United States Department of Labor
Employees' Compensation Appeals Board

D.R., Appellant	)	
and	)	**Docket No. 17-0971**
	)	**Issued: October 5, 2017**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Wilmington, DE, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 3, 2017 appellant filed a timely appeal from a December 2, 2016 merit decision and a March 10, 2017 nonmerit 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 this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a low back injury causally related to the accepted December 14, 2015 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 14, 2015 appellant, then a 50-year-old food service worker supervisor, filed a traumatic injury claim (Form CA-1) alleging that on December 14, 2015 he slipped while pulling a hand truck loaded with ice cream into a freezer, landed on his back, and was hit by the hand truck on his lower back, legs, elbows, and right knee. He stopped work on December 14, 2015.

Appellant received medical treatment from Dr. Matthew Voltz, an osteopath specializing in family medicine, who related in a December 21, 2015 report, that appellant experienced aching, burning, and sharp pain and stiffness in the lumbar region. He indicated that the onset was sudden with a December 14, 2015 work injury caused by a "direct blow and fall" when appellant slipped in a freezer trailer while pulling a hand truck. Dr. Voltz reviewed appellant's history and conducted an examination. He reported nonantalgic gait, normal lumbar lordosis, and level shoulders and iliac. Dr. Voltz noted that examination of appellant's lumbar spine showed tenderness upon palpation of the spinous, paraspinous, and lumbar region. Range of motion was restricted due to pain. Dr. Voltz diagnosed low back pain.

Dr. Voltz provided a December 21, 2015 physical therapy order form, which noted appellant's complaints of low back pain, likely discogenic pathology. He listed the modalities and exercises ordered.

In a December 22, 2015 lumbar spine x-ray report, Dr. Victoria E. Kong, a radiologist, noted moderate spondyloarthropathy, predominating at L3-4 and L4-5 with disc space low, vacuum disc phenomenon, and endplate spurring. She indicated five-millimeter (mm) retrolisthesis of L3 relative to L4 as seen in the neutral position that did not change with flexion or extension. Dr. Kong opined that appellant had lower lumbar spondyloarthropathy and grade 1 retrolisthesis at L3-4.

Appellant submitted various physical therapy progress notes dated December 28, 2015 to January 19, 2016 from Steven Banaszak. Mr. Banaszak noted diagnoses of low back pain, lumbar radiculopathy, and muscle weakness and recommended several therapeutic exercises. He also noted that appellant had low back pain with occasional radicular symptoms, tenderness to palpation, and deficits with range of motion.

In a January 21, 2016 report, Dr. Voltz indicated that appellant returned for a follow-up examination and still complained of aching, burning, and sharp pain and stiffness in the lumbar region. He reviewed appellant's history and conducted an examination. Dr. Voltz's reported nonantalgic gait, level shoulders and iliac crest, and normal thoracic kyphosis and lumbar lordosis. He diagnosed low back pain.

By letter dated February 16, 2016, OWCP informed appellant that his claim was initially approved as a minor injury, but it was being reopened because his medical bills had exceeded $1,500.00. It advised him that the evidence submitted was insufficient to establish his claim. OWCP requested that he respond to an attached questionnaire in order to substantiate that the December 14, 2015 incident occurred as alleged and provide additional medical evidence to establish a diagnosed condition causally related to the alleged December 14, 2015 incident. Appellant was afforded 30 days to submit additional evidence.

In a February 29, 2016 attending physician's report (Form CA-20), Dr. Voltz noted appellant's history of injury. He reported examination findings of tenderness along the paraspinal muscles and limited range of motion of the lumbar spine. Dr. Voltz diagnosed low back pain. He checked a box marked "yes" that appellant's condition was caused or aggravated by an employment incident. Dr. Voltz indicated that appellant was totally disabled from December 14, 2015 to January 21, 2016. He related that appellant was able to resume regular duty on January 21, 2016.

On March 7, 2016 OWCP received appellant's completed questionnaire. Appellant again explained that on December 14, 2015 he was pulling a hand truck filled with ice cream with a freezer when he slipped and fell backwards onto his back. He indicated that L.C., a supervisor, had immediate knowledge of the incident. Appellant explained that he began to experience low back pain and muscle spasms approximately 45 minutes after the incident. He described his current symptoms as low back pain, muscle spasm, tightness, and tingling down his legs to the back of his knees.

OWCP denied appellant's claim in a decision dated March 21, 2016. It accepted that the December 14, 2015 incident occurred as alleged, but it denied appellant's claim because the medical evidence of record failed to establish a diagnosed medical condition causally related to the accepted incident. OWCP found that Dr. Voltz only provided a medical diagnosis of "pain," which was a symptom and not considered a diagnosis under FECA.

On April 11, 2016 appellant requested reconsideration.

