United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant	)	
and	)	**Docket No. 18-1418**
	)	**Issued: February 7, 2019**
DEPARTMENT OF THE NAVY, MARINE CORPS LOGISTICS BASE, Albany, GA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 17, 2018 appellant filed a timely appeal from an April 3, 2018 nonmerit decision and a June 8, 2018 merit 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 OWCP properly denied appellant's request for a review of the written record under 5 U.S.C. § 8124(b); (2) whether he has met his burden of proof to establish a recurrence of a medical condition beginning December 6, 2012 causally related to his accepted employment injury; and (3) whether appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include additional lumbar conditions.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances as presented in the prior Board decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On September 8, 2001 appellant, then a 46-year-old heavy mobile mechanic, filed a traumatic injury claim (Form CA-1) alleging that, on August 6, 2001, he injured his left leg and low back while in the performance of duty. OWCP accepted the claim for lumbar strain and, assigned File No. xxxxxx248.[3] Appellant's attending physician found that he could perform his regular work duties beginning April 29, 2002.[4]

By decision dated December 30, 2009, the Board affirmed nonmerit decisions of OWCP dated June 19, August 20, and October 15, 2008 denying his request for a review of the written record and a July 16, 2008 OWCP decision denying his request for reconsideration as untimely and insufficient to show clear evidence of error.[5]

On November 16, 2012 OWCP referred appellant to Dr. Douglas P. Hein, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether he required further medical treatment due to his August 6, 2001 employment injury.[6]

Dr. Hein, in a report dated December 5, 2012, found that appellant had no residuals from his August 6, 2001 employment injury. He opined that appellant had preexisting degenerative changes at L4-5 and L5-S1 and that his current L4-5 spondylolisthesis constituted a natural progression of that condition.

By decision dated February 13, 2013, OWCP terminated appellant's medical benefits and entitlement to any future wage-loss compensation, effective that date. It determined that

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[2] Docket No. 16-1456 (issued January 10, 2017); Docket No. 15-1571 (issued November 5, 2015); *Order Dismissing Appeal*, Docket No. 14-1301 (issued November 12, 2014); Docket No. 13-1953 (issued December 11, 2013); Docket No. 09-0321 (issued December 30, 2009); *Order Dismissing Appeal*, Docket No. 08-1575 (issued September 29, 2008); *Order Dismissing Appeal*, Docket No. 07-1313 (issued April 28, 2008).

[3] In a decision dated August 19, 2002, OWCP denied appellant's claim for a schedule award. On September 3, 2002 appellant requested a review of the written record. On January 23, 2003 an OWCP hearing representative affirmed the August 19, 2002 decision.

[4] Appellant filed a notice of recurrence (Form CA-2a) claiming disability beginning July 2004 causally related to his August 6, 2001 work injury. However, as he cited new work factors, OWCP adjudicated the claim as a new injury, assigned File No. xxxxxx141.

[5] *Supra* note 2. By decisions dated September 27, 2011, and June 11, July 26, and September 26, 2012, OWCP denied appellant's continued requests for reviews of the written record under section 8124(b) as it found that there was no final decision from which he could receive a review of the written record.

[6] On August 8, 2012 appellant requested reconsideration of an August 19, 2002 schedule award decision. By decision dated September 21, 2012, OWCP denied his request for reconsideration as it was untimely and insufficient to show clear evidence of error.

Dr. Hein's opinion constituted the weight of the evidence and demonstrated that he had no further residuals of his accepted employment injury.

Thereafter, OWCP received a January 16, 2013 report from Dr. Jeffrey A. Fried, an attending Board-certified orthopedic surgeon. Dr. Fried opined that appellant had continued residuals of his accepted condition low back strain and that the low back strain had caused spondylolisthesis at L5-S1.

Appellant, on April 15, 2013, requested both a review of the written record and reconsideration. By decision dated May 10, 2013, OWCP denied his request for a review of the written record as it was not made within 30 days of its decision. By decision dated August 9, 2013, it denied modification of its February 13, 2013 decision. OWCP determined that appellant had not submitted any medical evidence sufficient to outweigh Dr. Hein's opinion that he had no residuals of his accepted lumbar strain.

On December 7, 2013 appellant filed a notice of recurrence (Form CA-2a) alleging that he required further medical treatment beginning December 6, 2012 causally related to his August 6, 2001 employment injury.[7]

Appellant appealed to the Board. By decision dated December 11, 2013, the Board affirmed the May 10, 2013 decision denying his request for a review of the written record and the August 9, 2013 decision terminating his medical benefits. The Board found that Dr. Hein's opinion constituted the weight of the evidence and demonstrated that appellant did not require further medical treatment. The Board further found that Dr. Fried's opinion in his January 16, 2013 report that appellant had continued residuals of his lumbar sprain was unsupported by medical rationale.[8]

Dr. Fried, in a report dated March 19, 2015, opined that appellant had a "previous quiescent back condition, which was aggravated by the accident and has not returned to its baseline state" and that, consequently, his spondylolisthesis was employment related.

