United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 21-0188**
	)	**Issued: August 5, 2022**
DEPARTMENT OF VETERANS AFFAIRS, BAY PINES VETERANS AFFAIRS MEDICAL CENTER, St. Petersburg, FL, Employer	)	

Appearances:
Capp Taylor, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On November 19, 2020 appellant, through his representative, filed a timely appeal from an October 28, 2020 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.[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 October 28, 2020 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include aggravation of degenerative disc at L4-5 and herniation of disc at L3-4 with stenosis and bilateral radiculopathy as causally related to his accepted September 8, 2015 employment injury; and (2) whether appellant has met his burden of proof to establish disability from work for the period June 7 through September 13, 2016 causally related to his accepted September 8, 2015 employment injury.

FACTUAL HISTORY

On October 7, 2015 appellant, then a 48-year-old medical instrument technician, filed a traumatic injury claim (Form CA-1) alleging that on September 8, 2015 he slipped, but did not fall, on a water puddle on the tiled floor in the parking garage while in the performance of duty. He indicated that he hurt his middle back, lower back, and right buttocks. The record reflects that appellant continued to work full-time regular duty without restrictions from the date of injury. He began modified work with restrictions on October 1, 2015. OWCP accepted the claim for lumbar spine sprain. Appellant resigned from his position effective September 16, 2016.

On September 16 and 19, 2016 appellant filed claims for compensation (Form CA-7) for the period June 7 through September 13, 2016. In an attached time analysis (Form CA-7a), he noted that he underwent a surgical procedure on June 7, 2016 and recovered from surgery and visited his physician on several days that followed. Appellant indicated that he was unable to work due to severe back pain and that he was taken off work by his physician. The record indicates that on June 7, 2016 he underwent bilateral facet injections at L3-4 and L4-5 which Dr. Samuel Joseph, a Board-certified orthopedic surgeon, performed.

Work excuse notes dated June 7 and July 12, 2016, from Dr. Joseph, excused appellant from work for medical treatment from June 7 to 8 and July 12 to 14, 2016. In an undated work release note, he excused appellant from work on June 10, 2016. In a June 14, 2016 note, Dr. Linda Harvey, a Board-certified family practitioner, indicated that appellant should not return to work until June 17, 2016.

The records from Dr. Joseph indicate that appellant was status post slip injury, lumbar facet injections, and L3-4 and L4-5 helped his pain, but appellant's left leg still had discomfort. He noted that a January 11, 2016 magnetic resonance imaging (MRI) scan of the lumbar spine indicated mild canal stenosis, moderate left neural foraminal narrowing, mild right neural foraminal narrowing at L4-5 secondary to a 2 millimeter (mm) left eccentric disc bulge in association with bilateral facet degenerative disease, and mild bilateral neural foraminal narrowing at L3-4 secondary to a 2 mm disc bulge in association with bilateral facet degenerative disease. Dr. Joseph indicated that appellant had failed left L3-4 and L4-5 transforaminal lumbar epidural steroid injection and recommended a left L3-4 and L4-5 hemilaminectomy/microdiscectomy.

In a work excuse note dated August 19, 2016, Dr. Joseph excused appellant from work for two weeks from August 19 through September 2, 2016 as a result of lumbago/thoracic spine pain.

In an August 25, 2016 report, Dr. Todd Fellars, a Board-certified orthopedic surgeon, and an OWCP district medical adviser (DMA), reviewed a statement of accepted facts (SOAF) and appellant's medical record to determine whether a proposed hemilaminectomy and

microdiscectomy at L3-4 and L4-5 were causally related to the accepted conditions and medically necessary. The DMA reported that appellant's x-ray showed degenerative changes in the lumbar spine, the lumbar MRI scan showed degenerative spondylosis at L3-4 and L4-5 with mild left-sided stenosis at the L3-4 foramen and moderate-left-sided stenosis at the L4-5 foramen. He indicated that the surgical request was due to appellant's lumbar spondylosis, a preexisting degenerative condition not related to the accepted lumbar sprain. The DMA noted that appellant's initial pain complaints were in the posterolateral leg, but were now in the anterior leg. He indicated that this involved different nerves and therefore the proposed surgery was not causally related to the accepted lumbar sprain. The DMA further opined that the proposed surgery was not medically necessary. He explained that the indications for surgery were weak as appellant had mild sensory changes in the dermatome and that axial back pain, which appellant mostly had, generally did not respond well to surgery.

