United States Department of Labor
Employees' Compensation Appeals Board

M.J., Appellant	)	
and	)	**Docket No. 11-1858**
	)	**Issued: April 23, 2012**
DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, APO, AE, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 1, 2011 appellant filed a timely appeal from a February 8, 2011 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a low back condition in the performance of duty.

FACTUAL HISTORY

On July 28, 2008 appellant, then a 52-year-old construction representative, filed a traumatic injury claim alleging that he sustained low back stiffness in Iraq after getting out of

[1] 5 U.S.C. § 8101 *et seq.*

bed on July 10, 2008.[2] He stopped work on July 22, 2008 and did not return. A witness statement from Patrick Kelly indicated that appellant sought medical treatment.

An April 12, 2008 magnetic resonance imaging (MRI) scan obtained by Dr. Robert C. Benson, a Board-certified diagnostic radiologist, exhibited left L4-L5 disc protrusion and herniation measuring five millimeters, L4-L5 degenerative changes and slight L5 compression.

In a July 22, 2008 health record, Dr. Nealanjon P. Das, an employing establishment osteopath and Board-certified internist, related that appellant experienced lower back stiffness and pain radiating to the anterior left thigh. On examination, he observed bilateral lumbar paraspinal muscle spasms and a positive straight leg raise test. Dr. Das noted a history of L4-L5 degenerative disease and concluded that appellant's condition was "not work related." In a July 27, 2008 health record, he remarked that appellant was functionally impaired and unable to perform his occupational duties. Dr. Das reiterated that the condition was not work related and opined that the etiology was likely mechanical and discogenic. He placed appellant on modified duty from July 27 to August 27, 2008.[3]

An August 8, 2008 MRI scan report showed multilevel degenerative disc disease, left L4-L5 subarticular zone disc extrusion, L4 hypersensitivity, concavity, and height loss, possible L1-L2 arachnoiditis and possible Schmorl's nodes.[4]

In an August 1, 2008 medical form, Dr. Jean-Jacques Abitbol, a Board-certified orthopedic surgeon, diagnosed lumbar radiculopathy. He checked a box indicating that appellant was unable to return to work for 45 days.[5] In an August 15, 2008 duty status report, Dr. Abitbol obtained appellant's account that he injured his lower back on July 22, 2008 when he twisted his body to collect paperwork and when he entered and exited a truck.

The employing establishment controverted the claim in an August 18, 2008 letter on the grounds that appellant had a preexisting back condition.

OWCP informed appellant in an August 25, 2008 letter that additional evidence was needed to establish his claim. It gave him 30 days to submit a factual statement detailing the

[2] Although appellant filed a traumatic injury claim, he attributed his claimed condition to several activities occurring over more than one workday or work shift and OWCP has considered these matters in denying his claim. Consequently, the Board will adjudicate this matter as an occupational disease claim. *See* 20 C.F.R. § 10.5(q), (ee) (an occupational disease or illness means a condition caused by the work environment over a period longer than a single day or work shift while a traumatic injury means a condition caused by an event or series of events within a single workday or work shift).

[3] A July 22, 2008 note signed by a medical officer proscribed heavy lifting for five days.

[4] This report was unsigned.

[5] A significant portion of this form was illegible.

July 10, 2008 work event and medical evidence explaining how this purported incident caused or aggravated a diagnosed condition.[6]

Appellant advised in a September 12, 2008 statement that he was deployed to Iraq from June 28 to July 28, 2008. He stated that his condition started in late June 2008 when he was transported from Kuwait to Iraq *via* bus and plane and wore a 50-pound armored vest. While entering the bus, he twisted his lower back. On July 10, 2008 appellant experienced back symptoms, which he attributed to sleeping on a soft mattress. On July 21, 2008 he sustained pain after twisting and reaching for paperwork. Following visits to various construction sites, and moving from his transient to his regular quarters, appellant's condition significantly worsened. He noted regularly seeing a chiropractor for back pain since 1988 but advised that he had not experienced similar pain for a very long time. Appellant stated that he was diagnosed with lower back arthritis in 2004 and initially thought his pain was due to his arthritis. He also sustained an injury in March 2008 due to yard work and shoveling gravel. Appellant underwent surgery on September 3, 2008.[7]

In an October 16, 2008 attending physician's report, Dr. Abitbol noted that appellant shoveled granite at his home for approximately one week when he developed back pain on March 6, 2008. His findings included mechanical back pain, decrease range of motion (ROM), multilevel degenerative disc disease, left lateral recess stenosis, L1-L2 nerve root clumping suggestive of arachnoiditis, and L4-L5 disc protrusion and herniation. Dr. Abitbol diagnosed lumbar herniated nucleus pulposus. He checked the "yes" box in response to a question asking whether this condition was caused or aggravated by employment activity, explaining that appellant wore a 50-pound vest in Iraq.

By decision dated October 21, 2008, OWCP denied appellant's claim, finding the medical evidence insufficient to demonstrate that accepted employment incidents occurring on or around July 10, 2008 caused or aggravated a back condition.

