United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 23-0768**
	)	**Issued: December 22, 2023**
DEPARTMENT OF VETERANS AFFAIRS, EAST ORANGE VA MEDICAL CENTER, East Orange, NJ, Employer	)	

Appearances:
James D. Muirhead, Esq., 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 May 3, 2023 appellant, through counsel, filed a timely appeal from a March 3, 2023 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 March 3, 2023 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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 a medical condition causally related to the accepted December 10, 2020 employment incident.

FACTUAL HISTORY

On December 14, 2020 appellant, then a 52-year-old diagnostic radiology technician, filed a traumatic injury claim (Form CA-1) alleging that on December 10, 2020 he sustained an injury to his legs when he lifted a portable x-ray machine tube while in the performance of duty. He stopped work on December 11, 2020.

In a December 10, 2020 report, Dr. Brian A. Bannister, an anesthesiologist specializing in pain management, recounted appellant's history of low back and leg pain commencing in June 2017, worsened by standing, walking, bending, and twisting. He noted that appellant had undergone a discectomy in 2018. On examination, Dr. Bannister observed bilaterally positive straight leg raising, Gaenlen's, and Patrick's tests, and tenderness to palpation of the lumbosacral spine at L4-5 and L5-S1. He noted that appellant had undergone a magnetic resonance imaging (MRI) scan on an unspecified date, which demonstrated bulging/herniated discs at L4-5 and L5-S1. Dr. Bannister diagnosed lumbago of the lumbar region with sciatica, lumbar radiculopathy, lumbosacral radiculopathy, lumbar spondylosis without myelopathy or radiculopathy, and chronic pain syndrome.

In a December 30, 2020 attending physician's report (Form CA-20), Dr. Bannister recounted that on December 10, 2020 appellant lifted a tube on a portable x-ray machine. He diagnosed lumbago, radiculopathy, and spondylosis. Dr. Bannister checked a box marked "Yes" indicating that the diagnosed conditions had been aggravated by the claimed employment incident. He found appellant totally disabled from work for the period December 14, 2020 through February 1, 2021.

In development letters dated February 5 and 12, 2021, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

On January 15, 2021 Dr. Bannister diagnosed lumbar lumbago with sciatica, lumbar and lumbosacral radiculopathy, lumbar spondylosis without myelopathy or radiculopathy, and chronic pain syndrome.

OWCP received a January 22, 2021 report by Dr. Bannister diagnosing lumbar and lumbosacral radiculopathy, lumbar and lumbosacral intervertebral disc degeneration, and low back pain. On January 22, 2021 Dr. Bannister administered intra-articular injections.

In a January 28, 2021 report, Dr. Bannister reiterated previous diagnoses.

In a January 29, 2021 work slip, Dr. Bannister returned appellant to full-duty work effective February 8, 2021.

The record reveals that appellant returned to full-duty work on February 8, 2021.

By decision dated March 16, 2021, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish a causal relationship between his diagnosed conditions and the accepted December 10, 2020 employment incident. Therefore, it concluded that the requirements had not been met to establish an injury as defined by FECA.

In reports dated March 9 and April 6, 2021, Dr. Bannister reiterated prior findings and diagnoses. He noted that appellant was considering surgery.

In a March 18, 2021 report, Dr. Joshua Seth Rovner, a Board-certified orthopedic surgeon, recounted that appellant sustained "an injury at work on December 10, 2020 while lifting something. He also had a previous motor vehicle accident in 2017 from which he had a diskectomy procedure" at L4-5 and L5-S1. On examination, Dr. Rovner observed difficult toe and heel walking, an antalgic gait, limited lumbar range of motion due to pain, a positive left straight leg raising test, and decreased sensation in the plantar aspect of both feet. He obtained x-rays, which demonstrated grade 2 spondylolisthesis at L4-5, reduced to grade 1 on extension. Dr. Rovner diagnosed lumbar stenosis and spondylolisthesis at L4-5 and L5-S1. He recommended an anterior lumbar interbody fusion at L4-5 and L5-S1 with instrumentation and likely a left-sided foraminotomy.

In a July 8, 2021 report, Dr. Rovner recounted appellant's continuing, severe low back pain and bilateral posterolateral lower extremity pain. He noted that appellant wished to proceed with lumbar fusion.

On March 15, 2022 appellant, through counsel, requested reconsideration.

In a March 23, 2022 report, Dr. Bannister recounted appellant's treatment history. He noted that in early October 2021, appellant underwent anterior lumbar interbody fusion at L4-5 and L5-S1. Dr. Bannister opined that the "functions of his present job" would exacerbate his injury.

By decision dated November 3, 2022, OWCP denied modification of its March 16, 2021 decision.

