United States Department of Labor
Employees' Compensation Appeals Board

P.A., Appellant	)	
	)	**Docket No. 10-2189**
and	)	**Issued: June 21, 2011**
	)	
DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND, Norfolk, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 24, 2010 appellant, through her attorney, filed a timely appeal from April 29 and July 29, 2010 merit decisions of the Office of Workers' Compensation Programs denying her traumatic injury claim. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained an injury on September 8, 2009 in the performance of duty.

FACTUAL HISTORY

On October 6, 2009 appellant, then a 52-year-old utility man, filed a claim alleging that on September 8, 2009, while onboard a ship, she sustained a muscle spasm after she tried to open the door of the vegetable freezer. She related, "I tried to pull open the door of the vegetable

[1] 5 U.S.C. § 8101 *et seq.*

freezer and it would not budge. I then pulled the door for a second time only harder. The door opened and I felt a sharp pain that traveled from the back of my neck down the end of my back bone."

On September 8, 2009 a nurse treated appellant for low back pain which she attributed to "prolonged standing and pulling hard on freezer doors." Appellant indicated that the pain was present for three days and that when she pulled hard on a freezer door she experienced a sharp pain. The nurse diagnosed a muscle spasm and unspecified backache.

On September 11, 2009 Dr. W. Palmer Lowery, Board-certified in family medicine, opined that appellant could resume work without limitations on September 14, 2009.

On September 12, 2009 a nurse diagnosed lumbosacral sprain with spasm. On September 26, 2009 the nurse noted that appellant was experiencing increased pain and diagnosed an unspecified back disorder and a probable muscle or ligamental sprain. In a form report dated October 26, 2009, a physician's assistant diagnosed a back ache and retrolisthesis. She checked "yes" that the condition was due to employment as appellant was working onboard ship.

By letter dated March 22, 2010, the Office informed appellant that medical evidence must be signed by a physician or osteopath rather than a nurse or physician's assistant. It requested a medical report explaining how the identified incident caused an injury.

In a report dated October 12, 2009, Dr. Mark W. McFarland, an osteopath, evaluated appellant for back pain beginning September 8, 2009.[2] He discussed her history of severe back pain after pulling hard and twisting trying to open a freezer door. On examination Dr. McFarland found full range of motion and that appellant was intact neurologically with a negative straight leg and no spasm. He reviewed x-rays and diagnosed severe degenerative disc disease with retrolisthesis at L5-S1.

In a form report dated October 26, 2009, Dr. Thomas N. Robeson, Board-certified in family medicine, provided a history of a back injury at work and diagnosed a backache and retrolisthesis. He checked "yes" that the condition was due to employment as appellant related that she was injured while lifting at work on a ship. Dr. Robeson found that she was totally disabled.

On November 9, 2009 Dr. McFarland diagnosed severe degenerative disc disease and left gluteus pain. He recommended steroid injections and found that she could work with restrictions. In a December 16, 2009 progress report, Dr. McFarland noted that appellant reported increased pain after the epidural injection.[3] He recommended diagnostic studies. A December 22, 2009 magnetic resonance imaging (MRI) scan study revealed a moderate disc protrusion at L5-S1 with restrolisthesis or deficiency of the S1 posterior-superior margin and a moderate right disc extrusion narrowing the right lateral recess and neural foramen at L4-5. On

[2] On October 26, 2009 a physician's assistant found that appellant was unable to work.

[3] Appellant submitted numerous physical therapy reports.

December 30, 2009 Dr. McFarland reviewed the MRI scan study and diagnosed degenerative disc disease and facet joint arthropathy at L4-5 and L5-S1, grade 1 retrolisthesis at L5-S1, a herniated nucleus pulposus at L4-5 and stenosis at L4-5 and L5-S1.