Appellant requested reconsideration on August 6, 2009 and submitted new medical evidence. A February 17, 2009 MRI scan obtained by Dr. Sydney L. Stevens, Jr., a Board-certified diagnostic radiologist, revealed multiple chronic endplate compression deformities at T6 and from T8 through L1, moderate cervical disc desiccation signal, and T6-T7, T10-T11, T11-12 and T12-L1 posterior disc bulging.[8] In a February 20, 2009 medical form, Dr. Abitbol examined appellant and observed thoracic and lumbar tenderness to palpation. He diagnosed thoracic sprain.[9]

[6] OWCP pointed out that appellant's claim was originally received as a simple, uncontroverted case resulting in minimal or no lost time from work and payment was approved for limited medical expenses without formal adjudication.

[7] Appellant's subsequent factual statements incorporated these details.

[8] Dr. Stevens also conducted a February 17, 2009 MRI scan of the right knee, which was symptomatic. This condition is not presently before the Board.

[9] A significant portion of this form was illegible.

In a March 11, 2009 report, Dr. Lorenzo H. Suarez, a Board-certified family practitioner, reviewed the findings of the February 17, 2009 thoracic MRI scan. Testing revealed a kappa light chain elevated to 59.9 and a kappa lambda ratio of 32.4.[10] Dr. Suarez diagnosed elevated light chain disease and ruled out multiple myeloma. He commented that the etiology of appellant's lower back pain was "unclear."

Dr. William Stanton, III, a Board-certified internist, stated in an August 4, 2009 note that the April 12, 2008 MRI scan demonstrated that appellant had several lumbar disc bulges before his deployment, but did not otherwise show thoracic or lumbar compression fractures. After his stint in Iraq, during which he was required to wear body armor, his back condition worsened. An MRI scan conducted in August 2008 exhibited T12 compression fracture and extensive lumbar vertebral height loss. Appellant was thereafter diagnosed with multiple myeloma. Dr. Stanton opined, "While [appellant] was diagnosed with myeloma, a form of bone cancer, it would be reasonable medical probability that his worsening vertebral pathology was aggravated by his duty in Iraq." Appellant also provided articles on multiple myeloma and unsigned records from September 19, 2008 to February 20, 2009 stating that he returned to full-time duty on October 27, 2008 and complained of middle and lower back symptoms.

On November 6, 2009 OWCP denied modification of the October 21, 2008 decision. It noted that Dr. Stanton's report was not well rationalized and did not display familiarity with the work factors asserted by appellant.

Appellant's counsel requested reconsideration on November 3, 2010, detailing that appellant, who was temporarily stationed in Iraq from June 28 to July 28, 2008, was required to wear a 50-pound armored vest whenever he left his living quarters and went to work. By July 10, 2008, appellant developed back pain due to the vest. After he returned from abroad, he had surgery on September 3, 2008. Appellant was subsequently diagnosed with multiple myeloma on February 20, 2009. Counsel submitted new evidence. In a July 27, 2008 report, Dr. Das confirmed that appellant was evaluated for persistent back pain and, due to limited medical resources, recommended further treatment at an alternate site. He advised that appellant was cleared to fly, but should only wear protective gear when absolutely necessary in light of his back condition.

In a November 1, 2010 report, Dr. John B. Dorsey, a Board-certified orthopedic surgeon, related that appellant experienced back pain in Iraq while wearing an armored vest weighing between 50 and 60 pounds. In addition, he was completing paperwork at his desk on July 10, 2008 when he turned and felt a pop in his back. Appellant underwent microdiscectomy on September 3, 2008 and returned to work on October 29, 2008. He then developed compression fractures in the spine and was diagnosed with multiple myeloma. On examination, appellant had pain to palpation over the healed L4-L5 incision site. The examination was otherwise essentially normal. Following a review of the medical file and appellant's history, including his previous lower back injury in March 2008, Dr. Dorsey diagnosed L4-L5 disc herniation L4-L5 and

[10] Dr. Suarez also found right femoral lesion, bilateral degenerative shoulder changes and bilateral rib fractures. These conditions are not presently before the Board.

aggravation of thoracic compression fractures secondary to weighted vest usage and multiple myeloma. He explained:

> "[Appellant]'s disc herniation was not caused by multiple myeloma. Multiple myeloma resulted in compression fractures of the spine but did not result in a disc herniation, which this patient suffered after wearing the armored vest. The weight of the vest, as well as the incident when he was retrieving paperwork, resulted in the disc herniation at L4-L5 and the need for his surgery on September 3, 2008."

Dr. Dorsey added that other physicians "have agreed that [appellant's] back pain is related to wearing the weighted vest in Iraq...."

On February 8, 2011 OWCP denied modification of the November 6, 2009 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period, that an injury was sustained in the performance of duty as alleged and that any disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.[11] 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.[12]

Whether an employee actually sustained an injury in the performance of duty begins with an analysis of whether fact of injury has been established.[13] To establish fact of injury in an occupational disease claim, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[14]

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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

[11] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[12] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[13] *See S.P.*, 59 ECAB 184, 188 (2007).

