

**United States Department of Labor
Employees' Compensation Appeals Board**

A.H., Appellant)	
)	
and)	Docket No. 18-1632
)	Issued: June 1, 2020
DEPARTMENT OF THE NAVY, NAVAL)	
FACILITIES, Pearl City, HI, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On August 28, 2018 appellant filed a timely appeal from a July 23, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

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.*

³ The Board notes that following the July 23, 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 expand acceptance of his claim to include the additional conditions of herniated nucleus pulposus (HNP) and adjustment disorder as causally related to the accepted September 2, 2014 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are as follows.

On September 9, 2014 appellant, then a 40-year-old waste-water treatment plant operator, filed a traumatic injury claim (Form CA-1) alleging that on September 2, 2014 he felt sharp pain in his lower back when moving a metal locker onto a truck while in the performance of duty. He stopped work that day, and received continuation of pay through October 17, 2014.

An October 20, 2014 lumbar spine x-ray revealed mild degenerative disc disease and no acute osseous abnormality.

On November 4, 2014 OWCP accepted appellant's claim for lumbar sprain. Appellant returned to modified duty on November 18, 2014.

By decision dated September 11, 2015, OWCP denied appellant's claim for a recurrence of disability beginning July 10, 2015.

An October 20, 2015 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated mild degenerative changes including a focal right central disc protrusion at T12-L1 causing narrowing of the right lateral recess.

On January 4, 2016 appellant requested reconsideration of the September 11, 2015 decision.

By decision dated March 31, 2016, OWCP denied modification of its September 11, 2015 decision.

On September 15, 2016 appellant filed a timely appeal with the Board. By decision dated June 2, 2017, the Board affirmed the March 31, 2016 decision. The Board found that the medical evidence submitted failed to establish causation between appellant's accepted September 2, 2014 employment injury and the conditions of lumbar radiculopathy and right T12-L1 disc herniation that disabled him from work.⁵

Evidence submitted subsequent to OWCP's March 31, 2016 decision includes a June 28, 2016 report in which Dr. Scott J. Miscovich, a family and occupational medicine practitioner, recounted a history that while at work on September 2, 2014, appellant pushed a metal locker onto

⁴ Docket No. 16-1824 (issued June 2, 2017).

⁵ *Id.*

a truck which became stuck and appellant felt a stabbing pain. A back examination demonstrated tenderness on palpation, muscle spasms, and lumbosacral pain elicited by motion. Dr. Miscovich diagnosed an HNP and advised that appellant should not work.

In treatment notes dated July 5 and 21, 2016, Dr. Miscovich noted continued lumbar spasms and pain. He reiterated his diagnosis of HNP and continued to advise that appellant was “off work.” On July 21, 2016 Dr. Miscovich additionally diagnosed adjustment disorder.

By letter dated August 4, 2016, Dr. Miscovich repeated appellant’s history of the employment injury. He indicated that appellant’s physical examination revealed positive findings for a herniated disc at T12-L1 where muscle spasms were present and ongoing. Dr. Miscovich noted that he had reviewed the October 20, 2015 MRI scan report which confirmed the T12-L1 disc herniation. He diagnosed an HNP at the T12-L1 level and adjustment disorder. Dr. Miscovich related that, when appellant attempted to slide the heavy metal tool locker further into a work truck, he used the upper force of his mid-body, and applied most of his thoracic muscle in an attempt to push the locker, which snagged halfway through the push, and this broke the momentum, at which time appellant felt a sharp pain radiating from his mid-back. He indicated that appellant’s description of the incident was consistent with his HNP at T12-L1 and opined that this was the direct result of the September 2, 2014 employment injury.

Dr. Miscovich continued to treat appellant. In reports dated August 19, 2016 to April 27, 2017, he described examination findings, reiterated his diagnoses, and advised that appellant should not work.

On February 23, 2017 Dr. Miscovich reported that appellant had a new subjective complaint of dislocation of the T1-2 thoracic vertebra. He described physical examination findings and diagnosed an HNP, dislocation of the T1-2 thoracic vertebra, a complete lesion of the L1 level of the lumbar spinal cord, and adjustment disorder. Dr. Miscovich continued to advise that appellant remain off work and continue physical therapy and acupuncture. In follow-up reports dated March 28, 2017 to January 19, 2018, Dr. Miscovich described examination findings and reiterated his findings and conclusions.

By report dated September 15, 2017, Daniel Lev, Ph.D., a clinical psychologist, noted that appellant suffered low back pain due to a bulging disc, and that there had been three years of no resolution in his workers’ compensation case. He referred appellant to a chronic pain program and began training him in clinical meditation. Dr. Lev diagnosed adjustment disorder with mixed anxiety and depressed mood.

