United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 19-0506**
	)	**Issued: July 23, 2019**
DEPARTMENT OF THE ARMY, IOWA NATIONAL GUARD, Johnston, IA, Employer	)	

Appearances:
Benjamin Hayek, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 8, 2019 appellant, through counsel, filed a timely appeal from a November 8, 2018 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.

[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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury to his back causally related to the accepted January 10, 2017 employment incident.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as presented in the prior appeal are incorporated herein by reference. The relevant facts are as follows.

On January 23, 2017 appellant, then a 55-year-old supervisory information technology specialist, filed a traumatic injury claim (Form CA-1) alleging that on January 10, 2017 he slipped on ice and fell down three stairs while in the performance of duty.[4] He advised that at the time of his fall he was wearing a back brace because he was recovering from two surgeries on his back. Appellant stopped work on January 11, 2017. The employing establishment did not controvert the claim.

In the attending physician's report section (Part B) of a January 18, 2017 authorization for examination and/or treatment (Form CA-16), Dr. David Hatfield, a Board-certified orthopedic surgeon, indicated that appellant had fallen on ice at work on January 10, 2017. He noted that appellant had undergone back surgery on April 26 and November 22 and 29, 2016. Dr. Hatfield checked a box marked "yes" that the condition was caused or aggravated by employment and found that he was totally disabled.

In a narrative report of even date, Dr. Hatfield obtained a history of appellant doing well following a November 2016 anterior posterior decompression and fusion at L5-S1 until he fell down approximately four stairs on January 10, 2017. He noted that x-rays had failed to demonstrate loosening or changes in hardware. Dr. Hatfield opined that appellant might have "some disruption in healing" and listed work restrictions.

In a February 28, 2017 attending physician's report (Form CA-20), Dr. Hatfield diagnosed low back pain following lumbar surgery and checked a box marked "yes" that the condition was caused or aggravated by the described employment activity of appellant falling on ice on January 10, 2017. He provided as a rationale that his back pain had increased instead of improving.[5]

In a February 28, 2017 chart note, Dr. Hatfield advised that appellant's fall at work had aggravated his back.

By decision dated May 8, 2017, OWCP denied appellant's traumatic injury claim. It determined that he had not submitted medical evidence sufficient to establish that he sustained a diagnosed condition as a result of the accepted employment incident. OWCP noted that

[3] Docket No. 18-1022 (issued October 24, 2018).

[4] Appellant submitted a statement from a witness who saw him fall.

[5] Dr. Hatfield provided similar findings in an April 5, 2017 CA-20 form.

Dr. Hatfield had diagnosed pain rather than a specific medical condition caused or aggravated by the January 10, 2017 employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

In a report dated May 24, 2017, Dr. Hatfield discussed appellant's history of an anterior and posterior decompression and fusion at L5-S1 in November 2016. He noted that there was no dispute that he had fallen on January 10, 2017. Dr. Hatfield related, "As [appellant] was progressing well until the fall as described, would have not yet had a solid fusion, and had a distinct setback following the fall, I would relate his delay in healing and slowed progress to the fall as described."

On July 19, 2017 Dr. Hatfield noted that appellant had undergone back surgery in November 2016 and had fallen on ice on January 10, 2017. He indicated that he had ordered a bone growth stimulator after the fall due to the "potential disruption in fusion mass." Dr. Hatfield related, "Given [appellant's] fall and potential delay in healing as above return to work was delayed in order to maximize healing."

In a report dated September 6, 2017, Dr. Hatfield reviewed appellant's history of back surgery and his January 10, 2017 fall on ice leaving work. He noted that he had spoken with him on the date of injury and had evaluated him on January 18, 2017 for possible disruption of the hardware and fusion due to the fall. Dr. Hatfield advised:

> "No gross radiographic changes were appreciated on imaging at that time. However, his instrumented lumbar fusion was distinctly aggravated…. Note original diagnosis of lumbar fusion was not altered by the fall. However, the fall did directly result in a marked setback and aggravation in his findings and progress. Thus in an attempt to lessen the impact of such fall, a bone growth stimulator was ordered. Further recovery period was extended with [a] lengthened time frame of bracing and delayed return to work activities."

