United States Department of Labor
Employees' Compensation Appeals Board

A.B., Appellant	)	
and	)	**Docket No. 19-1760**
	)	**Issued: October 23, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Phoenix, AZ, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 20, 2019 appellant, through counsel, filed a timely appeal from a June 26, 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 to consider 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 June 26, 2019 decision, OWCP received additional evidence. Appellant also submitted additional evidence on appeal. 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 establish that the acceptance of his claim should be expanded to include permanent aggravation of preexisting degenerative spinal conditions as a consequence of his accepted September 13, 2017 employment injury.

FACTUAL HISTORY

On September 15, 2017 appellant, then a 41-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 13, 2017 when delivering his route, he ran from an aggressive dog and fell backward onto the hood of a vehicle, then to the ground while in the performance of duty. He stopped work briefly at the time of injury and returned to light-duty work.

On September 13, 2017 Dr. Erik Cohen, a physician specializing in occupational medicine, examined appellant. In reports through September 19, 2017, he described the claimed September 13, 2017 employment incident and noted appellant's history of a C6-7 fusion approximately five years previously. Dr. Cohen diagnosed cervical, thoracic, and lumbar sprains, and a left forearm abrasion.[4]

On September 26, 2017 OWCP accepted the claim for cervical, thoracic, and lumbar spine sprains and an abrasion of the left forearm.

In a September 28, 2017 report, Dr. Vernon Williams, a physician specializing in emergency medicine, noted increasing cervical spine symptoms.[5]

In an October 2, 2017 report, Dr. Robert Waldrop, a Board-certified orthopedic surgeon specializing in spine surgery, noted the September 13, 2017 employment incident and appellant's history of anterior discectomy and fusion at C6-7. He related appellant's symptoms of cervical spine pain with radiation to both shoulders and significantly limited cervical motion. On examination Dr. Waldrop found decreased sensation in the C8, T1, and T2 dermatomes of the right upper extremity and the C8 dermatome of the left upper extremity.

Appellant stopped work on October 6, 2017. He filed claims for wage-loss compensation (Form CA-7) for disability while in a leave-without-pay status for the period November 3, 2017 and continuing.

In a November 13, 2017 report, Dr. Waldrop noted improvement in appellant's cervical spine symptoms, but had an increase in lumbar pain. He diagnosed degenerative lumbar spondylolisthesis, with pain symptoms exacerbated by the September 13, 2017 injury. Dr. Waldrop held appellant off work beginning November 11, 2017.

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[4] A September 30, 2017 magnetic resonance imaging scan showed multilevel degenerative disc disease throughout the cervical spine, severe canal stenosis at C4-5, moderate stenosis at C5-6, and status post anterior discectomy and fusion at C6 and C7.

[5] Appellant participated in physical therapy treatments in October 2017.

In a development letter dated January 5, 2018, OWCP requested additional information regarding appellant's claims for total disability compensation, commencing November 3, 2017 and continuing. It afforded him 30 days to submit such evidence.

In a January 15, 2018 report, Dr. Waldrop opined that appellant's spinal conditions were painful and limited his activities of daily living. He noted that appellant required additional imaging studies to assess his condition.

Dr. Waldrop, in a February 5, 2018 report, diagnosed a cervical strain, largely resolved, degenerative lumbar spondylolisthesis, and lumbar stenosis with neurogenic claudication.[6]

In a February 20, 2018 letter, OWCP requested that Dr. Waldrop provide medical rationale, explaining whether the accepted September 13, 2017 employment injury caused a temporary or permanent aggravation of a preexisting degenerative spinal condition. It afforded him 30 days to submit the requested evidence. No response was received.

By decision dated February 21, 2018, OWCP denied appellant's claim for compensation for disability, commencing November 3, 2017, as he submitted insufficient rationalized medical evidence to establish that the accepted September 13, 2017 employment injury disabled him for work for the claimed period.

By decision dated March 26, 2018, OWCP denied expansion of the acceptance of appellant's claim to include an aggravation of preexisting degenerative spondylolisthesis as work related.