In a February 2, 2018 letter, Dr. Miscovich noted that he began treating appellant on June 28, 2016. He reported that on September 2, 2014, while lifting a 400-pound metal tool locker onto a work truck with four coworkers, appellant used the upper force of his mid-body and applied most of his thoracic muscle in an attempt to push the locker, but that halfway through his push, the locker snagged on something in the truck and this broke his momentum. Dr. Miscovich related that appellant instantly felt a sharp pain radiating from his mid-back. He opined that appellant’s HNP at T12-L1 was a direct result of this incident. Dr. Miscovich also observed that appellant had positive findings for a herniated disc at T12-L1, noting that muscle spasms were present and were consistent with the October 20, 2015 lumbar MRI scan. He further indicated that appellant’s

adjustment disorder was due to difficulty adjusting to life with a severe back injury. Dr. Miscovich concluded that appellant could not work due to pain.

By letter dated March 1, 2018, OWCP notified appellant that the evidence of record was insufficient to support that the diagnosed conditions of HNP and adjustment disorder were causally related to the accepted September 2, 2014 employment injury. It advised him of the medical evidence needed and afforded him 30 days to submit the requested evidence.

On March 26, 2018 Dr. Miscovich reiterated his opinion that appellant's HNP at T12-L1 was the direct result of this incident, as confirmed by the October 20, 2015 MRI scan report. He maintained that prior to the September 2, 2014 incident, appellant had no preexisting back injury, muscle spasms, or back pain.

By decision dated April 3, 2018, OWCP denied expansion of the acceptance of appellant's claim to include HNP and adjustment disorder. It noted that appellant's claim remained accepted for lumbar back sprain.

In an April 16, 2018 letter, Dr. Miscovich opined that, in his medical judgment, appellant's HNP was caused on September 2, 2014 when he lifted a heavy locker onto a truck, noting that when the locker snagged on something and stopped, this caused a change in the momentum that was exerted by appellant. He described that, due to the stoppage, the physics of the force of the heavy locker were then transmitted through appellant's body into his angulated and tilted spinal column which was in an awkward position, and this transmitted force then caused the disc and spinal column to shift which resulted in a herniated disc at T12 and L1. Dr. Miscovich noted that he could not explain why the condition was not diagnosed earlier, other than to opine that the previous physicians did not engage in a thorough evaluation at the time of injury. He advised that appellant's physical examination findings and symptoms of constant radicular pain in the mid-back with radiation to the T12 and L1 dermatomes, and with weakness to the musculature around these dermatomes had always been consistent with a herniated disc at this region. Dr. Miscovich indicated that on physical examination appellant had atrophy that resulted from his injury, which was supported by an MRI scan report. He further opined that appellant's adjustment disorder was due to the lack of response from OWCP and due to being injured and in pain for years, observing that 80 percent of people in chronic pain from an injury for more than six months would have a mood disorder.

On July 16, 2018 appellant, through counsel, requested reconsideration of OWCP's April 3, 2018 decision.

By decision dated July 23, 2018, OWCP denied modification of its April 3, 2018 decision. It found that Dr. Miscovich did not provide sufficient rationale to support his opinion that appellant's claimed additional conditions were causally related to the accepted September 2, 2014 employment injury. OWCP concluded that the evidence presented was insufficient to meet appellant's burden of proof.

LEGAL PRECEDENT

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁶

The medical evidence required to establish causal relationship between a specific condition, as well as any attendant disability claimed, and the employment injury, is rationalized medical opinion evidence.⁷ 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 claimant.⁸ The weight of 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.⁹

While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.¹⁰

ANALYSIS

The Board finds that appellant has not met his burden of proof to expand acceptance of his claim to include adjustment disorder as a result of the accepted September 2, 2014 employment injury.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's March 31, 2016 merit decision. The Board considered evidence in its June 2, 2017 decision and found that it was insufficient to establish a recurrence of disability commencing July 10, 2015 causally related to the accepted September 2, 2014 employment injury. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹¹

In support of the request to expand the acceptance of his claim to include adjustment disorder, appellant submitted the September 15, 2017 report of Dr. Lev, a clinical psychologist, who noted that appellant suffered low back pain due to a bulging disc, and that there had been three years of no resolution in his workers' compensation case. Dr. Lev diagnosed adjustment

⁶ *S.S.*, Docket No. 19-1803 (issued April 1, 2020); *see T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁷ *G.V.*, Docket No. 20-0055 (issued April 21, 2020); *John D. Jackson*, 55 ECAB 465 (2004).

⁸ *See K.T.*, Docket No. 19-1718 (issued April 7, 2020); *P.M.*, Docket No. 18-0287 (issued October 11, 2018); *Patricia J. Glenn*, 53 ECAB 159 (2001).