On January 12, 2010 Dr. Eric Goldberg, a Board-certified neurologist, noted that appellant twisted "a long way" and "felt a severe low back pain that occurred in September 2009." He diagnosed lumbosacral radiculopathy and recommended diagnostic studies.

On April 16, 2010 Dr. Robeson related that appellant was initially treated for back pain by a physician's assistant after she was "injured while operating heavy equipment on board ship." He diagnosed her with severe degenerative disc disease with retrolisthesis and opined that she was unable to work.

By decision dated April 29, 2010, the Office denied appellant's claim for compensation after finding that the medical evidence was insufficient to show that she sustained an injury due to the accepted September 8, 2009 work incident.

On March 25, 2010 Dr. Goldberg related that an electromyogram (EMG) revealed "a mild chronic nerve impingement at the L5-S1 root level consistent with lumbosacral radiculopathy." He recommended further physical therapy.

Ono May 10, 2010 Dr. Goldberg described his treatment of appellant for lumbosacral radiculopathy. He related, "She works at the shore doing quite physical labor. [Appellant] notes her symptomatology started in September[;] she was bending opening a refrigerator at work and felt a pop in her back." Dr. Goldberg diagnosed cervical and lumbosacral radiculopathy and listed work restrictions that were likely permanent and began on September 9, 2009.

On May 13, 2010 appellant requested reconsideration. In a report dated May 13, 2010, Dr. Robeson described the findings on MRI scan study of a moderate disc protrusion, retrolisthesis, disc extrusion at L4-5 with right lateral recess and neural foramen narrowing. He noted that a physician's assistant treated appellant on September 8, 2009 for severe back pain. Dr. Robeson stated, "It is possible that some of these abnormalities were present before the mentioned injury, but [she] has never suffered or been seen for back pain in her [seven-]year history at this practice. It is know that on September 8, 2009 [she] was seen with severe back pain which occurred while working on the ship[;] per [appellant] her pain was initiated by opening a freezer door, while at work."

By decision dated July 29, 2010, the Office denied modification of its April 29, 2010 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Act[4] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United

[4] 5 U.S.C. § 8101 *et seq.*

States" within the meaning of the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[5] 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.[6]

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[7] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.[8] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[9]

ANALYSIS

Appellant alleged that she sustained an injury on September 8, 2009 to her back when she pulled on the door of a vegetable freezer that would not open. She has established that the September 8, 2009 incident occurred at the time, place and in the manner alleged. The issue, consequently, is whether the medical evidence establishes that appellant sustained an injury as a result of this incident.

The Board finds that appellant has not established that the September 8, 2009 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.[10]

Appellant submitted September and October 2009 reports from a nurse and a physician's assistant. Neither a nurse nor a physician's assistant, however, are considered physicians under the Act and thus cannot render medical opinions.[11]

[5] *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

[6] *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

[7] *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

[8] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[9] *Id.*

[10] *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

[11] *See* 5 U.S.C. § 8101(2); *Allen C. Hundley*, 53 ECAB 551 (2002); *Vincent Holmes*, 53 ECAB 468 (2002).

In a treatment note dated September 11, 2009, Dr. Lowery asserted that appellant could return to work with no restrictions on September 14, 2009. He did not, however, provide a diagnosis or causation finding and thus his report is of little probative value.[12]

On October 12, 2009 Dr. McFarland discussed appellant's history of back pain beginning September 8, 2009 when she pulled hard to open an iced-over freezer door. He diagnosed severe degenerative disc disease with retrolisthesis at L5-S1 by x-ray. In a progress note dated December 30, 2009, Dr. McFarland reviewed the results of an MRI scan study. On November 9, 2009 he diagnosed severe degenerative disc disease and left gluteus pain. Dr. McFarland did not, however, attribute the diagnosed conditions of degenerative disc disease with retrolisthesis or the findings on MRI scan study to the September 8, 2009 work incident. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[13]

