United States Department of Labor
Employees' Compensation Appeals Board

R.T., Appellant	)	
and	)	**Docket No. 20-0081**
	)	**Issued: June 24, 2020**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Deer Lodge, MT, 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:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 11, 2019 appellant, through counsel, filed a timely appeal from a June 27, 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.

[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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a medical condition causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On July 15, 2009 appellant, then a 36-year-old seasonal maintenance worker, filed an occupational disease claim (Form CA-2) alleging that he experienced tingling, nerve spasms, loss of muscle control, numbness, rapid and heavy breathing, tightness in his chest, sweating, panic, and emotional stress after he cleaned out hazardous materials (hazmat) storage sheds on July 8 and 10, 2009. He indicated that he first became aware of his condition and realized its relationship to his employment on July 11, 2009. Appellant stopped work on July 31, 2009.

Appellant initially sought medical treatment from his primary physician, Dr. Patrick J. McGee, a family practitioner. In a July 22, 2009 report, Dr. McGee described appellant's work exposure on July 8 and 10, 2009 and the symptoms that he had experienced. He indicated that appellant had an "episode" on July 11 and 12, 2009 when he experienced cramps in his legs and arms, got into the fetal position. Dr. McGee indicated that it was not a seizure, but was "some kind of a spell." Appellant reported that neurological examination appeared grossly intact and diagnosed chemical exposure, multiple spells of muscle spasms and contractures, and history of hepatitis C.

OWCP received an employing establishment incident investigation report dated July 28, 2009 by R.G., an accident investigator. R.G. indicated that linseed oil was 80 percent of the contents that had spilled in the hazmat sheds and that the other 20 percent was unknown. He noted that appellant was provided with rubber gloves, latex gloves, and N-95 respirators and used chemicals such as citristrip paint stripper and Grez-off to loosen the waste materials.

The employing establishment provided an inventory list dated May 15, 2009 of the 62 materials stored in the hazmat shed and several material safety data sheets (MSDS) for the various substances in the hazmat shed. It also submitted a position description for a maintenance worker, the results of the analysis screening of the spilled material, and an August 25, 2009 Investigative Activity Report.

In a December 4, 2009 electroencephalogram (EEG) report, Dr. Shawn M. Smith, a neurologist, indicated that the EEG was within normal limits. He noted no focal abnormalities or epileptiform discharges.

[3] Docket No. 17-0925 (issued December 14, 2017); Docket No. 16-0374 (issued November 2, 2016); *Order Dismissing Appeal*, Docket No. 14-0517 (issued October 23, 2014).

By decision dated February 4, 2010, OWCP denied appellant's occupational disease claim. It accepted that on July 8 and 10, 2009 he was exposed to various chemicals at work, but denied the claim finding that the medical evidence of record was insufficient to establish a diagnosed medical condition causally related to the accepted employment factors.

Appellant disagreed with the denial decision and submitted several requests for a telephonic hearing before an OWCP hearing representative. By decisions dated July 29, 2010, September 1, 2011 and June 29, 2012, an OWCP hearing representative vacated the February 4, 2010, January 20, 2011, and May 7, 2012 denial decisions, respectively, and remanded the case for further development of the medical evidence. In a June 29, 2012 decision, the hearing representative determined that a conflict in medical opinion evidence existed between Dr. Kaye H. Kilburn,[4] appellant's treating physician and Board-certified in internal and occupational medicine with a subspecialty in neurotoxicology, and Dr. Edward Cetaruk,[5] an OWCP second-opinion examiner, Board-certified in emergency medicine with a subspecialty in medical toxicology, as to whether appellant developed a medical condition as a result of exposure to chemicals while working in a hazmat shed for two days in July 2009. OWCP's hearing representative remanded appellant's case for OWCP to refer him for an impartial medical examination in order to resolve the conflict in the medical opinion evidence.

OWCP subsequently referred appellant's case, along with an addendum to the September 23, 2010 statement of accepted facts (SOAF), to Dr. Scott Phillips, Board-certified in internal and emergency medicine with a subspecialty in medical toxicology, for an impartial medical examination in order to resolve the conflict of the medical opinion evidence regarding whether appellant's exposure to chemicals or substances on July 8 and 10, 2009 caused or contributed to a chemical encephalopathy condition.