On May 22, 2015 appellant requested reconsideration. By decision dated June 25, 2015, OWCP denied his request for reconsideration as it was untimely filed and did not demonstrate clear evidence of error.

Appellant appealed to the Board. By decision dated November 5, 2015, the Board affirmed the June 25, 2015 decision.[9] The Board discussed appellant's contention that OWCP should have adjudicated the issue of whether he had sustained a recurrence of a medical condition. The Board

[7] OWCP, in a March 21, 2014 response, advised appellant that it would not take action on his notice of recurrence of a medical condition as it had previously terminated his compensation and medical benefits. Appellant appealed the March 21, 2014 correspondence to the Board. On November 12, 2014 the Board dismissed the appeal after finding that the March 21, 2014 letter was informational in nature rather than a final adverse decision. The Board thus found that there was no final decision over which it had jurisdiction. *Order Dismissing Appeal*, Docket No. 13-1953 (issued December 11, 2013).

[8] *Supra* note 2.

[9] *Supra* note 2.

found, however, that the current issue was whether OWCP had properly terminated his entitlement to medical benefits as he had no further residuals of his lumbar strain.

OWCP, on January 13, 2016, requested that appellant submit supporting factual and medical evidence, including a report from his attending physician, addressing the relationship between any current condition and his accepted work injury.

In a report dated January 27, 2016, Dr. Fried noted that on October 6, 2001 appellant had sustained an injury to his back pulling a wheel off a trailer. He advised that a magnetic resonance imaging (MRI) scan obtained after his injury showed spondylosis, but that his condition had deteriorated as evidenced by a March 6, 2009 MRI scan showing grade one spondylolisthesis and a bulging disc. Dr. Fried opined that appellant's employment injury had aggravated his preexisting spondylosis and caused spondylolisthesis at L4-5.

By decision dated June 24, 2016, OWCP found that appellant had not established an employment-related recurrence of disability. It determined that Dr. Fried's January 27, 2016 report failed to explain why his current condition was related to the August 6, 2001 employment injury.

Appellant appealed to the Board. By decision dated January 10, 2017, the Board affirmed OWCP's June 24, 2016 decision.[10] The Board found that appellant had not submitted reasoned medical evidence sufficient to establish the need for further medical treatment due to his August 6, 2001 employment injury. The Board also determined that Dr. Fried's reports were insufficient to establish that he sustained spondylolisthesis due to his accepted employment injury.

Dr. Fried, in a May 26, 2017 report, discussed appellant's history of lumbar sprain on August 6, 2001 and his continued complaints of pain in the leg and back. He opined that an injury could trigger asymptomatic spondylolisthesis. Dr. Fried related, "It is my opinion with reasonable medical certainty that the lumbar strain sustained by [appellant] on August 6, 2001 resulted in an aggravation of a previously quiescent spondylolisthesis and that aggravation has persisted today and he is continuing to have back and leg pain."

On June 26, 2017 appellant requested reconsideration.

By decision dated February 15, 2018, OWCP denied modification of its January 10, 2017 decision. It found that Dr. Fried had failed to explain how the August 6, 2001 employment injury caused or aggravated spondylolisthesis.

Appellant, on February 26, 2018, requested a review of the written record by an OWCP hearing representative. He contended that OWCP erred in failing to expand acceptance of his claim to include chronic musculoskeletal low back pain and degenerative disc disease at L4-5 and L5-S1. Appellant also requested that OWCP consolidate his claims.

By decision dated April 3, 2018, OWCP denied appellant's request for a review of the written record under section 8124(b) as it was made after he had requested and received

[10] *Supra* note 2.

reconsideration of his claim under section 8128(a). It considered the matter within its discretion and found that the issue could be equally well addressed through the submission of a reconsideration request with evidence supporting that he sustained degenerative lumbar disc disease due to his August 6, 2001 employment injury.

In an April 18, 2018 report, Dr. Fried asserted that appellant had not recovered from his August 6, 2001 employment injury. He noted that he had reduced motion and back pain. Dr. Fried related, "Although the degenerative disc disease and spondylolisthesis were probably a preexisting condition, the incident resulted in a permanent aggravation of [appellant's] injury as he has not returned to baseline condition."

On May 29, 2018 appellant requested reconsideration.