In a letter dated September 22, 2016, OWCP informed appellant that the evidence of record was insufficient to establish his entitlement to intermittent wage-loss compensation for the period June 7 through September 13, 2019. It advised him of the type of evidence required to establish his claim. OWCP also stated that if appellant's resignation was based on his work injury, then medical documentation to support his work injury must be provided. It further requested that he have his treating physician review the attached DMA's report, which found that the requested surgery was not causally related to the work injury and provide his opinion about the requested back surgery.

By decision dated September 23, 2016, OWCP denied authorization for the requested surgery.

In an October 18, 2016 report, Dr. Joseph provided an assessment of thoracic spine pain. He recommended a thoracic spine MRI scan to evaluate any discogenic issues and continued to recommend left L3-4 and L4-5 hemilaminectomy/microdiscectomy.

By decision dated December 6, 2016, OWCP denied appellant's claim for disability for the period June 7 through September 13, 2006. It found that there was no medical evidence which kept him out of work during the claimed period as a result of his September 8, 2015 work-related injury.

On December 24, 2016 appellant, through his representative, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on October 15, 2018. At the hearing, appellant indicated that he resigned on September 16, 2016 due to the restrictions imposed by Dr. Joseph.

Appellant submitted additional evidence after the hearing.

In his initial medical evaluation of November 1, 2018, Dr. Robert R. Reppy, an osteopath specializing in family medicine, related appellant's history of injury as appellant slipping on a wet floor in 2015. He noted that appellant reported that he had multiple lumbar disc herniations since 2006, but the January 11, 2016 MRI scan did not show that. Dr. Reppy provided examination findings. He opined that, since appellant's symptoms had persisted for three years, the accepted diagnosis of lumbar sprain was wrong as the MRI scan evidence provided proof of displaced lumbar discs at L3-4 and L4-5 and stenosis at L4-5 in central canal. In a November 21, 2018 report, Dr. Reppy noted the results of appellant's November 6, 2018 abnormal nerve conduction

velocity (NCV) study and indicated that appellant had radiculopathy secondary to the known L3-4 and L4-5 disc herniations noted on MRIs scans. He opined that "since the L3-4 disc herniation is a direct result of [appellant's] work injury (a case could be made that the L4-5 herniation was preexisting), then so is this radiculopathy."

In his December 18, 2018 report, Dr. Reppy reviewed the results of appellant's November 29, 2018 physical capacity evaluation. He indicated that appellant was suffering from displaced lumbar disc at L3-4 and L4-5, lumbar radiculopathy to the lower extremities, and stenosis at L4-5 in the central canal. Dr. Reppy again opined that the accepted lumbar sprain diagnosis was wrong as appellant's symptoms had persisted for three years.

By decision dated December 28, 2018, OWCP's hearing representative affirmed OWCP's December 6, 2016 decision.

On March 27, 2019 appellant, through his representative, requested reconsideration and submitted arguments. In another letter of even date, appellant's representative requested that the acceptance of appellant's claim be expanded "to include aggravation of degenerative disc at L4-5 and herniation of disc at L3-4 with stenosis and bilateral radiculopathy."

Evidence received in support of the reconsideration requests included additional diagnostic reports to including a November 6, 2018 electromyogram (EMG) report, and other diagnostic reports dated January 15, February 26, March 26, and April 25, 2019.

