad-based central disc protrusion at L4-5, and broad-based central disc protrusion at L5-S1. Dr. St. Ville assessed lumbar herniated disc.

On December 8, 2014 appellant began to undergo physical therapy treatments and submitted various treatment reports.

By development letter dated January 27, 2015, OWCP informed appellant that his claim initially appeared to be a minor injury and was therefore administratively approved for a payment of a limited amount of medical expenses. It advised that the claim was now being reopened for formal consideration and that additional factual and medical evidence was necessary to establish his claim. OWCP requested that appellant respond to an attached questionnaire and provide medical evidence to establish that he sustained a diagnosed condition as a result of the alleged incident. It afforded him 30 days to submit the necessary evidence.

Appellant subsequently submitted a January 30, 2015 medical report by Dr. Jonathan Citow, a Board-certified neurological surgeon. Dr. Citow noted that appellant worked as a brick mason and related that he developed severe back pain extending through both lower extremities after a July 12, 2014 work injury. Upon examination of appellant's lumbar spine, he observed tenderness to palpation of the lumbar paraspinal musculature and normal gait. Straight leg raise testing was negative. Dr. Citow diagnosed lumbar spondylosis.

On February 9, 2015 OWCP received appellant's completed development questionnaire. Appellant indicated that he did not sustain any other injury and at the time of the injury, he was placed on light duty. He also noted that he hurt his back approximately 10 years ago and always had back pain.

By decision dated March 6, 2015, OWCP denied appellant's claim. It accepted that the July 12, 2014 employment incident occurred as alleged and that a medical condition had been diagnosed. However, OWCP found that the medical evidence of record was insufficient to establish that the July 12, 2014 employment incident caused or aggravated the diagnosed lumbar condition.

On March 17, 2015 appellant requested reconsideration. By decision dated April 24, 2015, OWCP denied further merit review, finding that his reconsideration request neither raised

[3] Appellant has two previously accepted traumatic injury claims: one for an August 27, 2002 injury under OWCP File No. xxxxxx461 and one for a February 27, 2003 injury under OWCP File No. xxxxxx050.

substantive legal questions, nor included new and relevant evidence sufficient to warrant further merit review.

On June 24, 2015 appellant again requested reconsideration and submitted additional medical evidence.

In a June 19, 2015 report, Dr. Citow recounted that appellant continued to have severe back pain, but was forced to return to work. Examination of appellant's lumbar spine revealed tenderness to palpation of the lumbar paraspinal musculature and negative straight leg raise testing. Dr. Citow diagnosed lumbar spondylosis.

By decision dated August 20, 2015, OWCP denied modification of the March 6, 2015 decision.

OWCP subsequently received employing establishment health unit records and occupational health forms dated July 16 to October 14, 2014 by Dr. Jason Y. Kim, Board-certified in anesthesiology and pain medicine. Dr. Kim indicated that appellant was a brick worker and complained of low back pain. He noted lumbar examination findings of positive straight leg raise testing on the right and no tenderness to palpation or muscle spasms. Dr. Kim diagnosed lower back and mid back pain. He released appellant to work with limitations. In a July 30, 2014 employing establishment health unit form, Dr. Kim indicated that he conducted a follow-up examination and authorized appellant to return to his date-of-injury job. In an October 14, 2014 health record, he referred appellant to his primary physician in order to rule out possible lumbar disc syndrome and recommended that appellant work with restrictions.

In a November 21, 2014 employing establishment health unit record, Lieutenant Commander (Lt. Cmdr.) Richard Langton, a military physician, indicated that appellant was seen for follow-up for low back pain while lifting bricks at work. He reviewed appellant's history and conducted an examination. Lt. Cmdr. Langton reported positive "shopping cart" sign and MRI scan findings consistent with spinal stenosis. He recommended that appellant work limited duty.

