

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

_____)	
T.W., Appellant)	
)	
and)	Docket No. 20-0836
)	Issued: July 21, 2021
DEPARTMENT OF THE ARMY, U.S. ARMY)	
CORPS OF ENGINEERS, Jersey City, NJ,)	
Employer)	
_____)	

Appearances: *Case Submitted on the Record*
*Thomas R. Uliase, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 4, 2020 appellant, through counsel, filed a timely appeal from an October 23, 2019 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.

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 November 30, 2016 employment incident.

FACTUAL HISTORY

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

On December 14, 2016 appellant, then a 39-year-old deckhand, filed a traumatic injury claim (Form CA-1) alleging that on November 30, 2016 he sustained a thoracic herniated disc at T7-8 when bending over to remove a line while in the performance of duty. He notified his supervisor, stopped work, and sought emergency medical treatment on the alleged date of injury.⁴

In a March 9, 2016 report, Dr. Carmen M. Renna, Board-certified in internal medicine, noted appellant's complaints of chronic back pain, which intermittently worsened. In a January 10, 2017 report, she reported that appellant had experienced intermittent back pain since his November 2013 employment injury. Dr. Renna reported a recent acute exacerbation resulting in severe recurrent back pain radiating into both thighs. She diagnosed back pain of lumbosacral region with sciatica.

In a December 22, 2016 medical report, Dr. Joelle Rehberg, Board-certified in sports medicine, noted that appellant complained of dull lower back and bilateral leg pain following a November 30, 2016 injury when he was working on a boat and bent over to release a line. She noted active problems for restless leg syndrome, acute sacroiliitis, muscle spasm, lumbar back pain with radiculopathy, and herniated disc. Dr. Rehberg also noted chronic back pain. She diagnosed low back pain, most likely sacroiliac in nature and restricted appellant from working.

By decision dated January 27, 2017, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that his diagnosed medical conditions were causally related to the accepted November 30, 2016 employment incident.

On February 22, 2017 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

³ Docket No. 18-1436 (issued April 10, 2019).

⁴ The record reflects that appellant has two prior traumatic injury claims involving back injuries. On December 3, 2013 appellant filed a Form CA-1 alleging a November 29, 2013 back injury after he bent over to pick up a rubber block. OWCP assigned that claim OWCP File No. xxxxxx243 and accepted it for sprain of back, lumbar region. On July 24, 2015 appellant filed another Form CA-1 alleging a July 14, 2014 back injury after he lifted a steel plate on a flexi float. OWCP assigned that claim OWCP File No. xxxxxx570 and accepted it for sprain of back. Appellant's claims have not been administratively combined.

In support of his claim, appellant submitted a February 6, 2017 electromyogram (EMG) and nerve conduction velocity (NCV) study of the lower extremities, a computerized tomography (CT) scan of the thoracic spine, and a CT scan of the lumbar spine.

In medical reports dated January 26 through June 29, 2017, Dr. Marc A. Cohen, a Board-certified orthopedic surgeon, reported that appellant was referred for evaluation of his back condition. He noted a 2013 employment injury when appellant bent down to pick up a rubber hose and presented to the hospital for a herniated disc at T7-8. Appellant had been treated with conservative care and subsequently released to work. Dr. Cohen noted an exacerbation occurred in 2015 along with a more recent exacerbation on November 30, 2016 when appellant was untying a rope and had to seek emergency medical treatment. He reported that a December 19, 2016 MRI scan of the lumbar spine showed evidence of degeneration at L2-3 and L4-5. Dr. Cohen also noted that a repeat MRI scan of the thoracic spine revealed a left herniated disc at T7-8 with some impingement on the spinal cord, and to a smaller degree T8-9. He diagnosed bilateral neurological radiculopathy and disc herniation at T7-8 and restricted appellant from returning to work.

Dr. Cohen, in a June 29, 2017 medical report, discussed the findings of the February 6, 2017 lumbar and thoracic CT myelogram. He further reported that the EMG testing on that date revealed bilateral L5-S1 radiculopathy. Dr. Cohen diagnosed thoracic disc herniation at T7-8, with neurodiagnostic testing of a thoracic CT myelogram showing significant worsening of his prior 2013 and 2015 employment injury. He reported that appellant, through the course of his employment, when bending to untie a line, caused a significant amount of flexion in the thoracic spine and his disc herniation to significantly worsen. Dr. Cohen restricted appellant from returning to work.