Reports from Dr. Reppy dated January 15 through April 25, 2019 were also received. In a March 21, 2019 report, he indicated that the 2005 MRI scan taken before the September 8, 2015 injury showed a disc herniation at L4-5, not mere spondylosis degeneration as the DMA maintained at L3-4. Dr. Reppy indicated that the September 8, 2015 MRI scan, taken after the September 8, 2015 injury, showed a disc herniation at L3-4. He reasoned that the L3-4 disc was not a preexisting condition, however, the slip injury aggravated the L4-5 condition and it was the cause of the L3-4 disc injury as appellant had no complaints of any residual pain prior to the work injury. Dr. Reppy further reasoned that appellant suffered more than a sprain as his symptoms have persisted for over three years. He opined that appellant suffered two disc herniations at L3-4 and L4-5 along with the stenosis and radiculopathy caused by them, which only trauma could produce and that it was common for disc herniations to be caused by falls. Dr. Reppy explained that the chain of causation was consistent chronologically with the date of injury and that appellant's conditions did not exist in its present form prior to the injury. He thus opined that the mechanism of injury caused appellant's condition and that the amount of impact was sufficient to rupture discs, as evidence by radiological studies and appellant's symptoms. Dr. Reppy also opined that appellant's two distinct areas of structural pathology were resolvable by the recommended surgery and would never resolve without such surgery. He continued to provide treatment notes documenting appellant's condition.

By decision dated June 25, 2019, OWCP denied modification of its December 28, 2018 decision.

On January 15, 2020 appellant, through his representative, requested reconsideration.

Follow-up reports dated November 14, 2019 and January 13, 2020 from Dr. Reppy were received. In his January 13, 2020 report, he indicated that he was aware that appellant's injury

was a slip injury with no particular fall. Dr. Reppy reiterated his opinion that appellant suffered more than a lumbar sprain on September 8, 2015 as a sprain would have resolved within six months. He further explained that the 2005 MRI scan showed a L4-5 disc herniation preexisted the September 8, 2015 work injury and was aggravated by the September 8, 2015 work injury. The MRI scan taken after the work injury showed the disc herniation at L3-4 and the diagnostic testing established radiculopathy secondary to herniation at L3-4 and L4-5. Dr. Reppy opined that the stenosis and radiculopathy caused by these disc herniations resulted from September 8, 2015 work injury as it was trauma induced and not age related. He explained that disc herniations, stenosis, and radiculopathy are produced by trauma and are not age related. Furthermore, appellant's symptoms and history are consistent with the NCV study and 2015 MRI scan in that the radiculopathy began after the September 8, 2015 slip injury and not before. Dr. Reppy explained that the slip injury produced an awkward movement regarding the lumbar spine which caused additional stress shifting the disc. The shift of the disc caused stenosis or narrowing of the gap where the nerve roots exit the spine. Dr. Reppy further explained that the impingement of the nerve root caused the radiculopathy, which was supported by the positive NCV testing and the 2015 MRI scan.

OWCP also received a January 21, 2020 EMG/NCV report.

By decision dated March 6, 2020, OWCP denied modification of its June 25, 2019 decision.

On July 15, 2020 appellant, through his representative, requested reconsideration.

Evidence received in support of reconsideration included diagnostic testing and medical reports by Dr. Reppy dated March 12, April 23, May 20, June 16 and 25, and September 10, 2020 which provided a review of the diagnostic tests performed on January 21, 2020 examination findings, and diagnoses of displaced lumbar discs at L3-4 and L4-5, lumbar radiculopathy to the lower extremities and stenosis at L4-5 in the central canal.

In his June 16, 2020 report, Dr. Reppy indicated that the 2005 lumbar MRI scan was significant for a bulging disc at L3-4 sufficiently large to indent the thecal sac and thus, large enough to cause symptoms, even though it had not fully ruptured into a herniation at the time the MRI scan was taken on October 31, 2005. He further indicated that the 2005 lumbar MRI scan showed a disc herniation at L4-5. Thus, Dr. Reppy opined that the L4-5 disc herniation was a preexisting condition while the L3-4 disc was not. He also indicated that the MRI scan showed some scoliosis, which he opined that was not related to any workplace injury. Dr. Reppy indicated that the injuries can be differentiated by the fact that the nerve roots exiting the spinal cord at the L3-4 level enervate different dermatomes than those from the L4-5 levels and lower. He explained which areas each level enervated and indicated that, before the September 8, 2015 work injury, appellant did not complain of residual pain at the lower legs and none at the anterior upper legs. However, after the injury, appellant experienced below the knee posterior leg pain. Dr. Reppy indicated that pain was an aggravation of an existing injury. He further explained that the pain higher in appellant's legs at the anterior thighs was new and was from the dermatome enervated by the L3-4 nerve roots, which he opined that was from the 2015 work injury.