By decision dated June 8, 2018, OWCP denied modification of its February 15, 2018 decision. It found that Dr. Fried, in his April 18, 2018 report, did not provide rationale supporting his causation finding.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b) of FECA, concerning a claimant's entitlement to a hearing, states that: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his or her claim before a representative of the Secretary."[11] Section 10.615 of OWCP's regulations, implementing this section of FECA, provides that a claimant who requests a hearing can choose between two formats, either an oral hearing or a review of the written record by an OWCP hearing representative.[12] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[13] The date of filing is fixed by postmark or other carrier's date marking.[14]

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and that it must exercise this discretionary authority in deciding whether to grant a hearing.[15] Specifically, the Board has held that OWCP has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to FECA which provided the right to a hearing,[16] when the request is made after the

[11] 5 U.S.C. § 8124(b)(1).

[12] 20 C.F.R. § 10.615.

[13] *T.A.*, Docket No. 18-0431 (issued November 7, 2018).

[14] *See* 20 C.F.R. § 10.616(a).

[15] *C.K.*, Docket No. 18-0607 (issued October 18, 2018); *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[16] *See C.A.*, Docket No. 17-0944 (issued May 15, 2018).

30-day period for requesting a hearing,[17] when the request is for a second hearing on the same issue,[18] and when the request is made after a reconsideration request was previously submitted.[19]

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly denied appellant's request for a review of the written record under 5 U.S.C. § 8124(b).

Appellant's February 26, 2018 request for a review of the written record by an OWCP hearing representative of OWCP's February 15, 2018 decision was made after he had previously requested reconsideration under section 8128(a). By decision dated June 24, 2016, OWCP found that appellant had not established an employment-related recurrence. The Board, by decision dated January 10, 2017, affirmed OWCP's June 24, 2016 decision. Appellant requested reconsideration on June 26, 2017. By decision dated February 15, 2018, OWCP denied modification of its prior merit decision. Consequently, appellant was not entitled to a hearing as a matter of right as he had previously requested reconsideration.[20]

OWCP also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right.[21] In its April 3, 2018 decision, it properly exercised its discretion by considering appellant's request and finding that the issue could be equally well addressed through the submission of a reconsideration request with evidence supporting that he had a current lumbar condition causally related to his accepted employment injury. The Board has held that as the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[22] In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's request for a hearing which could be found to be an abuse of discretion.[23]

LEGAL PRECEDENT -- ISSUE 2

The United States shall furnish to an employee who is injured while in the performance of duty the services, appliances, and supplies prescribed or recommended by a qualified physician

[17] *D.R.*, Docket No. 18-0232 (issued October 2, 2018).

[18] *M.W.*, Docket No. 16-1560 (issued May 8, 2017).

[19] *T.A.*, Docket No. 18-0431 (issued November 7, 2018). Section 10.616(a) of OWCP's regulations provides that the claimant seeking a hearing must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision. 20 C.F.R. § 10.616(a).

[20] *See id.*

[21] *See R.K.*, Docket No. 17-0151 (issued December 12, 2018).

[22] *See A.N.*, Docket No. 18-0843 (issued December 11, 2018).

[23] *C.A.*, Docket No. 17-0944 (issued May 15, 2018).

that the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability, or aid in lessening the amount of any monthly compensation.[24]

A recurrence of a medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage.[25] An employee has the burden of proof to establish that he or she sustained a recurrence of a medical condition that is causally related to his or her accepted employment injury without intervening cause.[26] To meet this burden the employee must submit medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, supports that the condition is causally related and supports his or her conclusion with sound medical rationale.[27] Where no such rationale is present, the medical evidence is of diminished probative value.[28]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish a recurrence of a medical condition on or after December 6, 2012 causally related to his August 6, 2001 employment injury.

In decisions dated February 13 and August 9, 2013, OWCP terminated his medical benefits and entitlement to wage-loss compensation, effective February 13, 2013. The Board, by decision dated December 11, 2013, affirmed the August 9, 2013 decision.

Appellant subsequently maintained that he required additional medical treatment due to his accepted employment injury. The Board notes that it has previously reviewed the medical evidence submitted to OWCP prior to its June 24, 2016 decision. By decision dated January 10, 2017, the Board affirmed the June 24, 2016 decision, finding that the medical evidence was insufficient to establish that appellant required further medical treatment as a result of his accepted employment injury. Absent further merit review by OWCP pursuant to section 8128 of FECA, the Board's prior findings with regard to the earlier medical evidence are *res judicata*.[29] The Board, therefore, will not review the evidence addressed in the prior appeal.[30]

In a May 26, 2017 report, Dr. Fried reviewed appellant's history of lumbar sprain on August 6, 2001 and his current symptoms of back and leg pain. He opined that the August 6, 2001 work injury caused an aggravation of preexisting, asymptomatic spondylolisthesis and that the

[24] 5 U.S.C. § 8103(a).

[25] 20 C.F.R. § 10.5(y).

[26] *E.R.*, Docket No. 18-0202 (issued June 5, 2018).