In a June 5, 2017 medical report, Dr. John Knightly, a Board-certified neurosurgeon, noted review of appellant's thoracic CT scan, which revealed minimal disc protrusion and some degree of cord flattening, mild kyphosis, and what appeared to be loss of lordosis in the neck. The CT scan of the lumbar spine revealed mild degenerative changes with minimal bulging. Dr. Knightly noted the active problems of chronic back pain, restless leg syndrome, acute sacroiliitis, muscle spasm, lumbar back pain with radiculopathy, and herniated disc. He diagnosed chronic back pain, which appeared to be myofascial as there was no evidence of instability.

By decision dated July 18, 2017, OWCP's hearing representative affirmed the January 27, 2017 decision.

On July 27, 2017 appellant, through counsel, requested reconsideration of OWCP's January 27, 2017 decision and submitted additional medical evidence in support of his claim.

In a May 22, 2017 report, Dr. Andrew Sim, Board-certified in pain medicine, discussed the findings of appellant's diagnostic studies and provided bilateral sacroiliac joint injections. He diagnosed lumbar radiculopathy, sacroiliitis, lumbar degenerative disc disease, thoracic disc herniation, and lumbar spondylosis.

By decision dated October 25, 2017, OWCP denied modification of the July 18, 2017 decision.

On January 26, 2018 appellant, through counsel, requested reconsideration.

In a November 18, 2017 medical report, Dr. Vincent K. McInerney, a Board-certified orthopedic surgeon, reported that appellant was evaluated for low back and bilateral leg pain. He reviewed his history and prior medical reports, noting several injuries while at work as a boat pilot and deckhand. Dr. McInerney reported that the first episode was in 2013 when appellant bent down to pick up a rubber block trailer while at work and experienced sharp pain in his lower thoracic and upper lumbar area. Appellant was told that he had T7-8 disc herniation, which was tolerable and improved with physical therapy treatments. He continued to work as a deckhand through 2013 and sustained a second episode of back and leg pain in 2015 when he was lifting a steel plate. Dr. McInerney reported that on November 30, 2016 appellant had another injury when he was bending over to untie a line and could not stand due to sharp pain in his lower back and left leg area. He diagnosed T8-9 thoracic disc herniation, which was consistent with appellant's signs and symptoms. Dr. McInerney noted an assessment for herniation of intervertebral disc of thoracic spine without myelopathy and restricted appellant from returning to work.

In a January 25, 2018 narrative report, Dr. Cohen reported that on November 30, 2016 appellant bent over to work a line and felt a pop in his back when he stood up, rendering him unable to walk. A February 6, 2017 MRI scan of the thoracic spine revealed T7-8 left-sided herniated disc with significant superior extrusion, which was seen in association with spondylosis. Dr. Cohen noted significant cord impingement, which appeared to be flattened by the disc herniation. He reported that this was in contrast to his July 17, 2011 thoracic MRI scan from his prior work injury, which showed a left T7-8 herniation with mild deformity. Dr. Cohen explained that this objectively confirmed a significant change from appellant's prior thoracic work injury as the disc fragment had become extruded and was causing cord impingement.

By decision dated May 9, 2018, OWCP denied modification of the October 25, 2017 decision.

On July 19, 2018 appellant, through counsel, appealed to the Board. By decision dated April 10, 2019, the Board affirmed the May 9, 2018 decision, finding that the record lacked rationalized medical evidence to establish causal relationship between the accepted November 30, 2016 employment incident and his thoracic and lumbar spine conditions.⁵

On October 16, 2019 appellant, through counsel, requested reconsideration and submitted an August 11, 2019 report from Dr. Cohen. Dr. Cohen addressed his report as an "addendum" to his prior medical notes for clarification of appellant's biomechanical injury as a result of the November 30, 2016 accident. He reported that appellant felt a pop in his back when bending forward and lifting something while at work. Dr. Cohen opined that lifting from a flexed to extended position while appellant was bent, twisting, and turning caused a torsion effect to the disc on his back and aggravation of the preexisting degenerative disc condition. He explained that preexisting degenerative discs are always structurally weaker and predisposing appellant to this biomechanical change when coming from a bent to extended position while twisting, turning, and lifting, resulting in a pop of his lower back that necessitated him to go to the emergency room due to pain.