In a September 26, 2012 report, Dr. Phillips recounted that on July 8 and 10, 2009 appellant cleaned up spilled linseed oil in a hazmat shed that contained several containers of other materials and experienced symptoms of muscle spasms in his face and arms and difficulty talking the next day. He reviewed appellant's medical records and conducted a physical examination. Dr. Phillips noted some intermittent twitching movements, primarily involving the right side of appellant's face. He diagnosed other and unspecified factitious illness, episodic mood disorder, and hepatitis C without coma. Dr. Phillips opined that he did not believe that there was "a causal nexus between the work in the hazardous materials shed and the complaints proffered by [appellant]." He explained that the chemicals listed were not known to cause the types of symptoms claimed by

[4] In June 9 and August 12, 2010 reports, Dr. Kilburn described the July 8 and 10, 2009 work exposure and noted that physical examination and physiological testing revealed some abnormal findings. He diagnosed chemical encephalopathy, peripheral neuropathy, and chemical intolerance due to pyrethroids and similar chemicals. Dr. Kilburn reported that a single causal factor was probably pyrethroid exposure, which was on the inventory list of chemicals in the hazmat shed.

[5] In December 17, 2010 and April 19, 2012 reports, Dr. Cetaruk provided an accurate history of injury and noted essentially normal physical and neurological examination. He indicated that appellant had no current diagnoses from a toxicological perspective. Dr. Cetaruk opined that there was no evidence of a chemical exposure as a result of working in the hazmat shed on July 8 and 10, 2009 that would have caused appellant's current complaints.

appellant and that there was no evidence to demonstrate pesticide poisoning, particularly pyrethroid poisoning.

In a decision dated October 10, 2012, OWCP denied appellant's claim, finding that the special weight of the medical evidence rested with the impartial medical opinion of Dr. Phillips, who determined in a September 26, 2012 report that appellant's medical conditions were not causally related to the accepted July 8 and 10, 2009 work factors. By decision dated April 26, 2013, an OWCP hearing representative affirmed the October 10, 2012 decision.

On July 18 and December 2, 2013 appellant, through counsel, requested reconsideration. In August 20 and December 4, 2013 decisions, OWCP denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

On October 30, 2013 and April 17, 2015 appellant, through counsel, continued to request reconsideration. By decisions dated November 14, 2013 and August 11, 2015, OWCP denied modification of its previous denial decisions.[6]

Appellant filed an appeal to the Board. In a decision dated November 2, 2016, the Board set aside OWCP's August 11, 2015 decision finding that Dr. Phillips' September 26, 2012 impartial medical report was insufficient to resolve the conflict in the medical opinion evidence. The Board noted that Dr. Phillips provided conclusory statements and did not adequately explain, based on medical rationale and clinical findings, how appellant's exposure to chemical substances on July 8 and 10, 2009 did not cause or contribute to any medical condition. The Board remanded the case for OWCP to obtain a supplemental report from Dr. Phillips.

In a January 12, 2017 supplemental report, Dr. Phillips described his medical toxicology training and noted the additional medical reports that he had reviewed. He asserted that Dr. Kilburn's conclusions were based on circular reasoning and were not supported by the widely accepted Hill methodology for establishing causation in toxicology cases.

By decision dated January 20, 2017, OWCP denied appellant's claim finding that the special weight of the medical evidence rested with the September 26, 2012 and January 12, 2017 reports of Dr. Phillips, the impartial medical examiner, who determined that appellant's condition was not causally related to appellant's work exposure on July 8 and 10, 2009.

Appellant, through counsel, filed an appeal to the Board. In a December 14, 2017 decision, the Board set aside the January 20, 2017 OWCP decision. The Board found that Dr. Phillips' supplemental opinion was insufficient to resolve the outstanding conflict in this case as he did not provide sufficient medical rationale to support his conclusion. The Board remanded the case for referral to a new impartial medical examiner in order to resolve the conflict as to whether appellant's accepted work exposure on July 8 and 10, 2009 caused or contributed to a medical condition.

[6] On December 30, 2013 appellant filed an appeal of the November 14, 2013 decision before the Board, but later withdrew the appeal. *Order Dismissing Appeal*, Docket No. 14-0517 (issued October 23, 2014).

Subsequent to the Board's December 14, 2017 decision, OWCP prepared a new conflict statement, a series of questions and referred appellant to Dr. Paul Darby, Board-certified in occupational and environmental medicine physician for a new impartial examination in order to resolve the conflict in the medical opinion regarding whether appellant's work exposure on July 8 and 10, 2009 caused or contributed to a diagnosed medical condition.