By decision dated October 28, 2020, OWCP denied modification of its prior decision.

LEGAL PRECEDENT -- ISSUSE 1

Where 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.[4]

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.[5] A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.[6] Additionally, the opinion of the physician must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and the specific employment factor(s) identified by the claimant.[7]

ANALYSIS -- ISSUE 1

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

In his January 13, 2020 report, Dr. Reppy indicated that he was aware that appellant had a slip injury with no particular fall. He reiterated his prior opinions that appellant suffered more than a lumbar sprain on September 8, 2015 noting that a sprain would resolve within six months, but appellant's sprain did not resolve. Dr. Reppy explained that the first 2005 MRI scan showed a L4-5 disc herniation which preexisted the September 8, 2015 work injury, and that the 2015 MRI scan taken after the work injury showed the disc herniation at L3-4 with diagnostic testing establishing radiculopathy secondary to herniation at L3-4 and L4-5. He opined that the stenosis and radiculopathy caused by these disc herniations resulted from September 8, 2015 work injury as it was trauma induced and not age related. Dr. Reppy explained that the slip injury produced an awkward movement in the lumbar spine which caused additional stress shifting the disc and that the shift of the disc caused stenosis or narrowing of the gap where the nerve roots exits the spine. He indicated that the impingement of the nerve root which caused the radiculopathy started after the September 8, 2015 slip injury and was supported by the positive NCV testing and the 2015 MRI scan. In his June 15, 2020 report, Dr. Reppy indicated that, prior to the September 8, 2015 work injury, appellant did not complain of residual pain at the lower legs or at the anterior upper legs. After the injury, appellant experienced below the knee posterior leg pain. Dr. Reppy opined that such pain was an aggravation of the preexisting L4-5 disc herniation. He further explained that the pain at the anterior thighs was new and was from the dermatome enervated by the L3-4 nerve roots, which he opined was from the 2015 work injury.

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[4] *See L.C.*, Docket No. 20-1866 (issued February 26, 2021); *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[5] *See T.B.*, Docket No. 20-0182 (issued April 23, 2021); *T.C.*, Docket No. 19-1043 (issued November 8, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

[6] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

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

The Board finds that while Dr. Reppy's reports are not completely rationalized, they are consistent in indicating that appellant sustained additional medical conditions due to the September 8, 2015 slip incident and are sufficient to require OWCP to further develop the medical evidence and the case record.[8]

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 to see that justice is done.[9]

The Board will therefore remand the case for further development of the medical evidence. On remand, OWCP shall prepare a SOAF and obtain a rationalized opinion from a physician in the appropriate field of medicine as to whether the September 8, 2015 slip incident caused or aggravated appellant's diagnosed conditions. If the second opinion physician disagrees with the explanation provided by Dr. Reppy, he or she must provide a fully rationalized report explaining why the accepted September 8, 2015 employment injury was insufficient to have caused appellant's aggravation of degenerative disc at L4-5 and herniation of disc at L3-4 with stenosis and bilateral radiculopathy. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.[10]

CONCLUSION

The Board finds that this case is not in posture for decision with regard to the issue of whether the acceptance of appellant's claim should be expanded to include aggravation of

[8] *See E.P.*, Docket No. 19-1703 (issued April 16, 2021); *C.W.*, Docket No. 19-0322 (issued July 18, 2019); *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *D.W.*, Docket No. 17-1884 (issued November 8, 2018); *John. J. Carlone*, 41 ECAB 354 (1989).

[9] *S.W.*, Docket No. 18-0119 (issued October 5, 2018); *William J. Cantrell*, 34 ECAB 1233 (1993).

[10] Given the disposition of Issue 1, Issue 2 is rendered moot.

degenerative disc at L4-5 and herniation of disc at L3-4 with stenosis and bilateral radiculopathy as causally related to his accepted September 8, 2015 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2020 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.

Issued: August 5, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board