[14] *See R.R.*, Docket No. 08-2010 (issued April 3, 2009); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005).

rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[15]

ANALYSIS

The case record supports that appellant has been diagnosed with low back conditions and that he wore an armored vest weighing approximately 50 pounds and engaged in other claimed work-related activities during his temporary assignment in Iraq from June 28 to July 28, 2008. However, the Board finds that he did not establish his injury claim because the medical evidence did not sufficiently demonstrate that the accepted employment factors caused or aggravated his back condition.

In a November 1, 2010 report, Dr. Dorsey related that appellant wore an armored vest in Iraq. Also, on July 10, 2008, appellant popped his back when he turned to retrieve paperwork. Following a September 3, 2008 microdiscectomy, he developed compression fractures. Dr. Dorsey diagnosed L4-L5 disc herniation and aggravation of thoracic compression fractures secondary to weighted vest usage and multiple myeloma. He then specified that the L4-L5 disc herniation and subsequent surgery resulted from the weight of the armored vest while the thoracic compression fractures were due to multiple myeloma. Dr. Dorsey's opinion, however, did not sufficiently explain how either wearing a 50-pound armored vest or twisting to retrieve paperwork pathophysiologically caused or contributed to appellant's lumbar condition.[16] The need for such medical rationale is particularly important here because the case record contains evidence that appellant sustained preexisting back injuries, Dr. Benson's April 12, 2008 MRI scan confirming that appellant's L4-L5 disc herniation existed prior to his deployment and Dr. Das' July 2008 health records finding that this condition was "not work related."[17] To the extent that appellant may assert that his employment contributed to his multiple myeloma, Dr. Dorsey did not address causal relationship of this condition.[18]

Dr. Stanton opined in an August 4, 2009 note that appellant's back condition worsened after his assignment in Iraq, where he was required to wear body armor. He pointed out that appellant, who did not have a thoracic compression fracture prior to his deployment, sustained such an injury afterward as demonstrated by an August 2008 MRI scan. Dr. Stanton concluded, "While [appellant] was diagnosed with myeloma, a form of bone cancer, it would be reasonable medical probability that his worsening vertebral pathology was aggravated by his duty in Iraq." Nonetheless, his opinion was of diminished probative value on the issue of causal relationship because he did not provide fortifying medical rationale.[19] Reasoning that appellant was

[15] *I.J.*, 59 ECAB 408 (2008); *Woodhams*, *supra* note 12.

[16] *Joan R. Donovan*, 54 ECAB 615, 621 (2003); *Ern Reynolds*, 45 ECAB 690, 696 (1994).

[17] *See Conard Hightower*, 54 ECAB 796 (2003) (contemporaneous evidence is entitled to greater probative value).

[18] The Board notes that Dr. Suarez's March 11, 2009 report expressly ruled out multiple myeloma.

[19] *George Randolph Taylor*, 6 ECAB 986, 988 (1954).

asymptomatic before his deployment and symptomatic thereafter, without supporting medical rationale, cannot establish causal relationship.[20]

In August 1, 2008 and February 20, 2009 medical forms, Dr. Abitbol diagnosed lumbar radiculopathy and thoracic sprain, respectively. He obtained a history of injury in an August 15, 2008 duty status report recounting that appellant injured his lower back on July 22, 2008 when he twisted his body to collect paperwork and when he entered and exited a truck. In an October 16, 2008 attending physician's report, Dr. Abitbol diagnosed lumbar herniated nucleus pulposus. He checked the "yes" box in response to a question asking whether this condition was caused or aggravated by employment activity, explaining that appellant wore a 50-pound vest in Iraq. Still, Dr. Abitbol did not offer fortifying medical rationale. A checkmark response, without such rationale, is of diminished probative value on the issue of causal relationship.[21]

A medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician.[22] Because it cannot be determined that unsigned medical records for the period September 19, 2008 to February 20, 2009 were drafted by a qualified physician, they cannot constitute competent medical evidence.[23] Lastly, articles describing multiple myeloma were immaterial as the Board has held that such articles are of general application and not determinative regarding whether specific conditions are causally related to the particular employment factors in a claim.[24] In the absence of rationalized medical opinion on causal relationship, appellant failed to meet his burden.

The Board notes that appellant submitted new evidence after issuance of the February 8, 2011 decision. The Board lacks jurisdiction to review evidence for the first time on appeal.[25] However, appellant may submit new evidence or argument as part of a formal written request for reconsideration to OWCP within one year of this 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 did not establish that he sustained an occupational disease injury in the performance of duty.

[20] *See T.M.*, Docket No. 08-975 (issued February 6, 2009). The Board points out that the case record does not contain an August 2008 MRI scan diagnosing thoracic compression fracture. Instead, the first mention of a thoracic condition was in the February 17, 2009 MRI scan.

[21] *Alberta S. Williamson*, 47 ECAB 569 (1996).

[22] *See Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (medical opinion, in general, can only be given by a qualified physician).

[23] *R.M.*, 59 ECAB 690, 693 (2008).

[24] *B.C.*, Docket No. 10-691 (issued October 19, 2010).

[25] 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the February 8, 2011 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: April 23, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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