United States Department of Labor
Employees' Compensation Appeals Board

K.C., Appellant **and** **DEPARTMENT OF VETERANS AFFAIRS, MILWAUKEE VA MEDICAL CENTER, Milwaukee, WI, Employer**	)	**Docket No. 23-0252** **Issued: January 8, 2024**

Appearances:
Alan J. Shapiro, *Esq.,* for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On December 13, 2022 appellant filed a timely appeal from a December 1, 2022 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]

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[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 December 1, 2022 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*.

ISSUE

The issue is whether appellant has met his burden of proof to expand the acceptance of his claim to include additional cervical or lumbar spine conditions as causally related to the accepted April 15, 2019 employment injury.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.[4] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 18, 2019 appellant, then a 61-year-old food service worker, filed a traumatic injury claim (Form CA-1) alleging that on April 15, 2019 he strained his back, and injured his neck and shoulder while in the performance of duty. He explained that he was carrying a tray to a tray-carrier when his left foot struck the lip of a metal plate bolted to the floor and caused him to fall to his knees and then on his face. Appellant stopped work on the date of injury.

In a May 3, 2019 development letter, OWCP informed appellant that it had received no evidence in support of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond. No additional evidence was received.

In a June 3, 2019 letter, the employing establishment controverted appellant's claim.

By decision dated June 7, 2019, OWCP denied appellant's traumatic injury claim, finding that he had not submitted any medical evidence containing a diagnosis in connection with his injury. It concluded, therefore, that the requirements had not been met to establish an injury as defined under FECA.

OWCP thereafter received a May 16, 2019 letter from Dr. Jennifer Martin, a Board-certified physiatrist, who indicated that appellant had been admitted to the hospital from April 22 to May 16, 2019 and was under strict restrictions from neurosurgery until further notice. She indicated that he would undergo outpatient follow up and neurosurgery would determine when his restrictions could be liberalized and when he could return to work.

On June 19, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In April 15, 2019 diagnostic reports, Dr. Vivek Manchanda, a Board-certified radiologist, performed x-rays of appellant's thoracic and lumbar spine due to complaints of low back pain and lower extremity weakness after a fall forward. He noted no acute fracture, mild diffusely increased density of the thoracic spine and mild degenerative changes of the mid thoracic spine and moderate L5-S1 degenerative disease, mild L4-5 degenerative disc disease, and no acute fracture of the lumbar spine.

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[4] Docket No. 20-0683 (issued September 23, 2020).

In a separate April 15, 2019 diagnostic report, Dr. Mario Laguna, a Board-certified diagnostic radiologist, performed a magnetic resonance imaging (MRI) scan of appellant's cervical spine, finding degenerative changes with associated compressive myelopathy at C3-4, C4-5, and C5-6.[5] In a computerized tomography (CT) scan of even date, he found no evidence of a fracture in appellant's cervical spine.

In an April 15, 2019 medical report, Dr. Daniel Kopatich, Board-certified in emergency medicine, recounted appellant's history of a trip and fall on his knees and face and noted his history of spinal stenosis. On review of the diagnostic reports of even date, he admitted appellant to the hospital and scheduled him for neurosurgery the following week.

In a separate April 15, 2019 report, Dr. Karin Swartz, a Board-certified neurosurgeon, noted appellant's prior history of severe cervical stenosis and cervical myelopathy and found that the diagnostic reports of even date demonstrated that his findings were unchanged when compared to reports dated August 11, 2017. Appellant informed her that he experienced pain and lower extremity weakness after falling at work that day. Dr. Swartz noted new leg weakness and reasoned that it appeared to be related to muscle spasms. She opined that appellant's fall likely caused muscle spasms and advised that there was limited suspicion for a spinal cord injury. In an April 16, 2019 report, Dr. Michael Gelsomino, a Board-certified neurosurgeon, noted that he also evaluated appellant the previous day and relayed that he had been trying to schedule appellant's surgery related to his advanced myelopathy for months. He found that appellant had no fractures from his fall.

In another April 15, 2019 report, Dr. Andrew Scrima, a radiologist, evaluated appellant after his fall at work and noted his history of severe cervical stenosis with compressive myelopathy. Appellant reported increased intensity of the left lower arm, hand paresthesia, right leg weakness, and pain in the left side of his neck and lower back since his fall. On evaluation, Dr. Scrima stated his concern for the worsening of appellant's cervical myelopathy and opined that this could be due to a muscular strain.

A telephonic hearing was held on October 17, 2019.

By decision dated January 2, 2020, OWCP's hearing representative affirmed the June 7, 2019 decision.

On February 7, 2020 appellant, through counsel, appealed OWCP's January 2, 2020 decision to the Board. By decision dated September 23, 2020,[6] the Board affirmed the January 2, 2020 decision.

On August 17, 2021 appellant, through counsel, requested reconsideration. In support of appellant's request, he submitted a July 15, 2021 narrative report from Dr. Neil Allen, a Board-certified neurologist and internist, who noted a history that appellant was placing trays onto a carrier when he caught his foot against a metal plate on the floor and fell forward, landing on his knees and face. He further noted that he was unable to stand due to weakness in his lower limbs. Dr. Allen outlined appellant's treatment and diagnostic testing results and indicated that the

[5] Dr. Laguna noted that his findings were similar to an August 11, 2017 MRI scan of appellant's cervical spine.

