

**United States Department of Labor
Employees' Compensation Appeals Board**

K.H., Appellant)
)
and) **Docket No. 16-0776**
) **Issued: October 19, 2016**
)
DEPARTMENT OF AGRICULTURE,)
INSPECTION OPERATIONS PROGRAM,)
Minneapolis, MN, Employer)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 8, 2016 appellant filed a timely appeal from the November 23, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 a recurrence on September 15, 2014 causally related to his March 18, 2013 employment injury.

FACTUAL HISTORY

On July 11, 2013 appellant, then a 47-year-old inspector, filed a traumatic injury claim (Form CA-1) alleging that on March 18, 2013 he slipped and slid down steps during the

¹ 5 U.S.C. § 8101 *et seq.*

performance of duty. He reported an injury to his right elbow, left shoulder blade, left hand, and left calf and indicated that he had pain and tightness in his neck. Appellant stopped work on March 18, 2013 and returned to work on March 20, 2013.

In a March 18, 2013 report, Dr. Marc S. Wise, Board-certified in emergency medicine, reported that appellant slipped on approximately five steps and fell at work. Appellant complained of neck and left shoulder pain. Views of the left scapula demonstrated no fracture or bony abnormality. An impression of shoulder contusion was provided. A copy of the March 18, 2013 left x-ray scapula report was provided² along with a July 26, 2013 request for physical therapy authorization for appellant's neck and right shoulder was provided by Dr. Dennis M. Anthony, a Board-certified internist. As appellant lost minimal or no time loss from work, his case was administratively handled by OWCP to allow medical payments up to \$1,500.00.

On October 7, 2014 appellant filed a claim for a recurrence for medical treatment (Form CA-2a), noting the date of recurrence as September 15, 2014. He alleged that he experienced frequent pain and stiffness in his neck and right shoulder area and that his neck had never been "normal" since his injury. Appellant then stopped work on October 14, 2014 and submitted claims for compensation (Form CA-7) from November 2 through 29, 2014. The employing establishment verified that he was in a leave without pay status.

OWCP formally adjudicated the traumatic injury claim and accepted the claim for a left shoulder contusion.

In an October 27, 2014 letter, OWCP indicated that the evidence was insufficient to establish the claim for a recurrence and requested that appellant provide additional factual and medical evidence, including a well-rationalized opinion from a physician, supported by objective findings, that his accepted condition materially worsened/changed, without intervening cause, to the point that he became disabled. Appellant was afforded 30 days to submit this additional evidence.

In a November 3, 2014 statement, appellant stated that he had frequent pain since the injury and experienced temporary relief with visits to his physician. He explained that he had no new injuries and that he continued to work, hoping for recovery, but it never came and now the pain had become unbearable.

In an October 14, 2014 disability note, Dr. B. Kirk Brown, a chiropractor, indicated that appellant should not report to work on October 13 and 14, 2014 due to acute neck and arm pain. An October 15, 2014 Provider Enrollment Form from Dr. Brown was also submitted. In an October 20, 2014 chiropractic report, he indicated that appellant was initially seen on October 13, 2014 for right neck and upper back pain extending down his right arm into his fingers which he related to a March 18, 2013 incident at work when he slipped on the stairs and fell hard on his right elbow causing whiplash injury to his neck. Appellant indicated that he went to the hospital and was told he suffered a whiplash injury to his neck. He also sought out chiropractic treatment. Appellant indicated that the pain and stiffness never left. He also indicated a recent worsening of his symptoms without new injuries or intervening incidents.

² The Board notes that an x-ray of the right scapula was ordered, but the results were for the left scapula.

Dr. Brown provided examination findings and took a cervical x-ray, which revealed extreme forward weight bearing of the C-spine and head with mild mid-cervical degenerative changes. A diagnosis of cervical and upper dorsal sprain/strain with suspicion of cervical disc involvement was provided, which Dr. Brown opined was directly related to the March 18, 2013 fall. He indicated that appellant had no similar condition prior to that injury, nor any intervening injury since then. Dr. Brown noted that he had not ever returned to a pain-free condition of his neck, upper back, and right upper extremity. He further noted that, since October 13, 2014, appellant has not been able to return to his employment.

Medical records dated March 26, July 12 and 26, and December 2 and 31, 2013, and April 2, October 9 and 22, and November 7, 2014 from Dr. Anthony were also provided. Dr. Anthony noted appellant's subjective complaints, provided examination findings, and diagnosed neck pain. In a November 7, 2014 prescription slip, he diagnosed neck pain and ordered a C-spine x-ray with contrast. In a December 1, 2014 report, Dr. Anthony indicated that appellant had been a patient with his practice since June 2012. Appellant was seen on March 26, 2013 with complaints of neck pain and upper back pain status post a fall at work on March 18, 2013. Dr. Anthony noted prescription narcotics that were prescribed and that cervical and thoracic spine x-rays were ordered. He also listed the dates appellant was seen. Dr. Anthony opined that appellant's current symptoms of neck and back pain were a direct result of his initial work injury. He indicated that, due to the ongoing nature of pain and the extent of his injury, appellant needed a magnetic resonance imaging (MRI) scan to rule out any structural issues.

