

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

R.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Greensburg, TN, Employer**

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**Docket No. 14-1415
Issued: December 29, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 11, 2014 appellant filed a timely appeal of a May 19, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions of the case.

ISSUE

The issue is whether appellant met his burden to establish that she is entitled to wage-loss compensation beginning September 25, 2013.

FACTUAL HISTORY

On December 29, 2012 appellant, then a 31-year-old mail rural carrier, filed a Form CA-1, traumatic injury alleging that on December 28, 2012 she was involved in an automobile accident and was struck from behind in her mail truck and sustained neck and back injuries. She

¹ 5 U.S.C. §§ 8101-8193.

stopped work on December 28, 2012. Appellant received continuation of pay from December 29, 2012 to February 11, 2013.

Appellant was treated by Dr. Alfred Kahn, III, a Board-certified orthopedist, for cervical and lumbar injuries. She reported being struck in her mail truck while delivering mail. Dr. Kahn diagnosed flexion and extension injury of the cervical and lumbar spine with possible disc injury, old degenerative disc disease at L5-S1 and possible worsening preexisting condition secondary to accident.

In a decision dated February 20, 2012, OWCP denied appellant's claim, finding that she did not submit sufficient medical evidence to establish her claim.

On March 12, 2013 appellant requested reconsideration. She submitted reports from Dr. Kahn, dated January 28 to February 28, 2013, who diagnosed cervical disc protrusion at multiple levels and recommended epidural steroid injections. A February 12, 2013 magnetic resonance imaging (MRI) scan of the cervical spine revealed no abnormalities. An MRI scan of the lumbar spine dated February 12, 2013 revealed central disc bulge or protrusion at L5-S1.

In a decision dated May 30, 2013, OWCP again denied the claim finding that appellant submitted insufficient medical evidence supporting causal relationship.

On June 20, 2013 appellant requested reconsideration. She submitted a June 12, 2013 report from Dr. Kahn who diagnosed flexion/extension injury of both the cervical and lumbar spine with possible worsening of a preexisting condition degenerative disc disease at L5-S1 secondary to the work injury of December 28, 2012. Dr. Kahn opined that appellant's condition was directly and causally related to her work-related motor vehicle accident of December 28, 2012.

On June 26, 2013 OWCP referred appellant to Dr. Edward G. Fisher, a Board-certified orthopedist, for a second opinion. In a July 26, 2013 report, Dr. Fisher listed his diagnosis as cervical and lumbar sprain/strain as a direct result of the motor vehicle accident on December 28, 2012 which healed and resolved and was no longer clinically present. He noted that the cervical and lumbar sprain/strains were work-related conditions. Dr. Fisher noted preexisting degenerative disc disease/disc bulge over L5-S1 as noted on the MRI scan of February 2013 was nonwork related. He indicated that upon clinical examination he found no positive current objective findings over the cervical or lumbar areas and opined that there were no residuals still active or present. Dr. Fisher noted that his findings on examination were strictly subjective ones over the neck and lumbar/lumbosacral areas. He indicated that with appellant's current medical condition was not due to the work-related accident as the clinical findings were strictly subjective complaints with no positive clinical objective findings. Dr. Fisher indicated that since the cervical sprain/strain and the lumbar sprain/strain resolved and there were no positive objective findings over the cervical or lumbar areas, appellant was able to perform the full duties of the rural letter carrier as described in the statement of accepted facts, without restrictions. He further noted that the cervical sprain/strain and the lumbar sprain/strain had healed and resolved and were no longer clinically present on examination. Therefore, no treatment was necessary or appropriate.

On September 13, 2013 OWCP accepted the claim for cervical strain and lumbar sprain, resolved by September 13, 2013 based on Dr. Fisher's report. By decision dated September 13, 2013, it vacated its May 30, 2013 decision and noted that it had accepted appellant's condition for cervical strain and lumbar strain, resolved by September 13, 2013. OWCP indicated that this case had been accepted and then closed because her condition had resolved. It advised appellant to file a Form CA-7, claim for compensation, if she wished to claim wage-loss compensation.