Appellant submitted an April 5, 2016 Form CA-20 from Dr. Voltz. Dr. Voltz described the December 14, 2015 employment incident and reported diagnoses of low back pain and other intervertebral disc displacement of the lumbosacral region. He checked a box marked "yes" that appellant's condition was caused or aggravated by his employment. Dr. Voltz indicated that appellant was disabled from December 28, 2015 to January 21, 2016 and had been advised to return to work.

By decision dated July 7, 2016, OWCP denied modification of the March 21, 2016 decision. It found that Dr. Voltz's April 5, 2016 Form CA-20 did not contain a firm, medical diagnosis or explanation, based on medical rationale, of how appellant's alleged back condition resulted from the accepted December 14, 2015 employment incident.

On September 6, 2016 appellant requested reconsideration. He submitted a narrative letter dated July 1, 2016 by Dr. Voltz. Dr. Voltz noted appellant's December 14, 2015 slip and fall and that he had since complained of constant aching, burning, sharp pain, and stiffness in the lumbar region. He related that during his initial December 21, 2015 physical examination appellant's range of motion was restricted due to pain. Dr. Voltz explained that appellant's subjective history and physical examination were "consistent with low back pain secondary to discogenic pathology with lumbar radiculopathy." He opined: "it is likely that [appellant's] fall was the cause of the injury to the lumbar intervertebral disc that contributed to his low back pain and lumbar radiculopathy. The fall could have resulted in a sheering or compression injury to the intervertebral disc that lead to the previously mentioned symptoms." Dr. Voltz reported that appellant had a follow-up examination on January 21, 2016 and that the examination findings

continued to be consistent with low back pain secondary to discogenic pathology with lumbar radiculopathy.

By decision dated December 2, 2016, OWCP again denied appellant's traumatic injury claim with modification. It accepted a diagnosed back condition, but determined that Dr. Voltz's affirmative opinion on causal relationship was speculative and insufficient to establish that appellant's low back condition resulted from the accepted December 14, 2015 employment incident.

On February 27, 2017 appellant requested reconsideration. He resubmitted Dr. Voltz's July 1, 2016 narrative letter with one alteration. Dr. Voltz opined: "it is *more likely than not* that [appellant's] fall was the cause of the injury to the lumbar intervertebral disc that contributed to his low back pain and lumbar radiculopathy. The fall *more likely than not* resulted in a sheering or compression injury to the intervertebral disc that lead to the previously mentioned symptoms." (Emphasis added.)

By decision dated March 10, 2017, OWCP denied further merit review of appellant's case under 5 U.S.C. § 8128(a). It found that Dr. Voltz's July 1, 2016 narrative report was cumulative and substantially similar to his previously submitted report.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[2] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence[3] including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether "fact of injury" has been established.[5] There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[6] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[7] An employee may establish that the

[2] 5 U.S.C. §§ 8101-8193.

[3] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[4] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[6] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

[7] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

employment incident occurred as alleged but fail to show that his or her disability or condition relates to the employment incident.[8]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.[9] The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.[10] The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[11]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained a low back injury as a result of a December 14, 2015 slip and fall at work. OWCP accepted that the December 14, 2015 incident occurred as alleged and that he was diagnosed with a lumbar condition. However, it denied appellant's claim finding insufficient medical evidence to establish that his diagnosed medical condition was causally related to the accepted incident.

The Board finds that appellant has not established a low back injury causally related to the accepted December 14, 2015 employment incident.

Appellant was primarily treated by Dr. Voltz, who provided reports dated December 21, 2015 to July 1, 2016. Dr. Voltz accurately described that on December 14, 2015 while at work appellant slipped in a freezer trailer while pulling a hand truck loaded with ice cream at work and experienced aching, burning, sharp pain, and stiffness in the lumbar region. He reported tenderness upon palpation and restricted range of motion due to pain upon physical examination. Dr. Voltz diagnosed low back pain and other intervertebral disc displacement of the lumbosacral region. In Forms CA-20 dated February 29 and April 5, 2016, he checked a box marked "yes" indicating that appellant's condition was caused or aggravated by an employment activity. The Board has held, however, that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion is of diminished probative value and is insufficient to establish a claim.[12] Because Dr. Voltz did not provide any medical explanation or rationale regarding his opinion on causal relationship, these reports fail to establish appellant's claim.

Dr. Voltz further reported in a July 1, 2016 narrative report that appellant's history and physical examination were consistent with low back pain secondary to discogenic pathology with

[8] *T.H.,* 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi,* 57 ECAB 418 (2006).

[9] *See J.Z.,* 58 ECAB 529 (2007); *Paul E. Thams,* 56 ECAB 503 (2005).

[10] *I.J.,* 59 ECAB 408 (2008); *Victor J. Woodhams,* 41 ECAB 465 (2005).

[11] *James Mack,* 43 ECAB 321 (1991).

