File Number:
HR20-D-H

U.S. DEPARTMENT OF LABOR

RECEIVED AUG 19 2019

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

Date of Injury: 10/03/2018
Employee: JONATHAN L. MONTROSE

Dear

This is in reference to your workers' compensation claim. Pursuant to your request for a Review of the Written Record, the case file was transferred to the Branch of Hearings and Review.

The review was completed on 08/13/2019. As a result of such review, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's decision.

Your case file has been returned to the Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300

Sincerely,

Division of Federal Employees' Compensation

PAUL H FELSER
FELSER LAW FIRM, P.C.
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.

Washington DC, August 14, 2019

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of Claimant; Employed by the Case number

Examination of the written record was completed on August 13, 2019. Based on the review, the decision of the district office dated March 1, 2019 is set aside for the reasons set forth below.

The issue for determination is whether the claimant suffered a work-related Traumatic Injury as defined by the Federal Employees' Compensation Act (FECA).

born is employed as a with the He filed Form CA-1 for a Traumatic Injury alleged to have occurred on File number was assigned. On this date, the claimant was responding to a staff assistance call for a fight on the compound. While responding, he placed an inmate on the ground to gain control of him. While doing this, he landed in a fire ant pile. He claimed an injury to the back and leg. This case was denied following development and has been appealed to the Branch of Hearings and Review.

Mr. also filed Form CA-1 for a Traumatic Injury alleged to have occurred on On this date, he was responding to a staff assistance call for a fight on the compound. While responding, he placed an inmate on the ground to gain control of him. A low back and leg condition were claimed. This is the instant case on appeal.

A "Staff Injury Assessment and Followup" form dated was received from the agency health unit. The claimant was noted to have been breaking up a fight on the compound. He had to bring an inmate down to the ground and he twisted his back in the process. The assessment was left-sided tenderness of the left lower back. This report was signed by a nurse.[1]

On October 22, 2018 the claimant was evaluated by M.D. of He stated, "When I saw him on 9/17, he was having severe pain down his leg. He relates to me today that he was actually injured on two occasions this fall, once on 9/11/18 and again a second time on 10/3/18. Both of these involved working at the as a and then being called to break up an altercation between inmates, both of which involved him having to pull the inmates or lift them when he felt sharp and increased pain." Dr. stated that there were symptoms of a recurrent disc herniation and he believed that this likely contributed to a worsening of this condition. A lumbar epidural steroid injection was recommended on this date.

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[1] Lay individuals such as physician assistants, nurse practitioners and social workers are not competent to render a medical opinion. 53 ECAB (Docket No. issued).

By letter dated January 25, 2019 the Office advised the claimant of the factual and medical evidence necessary to prevail in his claim for benefits. Thirty days were afforded for a reply.

In response, the Office received a treatment note from Dr. The claimant was seen as a new patient with a 2½ year history of constant stabbing, burning, and aching low back pain. This radiated down the posterior aspect of the left leg. The pain was so severe that Mr. underwent microdiscectomy at the L4 5 level in February 2017. However, his pain did not resolve following this procedure. He took medication, used a TENS unit and sought chiropractic treatment. He underwent lumbar MRIs in and The assessment was lumbar radiculopathy, low back pain, post-laminectomy instability and a recurrent disc herniation (L4-5). Dr. stated, "The pain began in earnest about two months ago and now is associated with weakness and numbness down the left leg where it is interfering with his ability to work." Treatment options were discussed including surgical intervention.

The Office also received a response to the medical questions posed in the development letter, although there is no date or signature on this document therefore the author is unknown. According to this, the claimant saw Dr. on and He was said to have been injured on and again on Both incidents occurred at work while breaking up altercations between inmates. A discussion was supplied relative to the physical findings on exam and the assessment was post-laminectomy instability with recurrent disc herniation, lumbar radiculopathy and low back pain. Mr. was said to be a candidate for fusion-based surgery. With regard to causation, this note reads,

> " works at the correctional institute as a and was called to break up an altercation between inmates, both of which involved him having to pull the inmates or lift them when he felt sharp and increased pain. does have signs and symptoms of recurrent disc herniation, and I do believe most likely that these incidents have contributed to the worsening of his condition."

