United States Department of Labor
Employees' Compensation Appeals Board

L.G., Appellant	)	
and	)	**Docket No. 13-1867**
	)	**Issued: January 29, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Waverly, OH, Employer	)	

Appearances:
Alan J. Shapiro, 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 August 7, 2013 appellant, through her attorney, filed a timely appeal from a June 28, 2013 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 developed a back condition causally related to factors of her federal employment.

FACTUAL HISTORY

On September 12, 2012 appellant, then a 56-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging a back injury in the performance of duty. She noted that her

[1] 5 U.S.C. § 8101 *et seq.*

injury was due to repetition at work and genetic factors. Appellant first reported her condition to her supervisor on September 4, 2012, having stopped work on August 17, 2012.

On September 17, 2012 OWCP requested additional factual and medical evidence. It noted that appellant had not substantiated the factual elements of her claim and that the medical evidence was also insufficient. OWCP afforded her 30 days to submit additional evidence and respond to its inquiries.

In an emergency department report dated May 12, 2012, Dr. Corey M. Amann, a Board-certified family physician, diagnosed appellant with sciatica. He prescribed medicine for treatment.

In an emergency department report dated May 17, 2012, Dr. Philiph I. Bialecki, Board-certified in emergency medicine, diagnosed appellant with a herniated disc and acute right sciatica. He noted that she had a prior history of back problems.

In a diagnostic report dated May 25, 2012, Dr. David Magee, a Board-certified radiologist, noted mild-to-moderate spondylitic changes on x-ray, greatest in the lower facet joints with a grade one anterolisthesis of L4 on L5.

In a report dated May 25, 2012, Dr. James E. Fleming, Jr., a Board-certified orthopedic surgeon, diagnosed appellant with degenerative spondylolisthesis at L4 and L5. He stated that she had noted back pain of three weeks duration. On physical examination, appellant's lumbar and cervical ranges of motion were full and painless in all planes. There were no sensory changes in the cervical or lumbar dermatomes and full and painless range of motion in all major joints. Dr. Fleming recommended physical therapy and referred appellant to another physician for consideration of epidural steroid injections.

In an undated statement, appellant noted that she began treatment by chiropractors and a physician in October 2001. Until May 7, 2012, she had been able to work with the help of massage and adjustment. On May 7, 2012 appellant did not work because her pain was so severe that she could not walk. She did not return to work for several weeks while she sought treatment. On August 18, 2012 appellant lost her balance and fell. She determined on the advice of her physicians that she needed to have surgery. Appellant noted that her back condition, prior to the last episode, was aggravated by a heavier volume of mail and parcels.

In a report dated June 8, 2012, Dr. Karen C. Evans, Board-certified in physical medicine and rehabilitation, stated that appellant's symptoms started on May 7, 2012 and were aggravated by standing and walking. She noted significant degenerative changes at L4-5 with right lower limb dysesthesias. On examination of a May 10, 2012 magnetic resonance imaging (MRI) scan Dr. Evans noted a right paracentral interior annular tear at L4-5, a left paracentral posterior focal annular tear, protrusion of the disc approximating the right L4 nerve root and a significant amount of facet arthropathy causing narrowing of the bilateral neuroforamen.

In a report dated June 18, 2012, Dr. Evans noted that appellant had a right L4-5 transforaminal lumbar epidural steroid injection.

In a diagnostic study dated June 18, 2012, Dr. Bang H. Huynh, a Board-certified radiologist, interpreted an x-ray of appellant's lumbar spine. He diagnosed a grade one anterolisthesis of L4 and L5 and a needle at the level of L5.

In physical therapy notes dated June 6 through July 13, 2012, a physical therapist noted appellant's course of treatment and progress.

On July 17, 2012 Dr. William B. Mitchell, a Board-certified radiologist, obtained an x-ray of appellant's lumbar spine. He found no evidence of an acute osseous fracture, other acute fractures or dislocations in the lumbar spine. Dr. Mitchell noted overlying needles.

In a work status report dated September 4, 2012, Dr. Fleming recommended that appellant be off work until October 4, 2012.

On September 25, 2012 Dr. Fleming diagnosed appellant with spondylolisthesis of the lumbar region and lumbar stenosis. He noted that her lower back pain was long-standing and that extension of the lumbar spine caused pain in the buttocks and right lower extremity.

In a work status report dated September 25, 2012, Dr. Fleming recommended that appellant be off work until January 28, 2013, noting that she required surgery.

In an October 4, 2012 attending physician's form report, Dr. Fleming diagnosed spondylolisthesis of the lumbar region with lumbar stenosis. He checked a box indicating that appellant's condition was caused or aggravated by her employment activity, but did not explain further. Dr. Fleming noted that she should be able to resume work on January 10, 2012 and that she was scheduled for surgery on October 10, 2012. On October 4, 2012 appellant noted that her back had bothered her intermittently for years. On May 7, 2012 it became painful such that she could not work. Dr. Fleming recommended that appellant not resume work and listed work restrictions.

