

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
T.W., Appellant)	
)	
and)	Docket No. 23-0825
)	Issued: May 13, 2024
DEPARTMENT OF THE ARMY, U.S. ARMY)	
CORPS OF ENGINEERS, Jersey City, NJ,)	
Employer)	
_____)	

Appearances:
Thomas R. Uliase, Esq., for the appellant¹
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 May 23, 2023 appellant, through counsel, filed a timely appeal from an April 18, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 a medical condition causally related to the accepted November 30, 2016 employment incident.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On December 14, 2016 appellant, then a 49-year-old deckhand, filed a traumatic injury claim (Form CA-1) alleging that on November 30, 2016 he sustained a thoracic herniated disc at T7-8 when bending over to remove a line while in the performance of duty. He notified his supervisor, stopped work, and sought emergency medical treatment on the alleged date of injury.⁴

By decision dated January 27, 2017, OWCP denied appellant's claim, under OWCP File No. xxxxxx570, finding that the evidence of record was insufficient to establish that his diagnosed medical conditions were causally related to the accepted November 30, 2016 employment incident.

On February 18, 2017 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated July 18, 2017, OWCP's hearing representative affirmed the January 27, 2017 decision.

On July 27, 2017 appellant, through counsel, requested reconsideration of OWCP's January 27, 2017 decision, and submitted additional medical evidence.

By decision dated October 25, 2017, OWCP denied modification of the July 18, 2017 decision.

On January 26, 2018 appellant, through counsel, requested reconsideration.

By decision dated May 9, 2018, OWCP denied modification of the October 25, 2017 decision.

On July 19, 2018 appellant, through counsel, appealed to the Board. By decision dated April 10, 2019, the Board affirmed the May 9, 2018 decision, finding that appellant had not met

³ Docket No. 20-0836 (issued July 21, 2021); Docket No. 18-1436 (issued April 10, 2019).

⁴ OWCP assigned the present claim OWCP File No. xxxxxx570. The record reflects that appellant has two prior traumatic injury claims involving back injuries. On December 3, 2013 he filed a Form CA-1 alleging a November 29, 2013 back injury after he bent over to pick up a rubber block. OWCP assigned that claim OWCP File No. xxxxxx243 and accepted it for sprain of back, lumbar region. On July 24, 2015 appellant filed another Form CA-1 alleging a July 14, 2015 back injury after he lifted a steel plate on a flexi float. OWCP assigned that claim OWCP File No. xxxxxx687 and accepted it for lumbar sprain/strain. OWCP has not administratively combined appellant's claims.

his burden of proof to establish that his thoracic and lumbar conditions were causally related to the accepted November 30, 2016 employment incident.⁵

On October 16, 2019 appellant, through counsel, requested reconsideration.

By decision dated October 23, 2019, OWCP denied modification of the May 9, 2018 decision.

On March 4, 2020 appellant, through counsel, appealed to the Board. By decision dated July 21, 2021, the Board affirmed the October 23, 2019 decision, finding that appellant had not met his burden of proof to establish a medical condition causally related to the accepted November 30, 2016 employment incident.⁶

On July 18, 2022 appellant, through counsel, requested reconsideration and submitted a July 18, 2022 report from Dr. Faisal Mahmood, a Board-certified orthopedic and spine surgeon.

In his July 18, 2022 report, Dr. Mahmood reported treating appellant for complaints to the lumbar and thoracic spine since March 29, 2022. He noted a history of injury in 2013 when appellant was at work picking up a rubber block and experienced thoracic and lumbar spine pain. Appellant presented to the hospital and was diagnosed with a thoracic disc herniation. Dr. Mahmood noted a 2015 work-related injury when appellant was lifting something and felt pain in the thoracic and lumbar spine and was diagnosed with further thoracic disc herniation upon presentation at the hospital. He noted a 2016 injury when appellant was working on a boat, bent over to untie a line, and heard a “pop” in his back. Appellant presented to the hospital and was diagnosed with an additional thoracic disc herniation as well as multi-level lumbar spine disc bulging. Dr. Mahmood diagnosed large cranially migrating T6-7 disc herniation, L4-5 right paracentral disc herniation, lumbar spine muscle spasms, and thoracic spine paraspinal muscle spasms. After review of diagnostic testing and examination findings, he opined that the injuries sustained in 2013, 2015, and November 30, 2016, were directly and causally related to his thoracic and lumbar spine injuries. Appellant reported that, in his most recent 2016 injury, he felt a pop while bending down and began to experience significant pain. As he had no prior history of lumbar pain, Dr. Mahmood opined that 100 percent of appellant’s disc herniation could be attributed to the incident on November 30, 2016 resulting in significant pain. Appellant further reported that, from a biomechanical standpoint, intradiscal pressure in the lumbar spine is at its highest with standing, forward flexion (bending), and lifting or pulling, which was the case with this injury. In regard to the thoracic spine, Dr. Mahmood advised that the rib cage does add some support with the same movement from a biomechanical standpoint, which will also place pressure on the thoracic intervertebral disc. He opined that, although appellant had preexisting pathology in the thoracic spine, there was an exacerbation of this condition on November 30, 2016, and he further found that, based on prior complaints of thoracic pain with a known herniation, 33.3 percent of his thoracic herniation and pain could be attributed to each of the three incidents. Dr. Mahmood

⁵ Docket No. 18-1436 (issued April 10, 2019).

⁶ Docket No. 20-0836 (issued July 21, 2021).

concluded that appellant's conditions were permanent and required both thoracic and lumbar spine surgery.

By decision dated October 14, 2022, OWCP denied modification of the July 21, 2021 decision.

Following OWCP's decision, appellant submitted an April 13, 2022 magnetic resonance imaging (MRI) scan of the thoracic spine, an April 14, 2022 MRI scan of the lumbar spine, and an April 18, 2022 electromyography and nerve conduction velocity (EMG/NCV) study.