[12] *D.D.*, 57 ECAB 734, 738 (2006); *Deborah L. Beatty,* 54 ECAB 340 (2003).

lumbar radiculopathy. He opined: "it is likely that [appellant's] fall was the cause of the injury to the lumbar intervertebral disc that contributed to his low back pain and lumbar radiculopathy. The fall could have resulted in a sheering or compression injury to the intervertebral disc that led to the previously mentioned symptoms." The Board finds, however, that Dr. Voltz's opinion that appellant's fall was "likely" the cause of appellant's lumbar injury is speculative and failed to explain the causal relationship between appellant's condition and the December 14, 2015 employment incident.[13] Dr. Voltz's opinion that the fall "could" have resulted in psychological conditions that led to his symptoms is as well speculative. The Board has held that medical opinions that are speculative or equivocal in character are of diminished probative value.[14] An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is causal relationship between his claimed condition and his employment.[15] Dr. Voltz's July 1, 2016 report, therefore, is insufficient to establish appellant's claim.

Appellant also submitted a December 22, 2015 lumbar spine x-ray report by Dr. Kong, who noted diagnosis of lower lumbar spondyloarthropathy and grade 1 retrolisthesis at L3-4. While the diagnostic report contains a diagnosis of appellant's lumbar condition, it does not have an opinion on the cause of appellant's lumbar 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.[16]

The physical therapy reports dated December 28, 2015 to January 19, 2016 are likewise insufficient to establish appellant's claim as reports by a physical therapist are of no probative value as a physical therapist is not a physician under FECA.[17]

On appeal appellant notes his disagreement with OWCP's denial decision. He asserts that he had no pain or stiffness in his lower back prior to the slip and fall incident and that his medical provider submitted all the information that OWCP had requested. As previously explained, the medical evidence of record fails to establish that appellant's back condition resulted from the accepted December 14, 2015 incident. In order to obtain benefits under FECA, an employee has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence.[18] Because appellant has failed to provide such evidence demonstrating that his back condition was causally related to the December 14, 2015 employment incident, he has failed to meet his burden of proof to establish his claim.

[13] *Roy L. Humphrey*, 57 ECAB 238, 242 (2005); *Michael E. Smith*, 50 ECAB 313 (1999).

[14] *D.D.*, 57 ECAB 734, 738 (2006); *Kathy A. Kelley*, 55 ECAB 206 (2004).

[15] *Robert A. Boyle*, 54 ECAB 381 (2003); *Patricia J. Glenn*, 53 ECAB 159 (2001).

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

[17] 5 U.S.C. 8102(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law; *J.G.*, Docket No. 15-251 (issued April 13, 2015); *A.C.*, Docket No. 08-1453 (issued November 18, 2008) (records from a physical therapist do not constitute competent medical opinion in support of causal relation, as physical therapists are not considered physicians as defined under FECA).

[18] *Supra* note 4.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.[19]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[20]

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.[21] If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.[22] If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[23]

ANALYSIS -- ISSUE 2

In its most recent merit decision dated December 2, 2016, OWCP again denied appellant's traumatic injury claim finding that the medical evidence of record failed to establish that his back condition was causally related to the accepted December 14, 2015 employment incident. On February 27, 2017 OWCP received appellant's latest request for reconsideration. In a decision dated March 10, 2017 it denied further merit review of appellant's case pursuant to 5 U.S.C. § 8128(a). The Board must determine whether OWCP properly denied a merit review of his request for reconsideration.

The Board finds that OWCP properly declined to reopen appellant's claim for further consideration of the merits. Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, he has not advanced a relevant legal argument not previously considered by OWCP, nor has he submitted relevant and pertinent new evidence not previously considered by OWCP.

[19] 5 U.S.C. § 8128(a)

[20] 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[21] *Id*. at § 10.607(a).

[22] *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

[23] *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

In support of his February 27, 2017 reconsideration request, appellant resubmitted Dr. Voltz's July 1, 2016 narrative letter, which included one change. He related that it was "more likely than not" that appellant's fall was the cause of his back injury and that the December 14, 2015 fall at work "more likely than not" resulted in his injury. The Board notes that Dr. Voltz merely repeated his speculative opinion on the causal relationship between appellant's back condition and the accepted December 14, 2015 employment incident. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[24]

The Board finds that appellant failed to show that OWCP erroneously applied or interpreted a specific point of law and failed to advance a point of law or fact not previously considered by OWCP. Consequently, appellant has not met any of the regulatory requirements and OWCP properly declined his request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).[25] Thus, OWCP did not abuse its discretion in refusing to reopen his claim for a review on the merits.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that a low back injury causally related to the accepted December 14, 2015 employment incident.

The Board also finds that OWCP properly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

[24] *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007). *See also S.E.*, Docket No. 08-2214 (issued May 6, 2009) (finding 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); *Cecilia M. Corley*, 56 ECAB 662, 669 (2005) (finding that medical opinions which are speculative or equivocal are of diminished probative value).

[25] *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2017 and December 2, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 5, 2017
Washington, DC

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

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

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