United States Department of Labor
Employees' Compensation Appeals Board

M.R., Appellant	)	
and	)	**Docket No. 13-692**
	)	**Issued: August 1, 2013**
U.S. POSTAL SERVICE, WESTPORT CARRIER ANNEX, Norwalk, CT, Employer	)	

Appearances:
William E. Shanahan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 5, 2013 appellant, through her attorney, filed a timely appeal from a September 14, 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.

ISSUES

The issues are: (1) whether OWCP properly rescinded acceptance of a July 8, 2010 recurrence of disability due to a November 2, 2002 employment injury; and (2) whether appellant met her burden of proof to establish that she sustained a traumatic injury on July 8, 2010.

On appeal, appellant's attorney asserts that the medical evidence is sufficient to raise an uncontroverted inference of causal relationship requiring OWCP to further develop the claim.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On August 29, 2006 appellant, then a 32-year-old letter carrier, sustained employment-related neck and thoracic sprains and displacement of a cervical intervertebral disc without myelopathy when her postal vehicle was hit from behind.[2] She missed intermittent periods of work until she stopped on January 21, 2007. On May 8, 2007 appellant underwent an anterior cervical discectomy and fusion at C5-6. Appellant returned to modified duty on June 9, 2008.[3]

On July 8, 2010 appellant filed a claim alleging a recurrence of disability that day while carrying a bundle of mail. She experienced pain in the neck and shoulder where her original injury occurred. Appellant stopped work that day. By letter dated September 8, 2010, OWCP informed appellant that, based on her description of the circumstances surrounding the claimed recurrence, it would be adjudicated as a new traumatic injury. Appellant received continuation of pay for the period July 9 to August 22, 2010 and thereafter filed claims for compensation.

In reports dated July 9, 2010, John Napolitano, a physician's assistant in the office of Dr. Abraham Mintz, a Board-certified neurosurgeon, obtained a history that appellant was injured on July 8, 2010 while carrying and delivering mail. He provided findings on physical examination and diagnosed cervicalgia and muscle spasm. Dr. Napolitano advised that she could not work until a magnetic resonance imaging (MRI) scan study was obtained. On September 14, 2010 Mr. Napolitano indicated that appellant could return to work on September 20, 2010 with restrictions to her physical activity.

Appellant returned to modified duty on September 20, 2010. In an October 6, 2010 report, Dr. Rahul S. Anand, Board-certified in anesthesiology and pain medicine, advised that she had neck pain that radiated to her left scapula and arm and had difficulty working. He provided findings on physical examination and diagnosed cervical radiculitis and cervical disc disease. In a duty status report dated December 1, 2010, Mr. Napolitano advised that appellant could work with restrictions.

By letter dated January 5, 2011, OWCP requested a narrative report from an attending physician that included a medical explanation as to how the reported work incident caused or aggravated her medical condition. It also informed her that a physician's assistant was not a physician as defined under FECA and the reports must be countersigned by a physician to constitute medical evidence.

Appellant submitted reports dated November 3 and December 29, 2010 from Dr. Anand who described her neck and left upper extremity pain. Dr. Anand provided physical examination findings and reiterated the diagnoses.

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[2] Appellant has additional claims. On November 2, 2002 she filed a claim for a lower back injury that was adjudicated by OWCP under file number xxxxxx914 as a short-term closure. Under file number xxxxxx255, on January 20, 2004 appellant sustained an employment-related lumbar strain when she was shoveling out her postal vehicle that was stuck in snow.

[3] Appellant received a third-party settlement for this injury.

By decision dated March 4, 2011, OWCP found that the July 8, 2010 work incident occurred but denied appellant's traumatic injury claim on the grounds that the medical evidence did not establish that she sustained a medical condition causally related to the employment incident.

On January 12, 2010 appellant, through her attorney, requested reconsideration. She submitted a July 9, 2010 treatment note from Mr. Napolitano, counter-signed by Dr. Mintz. The report stated that appellant sustained an injury on July 8, 2010 while carrying mail and included examination findings and diagnosed cervicalgia and muscle spasm. On July 22, 2010 Dr. Anand reported that she returned for ongoing severe neck pain and headaches. He diagnosed unspecified musculoskeletal disorders and symptoms referable to the neck. On September 15, 2010 Dr. Mintz advised that appellant returned for follow up and complained of terrible neck pain radiating to the left trapezius. He reviewed x-ray and MRI scan studies, which demonstrated a solid arthrodesis at C5-6 and minimal degenerative changes at C6-7. Dr. Mintz advised appellant that no further surgical treatment was indicated. In reports dated December 1, 2010 and January 21, 2011, he described her continued complaints. Dr. Mintz advised that a repeat MRI scan study of the cervical spine of August 23, 2010 showed the cervical fusion at C5-6 with degenerative changes and a new very small central disc protrusion at C6-7, which could be contributing to appellant's symptoms. He also indicated that she had a left shoulder injury and recommended orthopedic evaluation.