By decision dated December 14, 2012, OWCP denied appellant's claim. It found that the factual evidence was not sufficient as she failed to provide a detailed description of the work factors alleged to have cause her condition. OWCP also found that the medical evidence was insufficient to support appellant's claim as the record lacked a physician's rationalized medical opinion explaining how her back condition was causally related to the factors of her employment.

On January 7, 2013 appellant requested an oral telephonic hearing before an OWCP hearing representative.

In forms dated May 25 and June 6, 2012, Dr. Fleming recommended physical therapy for treatment of appellant's condition.

On September 27, 2012 appellant stated that, since her return to work after returning to work following her injury, she had been very careful about lifting parcels and would ask for help when lifting a heavy item. She stated that her recurrence occurred on May 7, 2012, when she was scheduled to train new carriers and woke up unable to walk. Describing injuries and illnesses suffered between the date she returned to work after the original injury, appellant

asserted that she had several surgeries and returned to work earlier than her physicians thought she could. This notice of recurrence was not signed by a supervisor or compensation specialist and did not contain an OWCP file number for the original injury.

Appellant submitted records related to her prior treatment. In an excuse slip dated October 2, 2002, Dr. Leslee C. Schork, a chiropractor, noted that she had seen appellant on that date for acute middle to lower back pain. In a disability certificate dated January 26, 2004, Dr. John Bevins, a chiropractor, found that appellant was totally incapacitated from January 26 through 28, 2004 and could return to work on January 29, 2004.

In a report dated May 10, 2012, Dr. Stephen J. Pomeranz, a Board-certified radiologist, reviewed an MRI scan of appellant's lumbar spine. He found a right-sided posterior osseous stress injury at L4-5; a broad posterior disc protrusion involving L4-5 with bilateral foraminal encroachment and effacement of the right L4 exiting nerve root; grade one degenerative spondylolisthesis at L4-5 accompanied by left-sided facet joint capsular edema with facet distention; and broad noncompressive disc bulging at L2-3, L3-4 and L5-S1 accompanied by multilevel degenerative facet arthropathy resulting in mild and mild-to-moderate severity biforaminal stenosis at L3-4 and L4-5.

In a report dated September 4, 2012, Dr. Gregory W. Balturshot, a Board-certified neurologist, noted that appellant had years of progressively worsening back pain down into her right lower extremity. He diagnosed L4-5 stenosis and L4-5 radiculopathy. Dr. Balturshot recommending surgery for an L4-5 laminectomy, facetectomy, posterolateral arthrodesis and pedicle screw instrumentation.

In a report dated September 6, 2012, Dr. Scott Howard, a Board-certified osteopath, diagnosed anxiety and depression.

In a report dated November 7, 2012, Dr. Howard noted that appellant had back surgery on October 10, 2012 and had swelling and pain in her right knee.

A hearing was held before an OWCP hearing representative on April 15, 2013. Appellant testified that her original injury occurred in October 2001, when she was working as a substitute or city carrier on a part-time basis. She was a rural route carrier when she stopped work in August 2012. Appellant's duties involved putting mail in the sequence of delivery, loading mail bundles in a basket cart, loading and unloading parcels of up to 70 pounds, loading her vehicle with mail in order of delivery and delivering parcels and mail. She used a basket cart that was spring-loaded, on the advice of her chiropractor. On August 18, 2012 appellant fell onto the floor while loading the basket cart, which aggravated her symptoms. She had been back at work for two weeks when the fall occurred. Appellant asserted that the fall was not the cause of her worsening symptoms or inability to work. Her representative stated that her case should be analyzed as an occupational disease claim.

By decision dated June 28, 2013, the hearing representative denied appellant's claim finding that she had not provided sufficient evidence to establish that her claimed back condition was due to factors of her employment.

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 filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[2] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[3]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.[4] An award of compensation may not be based on appellant's belief of causal relationship. 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 a causal relationship.[5]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[6] Rationalized medical opinion evidence is medical evidence which includes a physician's reasoned opinion on whether there is a causal relationship between the claimant's diagnosed condition and the compensable employment factors. 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 claimant.[7] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the

[2] *Gary J. Watling*, 52 ECAB 278, 279 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[3] *Michael E. Smith*, 50 ECAB 313, 315 (1999).

[4] *Roma A. Mortenson-Kindschi*, 57 ECAB 418, 428 n.37 (2006); *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

[5] *P.K.*, Docket No. 08-2551 (issued June 2, 2009); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[6] *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117, 123 (2005).

