United States Department of Labor
Employees' Compensation Appeals Board

S.C., Appellant	)	
and	)	**Docket No. 17-0490**
	)	**Issued: June 27, 2017**
DEPARTMENT OF THE AIR FORCE, AIR NATIONAL GUARD, Raleigh, NC, Employer	)	

Appearances:
Martin Kaplan, 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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 4, 2017 appellant, through counsel, filed a timely appeal from a December 15, 2016 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 has met his burden of proof to establish an injury causally related to a February 7, 2014 employment incident.

[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 March 14, 2014 appellant, then a 44-year-old air traffic control specialist, filed a traumatic injury claim (Form CA-1) alleging that on February 7, 2014 he experienced pain in his left shoulder by rotating a jack handle for approximately five minutes while jacking up a large piece of equipment. He stopped work on March 3, 2014 and returned to work on March 17, 2014.

A physician assistant, on February 27, 2014, noted that appellant had undergone a left rotator cuff repair in March 2013 and had returned to his usual exercise routine in January 2014. Approximately, three weeks prior to the examination, appellant noted having experienced left scapular pain after "rotating some equipment at work." The shoulder pain increased at that time and he had numbness radiating into his left upper extremity. The physician assistant diagnosed left arm and scapular pain with possible radiculopathy. She indicated that her supervising physician was Dr. Leo Spector, a Board-certified orthopedic surgeon.[3]

A magnetic resonance imaging (MRI) scan study, obtained on February 27, 2014, revealed a C6-7 large left posterolateral and foraminal disc herniation compressing the left C7 nerve root and ventral cord.

In a report dated March 3, 2014, Dr. Spector related, "[Appellant] states that, in January, he was doing routine exercises and felt severe pain in his neck with radiation down his left upper extremity, numbness and tingling in a C7 dermatomal distribution." He noted that an MRI scan study showed a large C6-7 left disc herniation compressing the left C7 nerve root. Dr. Spector diagnosed a left herniated nucleus pulposus at C6-7 with left C7 radiculopathy. He recommended surgery. On March 7, 2014 Dr. Spector performed an anterior cervical discectomy and fusion at C6-7.

OWCP, by letter dated December 29, 2014, advised appellant that it had paid a limited amount of medical expenses as his injury appeared minor and was not controverted. It was now formally adjudicating his claim. OWCP requested that appellant submit additional factual and medical information, including a detailed report from his attending physician addressing causal relationship between any diagnosed condition and the identified work incident.

In a January 21, 2015 response, appellant related that on February 7, 2014 he assisted a coworker by turning a jack repeatedly for around five minutes. He felt some neck and left shoulder discomfort, but did not believe that it was significant. Over the next couple of days, appellant's pain increased and on February 19, 2014 he informed his supervisor that he required medical treatment. He described the medical treatment received and noted that he underwent surgery on March 7, 2014.

Appellant, in a statement dated January 22, 2015, advised that he did not immediately inform his supervisor of the alleged incident because he did not believe that it was serious since the pain began gradually and increased with time.

[3] In a progress report dated February 28, 2014, the physician assistant diagnosed left radiculopathy and a disc herniation at C6-7 compressing the C7 nerve on the left side.

In progress reports dated March through June 2014, Dr. Spector described appellant's condition after his anterior cervical discectomy and fusion at C6-7.

By decision dated February 4, 2015, OWCP denied appellant's claim for a traumatic injury. It found that the medical evidence of record was insufficient to establish that he sustained a diagnosed condition causally related to the February 7, 2014 work incident.

Dr. Spector, in a report dated February 24, 2015, related that he treated appellant beginning March 3, 2014 for a herniated disc at C6-7 requiring surgery. He advised that his physician assistant had obtained appellant's medical history of a March 2013 rotator cuff surgery following which appellant had resumed normal exercises. While rotating equipment at work, appellant experienced left scapular pain. Dr. Spector related:

> "The work[-]related incident was a contributing factor [in] the ultimate herniation of his disc. A healthy disc does not herniate and, therefore, there is underlying preexisting degeneration that must occur; however, in this instance there was a specific work-related incident that in all likelihood caused the final herniation to occur and, therefore, this is an asymptomatic preexisting condition made symptomatic by a work-related injury."

On March 11, 2015 appellant requested reconsideration based on the February 24, 2015 report from Dr. Spector.

In a report dated February 20, 2014, received by OWCP on April 15, 2015, a nurse practitioner diagnosed a backache and subscapular bursitis. On February 24, 2014 a physician assistant diagnosed neck sprain or strain.

By decision dated April 23, 2015, OWCP denied modification of its February 4, 2015 decision. It found that Dr. Spector's opinion was speculative and thus insufficient to show that appellant sustained an employment-related condition on February 7, 2014.

On March 16, 2016 Dr. William A. Somers, a Board-certified orthopedic surgeon, discussed appellant's history of a left rotator cuff condition in 2002 and a left rotator cuff repair in 2013, following which he resumed full duty. Appellant did not experience problems with his neck, upper back, or left arm until February 2014, when he used a lever on a mechanical device and "felt a twinge in the posterolateral cervical spine region." His symptoms worsened and he began to have radiculopathy. Appellant underwent surgery for a herniated disc with substantial improvement. Dr. Somers diagnosed a herniated nucleus pulposus at C6 with radiculopathy either caused or aggravated by the February 2014 injury, degenerative cervical disc disease aggravated by the February 2014 injury, and residual fine motor dexterity loss due to the February 2014 injury. He opined:

> "There is no doubt that all of [appellant's] symptoms originate with the injury using the crank arm. Prior to that, there is no history of cervical discomfort or radiculopathy. After that injury, cervical discogenic and radiculopathic pain began. Although [appellant] has a history of being very active throughout his life, there is no prior history of injury causing cervical spine difficulty. His degenerative arthritis in the cervical spine does predate his injury, but was totally

asymptomatic prior to February 2014. Therefore, all of [appellant's] current symptoms are related to his work injury dated February 2014. One cannot say whether the disc herniation at C6 is new, old, or increased in size related to his February 2014 injury."