On May 19, 2011 Dr. James I. Spak, a Board-certified orthopedic surgeon, obtained a history that appellant sustained a neck injury at work when her vehicle was struck from behind. He discussed examination of the neck and left shoulder and opined that it was relatively unlikely that she had shoulder pathology but recommended additional studies. A left shoulder MRI scan arthrogram on May 26, 2011 was suggestive of a partial intrasubstance tear. On June 6, 2011 Dr. Spak discussed the MRI scan findings and recommended surgical repair of the shoulder. In a June 24, 2011 report, John M. Carravone, a physician's assistant in Dr. Spak's office, advised that appellant would be admitted for left shoulder rotator cuff tear repair. On January 3, 2012 Dr. Spak noted a history of injury that she was carrying a bundle of mail on July 8, 2010 and was previously in a work-related motor vehicle accident on August 29, 2006. He diagnosed a left rotator cuff tear and checked a form box "yes," indicating that the diagnosed condition was caused or aggravated by the employment activity. Dr. Spak stated that the July 8, 2010 incident at work permanently aggravated appellant's preexisting condition from August 29, 2006. He indicated that she had not been advised that she could return to work, that she was last seen on June 24, 2011 and that she needed left shoulder rotator cuff surgery as a direct result of her July 8, 2010 employment injury.

On January 9, 2012 Dr. Mintz provided an attending physician's report, noting a history of injury that appellant was carrying a bundle of mail on July 8, 2010 and was also in a work-related motor vehicle accident on August 29, 2006. He diagnosed cervicalgia, shoulder region disease and spasm of muscle. Dr. Mintz checked a form box "yes," indicating that the diagnosed condition was caused or aggravated by employment activity, stating that the July 8, 2010 incident at work permanently aggravated a preexisting work-related condition from August 29, 2006. He advised that appellant was last seen on January 21, 2011.

By decision dated March 13, 2012, OWCP rescinded its conversion of appellant's claim from a recurrence to a traumatic injury and vacated the March 4, 2011 decision. It found that she sustained a recurrence of disability under file number xxxxxx880. On April 10, 2012 appellant filed a claim for compensation for the period January 9 to August 22, 2010. On April 16, 2012 appellant, through her attorney, requested a hearing. On June 11, 2012 counsel withdrew appellant's request for a hearing, requesting that it be changed to a review of the written record.

By decision dated September 14, 2012, an OWCP hearing representative rescinded acceptance of the recurrence of disability under file number xxxxxx880 and affirmed the March 4, 2011 decision, finding that appellant did not sustain a traumatic injury on July 8, 2010. The hearing representative noted that the medical evidence suggested that appellant had a new shoulder injury rather than a spontaneous worsening of the previously accepted work injury. Regarding the traumatic injury claim, the hearing representative found the July 8, 2010 incident occurred as claimed but that appellant had submitted insufficient evidence to show that carrying bundles of mail on July 8, 2010 caused her diagnosed condition or explained how the July 8, 2010 incident caused or permanently aggravated her previously accepted conditions.

LEGAL PRECEDENT -- ISSUE 1

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.[4] The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute. OWCP's burden of justifying termination or modification of compensation holds true where OWCP later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.[5]

ANALYSIS -- ISSUE 1

On March 13, 2012 OWCP accepted that under file number xxxxxx880 appellant sustained a recurrence of disability on July 8, 2010 of an August 29, 2006 employment injury and rescinded its conversion of the July 8, 2010 claim to a traumatic injury, adjudicated under file number xxxxxx411. In a September 14, 2012 decision, an OWCP hearing representative rescinded acceptance of the recurrence of disability and affirmed a March 4, 2011 OWCP decision denying that appellant sustained a traumatic injury on July 8, 2010.

The Board finds that OWCP provided sufficient justification for rescinding its prior finding that appellant sustained a recurrence of disability on July 8, 2010. OWCP properly found that the rescission was appropriate because the record does not contain sufficient evidence to establish that on July 8, 2010 she sustained a recurrence of disability. A recurrence is defined

[4] 5 U.S.C. § 8128.

[5] *Amelia S. Jefferson*, 57 ECAB 183 (2005).

as a spontaneous change in a medical condition which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[6] As appellant described on her claim form, on July 8, 2010 while carrying a bundle of mail, she experienced pain in the neck and shoulder in the region where her original injury occurred. OWCP regulations at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.[7] As initially adjudicated by OWCP in its March 4, 2011 decision, which was affirmed by the hearing representative on September 14, 2012, the claim should be adjudicated as a traumatic injury and not a recurrence of disability.