On September 24, 2013 appellant filed a Form CA-7, claim for compensation, from February 12 to September 13, 2013. On October 11, 2013 OWCP issued her a wage-loss compensation payment covering the period February 12 to September 13, 2013.

On September 26, 2013 appellant requested reconsideration. She asserted that her injuries remained symptomatic and she required surgery. Appellant submitted a September 11, 2013 report from Dr. Kahn who noted that she continued to be symptomatic and has exhausted all conservative treatment. Dr. Kahn recommended an L5-S1 left-sided laminotomy discectomy foraminotomy. In a September 23, 2013 report, he diagnosed degenerative changes and retrolisthesis and recommended an L5-S1 left-sided laminotomy discectomy foraminotomy. Dr. Kahn indicated that appellant's current symptoms and surgical need were the result of the industrial injury in the work-related motor vehicle accident. He noted that the accident resulted in aggravation of preexisting degenerative disc disease at L5-S1 which was asymptomatic prior to her injury. Dr. Kahn noted that appellant failed conservative treatment and remained disabled from all work.

On November 4, 2013 appellant filed a Form CA-7, claim for compensation for total disability for the period September 25 to November 1, 2013.

On November 13, 2013 OWCP acknowledged receipt of appellant's CA-7 form, claim for compensation. It advised that, on September 13, 2013, the accepted conditions were determined to be resolved as of that date and appellant was not entitled to further compensation. OWCP advised her to exercise her appeal rights.

In a decision dated December 18, 2013, OWCP denied modification of the decision dated September 13, 2013.

Appellant filed a reconsideration request dated February 24, 2014 and asserted that her work injuries were severe and caused permanent restrictions. She submitted an emergency room report dated December 28, 2012 from Dr. Michael McCarty, an emergency room physician, who diagnosed bilateral trapezius strain from a motor vehicle accident. Appellant reported being struck by a truck in the rear and experiencing worsening back and shoulder pain. She submitted physical therapy notes from January 28, 2013.

In a February 18, 2014 report, Dr. Kahn noted treating appellant for injuries sustained on December 28, 2012 when her mail truck was struck by another vehicle. He noted that she was diagnosed with whiplash in the emergency room. Dr. Kahn advised that appellant was treated by a chiropractor several years earlier for her back but never had problems with her neck prior to the accident. He performed a laminotomy, discectomy, and foraminotomy at L5-S1 on October 8, 2013 and released appellant to work on January 29, 2014 with restrictions on lifting. Dr. Kahn

noted that she was functioning without any symptoms prior to the December 28, 2012 work accident. He opined that within a reasonable degree of medical certainty appellant's preexisting condition of degenerative disc disease at L5-S1 was significantly aggravated by her work injury of December 28, 2012 and that her need for treatment for the cervical spine condition was related to the work injury of December 28, 2012. Dr. Kahn noted that the diagnoses of whiplash and sprain/strain noted in the emergency room records was a catch all diagnoses and with additional diagnostic testing a comprehensive diagnoses was made. He indicated that although appellant had preexisting degenerative disc disease she was continuing to work and was asymptomatic and he opined that the work accident aggravated the degenerative disc disease.

In a decision dated May 19, 2014, OWCP denied modification of the December 18, 2013 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence. For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury. Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of reliable, probative, and substantial medical opinion evidence.² Such medical evidence must include findings on examination and the physician's opinion, supported by medical rationale, showing how the injury caused the employee disability for his or her particular work.³

Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.⁴ The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.⁵

ANALYSIS

OWCP advised appellant of the acceptance of her condition for cervical strain and lumbar strain, and that the strains resolved as of September 13, 2013. In its acceptance of the claim, it invited her to submit a CA-7 form if she felt that she had wage loss due to the claimed injury. Appellant submitted a CA-7 form claiming compensation from February 12 to September 13, 2013, which OWCP paid on October 11, 2013. Thereafter, she submitted another CA-7 form claiming compensation from September 25 to November 1, 2013. Appellant also

² *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

³ *Dean E. Pierce*, 40 ECAB 1249 (1989).