Appellant continued to submit evidence. In a March 19, 2018 report, Dr. Waldrop diagnosed cervical strain, lumbar spinal stenosis, and degenerative spondylolisthesis. He opined that, while the September 13, 2017 employment injury fall did not cause degenerative spondylolisthesis, "a hard fall can cause an asymptomatic degenerative spondylolisthesis to present with symptoms. This new occurrence of symptoms would be considered an aggravation of asymptomatic preexisting pathology."

In an April 12, 2018 report, Dr. Waldrop noted increasing right-sided lumbar radiculopathy into the right buttock and hip. He continued to hold appellant off from work.

On August 2, 2018 OWCP referred appellant to Dr. Michael Steingart, a Board-certified orthopedic surgeon specializing in spine surgery, for a second opinion evaluation regarding the nature and extent of the injury-related conditions. It provided a copy of the medical record and a statement of accepted facts (SOAF) and a series of question for his review. In a report dated September 12, 2018, Dr. Steingart provided a history of injury and treatment, and reviewed the medical record and SOAF. He noted that, while imaging studies of record did not demonstrate a lumbar spondylolisthesis, he agreed with Dr. Waldrop that the September 13, 2017 employment injury caused a temporary aggravation of a preexisting lumbar degenerative condition, most markedly at L4-5. However, Dr. Steingart was unable to indicate a cessation of the aggravation.

[6] On February 21, 2018 appellant underwent bilateral L3, L4, and L5 medial branch nerve block injections.

On November 7, 2018 OWCP accepted a temporary aggravation of lumbar intervertebral disc disorders. It paid appellant compensation for temporary total disability on the periodic rolls beginning November 11, 2018.

On December 26, 2018 appellant requested reconsideration of the February 21, 2018 decision. He submitted additional reports from Dr. Waldrop dated from November 21 to December 18, 2018, noting that preexisting lumbar spondylosis, degenerative spondylolisthesis, and lumbar stenosis remained aggravated by the accepted September 13, 2017 employment injury.[7]

By decision dated January 9, 2019, OWCP denied appellant's December 26, 2018 reconsideration request as he did not submit relevant or pertinent new evidence warranting a review of the merits of the claim.

In a development letter dated January 10, 2019, OWCP requested additional evidence and provided 20 days to respond.

In a January 15, 2019 report, Dr. Waldrop noted that appellant had some symptomatic relief following a lumbar epidural injection. He submitted periodic reports through March 5, 2019 holding appellant off from work.[8]

On February 6, 2019 OWCP requested a district medical adviser (DMA) answer a series of questions relative to whether the accepted September 13, 2017 employment injury aggravated degenerative lumbar spondylolisthesis. It noted that the DMA referral was necessary due to the complex nature of appellant's spinal conditions. In a February 12, 2019 report, Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon serving as DMA, opined that appellant had an L4-5 retrolisthesis rather than a lumbar spondylolisthesis. He agreed with Dr. Steingart that appellant had a "degenerative condition that was previously asymptomatic and that the work injury caused a temporary aggravation of this degenerative condition."

OWCP found a conflict of medical opinion between Dr. Steingart, for the government, and Dr. Waldrop, for appellant, regarding the nature and extent of the conditions caused or aggravated by the accepted September 13, 2017 employment injury. It selected Dr. Amit Sahasrabudhe, a Board-certified orthopedic surgeon, specializing in sports medicine, as an impartial medical specialist.

In a report dated May 6, 2019, Dr. Sahasrabudhe reviewed the SOAF and medical record and noted findings on examination. He noted that appellant's symptoms had "evolved" in a "migratory" pattern, with right-sided weakness and sensory loss beginning at L5, then progressing to L4, L3, and S1. Dr. Sahasrabudhe opined that, "as a non-spinal surgeon, but a general orthopedist, with orthopedic surgical residency training to include spinal surgery/spine evaluations, there is no objective explanation for how [appellant's] complaints could have 'evolved and migrated' in the manner that appears to have been documented/demonstrated in the medical

[7] A December 14, 2018 electromyography and nerve conduction velocity study showed slightly increased polyphasic potentials of the right anterior tibialis, and increased motor amplitude of the right vastus medialis.

[8] On February 13, 2019 appellant underwent right L3-4 and L5-S1 epidural injections.

records." He characterized any aggravation of preexisting degenerative disc disease as temporary in nature. In the final comment section of his report, Dr. Sahasrabudhe stated, "if there is any question as to the validity of this examination as well as whether spine surgery is indicated, regardless of causation, I would suggest a similar evaluation from a board-certified orthopaedic spine surgeon, one who is fellowship-trained in spine surgery."