In a December 5, 2014 report, Dr. Anthony diagnosed neck pain and cervical disc herniation. He requested a cervical spine MRI scan without contrast be authorized.

A March 27, 2013 x-ray of the thoracic spine and a March 27, 2014 x-ray of the cervical spine were provided.

By decision dated December 15, 2014, OWCP denied the recurrence claim. It found that the evidence of record did not provide a well-rationalized physician opinion supported by objective findings that appellant's accepted condition had materially worsened/changed, without intervening cause, to the point where he was disabled.³

On January 21, 2015 OWCP received appellant's January 8, 2015 request for reconsideration. Appellant submitted duplicative evidence previously of record along with new evidence not previously considered, which included a cervical spine MRI scan report dated December 3, 2014. The report provided an impression of focal right paracentral and foraminal disc herniation C5-6 to the right, primarily affecting the right C6 nerve root within the foramen. A physical therapy request dated December 5, 2014 provided a diagnosis of cervical disc herniation.

In a December 28, 2014 report, Dr. Brown explained that he had never, in 29 years of practice, treated a federal workers' compensation case. He indicated that he was unfamiliar with

³ While appellant had initially claimed a recurrence of medical treatment, he subsequently also claimed periods of disability. OWCP thereafter treated this claim as a claim for recurrence of disability.

the federal requirements and did not know that he needed to diagnose subluxation. Dr. Brown clarified that he had initially treated appellant for a diagnosis of cervical subluxation and provided an undated, unsigned “[w]orking [d]iagnosis [s]heet” with checkmarks in front of the following diagnoses: subluxation, cervical; C-sprain/strain-hyper flexion/extension; neuralgia; and subluxation thoracic. He also sought to clarify the diagnoses associated with the initial injury and noted that the left shoulder was not involved. Dr. Brown indicated that the notes from appellant’s previous chiropractor would corroborate this. In support of his comments, he provided a copy of his previously submitted October 20, 2014 report.

In a December 29, 2014 report, Dr. Anthony reiterated that he had been appellant’s physician since 2012. He reported evaluating appellant’s neck pain from March 26, 2013 to the present. Dr. Anthony noted that cervical and thoracic x-rays taken at that time appeared to be normal, noting that pain continued despite conservative measures. The cervical spine MRI scan performed in December 2014, revealed a C5-6 disc herniation. Dr. Anthony noted findings on examination of decreased range of motion in the neck, neck pain, and right arm pain and numbness. He also reported a headache at the base of the skull and an exacerbation of symptoms when coughing or sneezing. Dr. Anthony also reported a new onset of arm and hand numbness just three to four days prior to his December 22, 2014 examination. He opined that the ongoing symptoms were a direct result of the March 18, 2013 work injury.

By decision dated November 23, 2015, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

FECA pays compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁵

A recurrence of disability means an inability to work, after an employee has returned to work, caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁶

A recurrence of a medical condition is defined as a documented need for further medical treatment after release from treatment for the accepted condition or injury.⁷ Continuous treatment for the original condition or injury is not considered a recurrence of a medical treatment nor is an examination without treatment.⁸ As distinguished from a recurrence of

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.5(f).

⁶ *Id.* at § 10.5(x).

⁷ *Id.* at § 10.5(y).

⁸ *Id.*

disability, a recurrence of a medical condition does not involve an accompanying work stoppage.⁹ It is the employee's burden to establish that the claimed recurrence is causally related to the original injury.¹⁰

If appellant claims that a condition not accepted or approved by OWCP was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury.¹¹ To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual, and medical background, supporting such a causal relationship.¹² Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.¹³ The physician's opinion 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.¹⁴

ANALYSIS

OWCP accepted that appellant's slip and fall on March 18, 2013 resulted in a contusion of the left shoulder region. Appellant subsequently claimed a recurrence due to a change or worsening of his accepted work-related condition. He specifically claimed a worsening of his condition involving the neck and right shoulder and arm region. The Board notes that, while appellant initially reported injuring his right elbow and having pain and tightness in his neck, OWCP had not accepted those conditions as work related. Thus, appellant bears the burden of proof that those conditions are causally related to the March 18, 2013 work injury.¹⁵ The Board finds that he did not meet his burden of proof.

Several reports were provided from Dr. Anthony. The record indicates that appellant started seeing Dr. Anthony on March 26, 2013 and that appellant was diagnosed with neck pain. In his December 1, 2014 report, Dr. Anthony noted the history of the March 18, 2013 fall at work and opined that appellant's current symptoms of neck and back pain were a direct result of his initial work injury. However, these reports offer a conclusion, but lack a diagnosis and

⁹ *Id.* at § 10.5(x).