[27] *See T.B.*, Docket No. 18-0762 (issued November 2, 2018).

[28] *Id.*

[29] *See M.S.*, Docket No. 18-0877 (issued November 21, 2018).

[30] *Id*.

aggravation had not resolved. On April 18, 2018 Dr. Fried determined that appellant had residuals of his August 6, 2001 work injury. He found that the employment injury caused a permanent aggravation of what was likely preexisting spondylolisthesis and degenerative disc disease. As Dr. Fried failed to find that appellant had any need for further medical treatment due to his accepted lumbar strain, his opinion is of little probative value on the issue of whether he experienced a recurrence of the need for medical treatment due to his August 6, 2001 employment injury.[31]

Appellant has not submitted reasoned medical evidence establishing that he sustained a recurrence of a medical condition due to his accepted employment injury, and thus has not met his burden of proof.[32]

LEGAL PRECEDENT -- ISSUE 3

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that he or she 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 or specific condition for which compensation is claimed is causally related to the employment injury.[33]

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[34] Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.[35] The opinion of the physician 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 employee.[36] Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[37]

[31] *See E.R.*, Docket No. 18-0202 (issued June 5, 2018).

[32] *A.C.*, Docket No. 17-0521 (issued April 24, 2018).

[33] *See C.W.*, Docket No. 17-1636 (issued April 25, 2018).

[34] *See D.A.*, Docket No. 18-0525 (issued November 2, 2018); *T.F.*, Docket No. 17-0645 (issued August 15, 2018).

[35] *L.G.*, Docket No. 18-0321 (issued October 25, 2018).

[36] *E.G.*, Docket No. 17-1955 (issued September 10, 2018).

[37] *L.B.*, Docket No. 18-0560 (issued August 20, 2018).

ANALYSIS -- ISSUE 3

The Board finds that appellant has not met his burden of proof to expand acceptance of his claim to include additional lumbar conditions.

As noted, the Board has previously reviewed the evidence from Dr. Fried submitted prior to its January 10, 2017 decision and found that his reports were insufficient to establish that appellant sustained spondylolisthesis causally related to his August 6, 2001 employment injury. Again, absent further merit review by OWCP, the Board prior's findings are *res judicata*.[38]

Dr. Fried, on May 26, 2017, discussed appellant's history of lumbar sprain on August 6, 2001 and indicated that such an injury could trigger asymptomatic spondylolisthesis. He found that the August 6, 2001 lumbar strain aggravated preexisting asymptomatic spondylolisthesis. OWCP, however, has not accepted an aggravation of spondylolisthesis as related to the August 6, 2001 employment injury. Appellant has the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.[39] Dr. Fried has not provided any rationale for his opinion that the employment injury aggravated the preexisting spondylolisthesis other than to generally note that an injury could trigger asymptomatic spondylolisthesis. Medical conclusions unsupported by rationale, or which are speculative or equivocal in character, are of little probative value.[40] Such rationale is particularly warranted when there is a history of a preexisting condition.[41]

Dr. Fried, in a report dated April 18, 2018, opined that appellant had residuals of his August 6, 2001 work injury causing a loss of motion and back pain. He found that he likely had preexisting spondylolisthesis and degenerative disc disease, but that the employment injury had permanently aggravated these conditions. Dr. Fried did not, however, explain the mechanics of how the August 6, 2001 work injury caused a permanent aggravation of spondylolisthesis and degenerative disc disease, or address why appellant's current symptoms resulted from an employment-related aggravation rather than the normal progression of the preexisting conditions.[42] The Board thus finds that appellant has not submitted sufficient rationalized medical evidence supporting that the acceptance of his claim should be expanded to include additional lumbar conditions causally related to his August 6, 2001 employment injury.[43]

[38] *Supra* note 29.

[39] *See J.M.*, Docket No. 18-1223 (issued December 11, 2018).

[40] *See T.F.*, Docket No. 17-0645 (issued August 15, 2018).

[41] *See C.B.*, Docket No. 18-0633 (issued November 16, 2018).

[42] *Id*.

[43] *See T.T.*, Docket No. 17-0681 (issued March 13, 2018).

On appeal appellant contends that OWCP erred in failing to expand acceptance of his claim. As discussed, however, the medical evidence is insufficient to establish any additional conditions causally related to the August 6, 2001 employment injury.[44]

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.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a review of the written record under 5 U.S.C. § 8124(b). The Board further finds that he has not met his burden of proof to establish a recurrence of a medical condition beginning December 6, 2012 causally related to his accepted employment injury, or that the acceptance of his claim should be expanded to include additional lumbar conditions.

ORDER

IT IS HEREBY ORDERED THAT the June 8 and April 3, 2018 merit decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 7, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy 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

[44] *See M.S.*, Docket No. 17-0105 (issued December 7, 2017).