In a form report dated October 26, 2009, Dr. Robeson provided a history of appellant sustaining a back injury at work and diagnosed retrolisthesis. He checked "yes" that the condition was due to employment as she indicated that she was injured lifting at work. On April 16, 2010 Dr. Robeson related that appellant was injured on board ship operating heavy equipment. He diagnosed severe degenerative disease and retrolisthesis. In his reports, however, Dr. Robeson, however, provided upon an inaccurate history of injury, that of appellant sustaining an injury lifting at work or operating heavy equipment rather than while attempting to open a freezer door. Consequently, Dr. Roberson's report is of diminished probative value.[14]

On May 13, 2010 Dr. Roberson reviewed the findings on the December 22, 2009 MRI scan study and noted that, while it was "possible that some of these abnormalities were present before the mentioned injury," appellant had not received treatment for her back during her seven years of treatment at his practice. He stated, "It is known that on September 8, 2009 [she] was seen with severe back pain which occurred while working on the ship, [and] per [appellant] her pain was initiated by opening a freezer door, while at work." Dr. Roberson attributed the conditions found on MRI scan study to the September 8, 2009 work incident because appellant had no back symptoms prior to that date. However, a medical opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.[15]

On January 12, 2010 Dr. Goldberg related that appellant experienced low back pain beginning in September 2009 after she twisted "a long way." He diagnosed lumbosacral

[12] *Conrad Hightower*, 54 ECAB 796 (2003).

[13] *K.W.*, 59 ECAB 271 (2007); *see also Conrad Hightower*, *supra* note 12.

[14] *See M.W.*, 57 ECAB 710 (2006); *Joseph M. Popp*, 48 ECAB 624 (1997) (medical conclusions based on an inaccurate or incomplete factual history are of diminished probative value).

[15] *See Michael S. Mina*, 57 ECAB 379 (2006) (the fact that a condition arises after an injury and was not present before an injury is not sufficient to support causal relationship).

radiculopathy.[16] Dr. Goldberg, however, provided an incorrect history of injury, that of appellant extensively twisting rather than pulling on a freezer door. Further, he did not specifically address the cause of the lumbosacral radiculopathy. Consequently, Dr. Goldberg's opinion is of little probative value.[17]

In a report dated May 10, 2010, Dr. Goldberg discussed his treatment of appellant for lumbosacral radiculopathy. He noted that her symptoms began in September after she bent to open a refrigerator. Dr. Goldberg diagnosed lumbosacral and cervical radiculopathy and listed work restrictions beginning September 9, 2009. He did not specifically attribute the diagnosed conditions to the September 9, 2009 employment incident. As discussed, medical evidence that does not address the cause of appellant's condition is of little probative value.[18]

An award of compensation may not be based on surmise, conjecture, speculation, or upon appellant's own belief that there is a causal relationship between her claimed condition and her employment.[19] Appellant must submit a physician's report in which the physician reviews those factors of employment identified by her as causing his condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[20] She failed to submit such evidence and therefore failed to discharge her burden of proof.

CONCLUSION

The Board finds that appellant has not established that she sustained an injury on September 8, 2009 in the performance of duty.

[16] On March 25, 2010 Dr. Goldberg noted that an EMG revealed findings consistent with lumbosacral radiculopathy. He did not, however, address causation.

[17] *See M.W., supra* note 14; *Conrad Hightower*, note 12.

[18] *See A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of little probative value on the issue of causal relationship); *Carol A. Lyles*, 57 ECAB 265 (2005) (whether a particular injury caused an employee disability from employment is a medical issue which must be resolved by competent medical evidence).

[19] *D.E.*, 58 ECAB 448 (2007); *George H. Clark*, 56 ECAB 162 (2004); *Patricia J. Glenn*, 53 ECAB 159 (2001).

[20] *D.D.*, 57 ECAB 734 (2006); *Robert Broome*, 55 ECAB 339 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 29 and April 29, 2010 are affirmed.

Issued: June 21, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board