In a March 18, 2016 letter, Dr. Citow related that on July 12, 2014 appellant was working as a brick mason, lifting 45 pounds of bricks off a truck and carrying it, when he developed severe back pain extending to both lower extremities. He reported that physical examination showed tenderness in appellant's back with limited range of motion. Dr. Citow diagnosed "preexisting lumbar spondylosis and stenosis exacerbated by work injury." He noted that the exacerbation was clearly noted on the MRI scan films and also noted that appellant was not symptomatic with sciatica prior to his work injury. Dr. Citow opined that carrying heavy bricks "could easily have caused an asymptomatic condition to worsen."

On August 12, 2016 appellant, through counsel, requested reconsideration. Counsel alleged that Dr. Langton and Dr. Citow's medical reports had established a causal connection between the July 12, 2014 employment incident and appellant's lumbar stenosis. She argued that as appellant had established a *prima facie* claim, OWCP had a duty to further develop the medical evidence.

By decision dated November 9, 2016, OWCP denied modification of the August 20, 2015 decision.

On March 10, 2017 appellant, through counsel, requested reconsideration.

In support thereof, appellant submitted a February 15, 2017 progress report by Dr. Citow who recounted appellant's complaints of severe back pain extending through both lower extremities. Dr. Citow indicated that appellant's symptoms began after a July 12, 2014 work injury and noted that appellant had preexisting lumbar spondylosis. He opined that appellant's lumbar stenosis was aggravated by lifting and carrying the heavy bricks off a truck. Dr. Citow explained that the repetitive flexion and extension with heavy weight caused a combination of further disc protrusion due to the axial loading with the heavy weights, as well as the progression of local instability, causing more banging of the nerve roots. He reported that it was possible that appellant's lumbar stenosis may have worsened on its own, but since appellant deteriorated during this activity, "his demise was related to work."

By decision dated June 7, 2017, OWCP denied modification of the November 9, 2016 decision.

On May 2, 2018 appellant, through counsel requested reconsideration and submitted additional medical evidence.

Dr. Citow indicated in a September 20, 2017 letter that appellant had a natural progression of stenosis that was exacerbated by the lifting incident. He further reported that appellant lifted 45 pounds of bricks off a truck and carried it, which created an axial loading on the spine, causing vertical compression of the discs and contributing to the L3-4 disc protruding out into an already narrow canal from his preexisting lumbar stenosis.

In a November 20, 2017 addendum letter, Dr. Citow related that the normal progression of appellant's degenerative condition was disrupted by the repetitive lifting on July 12, 2014 when he had a sudden onset of symptoms. He also noted that appellant had previously injured his back 10 years prior.

By decision dated August 31, 2018, OWCP denied modification of the June 7, 2017 decision.

On January 29, 2019 appellant, through counsel, requested reconsideration. Counsel asserted that, in Dr. Citow's most recent medical report, he specifically detailed appellant's prior medical condition and how the normal progression of his back condition was aggravated by the July 12, 2014 employment incident.

In a January 23, 2019 letter, Dr. Citow discussed appellant's preexisting medical condition. He related that, prior to July 12, 2014, appellant's diagnoses were lumbar spondylosis and stenosis. Dr. Citow indicated that he had reviewed appellant's medical records, including diagnostic examination reports. He related that a November 2014 lumbar spine MRI scan revealed severe stenosis at L3-4 and L5-S1 spondylosis. Dr. Citow described that on July 12, 2014 appellant was repetitively lifting 45 pounds of bricks off a truck and carrying it when he developed severe back pain. He explained that the repetitive lifting and carrying "created axial loading on the spine, causing vertical compression of the discs and therefore contributed to the L3-4 disc protruding out into an already narrow canal from his preexisting lumbar stenosis." Dr. Citow opined that appellant's preexisting degenerative condition and stenosis was aggravated and exacerbated by appellant's excessive lifting on July 12, 2014. He related that, without this intervening injury,

appellant's degenerative condition would have had a natural progression that would be more even across the spine and resulted in gradual symptoms, but the July 12, 2014 injury brought about new symptoms of a more localized nature.