[7] *Leslie C. Moore*, 52 ECAB 132, 134 (2000).

care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[8]

ANALYSIS

Appellant alleged that she sustained a back condition as a result of duties of her employment as a letter carrier. OWCP denied her claim, finding that the medical evidence was insufficient to support that her condition was caused or aggravated by factors of employment. The Board finds that appellant failed to meet her burden of proof to establish an injury as a result of factors of her federal employment.

Appellant submitted documents from several physicians that included diagnoses and recommendations for treatment. However, the physicians did not provide any opinion that she sustained a back condition due to factors of her federal employment. These documents included: the May 12, 2013 report from Dr. Amann; a May 17, 2012 report from Dr. Bialecki; a May 25, 2012 diagnostic report from Dr. Magee; notes from Dr. Fleming dated May 25 through October 4, 2012; reports of Dr. Evans from June 8 through 18, 2012; a June 18, 2012 diagnostic report from Dr. Huynh; a July 17, 2012 diagnostic report from Dr. Mitchell; a May 10, 2012 report from Dr. Pomeranz; a September 4, 2012 report from Dr. Balturshot; reports from Dr. Howard from September 6 and November 7, 2012; and a September 6, 2012 report from Dr. Dohse.

The Board has held that medical evidence that does not address the causal relationship between an appellant's condition and specified work-related factors is of diminished probative value.[9] This medical evidence lacks any probative opinion as to the causal relationship between appellant's claimed condition and the implicated work duties.

On October 4, 2012 Dr. Fleming diagnosed appellant with spondylolisthesis of the lumbar region and lumbar stenosis. He checked a box indicating that her condition was caused or aggravated by employment activity, but did not explain further. As noted, to be probative, medical evidence should provide a rationalized opinion on the issue of causal relationship between a diagnosed condition and the identified employment factors. The opinion of a 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 claimant.[10] Dr. Fleming provided a diagnosis, but failed to identify the repetitive work activities or a detailed explanation as to how appellant's physical findings supported causal relationship. He marked a form that her condition was caused or aggravated by employment activities, but did not elaborate on the fact of her treatment on which he based his stated conclusion. The Board has held that the fact that a condition manifests itself or worsens

[8] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[9] *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[10] *Leslie C. Moore*, *supra* note 7.

during a period of employment[11] or that work activities produce symptoms revelatory of an underlying condition does not raise an inference of causal relationship between a claimed condition and employment factors.[12] Dr. Fleming's October 4, 2012 report does not establish appellant's claim for work-related spondylolisthesis of the lumbar region and lumbar stenosis.

Appellant submitted reports from Drs. Schork and Bevins, chiropractors. Section 8101(2) of FECA[13] 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 and subject to regulations by the Secretary.[14] Neither, Dr. Schork nor Dr. Bevins diagnosed a spinal subluxation. Without a diagnosis of a spinal subluxation as supported by x-ray, a chiropractor is not a physician as defined under FECA. Therefore, their reports do not constitute competent medical evidence and are of no probative value on the issue of casual relation.[15]

Appellant submitted notes from physical therapists dating from June 6 through July 13, 2012. A physical therapist does not qualify as a physician under FECA. Therefore, these reports do not qualify as probative medical evidence supportive of a claim for federal workers' compensation, unless such reports are countersigned by a physician.[16] None of the physical therapy notes were countersigned by a physician. As such, the reports do not constitute probative medical evidence supportive of appellant's claim for compensation.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's conditions became apparent during a period of employment nor the belief that her condition was caused, precipitated or aggravated by her employment is sufficient to establish causal relationship.[17] Causal relationship must be established by rationalized medical opinion evidence. As appellant did not submit medical evidence in support of her claim containing a physician's rationalized opinion that she developed a back condition as a result of identified employment factors, she has not met her burden of proof to establish a causal relationship between her condition and work-related duties.[18]

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[11] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[12] *B.B.*, Docket No. 13-256 (issued August 13, 2013); *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

[13] 5 U.S.C. § 8101(2).

[14] *See* 20 C.F.R. § 10.311.

[15] *See Jay K. Tomokiyo*, 51 ECAB 361, 367-68 (2000).

[16] *See* 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 n.4 (2000) (regarding physical therapists).

[17] *See D.U.*, Docket No. 10-144 (issued July 27, 2010); *D.I.*, 59 ECAB 158, 162 (2007); *Robert Broome*, 55 ECAB 339, 341 (2004).

[18] The Board notes that appellant filed a claim for recurrence on September 27, 2012. Board precedent contemplates that, in order for there to be a recurrence, there must be an accepted condition. *See, e.g., Ricky S. Storms*, 52 ECAB 349, 351-52 (2001) (the medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury). As appellant's claim for occupational disease is denied, it is not necessary to consider whether she has sustained a recurrence.

Appellant submitted new evidence on appeal. The Board lacks jurisdiction to review evidence for the first time on appeal.[19] 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 appellant did not establish that she sustained a back condition causally related to factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 29, 2014
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

[19] 20 C.F.R. § 501.2(c).