By decision dated March 1, 2019 the Office formally denied the claim on the basis that there had been no medical evidence received which contained a diagnosis in connection with the claimed work event.

The claimant disagreed with the March 1, 2019 decision and requested an oral hearing. A telephone hearing was scheduled to take place on June 11, 2019 at 12:45pm. Prior to the proceeding Mr. attorney contacted the Office and asked that the appeal be converted to a review of the written record. In accordance with this request, the appeal record was changed to a record review. Additionally, a letter was sent to the employing agency on June 10, 2019 requesting comments or documents believed to be relevant and material to Mr. claim. The claimant and his attorney were copied on this correspondence. No comments were submitted for consideration. Accordingly, the Branch now conducts the review of the record.

I have carefully reviewed all the evidence of record and find that the decision of March 1, 2019 should be *SET ASIDE and REMANDED* for the reasons set forth below.

An employee seeking benefits under the Federal Employee's Compensation Act[2] has the burden of establishing the essential elements of 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

[2] 5 U.S.C. §§ 8101-8193.

any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

In order to determine whether an employee actually sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. There are two components involved in establishing fact of injury which must be considered. 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. Second, the employee must submit sufficient evidence, generally in the form of medical evidence, to establish that the employment incident caused the personal injury.[4]

Mr. filed Form CA-1 for a Traumatic Injury alleged to have occurred on Following development, the claim was denied on the basis that the medical evidence failed to provide a diagnosis that could be connected to the work event. This is the issue on appeal. As outlined above, the claimant also filed a claim for a Traumatic Injury which occurred on Following development, this case was also denied. It has been appealed and will be addressed under separate cover.

On review, I find that the Office's decision must be set aside. At the time of the denial, they stated that a diagnosis had not been supplied in connection with the claimed work event. However, I find this assessment to be erroneous. Prior to the denial, the file contained an report from Dr. within which he diagnosed lumbar radiculopathy and a recurrent L4-5 disc herniation. The file also contained a report from Dr. within which he diagnosed lumbar radiculopathy, post-laminectomy instability and a recurrent disc herniation at the L4-5 level. This supports that the diagnoses outlined in the report were present *prior* to the njury. However, they are still considered conditions that could be connected to the work event either by aggravation or acceleration.[5] As such, I find that the medical component of the Fact of Injury element has been established. The evidence also supports that the claimed event occurred within the Performance of Duty. Therefore, the remaining element that must be established is Causal Relationship.

Causal relationship is a medical issue,[6] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established factors of employment. The opinion of the physician must be based on a complete factual and medical background, 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 established factors of employment.[7] The mere concurrence of a condition with a period of employment does not raise an inference of causal relation between the two.[8]

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[3] 51 ECAB (1999)

[4] 51 ECAB (2000).

[5] Mr. was also noted to have back pain, however pain is not a valid diagnosis for purposes of the FECA. Part 2-0803-3 of the FECA states.., a medical condition, however minor or seemingly incongruous, must be stated. Findings of pain or discomfort alone do not satisfy the medical aspect of the fact of injury determination.

[6] 37 ECAB (1986).

[7] 41 ECAB (1989).

[8] 27 ECAB 1975.

Additionally, the evidence of record establishes that the claimant has a significant pre-existing history of back problems which includes spinal surgery, performed in February Therefore, it is imperative that his physician differentiate between any pre-existing conditions versus injuries sustained secondary to the work injury. Chapter 2-0805(3)(e) of the FECA Procedure Manual addresses evidence needed if an underlying condition exists. In any case where a pre-existing condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration or precipitation, the physician must provide rationalized medical opinion which differentiates between the effects of the work-related injury or disease and the pre-existing condition. Such evidence will permit the proper kind of acceptance (e.g., temporary vs. permanent aggravation).

