

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

E.K., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
Topeka, KS, Employer**

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**Docket No. 07-1461
Issued: November 21, 2007**

Appearances:
Beth Foerster, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 28, 2007 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated December 11, 2006, which denied appellant's traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of appellant's claim.

ISSUE

The issue is whether appellant sustained a traumatic injury in the performance of duty.

FACTUAL HISTORY

On July 10, 2001 appellant, then a 39-year-old nursing assistant filed a claim that he sustained a traumatic injury when "p[atien]t had leg caught in [Sertalift] and when I tried to get his leg to straighten [I] hurt [my] right shoulder, neck, arm from strain of p[atien]t's weight." He submitted numerous medical documents. In a July 11, 2001 employee health visit note, Dr. David Barry, M.D., noted that appellant stated that he used his left forearm as a device to place under the patient's thigh to support his placement in the bed requiring a shove from

appellant's shoulder. He also noted that appellant was still being treated medically for residual back, neck and shoulder problems from his motor vehicle accident in 2000. An August 21, 2001 magnetic resonance imaging (MRI) scan revealed degenerative spondylitic changes beginning at C3-4 through C6-7 with no evidence of disc herniation.

On December 31, 2001 the Office denied appellant's claim on the grounds that the medical evidence was insufficient as it did not contain a detailed medical narrative. On December 13, 2001 appellant requested an oral hearing. The oral hearing was held on May 20, 2002.¹ Additional documentation was submitted by appellant after the hearing. In a June 4, 2002 letter, Dr. Sergio Delgado, M.D., stated that appellant was injured when a patient fell forward onto him while he was in a kneeling position pinning him with most of the weight carried on his upper torso and neck region. He concluded that appellant's work injury aggravated his cervical condition. In a January 4, 2002 letter, Dr. Kimball Stacey, Board-certified in internal medicine, noted that appellant was injured at work when a patient fell on him. Appellant had neck surgery with a fusion plate put in his neck on July 31, 2002.

In an August 23, 2002 decision, the hearing representative denied appellant's claim on the grounds that the medical opinion submitted was based on an exaggerated and inaccurate history of injury and therefore of little probative value to establish causal relationship. The hearing representative found it was "probable that the patient started to slip from the lift and [appellant] used his right arm and shoulder to shove him onto the bed."

On January 6, 2003 appellant requested reconsideration. In support of his request, appellant submitted a September 24, 2002 report in which Dr. Delgado opined that the new history proposed would still be a factor in producing cervical radiculopathy. Dr. Delgado identified the most important factor to demonstrate causation was that there was no evidence of cervical radiculopathy prior to the injury.

On March 14, 2003 the Office denied modification of the prior decisions on the grounds that the medical evidence was insufficient to establish that appellant's condition was related to his injury. When assessing the medical evidence the Office identified the date of the MRI scan report as June 21, 2001. On March 12, 2004 appellant requested reconsideration based on a factual error made by the Office in identifying the date of the MRI scan as June 21, 2001 when it was established at the oral hearing that the date of the MRI scan was August 21, 2001. In a June 10, 2004 merit decision, the Office denied modification of the prior decisions on the grounds that the date of the MRI scan would not change the basis for the prior decisions.

On June 8, 2005 appellant requested reconsideration and submitted a May 11, 2005 letter from Dr. Delgado. In his letter, Dr. Delgado opined that regardless of the history it appeared that the injury was sustained during appellant's work activities. He also stated that in view of the new history his opinion was that the events may have aggravated appellant's preexisting condition.

¹ The Board notes that on August 19, 2002 the hearing representative contacted Agnes Burns, a witness, by telephone outside the presence of appellant and not under oath. The Board strongly discourages all ex parte communication.

On August 25, 2005 the Office issued a merit decision denying modification of the prior decision on the grounds that Dr. Delgado's opinion was not based on the historical record. On February 3, 2006 appellant requested reconsideration. In support he submitted two reports dated January 11 and 24, 2006 from Dr. Lynn Curtis, Board-certified in physical medicine and rehabilitation. In the January 11, 2006 report, Dr. Curtis stated as the factual history that the patient fell forward onto appellant's upper neck and back and then appellant pushed the patient with his neck and right shoulder back onto the bed. She opined that appellant had an injury which aggravated the spondylosis of his neck and caused cervical radiculopathy. Dr. Curtis also opined that subsequent to his fall appellant had numbness and weakness and changes in his MRI scan and therefore the complaints were a direct result of his injury and appellant was totally disabled. In the January 24, 2006 report, she stated that he integrated the accepted history from the Office into his report but also included appellant's version of the incident, that the patient was falling from the lift and he had to use his body to lift the patient back onto the bed. Dr. Curtis stated that "appellant's medical condition deteriorated due to the fact that he had to use axial (his back, spine, legs) mechanism to get the patient's body weight back into bed." She also opined that the force applied to appellant's body, including his neck caused the spinal and neurologic deterioration.