⁴ *Laurie S. Swanson*, 53 ECAB 517, 520 (2002). *See also Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

⁵ *Jefferson*, *supra* note 2.

requested that her claim be expanded to include the aggravation of her degenerative conditions. OWCP denied this claim resulting in the instant appeal.⁶

Appellant submitted a February 18, 2014 report from Dr. Kahn who noted that she never had problems with her neck before the December 28, 2012 injury. Dr. Kahn performed a laminotomy, discectomy, and foraminotomy at L5-S1 on October 8, 2013 and released her to work on January 29, 2014 with restrictions. He opined that within a reasonable degree of medical certainty appellant's preexisting condition of degenerative disc disease at L5-S1 was significantly aggravated by her work injury of December 28, 2012 and that her need for treatment in the cervical spine was related to the work injury of December 28, 2012. The Board finds that Dr. Kahn he did not provide medical rationale explaining the basis of his conclusory opinion regarding the causal relationship between appellant's aggravation of degenerative disc disease, surgery, and continuing disability and the factors of employment.⁷

Additionally, OWCP did not accept appellant's claim for aggravation of preexisting degenerative disc disease at L5-S1 as a result of the December 28, 2102 work injury and there is no reasoned medical evidence to support such a conclusion.⁸ Dr. Kahn further noted that although she had preexisting degenerative disc disease she was asymptomatic prior to the December 28, 2012 accident and the accident aggravated the degenerative disc disease causing her to need surgery. However, an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury is insufficient, without supporting rationale, to support a causal relationship.⁹

Other reports from Dr. Kahn also did not provide medical reasoning to support that appellant's disability beginning September 25, 2013 was attributable to the accepted conditions. For example, in a September 11 and 23, 2013 reports, he noted her status and recommended surgery. While, in the September 23, 2013 report, Dr. Kahn indicated that appellant's work injury aggravated her preexisting degenerative disc disease at L5-S1, he provided no medical rationale to support his opinion other than to assert that she had been previously asymptomatic.¹⁰

Appellant submitted an emergency room report from Dr. McCarty dated December 28, 2012 who treated her for injuries sustained in a work-related motor vehicle accident.

⁶ The Board notes that, although OWCP accepted the claim and paid a limited period of compensation for wage loss, payment was made pursuant to a specific period claimed on a Form CA-7. Under these circumstances, appellant retains the burden of proof of establishing that she was disabled for work due to residuals of her accepted condition for periods claimed on specific CA-7 forms. *P.H.*, Docket No. 11-1905 (issued May 22, 2012); *Carlos A. Marrero*, 50 ECAB 117, 118 (1998); see *Donald Leroy Ballard*, 43 ECAB 876, 882 (1992).

⁷ See *T.M.*, Docket No. 08-975 (issued February 6, 2009) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

⁸ Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁹ *Kimper Lee*, 45 ECAB 565 (1994).

¹⁰ See *id.*

Dr. McCarty diagnosed bilateral trapezius strain from a motor vehicle accident. However, this report does not establish disability after September 13, 2013 because it significantly predates the time of the claimed disability. Appellant also submitted physical therapy notes. The Board has held that treatment notes signed by a physical therapist are not considered medical evidence as they are not a physician under FECA.¹¹

Furthermore, the record contains the July 26, 2013 report of Dr. Fisher, an OWCP referral physician, who diagnosed cervical and lumbar sprain/strain as a result of the December 28, 2012 motor vehicle accident but found that these conditions had resolved by the time of his examination. He opined that appellant's degenerative lumbar condition was preexisting and not employment related. Dr. Fisher advised that, since the cervical sprain/strain and the lumbar sprain/strain were resolved and no longer clinically present on examination, no further treatment was necessary or appropriate.

There is no other medical evidence of record from a physician which gives reasoned support that appellant had any employment-related disability beginning September 25, 2013.

On appeal, appellant contends that she submitted sufficient medical evidence from Dr. Khan to establish that the work injury of December 28, 2012 aggravated her preexisting condition of degenerative disc disease and necessitated surgery and continued disability. As noted above, the mere fact that she was asymptomatic and working full duties prior to her injury is insufficient, without supporting rationale. There is no other medical evidence of record from a physician to support that appellant had any employment-related disability beginning September 25, 2013.

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 did not establish her entitlement to disability compensation beginning September 25, 2013.

¹¹ See *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 29, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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