⁵ *Supra* note 3.

By decision dated October 23, 2019, OWCP denied modification of the May 9, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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 filed within the applicable time limitation period of FECA, that an injury was sustained while 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.⁷ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁸

To determine if an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. 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

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.¹¹ The opinion of the physician must be based on a complete factual and medical background, 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 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

⁶ *Supra* note 2.

⁷ *J.R.*, Docket No. 20-0496 (issued August 13, 2020); *D.K.*, Docket No. 17-1186 (issued June 11, 2018); *Gary J. Watling*, 52 ECAB 278 (2001).

⁸ *B.M.*, Docket No. 19-1341 (issued August 12, 2020); *T.C.*, Docket No. 18-1498 (issued February 13, 2019); *Michael E. Smith*, 50 ECAB 313 (1999).

⁹ *T.J.*, Docket No. 19-0461 (issued August 11, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

¹² *R.F.*, Docket No. 20-1181 (issued February 11, 2021); *S.S.*, Docket No. 18-1488 (issued March 11, 2019).

¹³ *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

In a case in which 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 appellant has not met his burden of proof to establish a medical condition causally related to the accepted November 30, 2016 employment incident.

Preliminarily, the Board notes that on January 27, 2017 OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that his diagnosed medical conditions were causally related to the accepted November 30, 2016 employment incident. By decision dated April 10, 2019, the Board affirmed the May 9, 2018 denial of modification, finding that the record lacked rationalized medical evidence to establish causal relationship between the accepted November 30, 2016 employment incident and his thoracic and lumbar spine conditions. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁵ The Board, therefore, will not consider the evidence addressed in the prior appeal.¹⁶

Following OWCP's May 9, 2018 decision, OWCP received an August 11, 2019 report from Dr. Cohen. Dr. Cohen indicated that appellant felt a pop in his back when bending forward and lifting something while at work. He opined that this would have caused a torsion effect on the disc of the back aggravating his preexisting disc condition because appellant's back was structurally weaker and predisposed to biochemical change due to the preexisting degenerative disc disease, noting that bending, extending, twisting, and turning while lifting caused a popping in the lower back necessitating the need for emergency treatment. Dr. Cohen, however, did not describe the November 30, 2016 employment incident in detail or provide adequate medical rationale in support of his opinion that the incident caused appellant's diagnosed thoracic and lumbar spine conditions. The Board has held that a physician must provide a narrative description of the identified employment incident and a reasoned opinion on whether the employment incident described caused or contributed to appellant's diagnosed medical condition¹⁷ Additionally, the Board has held that a well-rationalized opinion is particularly warranted when there is a history of a preexisting condition, as in this case.¹⁸ This report is, therefore, of limited probative value and insufficient to establish the claim.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013). See also *A.J.*, Docket No. 20-0484 (issued September 2, 2020); *S.K.*, Docket No. 18-1411 (issued July 22, 2020); *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

¹⁵ See *E.H.*, Docket No. 19-1569 (issued April 2, 2020); *J.T.*, Docket No. 18-1757 (issued April 19, 2019); *S.S.*, Docket No. 17-1106 (issued June 5, 2018); *H.G.*, Docket No. 16-1191 (issued November 25, 2016).

¹⁶ *B.R.*, Docket No. 20-0050 (issued March 4, 2021); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹⁷ *J.M.*, Docket No. 20-0256 (issued September 29, 2020).

¹⁸ *J.C.*, Docket No. 20-1509 (issued May 25, 2021); *P.M.*, Docket No. 20-0114 (issued December 23, 2020).

As the medical evidence of record does not contain rationalized medical evidence establishing causal relationship between appellant's diagnosed conditions and the accepted November 30, 2016 employment incident, the Board finds that appellant has not met his burden of proof.¹⁹

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted November 30, 2016 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the October 23, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 21, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

¹⁹ A.B., Docket No. 20-0971 (issued January 26, 2021).