United States Department of Labor
Employees' Compensation Appeals Board

G.H., Appellant	)	
and	)	**Docket No. 15-0896**
	)	**Issued: September 6, 2016**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Mesa, AZ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 17, 2015 appellant, through counsel, filed a timely appeal from a December 3, 2014 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.

ISSUE

The issue is whether appellant met his burden of proof to establish an injury in the performance of duty on November 24, 2013.

[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.*

FACTUAL HISTORY

On February 14, 2014 appellant, then a 62-year-old mine safety and health inspector, filed a traumatic injury claim alleging that on November 24, 2013 while at work he fell to the floor on his left shoulder and bumped his head on the door frame. Medical care was first received on January 17, 2014 from Dr. Jeff Crawford, a Board-certified internist, and appellant's treating physician.

OWCP received several treatment notes from Dr. Eileen Chang, Board-certified in family medicine. In March 7 and 13, 2014 reports, Dr. Chang noted that appellant was injured on November 24, 2013 and that he was walking to the safety manager's office when he tripped on three steps injuring his left shoulder and head and causing an "extreme" headache. Appellant did not go to the emergency room but saw his primary care physician. Dr. Chang provided results on examination and diagnosed cervical radiculopathy, cervical strain, displacement of cervical intervertebral disc without myelopathy, headache, shoulder strain, and derangement of shoulder joint and provided work restrictions. On March 20, 2014 she noted a normal computerized tomography (CT) brain scan and an unremarkable left shoulder magnetic resonance imaging (MRI) scan.[3] In a March 27, 2014 report, Dr. Chang repeated her diagnoses and referred appellant to a physiatrist. OWCP also received physical therapy notes.

An April 2, 2014 electromyogram (EMG) and nerve conduction study from Dr. Charles Gagnon, an osteopath and a Board-certified physiatrist, noted no evidence to support ongoing compression neuropathy, radiculopathy, or plexopathy throughout the left upper extremity. In an April 9, 2014 treatment note, Dr. Gagnon reported that on November 24, 2013 appellant had related that he had tripped going to the safety office, falling forward, twisting, and landing on his left shoulder and side, without loss of consciousness. He advised that appellant continued working, but later started having some headaches and pain in the base of his neck out to his left shoulder. Dr. Gagnon explained that appellant had followed up with Dr. Crawford but that he had not seen Dr. Crawford's notes. He diagnosed "left mid trapezius myofascial pain syndrome with transient referral myalgias, upper lateral arm."

By letter dated May 1, 2014, OWCP advised appellant that when his claim was received it appeared to be an uncontroverted minor injury that resulted in minimal or no lost time from work. It noted that a limited amount of medical expenses had been administratively approved. However, OWCP explained that the claim was reopened because the medical bills exceeded $1,500.00 dollars. As such, additional factual and medical evidence was undertaken. Appellant was requested to provide a physician's opinion supported by a medical explanation as to how the reported work incident caused the claimed injury. OWCP explained that the physician's opinion was crucial to his claim.

OWCP received a February 3, 2014 e-mail from Brian O'Neal, the safety manager, to Jaime Eubanks, appellant's supervisor. Mr. O'Neal noted that appellant had slipped on the stairs and fallen. He stated that appellant was asked if he needed medical assistance, but he declined. Mr. O'Neal stated that it seemed more embarrassed than anything else.

[3] The March 17, 2014 CT brain scan was read by Dr. Don C. Beresini, a Board-certified diagnostic radiologist, and the left shoulder MRI scan was read by Dr. Jordan Cohen, a Board-certified diagnostic radiologist.

In an April 23, 2014 treatment note, Dr. Gagnon noted that appellant had a history of a work-related fall on November 24, 2013. He noted that appellant had findings suggestive of acute left mid trapezius myofascial pain syndrome with transient myalgias, upper lateral arm. Dr. Gagnon advised that an MRI scan of the shoulder and electrodiagnostic testing were unremarkable. He advised that appellant had been feeding his goats since the most recent April 9, 2014 visit and one of his goats had pulled on his arm and he was "again with a lot of pain throughout the shoulder." Dr. Gagnon diagnosed a history of work-related ground level fall on November 24, 2013, resolving left mid trapezius myofascial pain syndrome with continued significant subjective myalgias and decreased left shoulder range of motion, and cervical and shoulder degenerative changes.[4]

