United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 12-1843**
	)	**Issued: April 19, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Bronx, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On August 29 2012 appellant, through her attorney, filed a timely appeal from the June 21, 2012 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.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a traumatic injury in the performance of duty on November 28, 2008.

FACTUAL HISTORY

This case was previously on appeal before the Board. In a decision dated December 22, 2010, the Board found that appellant did not meet her burden of proof to establish that she

[1] 5 U.S.C. § 8101 *et seq.*

sustained a traumatic injury in the performance of duty on November 28, 2008.[2] The Board found that the medical evidence was insufficient to establish that her employment duties on that date caused an injury. The facts of the case, as set forth in the prior decision, are incorporated by reference.

By letter received November 11, 2011, appellant's representative requested reconsideration and submitted additional medical evidence.

In a January 21, 2011 report, Dr. Lucas Bottcher, a chiropractor, noted that appellant was examined on December 8, 2008 for examination of injuries related to an incident on November 28, 2008. He advised that radiographic examination of the cervical spine revealed subluxation of the cervical spine, a loss of the cervical lordosis and C4 disc space narrowing and the lumbar spine revealed subluxation and dextroscoliosis and disc space narrowing at L4-5 and L5-S1. Dr. Bottcher indicated that the injuries appellant sustained were a competent producing cause of the diagnoses which included: cervicalgia at C2-3, C3-4, C4-5 and C5-6 degenerated discs with disc herniations approximately two millimeters with cord impingement and flattening, reversal of the cervical lordosis, bilateral cervical radiculopathy of C6; right S1 lumbar radiculopathy/right sciatica; degenerative disc at L4-5, low back syndrome, small joint effusion -- right shoulder and fluid surrounding the bicipital tendon of the right shoulder. Appellant reported that she had chronic neck and lower back pain, pain radiating towards her right shoulder; numbness/tingling in her right hand and lower back pain radiating into her right foot. Dr. Bottcher advised that appellant had a permanent restriction of ranges of motion to the cervical and lumbar regions as indicated. He opined that "in my professional opinion, the injuries sustained are causally related to the accident. There are permanent significant residuals that are affecting appellant's ability to perform all of her previous routine activities of daily and social living." Dr. Bottcher advised that appellant reached maximum medical improvement. The record also contains numerous treatment notes dating from November 18, 2011 to May 18, 2012 from Dr. Bottcher.

In an April 22, 2011 report, Dr. Jacob Nir, a physiatrist, noted appellant's history of injury and treatment which included that on November 28, 2008 while working, cleaning and lifting patients, she had low back pain at the end of her shift. He stated that she had a prior injury on August 12, 2007 in which appellant slipped on a wet surface, fell backwards and broke her fall with her right wrist, arm and shoulder.

Dr. Nir indicated that appellant injured her neck, right shoulder and low back. He advised that x-rays showed subluxations of the cervical spine, loss of cervical lordosis and C3-4 disc space narrowing as well as lumbar subluxation, dextrascoliosis and disc space narrowing at L4-5 and L5-S1. Dr. Nir indicated that appellant was totally disabled as a result of these injuries. He opined that "[i]n my professional opinion, the injuries are causally related to the accident of November 28, 2008." In an April 22, 2011 electromyography (EMG) scan, Dr. Nir diagnosed bilateral L5-S1 lumbar radiculopathy/ sciatica.

[2] Docket No. 10-490 (issued December 22, 2010). On November 28, 2008 appellant alleged that she injured her right shoulder and back after turning and pulling patients.

By decision dated June 21, 2012, OWCP denied modification of the October 21, 2009 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing 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 timely filed within the applicable time limitation period of FECA[3] and that an injury was sustained in the performance of duty.[4] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[6] In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.[7] 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.[8]

Rationalized medical opinion evidence is generally required to establish causal relationship. 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 specific employment factors identified by the claimant.[9]

ANALYSIS

Appellant alleged that on November 28, 2008 she was turning and pulling patients when she felt a pop in the right shoulder and felt pain in the back the next day. The Board previously found that the claim had not been established because the medical evidence was insufficient to establish the second component of fact of injury, that the November 28, 2008 employment

[3] *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[5] *Delores C. Ellyett*, 41 ECAB 992 (1990).

[6] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[7] *John J. Carlone*, 41 ECAB 354 (1989).

[8] *See id.* For a definition of the term "traumatic injury," *see* 20 C.F.R. § 10.5(ee).

[9] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

incident caused an injury. The medical reports of record do not establish that turning and pulling of patients on November 28, 2008 caused an injury.

Appellant provided reports and treatment notes dating from November 18, 2011 to May 8, 2012 from Dr. Bottcher, a chiropractor. In his January 21, 2011 report, Dr. Bottcher noted that appellant was examined for injuries related to an incident on November 28, 2008. He determined that x-rays of the cervical spine revealed a subluxation, loss of the cervical lordosis and C3-C4 disc space narrowing. Dr. Bottcher also indicated that x-rays of the lumbar spine revealed subluxation and dextroscoliosis and disc space narrowing at L4-L5 and L5-S1.[10] He opined that the injuries appellant sustained were a competent producing cause of appellant's diagnoses, stating that it was his "professional opinion, the injuries sustained are causally related to the accident." While Dr. Bottcher diagnosed cervical and lumbar subluxation based on x-ray and is a physician with respect to these conditions,[11] he provided an opinion on conditions other than subluxations of the spine, for which he is not considered to be a physician under FECA.[12] Furthermore, with regard to the subluxations, he only offered a conclusory opinion on causal relationship. Dr. Bottcher's opinion is of diminished probative value as he did not explain the reasons why the spinal subluxations were caused or aggravated by turning and pulling patients on November 28, 2008.

In an April 22, 2011 report, Dr. Nir noted appellant's history of injury and treatment. He advised that x-rays revealed subluxations of the cervical spine, loss of cervical lordosis and C3-4 disc space narrowing. Dr. Nir also determined that the lumbar spine revealed subluxation and dextrascoliosis and disc space narrowing L4-5 and L5-S1. He indicated that appellant was totally disabled from working as a result of these injuries. Dr. Nir opined that "[i]n my professional opinion, the injuries are causally related to the accident of November 28, 2008." However, he did not explain how he arrived at this conclusion. A physician's opinion on causal relationship between a claimant's disability and an employment injury is not conclusive simply because it is rendered by a physician. To be of probative value, the physician must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.[13]

Appellant also submitted other medical reports including reports of diagnostic testing. However, these reports did not address the employment incident of November 28, 2008 as a cause of the conditions at issue. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal

[10] The Board notes that section 8101(2) of FECA provides that the term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2).

[11] OWCP's regulations define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See* 20 C.F.R. § 10.5(bb).

[12] *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[13] *T.M.*, Docket No. 08-975 (issued February 6, 2009).

relationship.[14] For these reasons, appellant has not established that the November 28, 2008 employment incident caused or aggravated a diagnosed medical condition.

Appellant may submit evidence or argument with a written request for reconsideration 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 appellant has not met her burden of proof in establishing that she sustained an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the June 21, 2012 Office of Workers' Compensation Programs' decision is affirmed.

Issued: April 19, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

[14] *Jaja K. Asaramo*, 55 ECAB 200 (2004).