In support of the claim, Mr. supplied reports from Dr. dated and As outlined above, the note *pre-dates* the injury in the instant case and as such, is of no probative value in establishing causation. At that appointment, Mr. was noted to have lumbar radiculopathy, post-laminectomy instability, and an L4-5 disc herniation.

The claimant returned to Dr. on It was at that appointment that he documented injuries as having occurred on and Specifically, he explained that during both incidents Mr. was called to break up an altercation between inmates, both of which involved him having to pull the inmates or lift them. Dr. stated that the claimant's symptoms were indicative of a recurrent disc herniation. He also diagnosed lumbar radiculopathy however no explanation was provided to support the cause for these conditions.

The file contains an October 3, 2018 "Staff Injury Assessment and Followup" form. The claimant reported low back pain after breaking up a fight and bringing an inmate to the ground. The assessment was tenderness in the left low back however this is considered a symptom as opposed to an actual diagnosis. Further, this report was signed by a nurse, and not a qualified physician for purposes of the FECA. Lay individuals such as physician assistants, nurse practitioners and social workers are not competent to render a medical opinion.[9]

The file also contains a typed response to the medical portion of the Office's development letter. The content of this correspondence has been outlined in detail earlier in this decision. However, it is of no probative value as it has not been signed by a qualified physician for purposes of the FECA. In fact, there is no signature whatsoever on the form. It is well established that, to constitute competent medical opinion evidence, the medical evidence submitted must be signed by a qualified physician.[10]

Following the denial, Mr. submitted a note from PA-C although this is of limited probative value as it was not co-signed by a physician. In this report, Mr. e-iterated that the claimant had been involved in work related injuries on and at which time he was pulling fighting inmates off of each other. He stated that this caused his post-laminectomy syndrome to worsen and become more symptomatic. Mr. noted that Dr. had documented a permanent worsening of the claimant's condition at the last visit. He noted that Mr. continued to suffer with constant and severe back and left lower extremity pain. He stated that the MRI from documented evidence of a recurrent disc herniation at the L4-5 level. The claimant was involved in another work related incident on although an MRI was not performed after that event.

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[9] 53 ECAB (Docket No. issued

[10] 51 ECAB (Docket No. issued

While the above noted evidence by itself is not sufficient to support causation, Mr. submitted an narrative note from Dr. post denial within which he offered an affirmative opinion as to the cause for the claimant's diagnosed back condition. Dr. acknowledged that Mr. had undergone microdiscectomy in and at an appointment on he complained of increased leg pain. He was said to have a recurrent disc herniation at the L4-5 level that may require surgical intervention. Dr. noted that following this, on the claimant was involved in breaking up an altercation at work and experienced a marked increase in his pain. It was Dr. opinion that Mr. aggravated a pre-existing condition worsening his herniation to the point that surgical intervention may be required. He stated, "Specifically, the injury of and subsequently where he was pulling fighting inmates off of one another were the injuries that had the effect of causing his post-laminectomy syndrome to worsen or become more symptomatic with a diagnosis of radiculopathy. The assessment was low back pain, postlaminectomy syndrome, lumbar spondylolisthesis, and lumbar radiculopathy. In conclusion, Dr. stated, "He has suffered a permanent worsening of his condition and requires operative intervention to involve decompression and ankyloses ultimately." He specifically stated that the surgery was indicated secondary to the work injuries of and

While the report is insufficient to accept the claim outright, it is considered *prima facie* sufficient to warrant further development. Specifically, the report of Dr. is not sufficiently rationalized to meet the claimant's burden of proof, however it does raise an uncontroverted inference of causal relationship between his back condition and the claimed work event.