In a May 5, 2014 treatment note, Dr. Steven R. Kassman, a Board-certified orthopedic surgeon, examined appellant and stated that appellant had recovered from a "myriad" of prior work injuries. He noted that his symptoms suggested that he had fairly severe left shoulder pain. However, Dr. Kassman noted that a complete diagnostic work up included no evidence of nerve compression etiology and an MRI scan arthrogram of the left shoulder was normal. He noted that the clinical examination was suggestive of adhesive capsulitis. Dr. Kassman placed appellant on modified duty with a 10-pound lifting restriction, no overhead use of the left arm, and no climbing. He noted that he was "somewhat bothered" by the extent of pain that appellant had at rest. Dr. Kassman explained that if appellant did have adhesive capsulitis, he would expect the pain to be predominantly end range and not to be associated with rest activities.

On June 2, 2014 appellant explained how he sustained his injury and stated that he had waited until February 14, 2014 to file his claim as he was "Following Dr. Orders."

By decision dated June 24, 2014, OWCP denied appellant's claim. It found that the medical evidence failed to establish that the claimed medical condition was related to the established work-related events.

Appellant requested reconsideration. In a September 11, 2014 statement, he claimed that he delayed treatment because he self-medicated by taking over-the-counter pain relievers, heating pads, and ice packs. He noted that he had no prior trauma.

In a July 18, 2014 report, Dr. Crawford noted that, following the November 24, 2013 work incident, he first evaluated appellant on January 16, 2014 for left neck and left shoulder pain. Appellant's complaints were persistent left neck pain with associated spasms and stiffness/headaches, persistent left shoulder blade pains with stiffness, left C6 and C7 disc herniation with suspected myelopathy, and cervical spine degenerative disc disease with degenerative joint disease. Dr. Crawford explained that two weeks after the appointment, he spoke with appellant *via* telephone and appellant "recalled" that he had injured his left neck and left shoulder at a job site and appellant asked him if "this could be the cause of the current medical problems?" He noted that he had said yes to that question. Dr. Crawford again saw appellant on May 9, 2014. Appellant had advised Dr. Crawford that the treatment had been

[4] OWCP also received a January 17, 2014 cervical spine MRI scan read by, Dr. Mark Hoffman, a Board-certified diagnostic radiologist, which revealed "right central to right subarticular protrusion at C5-6 flattening the right ventral and ventrolateral aspects of the cord and loss of height of the intervertebral disc and uncovertebral hypertrophy at C6-7." A January 17, 2014 left shoulder x-ray from Dr. Hoffman showed mild degenerative joint disease of the acromioclavicular joint.

ineffective. At that visit, Dr. Crawford diagnosed stress anxiety with depressed features. On June 30, 2014 appellant showed signs of a "potential pinched nerve problem that could have been caused by the November 24, 2013 industrial incident." Dr. Crawford explained that the current diagnostic workup revealed no significant neuropathology. He stated that it was "most probably certain [appellant's] left C6 and C7 disc herniations are related to the November 24, 2013 industrial injury." Dr. Crawford opined that "the finding may be contributing to your persistent complaints of left neck and left shoulder blade pain." He indicated that the cervical degenerative conditions were preexisting and not part of the reported work injury. Dr. Crawford wrote that there was an obvious gap from the date of the injury to the date of the reporting but the current problems, with the exception of the cervical spine degenerative disc disease with degenerative joint disease, were "most probably related to the reported November 24, 2013 work injury."

By decision dated December 3, 2014, OWCP denied appellant's claim as the medical evidence was insufficient to establish that appellant's conditions were caused by the accepted employment incident.

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 of FECA,[5] and that an injury was sustained in the performance of duty.[6] These are the essential elements of each 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 must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged.[8] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[9]

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 generally required to establish causal relationship. 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 rationale explaining the nature of the relationship

[5] *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *James E. Chadden Sr.*, 40 ECAB 312 (1988).

[7] *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *John J. Carlone*, 41 ECAB 354 (1989).

[9] *Id*.

between the diagnosed condition and the specific employment factors identified by the claimant.[10]

ANALYSIS

Appellant indicated that on November 24, 2013 he fell to the floor onto his left shoulder and bumped his head on a door frame. OWCP accepted this incident. However, the Board finds that appellant has failed to establish that the November 24, 2013 incident caused or contributed to a diagnosed medical condition.