OWCP presented sufficient evidence to show that appellant did not sustain a recurrence of disability on July 8, 2010 and met its burden of proof to rescind its acceptance of the recurrence.[8]

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA[9] 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, 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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[10]

OWCP regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.[11] To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed. An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[12]

[6] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[7] *Id.* at § 10.5(ee) (1999, 2011); *Ellen L. Noble*, 55 ECAB 530 (2004).

[8] *See D.M.*, Docket No. 13-165 (issued March 19, 2013).

[9] *Supra* note 1.

[10] *Gary J. Watling*, 52 ECAB 357 (2001).

[11] *Supra* note 7.

[12] *Supra* note 10.

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[13] 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 employee.[14] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[15]

ANALYSIS -- ISSUE 2

OWCP accepted the July 8, 2010 incident in which appellant carried bundles of mail. The Board finds that the medical evidence of record is insufficient to establish that she sustained an injury or medical condition caused by this incident.

The May 26, 2011 MRI scan arthrogram of the left shoulder did not include an opinion as to the cause of any diagnosed condition. In reports dated July 22 to December 29, 2010, Dr. Anand described examination findings and diagnosed a musculoskeletal disorder, cervical radiculitis and cervical degenerative disc disease. He did not address the issue of causal relationship of the diagnosed conditions. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[16]

On July 9, 2010 Dr. Mintz reported a history that appellant sustained an injury while carrying mail on July 8, 2010 and diagnosed cervicalgia and muscle spasm. In reports dated September 10, 2010 to January 21, 2011, he noted her continued complaint of severe neck pain radiating to the left trapezius and reported that an MRI scan study demonstrated degenerative changes and a small disc protrusion at C6-7.[17] Dr. Mintz advised that appellant had a left shoulder injury. In an attending physician's report dated January 19, 2012, he noted a history of injury that she was carrying a bundle of mail on July 8, 2010 and was also in a work-related motor vehicle accident on August 29, 2006. Dr. Mintz advised that appellant was last seen on January 21, 2011 and diagnosed cervicalgia, shoulder region disease and spasm of muscle. He checked a form box "yes," indicating that the diagnosed condition was caused or aggravated by employment activity, stating that the July 8, 2010 incident at work permanently aggravated a preexisting work-related condition from August 29, 2006.

In reports dated May 19 and June 6, 2011, Dr. Spak reported a history that appellant sustained a neck injury at work when her vehicle was struck from behind. Following the

[13] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[14] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[15] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[16] *Willie M. Miller*, 53 ECAB 697 (2002).

[17] A copy of the MRI scan study report is not found in the record before the Board.

May 26, 2011 MRI scan arthrogram of the left shoulder that was suggestive of a partial intrasubstance tear, he recommended left shoulder surgical repair. In an attending physician's report dated January 3, 2012 that mirrored Dr. Mintz' January 9, 2012 report, Dr. Spak noted a history of injury that appellant was carrying a bundle of mail on July 8, 2010 and was also in a work-related motor vehicle accident on August 29, 2006. He diagnosed a left rotator cuff tear and checked a form box "yes," indicating that the diagnosed condition was caused or aggravated by employment activity, stating that the July 8, 2010 incident at work permanently aggravated a preexisting work-related condition from August 29, 2006. Dr. Mintz indicated that appellant had not been advised that she could return to work, that she was last seen on June 24, 2011 and that she needed left shoulder rotator cuff surgery as a direct result of her July 8, 2010 employment injury.

Neither Dr. Mintz nor Dr. Spak provided a sufficient explanation of a mechanism of injury explaining how the July 8, 2010 employment incident, when appellant had pain while carrying mail caused or aggravated any diagnosed condition, including a left shoulder condition that was diagnosed nine months after the employment incident. The Board has long held that an opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.[18] The Board therefore finds that the reports of Dr. Mintz and Dr. Spak are not sufficient to establish that appellant sustained an injury or diagnosed condition on July 8, 2010.

The reports of Mr. Napolitano and Mr. Carravone are not considered competent medical evidence. Reports from a physician's assistant are not considered medical evidence as a physician's assistant is not a physician as defined under FECA.[19]

As appellant did not submit sufficient medical evidence to establish that she sustained a diagnosed condition caused by the July 8, 2010 employment incident, she did not meet her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP 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 OWCP met its burden of proof to rescind acceptance of a recurrence of disability on July 8, 2010 and that appellant did not establish that she sustained an injury causally related to the July 8, 2010 employment incident.

[18] *Patricia J. Glenn*, 53 ECAB 159 (2001).

[19] *Ricky S. Storms*, 52 ECAB 349 (2001). Section 8101(2) of FECA defines the term "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2); *Paul Foster*, 56 ECAB 208 (2004).

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 1, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board