By decision dated April 25, 2019, OWCP denied modification of the August 31, 2018 decision.

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 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]

In order to determine whether a federal employee has sustained a traumatic injury in the performance of duty, OWCP must first determine whether fact of injury has been established.[8] There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.[9] Second, the employee must submit evidence to establish that the employment incident caused a personal injury.[10]

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.[11] The opinion of the physician must be based on a complete factual and medical background of the employee, 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

[4] *Supra* note 2.

[5] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *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); *S.P.*, 59 ECAB 184 (2007).

[9] *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[10] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[11] *See S.A.*, Docket No. 18-0399 (issued October 16, 2018); *see also Robert G. Morris*, 48 ECAB 238 (1996).

the specific employment incident identified by the employee.[12] The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[13]

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.[14]

ANALYSIS

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

In support of his claim, appellant provided narrative medical reports and letters from Dr. Citow dated January 30, 2015 to January 23, 2019. He related appellant's complaints of severe back pain extending through both lower extremities after a July 12, 2014 injury. Dr. Citow noted initial examination findings of tenderness to palpation of the lumbar paraspinal musculature and negative straight leg raise testing. He diagnosed lumbar spondylosis. In a March 18, 2016 letter, Dr. Citow described that on July 12, 2014 appellant was lifting 45 pounds of bricks off a truck. He opined that appellant's preexisting lumbar spondylosis and stenosis was exacerbated by the work injury. In a February 15, 2017 report, Dr. Citow further explained that repetitive flexion and extension with heavy weight caused a combination of further disc protrusion, as well as the progression of local instability, causing more banging of the nerve roots. He continued to elaborate in a January 23, 2019 letter that the repetitive lifting and carrying "created axial loading on the spine, causing vertical compression of the discs and therefore contributed to the L3-4 disc protruding out into an already narrow canal from [appellant's] pre-existing lumbar stenosis." Dr. Citow related that, without the intervening July 12, 2014 employment incident, appellant's preexisting condition would have had a natural progression that would be more even across the spine, instead of the new symptoms that appellant experienced in a localized section.

The Board finds that Dr. Citow's opinion demonstrates his knowledge of appellant's preexisting lumbar conditions and, although his opinion is not sufficiently rationalized to meet appellant's burden of proof to establish his claim, it is sufficient to require further development of the case by OWCP.[15] It is well established that proceedings under FECA are not adversarial in nature, and while appellant has the burden to establish entitlement to compensation, OWCP shares

[12] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[13] *James Mack*, 43 ECAB 321 (1991).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *K.G.*, Docket No. 18-1598 (issued January 7, 2020); *M.S.*, Docket No. 19-0913 (issued November 25, 2019).

[15] *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *C.W.*, Docket No. 17-1293 (issued February 12, 2018); *see also John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

responsibility in the development of the evidence.[16] OWCP has an obligation to see that justice is done.[17]

Therefore, the Board finds that the case shall be remanded to OWCP. On remand, OWCP shall prepare a statement of accepted facts and refer the matter to an appropriate medical specialist. Upon referral, the physician shall conduct a physical evaluation and provide a rationalized medical opinion as to whether appellant's lumbar condition was caused or aggravated by the accepted July 12, 2014 employment incident. Following this, and any other further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 25, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: February 11, 2020
Washington, DC

Patricia H. Fitzgerald, Deputy 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

[16] *See e.g., M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Michael Gallo,* 29 ECAB 159, 161 (1978); *William N. Saathoff,* 8 ECAB 769, 770-71; *Dorothy L. Sidwell,* 36 ECAB 699, 707 (1985).

[17] *See C.M.*, Docket No. 17-1977 (issued January 29, 2019); *A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell,* 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans,* 26 ECAB 195 (1974).