Appellant, through counsel, on March 17, 2016 requested reconsideration. He argued that the opinion of Dr. Somers was sufficient to meet his burden of proof or require further development.

In a decision dated December 15, 2016, OWCP denied modification of its April 23, 2015 decision. It found that Dr. Somers' opinion was insufficiently rationalized to establish that appellant sustained an injury on February 7, 2014.

On appeal counsel argues that Dr. Somers' report either establishes appellant's claim or is sufficient to require further development of the medical evidence.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA; 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, OWCP must determine whether "fact of injury" is established. First, an employee has the burden of proof to demonstrate 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]

[4] *Supra* note 2.

[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.*

ANALYSIS

Appellant alleged that he sustained an injury to his cervical spine and left shoulder on February 7, 2014 when he rotated a jack handle. OWCP has accepted that the 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 February 7, 2014 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.[10]

Dr. Somers, in a report dated March 16, 2016, noted that appellant had returned to his usual employment after a 2013 left rotator cuff repair. In February 2014, appellant felt a twinge in his cervical spine after using a lever on a mechanical device. Prior to that time he had not experienced neck, back, or left arm problems. Dr. Somers diagnosed a herniated nucleus pulposus at C6 with radiculopathy caused or aggravated by the February 2014 injury, degenerative cervical disc disease aggravated by the February 2014 injury, and residual fine motor dexterity loss due to the February 2014 injury. He related that before appellant's injury he did not have cervical radiculopathy or pain and that his preexisting degenerative arthritis was asymptomatic before the employment incident. Consequently, Dr. Somers attributed appellant's condition to his work injury, noting that he could not say if the disc herniation at C6 was old, new, or changed in size after February 2014. A medical opinion, however, 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.[11] Dr. Somers did not provide a rationalized explanation of how rotating a jack handle on February 7, 2014 caused or contributed to a diagnosed medical condition. Therefore, his opinion is of limited probative value.[12]

Appellant also provided evidence from Dr. Spector. On March 3, 2014 Dr. Spector obtained a history of appellant experiencing pain, numbness, and tingling radiating into his left upper extremity in January 2014 after "doing routine exercises." He diagnosed a C6-7 herniated disc with left-side C7 radiculopathy. As Dr. Spector related a history of appellant experiencing radiating left arm pain in January 2014 rather than an injury on February 7, 2014, his report does not support the claim.

In a report dated February 24, 2015, Dr. Spector advised that he had treated appellant since March 3, 2014 for a herniated C7 disc and resulting surgery. He discussed appellant's history, noting that he resumed normal exercises after March 2013 rotator cuff surgery and that he experienced left scapular pain rotating equipment at work. Dr. Spector opined that the employment incident contributed to the herniation of the disc. He noted that a healthy disc did

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

[11] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[12] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

not herniate. Dr. Spector found that appellant had an underlying preexisting degenerative condition, but that "in all likelihood" the work injury caused the final herniation. He did not, however, explain how rotating a jack handle on February 7, 2014 caused a herniated disc. A physician must provide an opinion on whether the employment incident described caused or contributed to claimant's diagnosed medical condition and support that opinion with medical reasoning to demonstrate that the conclusion reached is sound, logical and rationale.[13] Additionally, Dr. Spencer's finding that the work injury "in all likelihood" caused the herniation is speculative in nature and thus insufficient to meet appellant's burden of proof.[14] The need for rationale is particularly important as the evidence indicates that appellant has a preexisting degenerative condition.[15] Other reports from Dr. Spector are of limited probative value as they did not specifically address causation.[16] Thus, the evidence from Dr. Spector is insufficient to establish the claim.

Appellant also provided evidence from a nurse practitioner and a physician assistant. Nurse practitioners and physician assistants are not considered "physicians" under FECA, however, and thus cannot render a medical opinion.[17] Therefore, their reports have no probative value.

On appeal counsel argues that Dr. Somers' report either establishes appellant's claim or is sufficient to require further development of the medical evidence. He has the burden of proof, however, to submit reasoned medical evidence supporting that the February 7, 2014 work incident caused or aggravated appellant's cervical condition. As found, the medical evidence of record is insufficient to meet appellant's burden of proof.

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 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 an injury causally related to a February 7, 2014 employment incident.

[13] *John W. Montoya*, 54 ECAB 306 (2003).

[14] *Rickey S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

[15] *See R.R.*, Docket No. 16-1118 (issued November 7, 2016) (where the Board held that the need for rationale is particularly important where the evidence indicated that appellant had a preexisting condition).

[16] *Id.*; *see also A.D.*, 58 ECAB 149 (2006).

[17] *See* 5 U.S.C. § 8101(2); *D.C.*, Docket No. 16-1457 (issued May 18, 2017) (nurse practitioner); *Allen C. Hundley*, 53 ECAB 551 (2002) (physician assistants).

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 27, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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