The claimant has the burden of proof to establish the basic requirements of the claim but, once the claimant has made a prima facie claim, the Office has the responsibility to take the next step, either of notifying the claimant of what additional evidence is needed to establish the claim fully, or of developing the evidence in order to reach a decision. A prima facie claim is one that on first appearance demonstrates entitlement to compensation and which always requires further development if it is not accepted.[11]

Proceedings under the FECA are not adversarial in nature, nor is the Office of Workers' Compensation Programs a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[12]

The Employees' Compensation Appeals Board has consistently found that once an employee has established a *prima facie* case, i.e. when he or she has submitted evidence supporting the essential elements of his or her claim, including evidence of causal relationship, the Office has the responsibility to take the next step, either of notifying the employee what additional evidence is needed to fully establish the claim, or of developing evidence in order to reach a decision on the employee's entitlement to compensation.[13]

In the case of [14] the Board opined: "If the medical evidence supports the claimant's claim, even though it is insufficient to discharge claimant's burden of proving by the weight of reliable, substantial, and probative evidence that the condition was causally related to the work related injury, it does constitute sufficient evidence in support of claimant's claim to require further development by the Office."

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11 45 ECAB ___ (Docket No. issued).
12 41 ECAB ____ (Docket No. issued).
13 41 ECAB , (1990).
14 34 ECAB (1983).

Upon return of the case file, the Office must administratively combine the instant claim for an Traumatic Injury with file number for a Traumatic Injury. *Cases should be combined where correct adjudication depends on cross-referencing between files.*[15] The Office must prepare a Statement of Accepted Facts (SOAF) which details both of the above noted injuries. Upon completion, the claimant should be referred for a second opinion examination with a Board Certified specialist for an opinion as to whether Mr. diagnosed back conditions have been caused, aggravated, accelerated or precipitated by the and/or work events. The Office should supply the accepted definition of causal relationship as outlined in Chapter 2-0805(2) of the FECA Procedure Manual. Additionally, the examiner should be advised that it is not necessary for the employment duties alone to have caused the claimant's condition, in order for it to be compensable. It needs only to have contributed to it.[16] Based upon this, the second opinion physician should provide a well-rationalized medical explanation regarding whether the above referenced Traumatic Injuries, as outlined in the SOAF, contributed to Mr. diagnosed back conditions either by direct cause, aggravation, acceleration, or precipitation. If aggravation is indicated, the examiner should address whether this is temporary or permanent. If temporary, it should be stated when the aggravation is expected to cease. The evidence of record also supports that Mr. has a prior history of back problems which includes a microdiscectomy at the L4-5 level (performed in February 2017.) Therefore, it is imperative that the examiner differentiate between any pre-existing conditions versus any effects of the and work events. Medical rationale, as well as a discussion of the objective evidence, should be supplied to support the opinion rendered. Following receipt and review, the Office should take any further development action deemed necessary and issue a *de novo* decision addressing causal relationship.

As outlined above, Mr. has also appealed the February 15, 2019 denial, issued under file number relative to the September 11, 2018 Traumatic Injury. A separate decision has been issued in this regard, however the Office has been provided with the same instructions which consist of referring the claimant for a second opinion examination with a board certified specialist to further assess causation.

Consistent with the above findings, the decision of the district office dated March 1, 2019 is hereby set aside and ***remanded*** for further development. The case file is returned for further processing as noted.

ISSUED:

WASHINGTON, D.C.

Hearing Representative
Branch of Hearings and Review
for
Director, Office of Workers'
Compensation Programs

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[15] docket No. issued October 29, 2004).

[16] Where a person has a preexisting condition, which is not disabling but which becomes disabling because of aggravation causally related to the employment, then regardless of the degree of such aggravation, the resulting disability is compensable. It is not necessary to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relation. If the medical evidence reveals that an employment factor contributes in any way to the employees condition, such condition would be considered employment related for purposes of compensation under the Act (41 ECAB (Docket No. issued).