Following the November 24, 2013 incident, appellant did not seek immediate medical treatment. In his July 18, 2014 report, Dr. Crawford noted first seeing appellant on January 16, 2014 for the November 24, 2013 work incident. Appellant presented with left neck and shoulder pain. Dr. Crawford explained that two weeks after the appointment, he spoke with appellant *via* telephone and appellant had "recalled" that he had injured his left neck and left shoulder at a job site and wondered if that could be the cause of the problems. He agreed that it probably could have been a cause. When examining appellant on June 30, 2014, Dr. Crawford opined that he showed signs of a "potential pinched nerve problem that could have been caused by the November 24, 2013 industrial incident." He concluded that he was "most probably certain his left C6 and C7 disc herniations are related to the November 24, 2013 industrial injury." Dr. Crawford opined that the disc herniations could be contributing to appellant's persistent complaints of left neck and left shoulder blade pain. He opined that the cervical degenerative conditions were not employment related. Dr. Crawford acknowledged the obvious gap in treatment from the date of the injury to the date of the reporting, but he maintained that the problems were "most probably related to the reported November 24, 2013 work injury."

The Board finds the opinion of Dr. Crawford to be of diminished probative value. Terms such as "could be" or "most probably" are speculative in nature and the Board has held that such opinions are not sufficient to establish causal connection.[11]

In his April 23, 2014 treatment note, Dr. Gagnon noted that appellant had a history of a work-related fall on November 24, 2013. He stated that findings were suggestive of acute left mid trapezius myofascial pain syndrome with transient myalgias but that an MRI scan of the shoulder and electrodiagnostic testing was unremarkable. Dr. Gagnon also noted that appellant had increased symptoms after one of his goats pulled on his arm. He diagnosed a history of a work-related ground level fall on November 24, 2013 and advised that current findings suggested a resolving left mid trapezius myofascial pain syndrome as well as continued significant subjective myalgias. To the extent that Dr. Gagnon may be viewed as supporting causal relationship, his opinion does not find the symptoms and diagnoses attributable to the November 24, 2013 work incident. Rather, he referenced a possible intervening incident where appellant's arm was pulled by a goat. Other reports from Dr. Gagnon are of limited probative value as they failed to specifically address how the November 24, 2013 incident caused or contributed to a diagnosed medical condition.

[10] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[11] *S.E.*, Docket No. 08-2214 (issued May 6, 2009) (the Board has held that opinions such as the condition is "probably" related, "most likely" related or "could be" related are speculative and diminish the probative value of the medical opinion).

In the March 7 and 13, 2014 reports from Dr. Chang, she offered diagnoses and referred appellant for further treatment, but did not specifically explain how the November 24, 2013 work incident caused or contributed to any diagnosed conditions. The Board finds these reports of limited probative value on the issue of causal relationship.[12]

In a May 5, 2014 treatment note, Dr. Kassman reported that appellant recovered from a "myriad" of prior work injuries. Other than a vague reference to work injuries, he does not offer any opinion regarding the cause of appellant's condition and is of limited probative value on the issue of causal relationship.[13]

Likewise, other medical reports of record are of limited probative value with regard to causal relationship as these reports do not specifically address how the November 24, 2013 work incident caused or contributed to a diagnosed medical condition. 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.[14]

The physical therapy notes are of no probative value as a physical therapist is not a physician as defined under FECA and, therefore, not competent to provide a probative medical opinion.[15]

Consequently, the Board finds that the medical evidence is insufficient to establish appellant's claim. There is no reasoned medical evidence from a physician explaining how the employment activities on November 24, 2013 caused or aggravated appellant's shoulder and neck condition.

On appeal, counsel for appellant argued that the term "most probably" is not "equivocal." However, as noted, the Board has found that opinions such as the condition is "probably" related, "most likely" related or "could be" related are speculative and diminish the probative value of the medical opinion.[16] Furthermore, appellant's physicians did not otherwise provide an opinion explaining how the November 24, 2013 work incident caused or contributed to a diagnosed condition.

Appellant may submit new evidence or argument with a 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.

[12] *R.E.*, Docket No. 10-679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007).

[13] *Id.*

[14] *Id.*

[15] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physicians assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); *Charley V.B. Harley*, 2 ECAB 208 (1949) (the Board held that medical opinion, in general, can only be given by a qualified physician). *See also* 5 U.S.C. § 8101(2).

[16] *See supra* note 11.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on November 24, 2013.

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 6, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board