⁹ *R.K.*, Docket No. 20-0049 (issued April 10, 2020); *James Mack*, 43 ECAB 321 (1991).

¹⁰ *C.H.*, Docket No. 19-1315 (issued March 16, 2020); *J.S.*, Docket No. 16-0777 (issued January 3, 2017); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹¹ *See I.S.*, Docket No. 19-1461 (issued April 30, 2020).

disorder with mixed anxiety and depressed mood, but failed to provide an opinion on the issue of causal relationship. The Board has held that a report is of no probative value regarding causal relationship if it does not contain an opinion as to how the accepted employment incident relates to the diagnosed conditions.¹² As such, Dr. Lev's opinion is insufficient to meet appellant's burden of proof on this matter.

Appellant also submitted reports in which Dr. Miscovich diagnosed adjustment disorder. In his April 16, 2018 letter, Dr. Miscovich indicated that appellant's adjustment disorder was due to the lack of response from OWCP and from being injured and in pain for years. He maintained that 80 percent of people in chronic pain from an injury for more than 6 months would have a mood disorder. While Dr. Miscovich provided affirmative opinions that supported causal relationship, he did not offer a rationalized medical explanation in any of his reports to support his opinion. His noted statistics are of general application and are not determinative of whether the specifically claimed adjustment disorder is related to the accepted September 2, 2014 employment injury.¹³ Moreover, medical evidence that provides a conclusion, but does not offer a rationalized medical explanation regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁴ Thus, Dr. Miscovich's opinion is insufficient to meet appellant's burden of proof. As such, appellant has not submitted sufficient well-rationalized medical evidence to support expansion of acceptance of his claim to include adjustment disorder.

The Board further finds that the issue of expansion of the acceptance of appellant's claim to include the additional condition of an HNP is not in posture for decision.

Dr. Miscovich began treating appellant on June 28, 2016 and consistently submitted reports advising that the September 2, 2014 employment injury caused the HNP seen on the October 20, 2015 MRI scan. The October 20, 2015 lumbar MRI scan demonstrated mild degenerative changes of the lumbar spine, including a focal right central disc protrusion at T12-L1 that caused narrowing of the right lateral recess. In his April 16, 2018 correspondence, Dr. Miscovich stated that in his medical judgment, the HNP was caused on September 2, 2014 when lifting a heavy locker onto a truck. He explained how the herniated disc was caused by the incident in biomechanical terms, writing that appellant's herniated disc was caused on September 2, 2014 when he lifted a heavy locker onto a truck, noting that when the locker snagged on something and stopped moving, this caused a change in the momentum that was exerted by appellant and that, due to the stoppage, the physics of the force of the heavy locker were then transmitted through appellant's body into his angulated and tilted spinal column which was in an awkward position, and this transmitted force then caused the disc and spinal column to shift which resulted in a herniated disc at T12 and L1.

The Board notes that, while none of Dr. Miscovich's reports are sufficiently rationalized to meet appellant's burden of proof to establish expansion of the acceptance of the claim to include a herniated disc, they are sufficient to require further development of the case by OWCP.¹⁵ His

¹² *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹³ *See S.J.*, Docket No. 20-0157 (issued April 1, 2020); *Dominic E. Coppo*, 44 ECAB 484 (1993).

¹⁴ *M.B.*, Docket No. 19-1655 (issued April 7, 2020); *A.D.*, 58 ECAB 149 (2006).

¹⁵ *J.P.*, Docket No. 19-1206 (issued February 11, 2020); *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

opinion was supportive, was bolstered by objective findings, and was based on a firm diagnosis and accurate history.¹⁶ It is well established that proceedings under FECA are not adversarial in nature, and while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁷ OWCP has the obligation to see that justice is done.¹⁸

Accordingly, the Board finds that the case must be remanded to OWCP. On remand, OWCP should prepare a statement of accepted facts and refer appellant to an appropriate medical specialist. Upon referral, the physician shall conduct a physical evaluation and provide a rationalized opinion as to whether appellant's diagnosed HNP was caused or aggravated by the accepted September 2, 2014 employment injury. Following this and any other further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that the acceptance of his claim should be expanded to include the additional condition of adjustment disorder as causally related to the accepted September 2, 2014 employment injury. The Board further finds that the case is not in posture for decision regarding whether acceptance of his claim should be expanded to include the condition of an HNP.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: June 1, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁶ See *S.T.*, Docket No. 18-1119 (issued March 6, 2019).

¹⁷ *J.P.*, *supra* note 15; *Phillip L. Barnes*, 55 ECAB 426 (2004); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

¹⁸ *Id.*