[6] *Supra* note 5.

April 15, 2019 cervical MRI scan findings were unchanged when compared with an August 11, 2017 scan. He noted that appellant underwent previously scheduled surgery on his cervical spine on April 22, 2019. Dr. Allen advised that the claim should be expanded to include strain/sprain of the cervical spine, aggravation of other cervical disc displacement, aggravation of spinal stenosis, and aggravation of spondylosis with cervical radiculopathy due to the April 15, 2019 employment injury. He opined that when appellant fell forward and struck his head against the floor, "the soft tissues of the cervical spine were overstretched and musculature spasm was initiated to protect the osseous structures of the spine," which caused a sprain of the neck. Dr. Allen further opined that the force of appellant's face striking the floor caused cervical nucleus pulposus material to migrate posteriorly and strike the surrounding annular fibrosis leading to tearing and breakdown of his "already weakened" cervical discs and surrounding joints which in turn caused "further compression of [appellant's] adjacent neurological structures." He explained that, although appellant had preexisting cervical conditions, he experienced a new onset of lower leg weakness caused by his fall.

By decision dated November 9, 2021, OWCP modified its prior decision, finding that appellant had met his burden of proof to establish a resolved sprain of the cervical spine. It noted that it accepted the claim as a resolved cervical sprain because it had not received evidence to establish ongoing treatment or that the sprain persisted following surgery. OWCP, however, also denied modification in part, finding that the evidence was insufficient to establish any additional diagnoses causally related to the accepted April 15, 2019 employment injury.

On November 9, 2021 OWCP accepted the claim for a resolved sprain of the cervical spine.

In a note dated February 3, 2022, Dr. Martin opined that appellant had reached maximum medical improvement (MMI) "for [appellant's] work-related condition" on August 22, 2021 which she noted was 18 months post surgery.

On October 20, 2022 appellant, through counsel, requested reconsideration of OWCP's November 9, 2021 decision. In support of the request, he submitted a September 6, 2022 medical report by an unknown provider, who summarized current medications and outlined updated MRI scan findings of the cervical and lumbar spine, including softening of the spinal cord from C3 to C6, which had improved following surgery, and degenerative changes and severe narrowing of the spinal cord at L4-5 and L5-S1.

By decision dated December 1, 2022, OWCP denied modification of its November 9, 2021 decision.

LEGAL PRECEDENT

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.[7]

To establish causal relationship between a specific condition, as well as any attendant disability claimed, and the employment injury, an employee must submit rationalized medical

[7] *P.T.*, Docket No. 22-0841 (issued January 26, 2023); *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

evidence.[8] The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 factors identified by the claimant.[9]

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.[10]

ANALYSIS

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

Dr. Allen, in his July 15, 2021 narrative report, diagnosed aggravation of other cervical disc displacement, aggravation of spinal stenosis, and aggravation of spondylosis with cervical radiculopathy due to the April 15, 2019 employment injury. He advised that the acceptance of the claim should be expanded to include strain/sprain of the cervical spine, aggravation of other cervical disc displacement, aggravation of spinal stenosis, and aggravation of spondylosis with cervical radiculopathy due to the April 15, 2019 employment injury. Dr. Allen opined that when appellant fell forward and struck his head against the floor, "the soft tissues of the cervical spine were overstretched and musculature spasm was initiated to protect the osseous structures of the spine," which caused a sprain of the neck. He further opined that the force of appellant's face striking the floor caused cervical nucleus pulposus material to migrate posteriorly and strike the surrounding annular fibrosis leading to tearing and breakdown of his "already weakened" cervical discs and surrounding joints which in turn caused "further compression of [appellant's] adjacent neurological structures." Dr. Allen explained that, although appellant had preexisting cervical conditions, he experienced a new onset of lower leg weakness caused by his fall.

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[11] OWCP has an obligation to see that justice is done.[12] While Dr. Allen's opinion is insufficient to establish the claim, it is sufficient to require further development of the medical evidence.[13] The case must therefore be remanded for further development.

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[8] *See V.A.*, Docket No. 21-1023 (issued March 6, 2023); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

[9] *E.P.*, Docket No. 20-0272 (issued December 19, 2022); *I.J.*, 59 ECAB 408 (2008).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *J.L.*, Docket No. 20-0717 (issued October 15, 2020).

[11] *See L.B.*, Docket No. 23-0961 (issued December 15, 2023); *A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

[12] *See B.C.*, Docket No. 15-1853 (issued January 19, 2016); *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *John J. Carlone*, 41 ECAB 354 (1989).

[13] *John J. Carlone, id.*

On remand OWCP shall refer appellant to a specialist in an appropriate field of medicine, along with the case record, and a statement of accepted facts for an opinion on causal relationship. If the physician opines that the additional diagnosed conditions are not causally related, he or she must explain with rationale how or why their opinion differs from that of Dr. Allen. After this and other such further development of the case record 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 December 1, 2022 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: January 8, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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