In an August 27, 2018 memorandum, K.A., a senior claims examiner for OWCP indicated that the Board had remanded the case for OWCP to schedule a referee examination with a Board-certified toxicologist. She related that it was not possible to schedule one as a physician could not be located in the physician directory system. K.A. explained that Dr. Darby was the physician that a neighboring OWCP district office utilized for toxicology examination.

In a December 7, 2018 report, Dr. Darby indicated that he had reviewed the SOAF and listed the medical records that he had reviewed. He provided a detailed description of the July 8 and 10, 2009 employment incident when appellant cleaned out a storage shed that stored hazardous materials. Dr. Darby related that on July 11 and 12, 2009 appellant experienced a 45 to 60-minute episode where appellant experienced tingling nerve spasms, loss of muscle control, numbness, rapid and heavy breathing, tightness in the chest, sweating, panic and fear, and inability to speak. He noted that appellant currently complained of migraines, involuntary muscle movements, and intolerance to strong smells. Upon physical examination, Dr. Darby observed no fasciculations visible in his fascial muscles or extremities. Sensory examination revealed no sensory deficits of the upper or lower extremities. Dr. Darby indicated that at no time did appellant evidence any choreiform movements of any part of his body. He opined that appellant's history was consistent with a respiratory irritant exposure to one or more airborne chemicals on July 10, 2009, "on a more-probable-than-not basis," resolved. Dr. Darby further opined that this was a temporary condition that resolves with exposure to fresh air and avoidance of the irritant. He also related that appellant's history revealed multiple symptoms crossing many organ systems, which may suggest somatic symptom disorder. Dr. Darby noted that only a behavioral health professional could make such a diagnosis. He opined that such a condition if present would be preexisting and not caused or aggravated by the industrial exposure and noted that a previous primary care physician documented a similar symptom complex nine years ago prior to the industrial incident.

In response to OWCP's specific questions, Dr. Darby indicated that appellant did not have exposure to pyrethroids. He related that the chemical analysis of the sludge did not show any evidence of pyrethroids and that the other chemicals were stored in closed containers without spillage. Dr. Darby also replied that appellant did not have chemical encephalopathy because he did not have chemical exposure of sufficient dose and duration to a substance known to cause chemical encephalopathy or possessing a biologically-plausible mechanism for causing chemical encephalopathy. He further indicated that Dr. Kilburn's reference to specific medical articles and textbooks was irrelevant as there was no evidence that appellant was exposed to pesticides. Regarding the testing performed on the sludge that, had spilled, Dr. Darby reported that he reviewed the test results and related that, except for xylenes, the detected chemicals were below the quantitative reporting limits. He explained that, if aromatic compounds like xylenes were present in the breathing space of appellant at a concentration sufficient to cause toxicity, appellant would have had acute mental changes resembling intoxication at the time of exposure, instead of two to three days later. Dr. Darby pointed out that, after appellant's alleged symptomatic exposure, appellant was able to drive one hour to his home. Regarding appellant's exposure to the chemicals

or substances identified in the chemical inventory of the shed, he indicated that he had reviewed the MSDS sheets and that none of the products, or their components, could "plausibly be expected" to contribute to his medical condition in the scenario outlined in the SOAF.

By decision dated January 10, 2019, OWCP again denied appellant's occupational disease claim finding that the evidence of record was insufficient to establish that his medical condition was causally related to the accepted factors of his federal employment. It found that the special weight of the medical evidence of record rested with Dr. Darby's December 7, 2018 impartial medical report.

On January 18, 2019 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. A telephonic hearing was held on May 15, 2019.

In a June 27, 2019 decision, an OWCP hearing representative affirmed the January 10, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[7] has the burden of proof to establish the essential elements of his or her claim, including 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,[8] 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.[9] 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.[10]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[11]

[7] *Supra* note 2.

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

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

[10] *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).

[11] *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.[12] 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 specific employment factors identified by the employee.[13]

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[14] This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[15] When there exists 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.[16]

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.[17]

ANALYSIS

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

In the prior appeal, the Board remanded the case to OWCP to obtain a report from a new impartial medical examiner who was to determine whether appellant sustained a medical condition as a result of exposure to chemicals at work on July 8 and 10, 2009. Appellant was subsequently referred to Dr. Darby for an impartial medical examination in order to resolve the conflict in the medical evidence.