By decision dated June 26, 2019, OWCP denied modification of the March 26, 2018 decision based on Dr. Sahasrabudhe's opinion as representing the special weight of the medical evidence.

LEGAL PRECEDENT

The claimant bears the burden of proof to establish a claim for a consequential injury.[9] As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, establishing causal relationship. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.[10]

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.[11] 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.[12]

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury. The basic rule is that, a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[13]

Section 8123(a) provides that, 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] OWCP's implementing regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will

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[9] *I.S.*, Docket No. 19-1461 (issued April 30, 2020).

[10] *K.W.*, Docket No. 18-0991 (issued December 11, 2018).

[11] *G.R.*, Docket No. 18-0735 (issued November 15, 2018).

[12] *Id*.

[13] *K.S.*, Docket No. 17-1583 (issued May 10, 2018).

[14] 5 U.S.C. § 8123(a).

select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[15] Where a 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 on a proper factual background, must be given special weight.[16]

ANALYSIS

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

OWCP properly determined that a conflict of medical opinion existed between Dr. Waldrop, appellant's treating physician, and Dr. Steingart, the second opinion examiner, on the issue of whether appellant sustained an aggravation of a degenerative lumbar spinal condition as a consequence of appellant's accepted September 13, 2017 employment injury. Accordingly, it referred him to Dr. Sahasrabudhe for an impartial medical examination and an opinion to resolve the conflict, pursuant to 5 U.S.C. § 8123(a).[17] As noted, when a 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 on a proper factual background, must be given special weight.[18]

The Board finds that the report of Dr. Sahasrabudhe is insufficient to carry the special weight of the medical evidence. In a May 6, 2019 report, Dr. Sahasrabudhe reviewed the medical record and SOAF, and noted findings on examination as requested. However, he prefaced his opinion as to whether the accepted employment injury aggravated preexisting degenerative spinal conditions with the proviso that he was not a spine surgeon. Dr. Sahasrabudhe opined that, "as a non-spinal surgeon, but a general orthopedist, with orthopedic surgical residency training to include spinal surgery/spine evaluations, there is no objective explanation for how [appellant's] complaints could have 'evolved and migrated' in the manner that appears to have been documented/demonstrated in the medical records." He characterized any aggravation of preexisting degenerative disc disease as temporary in nature. In the final comment section of his report, Dr. Sahasrabudhe stated, "if there is any question as to the validity of this examination as well as whether spine surgery is indicated, regardless of causation, I would suggest a similar evaluation from a Board-certified orthopedic spine surgeon, one who is fellowship-trained in spine surgery." These statements indicate that he did not consider himself qualified to render the opinion that he was selected to provide. This is particularly crucial in this case, as OWCP had noted in its February 6, 2019 memorandum to the DMA that appellant's spinal conditions were particularly complex. The Board finds, therefore, that Dr. Sahasrabudhe's report does not represent the special weight of the medical evidence in this case.[19] The case will be remanded to OWCP for selection of a new impartial medical specialist with appropriate qualifications to resolve the conflict of

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[15] 20 C.F.R. § 10.321.

[16] *V.K.*, Docket No. 19-0422 (issued June 10, 2020); *K.C.*, Docket No. 19-1251 (issued January 24, 2020); *V.K.*, Docket No. 18-1005 (issued February 1, 2019); *D.M.*, Docket No. 17-1411 (issued June 7, 2018).

[17] *V.K.*, *id.*; *G.B.*, Docket No. 19-1510 (issued February 12, 2020); *R.H.*, 59 ECAB 382 (2008).

[18] *V.K.*, *id.*; *D.M.*, *supra* note 16.

[19] *Id.*

medical opinion between Dr. Waldrop and Dr. Steingart. Following this and any further development deemed necessary, it shall issue a de novo decision.[20]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 26, 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.[21]

Issued: October 23, 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

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[20] *V.K.*, *supra* note 16.

[21] The Board notes that the case file as transmitted to the Board, located at received date September 18, 2017, contains a medical report of another claimant, D.C. Upon return of the case file, OWCP shall associate this report with the proper case file.