On December 6, 2022 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In a February 8, 2022 report, Dr. Rovner noted reviewing the medical evidence of record, as well as medical reports and imaging studies dated prior to the December 10, 2020 employment injury, which were not previously of record. He recounted appellant's history of back pain commencing in 2014, a June 16, 2017 motor vehicle accident (MVA), and May 14, 2018 right-sided L4-5 and left-sided L5-S1 laminotomy/microdiscectomy. On December 10, 2020 appellant "sustained an injury to his lower back while at work" after lifting a portable x-ray machine tube. Dr. Rovner diagnosed a disc herniation with spondylolisthesis at L4-5 and a disc herniation at L5-S1. He opined that the December 10, 2020 injury, superimposed on a preexisting lumbar spine condition, caused an immediate worsening of symptoms requiring conservative care, pain management, and an October 6, 2021 anterior and posterior lumbar interbody fusion at L4-5 and L5-S1 with interbody cage placement. Dr. Rovner added that the December 10, 2020 employment incident caused immediate, objective, permanent lumbar spine injuries verified by physical examination and medical testing. He opined "to a reasonable degree of medical probability that

the exacerbation of his lumbar condition was directly causally related to the injury on December 10, 2020. [Appellant] had a severe exacerbation of pain and sought out medical treatment immediately following the injury." Dr. Rovner attributed 10 percent of appellant's lumbar condition to preexisting problems, 50 percent to the June 16, 2017 MVA, and 40 percent to the December 10, 2020 employment incident.

By decision dated March 3, 2023, OWCP denied modification of its November 3, 2022 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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,[5] 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.[6] 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.[7]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. Second, the employee must submit sufficient evidence to establish that the employment incident caused an injury.[8]

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.[9] 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

[4] *Supra* note 2.

[5] *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

[9] *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).

nature of the relationship between the diagnosed condition and the employment incident identified by the employee.[10]

In any case where 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.[11]

ANALYSIS

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

In a March 18, 2021 report, Dr. Rovner recounted a history of a 2017 motor vehicle accident with L4-5 and L5-S1 discectomy, and the December 10, 2020 employment incident. He diagnosed a spondylolisthesis at L4-5 and L5-S1, and lumbar stenosis. Dr. Rovner recommended lumbar fusion at L4-5 and L5-S1. In a July 8, 2021 report, he noted that appellant wished to proceed with the recommended lumbar fusion due to continued, severe low back pain and bilateral lower extremity pain. In a February 8, 2022 report, Dr. Rovner recounted appellant's history of back pain commencing in 2014, the June 16, 2017 motor vehicle accident, and May 14, 2018 right-sided L4-5 and left-sided L5-S1 laminotomy/microdiscectomy. He provided a detailed description of the accepted December 10, 2020 employment incident. Dr. Rovner opined that appellant sustained a new, permanent lumbar injury on December 10, 2020, superimposed on his preexisting lumbar conditions, requiring anterior and posterior interbody fusion at L4-5 and L5-S1 on October 6, 2021. He opined that "to a reasonable degree of medical probability that the exacerbation of his lumbar condition was directly causally related to the injury on December 10, 2020. [Appellant] had a severe exacerbation of pain and sought out medical treatment immediately following the injury."

Dr. Rovner identified the December 10, 2020 employment incident, which appellant claimed caused his lumbar condition and explained how the identified employment incident worsened his preexisting lumbar conditions. He provided an explanation as to how the accepted employment incident was sufficient to aggravate appellant's preexisting spondylolisthesis at L4-5 and L5-S1. The Board finds that Dr. Rovner's opinion, while insufficiently rationalized to meet appellant's burden of proof, is sufficient to require further development of the record.[12]

[10] *S.C.*, Docket No. 21-0929 (issued April 28, 2023); *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).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013). *See J.T.*, Docket No. 22-1308 (issued May 25, 2023); *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

[12] *J.T., id.*; *R.A.*, Docket No. 19-0650 (issued January 15, 2020); *B.M.*, Docket No. 18-0448 (issued January 2, 2020); *E.G.*, Docket No. 19-1296 (issued December 18, 2019); *John J. Carlone, supra* note 8.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While it is appellant's burden of proof to establish the claim, OWCP shares responsibility in the development of the evidence.[13] It has the obligation to see that justice is done.[14]

The Board shall therefore remand the case to OWCP for further development of the medical evidence. On remand, OWCP shall refer appellant, along with a statement of accepted facts (SOAF) and the medical record, to a physician in the appropriate field of medicine for a rationalized opinion regarding whether appellant's diagnosed lumbar conditions are causally related to the December 10, 2020 employment incident. If the physician opines that the diagnosed conditions are not causally related to the December 10, 2020 employment incident, he or she must explain with rationale how or why their opinion differs from that of Dr. Rovner. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2023 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 22, 2023
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

[13] *Id*.

[14] *Id*.