[12] *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

[13] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[14] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[15] 20 C.F.R. § 10.321.

[16] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[17] *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

The Board finds that the report of Dr. Darby, serving as the IME, is insufficient to carry the special weight of the medical evidence. In a December 7, 2018 report, Dr. Darby provided an accurate history of appellant's exposure at work on July 8 and 10, 2009 and described appellant's immediate and current symptoms. He reviewed appellant's records and provided examination findings. Dr. Darby opined that appellant's history was consistent with a respiratory irritant exposure to one or more airborne chemicals that was "on a more-probable-than-not basis," resolved. He further opined that this was a temporary condition that resolves with exposure to fresh air and avoidance of the irritant. Dr. Darby's opinion, however, is equivocal and he did not definitively opine on whether appellant's respiratory symptoms had resolved or whether they were causally related to the accepted work exposure.[18] Likewise, his opinion that none of the products stored in the hazmat shed or their components could "plausibly" be expected to contribute to appellant's symptoms is also speculative and equivocal. The Board has held that medical opinions which are equivocal or speculative are of diminished probative value.[19] Accordingly, the Board finds that Dr. Darby's opinion lacks the specificity and detail needed to carry the special weight of the medical evidence.

Dr. Darby also reported that appellant's history was suggestive of somatic symptom disorder, but noted that he was not qualified to make such a diagnosis. He indicated that such a disorder would be preexisting and not caused by appellant's industrial exposure, as it was documented nine years prior. Dr. Darby, however, did not provide any medical rationale to support his conclusion that appellant's possible somatic symptom disorder was preexisting and not causally related to the accepted work exposure. The Board has found that, when an IME fails to provide medical reasoning to support his conclusory statements about a claimant's condition, it is insufficient to resolve a conflict in the medical evidence.[20]

Dr. Darby further concluded that appellant did not have chemical encephalopathy. He did not, however, provide sufficient medical rationale to support his conclusion. Dr. Darby did not cite to specific clinical findings to substantiate his assertion and made no references to the case record to demonstrate that he was drawing his conclusion from medical facts. The Board has found that an IME's conclusion which is unsupported by medical reasoning is insufficient to resolve a conflict in the medical evidence.[21]

To be entitled to special weight, a referee physician's opinion must contain clear, persuasive rationale on the critical issue in the claim.[22] Because Dr. Darby's opinion does not contain such clear rationale, he failed to resolve the conflict in the medical evidence regarding whether appellant sustained a medical condition as a result of exposure to chemicals at work on

[18] *C.T.*, Docket No. 19-0508 (issued September 5, 2019); *see also F.D.*, Docket No. 18-1596 (issued June 18, 2019).

[19] *T.M.*, Docket No. 19-1414 (issued February 12, 2020); *S.R.*, Docket No. 16-0657 (issued July 13, 2016); *Minnie Cook*, Docket No. 99-1848 (issued December 20, 2000).

[20] *K.C.*, Docket No. 19-1251 (issued January 24, 2020); *B.J.*, Docket No. 18-1186 (issued July 9, 2019); *A.R.*, Docket No. 12-0443 (issued October 9, 2012).

[21] *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *P.F.*, Docket No. 13-0728 (issued September 9, 2014); *James T. Johnson*, 39 ECAB 1252 (1988).

[22] *A.R.*, Docket No. 17-1358 (issued February 1, 2018).

July 8 and 10, 2009. As OWCP referred appellant to Dr. Darby for an impartial medical examination, it has a duty to obtain a report sufficient to resolve the issues raised and the questions posed to the specialist.[23] When it obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, it must secure a supplemental report to correct the defect in his or her original report.[24] Accordingly, the case will be remanded to OWCP for a fully-rationalized opinion from Dr. Darby, based upon an updated SOAF containing specific reference to the identified chemicals to which appellant was exposed including cleaning solvents, regarding whether appellant sustained a medical condition causally related to the accepted work exposure on July 8 and 10, 2009. Additionally, OWCP shall refer appellant to an appropriate medical specialist to for an impartial medical opinion on the issue of whether the claimed psychiatric condition is related to the accepted exposure. Following this and other such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[23] *Melvin James*, 55 ECAB 406 (2004).

[24] *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810(11)(c)(1)-(2) (September 2010).

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2019 merit decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: June 24, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board