On January 27, 2023 appellant, through counsel, requested reconsideration.

In a January 17, 2023 addendum report, Dr. Mahmood reported that, at the time of the claimed November 30, 2016 employment injury, the impact of the trauma of lifting something led to worsening of appellant's underlying disc herniations and overall disc degeneration of the lumbar and thoracic spine. He opined that appellant's work-related incident further exacerbated his preexisting pathology of the thoracic spine due to the prior incident that occurred in 2013 and 2015 resulting in his hospitalization and diagnosis of thoracic disc herniation. Dr. Mahmood explained that "a herniated disc occurs when the softer center of the disc (nucleus pulposus) pushes through the tough exterior casing of the disc (annulus fibrosis). Although age and disc degeneration can be contributing factors," appellant's disc herniations had a traumatic component. Dr. Mahmood opined that, as a direct result of the traumatic impact on November 30, 2016, appellant's disc herniations had worsened as demonstrated by comparison of the MRI scans performed before and after the incident.

By decision dated April 18, 2023, OWCP denied modification of its October 14, 2022 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁷ has the burden of proof to establish the essential elements of his or her claim, including 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 of FECA,⁸ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁹ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.¹⁰

⁷ *Supra* note 2.

⁸ *E.K.*, Docket No. 22-1130 (issued December 30, 2022); *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁹ *S.H.*, Docket No. 22-0391 (issued June 29, 2022); *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

¹⁰ *E.H.*, Docket No. 22-0401 (issued June 29, 2022); *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

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. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. Second, the employee must submit sufficient evidence to establish that the employment incident caused an injury.¹¹

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.¹² 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 specific employment incident identified by the employee.¹³

ANALYSIS

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

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata*, absent any further review by OWCP under section 8128 of FECA.¹⁴ It is, therefore, unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's October 23, 2019 decision as the Board considered that evidence in its July 21, 2021 decision.¹⁵

In his July 18, 2022 and January 17, 2023 medical reports, Dr. Mahmood discussed appellant's medical history, reviewed diagnostic reports, and provided findings on physical examination. He opined that the November 30, 2016 employment incident caused or aggravated appellant's disc herniations and degenerative disc disease. Dr. Mahmood discussed the mechanism of injury for this traumatic injury claim.¹⁶ He reported that, at the time of the claimed November 30, 2016 employment incident, the impact of the trauma of lifting something led to worsening of appellant's underlying disc herniations and overall disc degeneration of the lumbar and thoracic spine. Dr. Mahmood noted that appellant had no significant lumbar issues prior to the pain experienced from his work injury. He opined that appellant's work-related incident further exacerbated his preexisting pathology of the thoracic spine due to the prior incident that

¹¹ *H.M.*, Docket No. 22-0343 (issued June 28, 2022); *T.J.*, Docket No. 19-0461 (issued August 11, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

¹² *S.M.*, Docket No. 22-0075 (issued May 6, 2022); *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

¹³ *J.D.*, Docket No. 22-0935 (issued December 16, 2022); *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹⁴ *A.T.*, Docket No. 22-0716 (issued February 24, 2023).

¹⁵ *A.C.*, Docket No. 20-1340 (issued November 1, 2022); *G.W.*, Docket No. 22-0301 (issued July 25, 2022); *L.K.*, Docket No. 19-0313 (issued January 15, 2020); *A.L.*, Docket No. 19-0285 (issued September 24, 2019); *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

¹⁶ *See J.K. (nee R.)*, Docket No. 23-0959 (issued February 14, 2024); *G.G.*, Docket No. 23-0774 (issued October 25, 2023); *S.B.*, Docket No. 20-1458 (issued March 5, 2021); *L.H.*, Docket No. 17-0947 (issued March 8, 2018).

occurred in 2013 and 2015 resulting in his hospitalization and diagnosis of thoracic disc herniation. Dr. Mahmood explained that “a herniated disc occurred when the softer center of the disc (nucleus pulposus) pushes through the tough exterior casing of the disc (annulus fibrosis). Although age and disc degeneration can be contributing factors,” appellant’s disc herniations had a traumatic component. He reported that, as a direct result of the traumatic impact on November 30, 2016, appellant’s disc herniations had worsened as demonstrated by comparison of the MRI scans performed before and after the incident.

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility for the development of the evidence.¹⁷ It has an obligation to see that justice is done.¹⁸

While Dr. Mahmood’s opinion is insufficient to establish the claim, it is sufficient to require further development of the medical evidence.¹⁹ On remand, OWCP shall refer appellant to a specialist in the appropriate field of medicine, along with the case record, and a statement of accepted facts, for an examination and a rationalized medical opinion as to whether the accepted November 30, 2016 employment incident either caused or aggravated his diagnosed conditions.²⁰ If the second opinion physician disagrees with the opinion of Dr. Mahmood, he or she shall provide a fully-rationalized explanation as to why the accepted November 30, 2016 employment incident was insufficient to have caused or aggravated appellant’s diagnosed conditions.²¹ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁷ See *id.*; see also *A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy Hammons*, 51 ECAB 219, 223 (1999).

¹⁸ See *B.C.*, Docket No. 15-1853 (issued January 19, 2016); *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *John J. Carlone*, *supra* note 11.

¹⁹ *L.P.*, Docket No. 23-1134 (issued February 22, 2024); see also *C.A.*, Docket No. 22-0067 (issued October 26, 2023); *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *C.C.*, Docket No. 19-1631 (issued February 12, 2020).

²¹ *S.M.*, Docket No. 22-1209 (issued February 27, 2024).

ORDER

IT IS HEREBY ORDERED THAT the April 18, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 13, 2024
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