Dr. Hatfield questioned why appellant's claim was denied in view of the "magnitude of his surgery and the magnitude of his fall…."

On October 24, 2017 appellant requested reconsideration.

By decision dated January 9, 2018, OWCP denied appellant's request for reconsideration under 5 U.S.C. § 8128(a). It found that he had not raised a relevant legal argument or submitted new and relevant evidence sufficient to warrant reopening his case for further merit review.

Appellant appealed to the Board. By decision dated October 24, 2018, the Board set aside the January 9, 2018 decision. The Board found that OWCP had improperly denied appellant's request for reconsideration of the merits of his claim under section 8128(a). The Board determined that Dr. Hatfield had provided a definite diagnosis and opinion regarding causal relationship in his September 6, 2017 report. The Board thus concluded that the report constituted pertinent new and relevant evidence not previously considered sufficient to warrant reopening of the case for further merit review.

By decision dated November 8, 2018, OWCP denied modification of its May 8, 2017 decision. It found that appellant had not provided medical evidence containing a specific diagnosis causally related to the January 10, 2017 employment incident.

LEGAL PRECEDENT

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 the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation period of FECA,[6] 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.[7] 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.[8]

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[9] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[10]

Rationalized medical opinion evidence is required to establish causal relationship. 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 claimant.[11] Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that a disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[12]

[6] *See R.B.*, Docket No. 18-1327 (issued December 31, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[7] *Y.K.*, Docket No. 18-0806 (issued December 19, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[8] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[9] *R.E.*, Docket No. 17-0547 (issued November 13, 2018); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[10] *D.C.*, Docket No. 18-1664 (issued April 1, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

[11] *H.B.*, Docket No. 18-0781 (issued September 5, 2018).

[12] *D.H.*, Docket No. 18-1410 (issued March 21, 2019).

ANALYSIS

The Board finds that the case is not in posture for decision.

In support of his claim, appellant submitted a January 18, 2017 report from Dr. Hatfield. Dr. Hatfield indicated that he was doing well after an anterior posterior decompression and fusion at L5-S1 prior to a fall down approximately four stairs on January 10, 2017. He opined that he might have some disruption in healing.

In a February 28, 2017 form report, Dr. Hatfield noted that appellant had fallen on ice at work on January 10, 2017 after he underwent back surgery in April and November 2016. He diagnosed low back pain after surgery on his lumbar spine and checked a box marked "yes" that the condition was caused or aggravated by employment, noting that his back pain had increased.

On May 24, 2017, Dr. Hatfield advised that appellant had progressed well after his November 2016 lumbar fusion until his fall on January 10, 2017. He indicated that the fusion was not yet solid and that the fall had caused a delay in healing. In a report dated September 6, 2017, Dr. Hatfield related that he evaluated appellant on January 18, 2017 and found no gross changes on x-ray but that the fall had aggravated his diagnosed condition of an instrumented lumbar fusion such that he required a bone growth stimulator and extended physical limitations.

The Board finds that the reports from Dr. Hatfield are sufficient, given the absence of any opposing medical evidence, to require further development of the record.[13] The Board notes that his reports are not contradicted by any substantial medical or factual evidence of record. While they are insufficiently rationalized to meet appellant's burden of proof to establish his claim, they raise an uncontroverted inference between the diagnosed aggravation of his lumbar fusion and the accepted employment incident and, therefore, are sufficient to require OWCP to further develop the medical evidence and the case record.[14]

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[15] OWCP has an obligation to see that justice is done.[16] The case shall, therefore, be remanded to OWCP for further development to obtain a rationalized medical opinion on the issue of whether appellant sustained an aggravation of his lumbar fusion causally related to the accepted employment incident. After this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.[17]

[13] *D.C.*, *supra* note 10.

[14] *Id*.

[15] *D.H.*, *supra* note 12.

[16] *M.F.*, Docket No. 18-0602 (issued October 11, 2018).

[17] *Id*.

CONCLUSION

The Board finds that the case is not in posture for decision.[18]

ORDER

IT IS HEREBY ORDERED THAT the November 8, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 23, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[18] The Board notes that where an employing establishment properly executes a Form CA-16 authorizing medical treatment related to a claim for a work injury, the form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination/treatment regardless of the action taken on the claim. *See Tracy P. Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c).