¹⁰ *Id.* at § 10.104. *See also Mary A. Ceglia*, 55 ECAB 626, 629 (2004).

¹¹ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹² *Jennifer Atkerson*, 55 ECAB 317 (2004).

¹³ *Elizabeth Stanislav*, 49 ECAB 540, 41 (1998).

¹⁴ *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

¹⁵ *J.V.*, Docket No. 11-0764 (issued January 24, 2012).

medical rationale explaining causal relationship.¹⁶ Moreover, the Board has held that pain is generally considered a symptom and not a firm medical diagnosis.¹⁷ Thus, these reports are insufficient to support appellant's claim.

In a December 29, 2014 report, Dr. Anthony reported that, while cervical and thoracic x-rays taken on March 26, 2013 appeared to be normal, appellant's pain continued and a cervical spine MRI scan in December 2014 revealed a C5-6 disc herniation. He noted appellant's continuing symptoms as well as new symptoms of arm and hand numbness three to four days prior to his December 22, 2014 examination. Dr. Anthony opined that appellant's ongoing symptoms were a direct result of the March 18, 2013 work injury. While he diagnosed C5-6 disc herniation and opined that appellant's ongoing symptoms were related to the March 18, 2013 work injury, he failed to provide any medical rationale explaining the nature of the relationship to the diagnosed condition and the March 18, 2013 work injury.¹⁸ Thus, this report is insufficient to establish appellant's claim.

Appellant also submitted several reports from Dr. Brown, a chiropractor. Section 8101(2) of FECA provides that chiropractors are considered physicians only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.¹⁹ Thus, where x-rays do not demonstrate a subluxation (a diagnosis of a subluxation based on x-rays has not been made), a chiropractor is not considered a physician, and his or her reports cannot be considered as competent medical evidence under FECA.²⁰ In his December 28, 2014 report, Dr. Brown indicated that he had diagnosed cervical spine subluxation on his "working diagnosis sheet," but had not placed it into the October 20, 2014 report because it was not a requirement of the Ohio state workers' compensation program. However, in the October 20, 2014 report, he interpreted the x-rays and noted that the findings were consistent with cervical and upper dorsal sprain/strain with "suspicion of cervical disc involvement." Thus, Dr. Brown's October 20, 2014 report conflicts with his statement that he had definitively diagnosed a cervical subluxation. Additionally, the undated and unsigned diagnosis worksheet, unaccompanied by a discussion that the subluxation was demonstrated by x-ray, is of little probative value to support that he had diagnosed a subluxation, based on x-ray examination. Because Dr. Brown did not diagnose a subluxation of the spine by x-ray, he is not considered a physician pursuant to section 8101(2) and his opinion on causal relationship of appellant's neck

¹⁶ See *T.O.*, Docket No. 16-0423 (issued June 20, 2016), a mere conclusion without the necessary rationale explaining how and why the physician believes that appellant's work activities could result in the diagnosed condition is insufficient to meet his burden of proof.

¹⁷ *P.S.*, Docket No. 12-1601 (issued January 2, 2013); *J.W.*, Docket No. 11-1475 (issued December 7, 2011); *Robert Broome*, 55 ECAB 339 (2004).

¹⁸ *Supra* note 16.

¹⁹ 5 U.S.C. § 8101(2); see also section 10.311 of the implementing federal regulations provides: (c) A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. OWCP will not necessarily require submittal of the x-ray or a report of the x-ray, but the report must be available for submittal on request.

²⁰ See *Susan M. Herman*, 35 ECAB 669 (1984).

conditions are of no probative value.²¹ Thus, his reports are insufficient to establish appellant's claim.

The diagnostic testing of record is also insufficient to establish appellant's claim. While some of the tests describe his current medical conditions or find no changes from past conditions, the interpreting physician failed to provide any opinion on the cause of his current medical conditions. The Board has found that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.²² Therefore, these diagnostic reports fail to establish causal relationship and appellant's recurrence claim.

Appellant was advised by October 27, 2014 letter of the evidence needed to establish his claim for recurrence of disability, including rationalized medical evidence from his attending physician supporting a causal relationship between the accepted conditions, and his condition on and after October 14, 2014. As he failed to submit such evidence, he failed to meet his burden of proof.²³

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 has not met his burden of proof to establish a recurrence causally related to his March 18, 2013 employment injury or the accepted conditions.

²¹ *T.T.*, Docket No. 07-1887 (issued January 8, 2008).

²² *R.E.*, Docket No. 10-0679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007).

²³ *Beverly A. Spencer*, 55 ECAB 501 (2004).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated November 23, 2015 is affirmed.

Issued: October 19, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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