On April 6, 2006 the Office denied modification of the prior decisions on the grounds that the actual history differed from the history of injury related in Dr. Curtis' reports. On August 9, 2006 appellant requested reconsideration and submitted a July 24, 2006 report from Dr. Curtis. In the report, Dr. Curtis stated that the mechanism of the injury to appellant was the same as he had to support the weight of the patient with his neck and back. She opined that if the incident had not occurred then appellant would have continued his usual work activities and not deteriorated as he was able to perform activities before the incident and not afterwards. Dr. Curtis described appellant as "status post lifting injury with compression/dead weight injury from a fall-incident of a patient onto appellant's neck and back."

On December 11, 2006 the Office denied modification on the grounds that appellant did not establish fact of injury. The Office noted that the factual evidence did not support that the patient fell on appellant's neck and back therefore Dr. Curtis' report was based on an inaccurate history of the employment injury and failed to establish that appellant's conditions are causally related to the work incident.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing that 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained 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.³ These are the essential

² 5 U.S.C. §§ 8101-8193.

³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a 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, place and in the manner alleged.⁵ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁶

ANALYSIS

Appellant claimed that he injured his right shoulder, arm and neck in the performance of duty on July 10, 2001. The Office, in its August 23, 2002 decision, accepted that appellant used his forearm to prevent the patient from falling and used his shoulder to shove the patient onto the bed. The medical evidence does not establish that appellant's conditions are related to the employment incident.

Some of the medical evidence is based on an inaccurate factual history of the incident. The only accepted history is that appellant used his right arm to stop the patient from falling and used his shoulder to shove the patient onto the bed. The history provided in many of the medical reports was that the patient fell onto appellant who had to use his neck and back to lift the patient back onto the bed. It is well established that medical reports must be based on a complete and accurate factual and medical background and that medical opinions based on an incomplete or inaccurate history are of diminished probative value.⁷ Therefore the medical reports with an inaccurate factual history have no probative value to establish causal relationship.

Several medical reports did contain accurate factual histories. In his September 24, 2002 report, Dr. Delgado stated that the new history was still a factor of appellant's condition. However, Dr. Delgado's rationale for the causal relationship was that appellant had no symptoms of cervical radiculopathy before the injury and did afterwards. The Board has held that an opinion that a condition is causally related because the employee was asymptomatic before the injury is insufficient, without sufficient rationale, to establish causal relationship.⁸ Therefore, Dr. Delgado's opinion is of limited probative value as it lacks sufficient rationale to support his conclusions. In his May 11, 2005 report, Dr. Delgado stated that considering the new history the events of July 10, 2001 may have aggravated appellant's preexisting condition. Whether or not something may have caused a condition is not a definitive opinion. The Board has held that

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

⁶ *Id.* For a definition of the term traumatic injury, *see* 20 C.F.R. § 10.5(ee). For a definition of the term occupational disease or illness, *see* 20 C.F.R. § 10.5(g).

⁷ *James R. Taylor*, 56 ECAB ____ (Docket No. 05-135, issued May 13, 2005).

⁸ *Michael S. Mina*, 57 ECAB ____ (Docket No. 05-1763, issued February 7, 2006).

medical opinions that are speculative or equivocal in character are of diminished probative value⁹ therefore Dr. Delgado's opinion is of limited probative value.

In her July 24, 2006 report, Dr. Curtis' statement of factual history identified the accepted facts, however, she also included that the mechanism of injury to appellant was still the same as appellant had to support the weight of the patient with his neck and back. The Office did not accept that appellant was supporting the patient with his neck and back. The Office accepted that appellant used his right shoulder and arm to shove the patient. The additional facts of appellant supporting the patient with his neck and back are inaccurate. Dr. Curtis later identified appellant as "status post lifting injury with compression/dead weight injury from a fall-incident of a patient on appellant's neck and back." Again, the Office never accepted that the patient fell onto appellant's neck or back nor did they accept that appellant was lifting the patient therefore these factual histories are inaccurate.

Dr. Curtis' medical opinion lacks the requisite medical rationale. Her sole reasoning as to how the incident caused appellant's condition was that appellant could perform activities before the incident occurred and deteriorated afterwards. Dr. Curtis offered an opinion without any rationale as support apart from that had the incident had not occurred then appellant's condition would not have deteriorated. The Board has held that an opinion that a condition is causally related because the employee was asymptomatic before the injury is insufficient, without sufficient rationale, to establish causal relationship.¹⁰

Dr. Curtis did not explain how the incident made appellant's condition worsen. She stated that after the incident appellant's arthritis worsened in his spine and neck root compression. Dr. Curtis did not offer an opinion as to how appellant's condition was affected by the incident except to opine that if the incident had not occurred appellant's arthritis would not have worsened. The mere fact that a disease or condition manifests itself during a period of employment is insufficient to establish a causal relationship.¹¹ Additionally Dr. Curtis first evaluated appellant many years after the incident therefore her report and subsequent medical opinion need to contain a more substantial medical rationale to establish causal relationship between the incident and appellant's condition.¹²

CONCLUSION

The Board finds that appellant failed to establish that he sustained a traumatic injury in the performance of duty.

⁹ *Kathy A. Kelley*, 55 ECAB 206 (2004).

¹⁰ *Michael S. Mina*, 57 ECAB ____ (Docket No. 05-1763, issued February 7, 2006).

¹¹ *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

¹² *Linda L. Mendenhall*, 41 ECAB 532 (1990).

ORDER

IT IS HEREBY ORDERED THAT the December 11, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 21, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board