United States Department of Labor
Employees' Compensation Appeals Board

T.B., Appellant	)	
and	)	**Docket No. 13-1930**
	)	**Issued: January 30, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Long Island, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 19, 2013 appellant filed a timely appeal from a March 27, 2013 merit decision of the Office of Workers' Compensation Programs' (OWCP) hearing representative. 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 a back injury causally related to a September 4, 2012 employment incident.

FACTUAL HISTORY

On September 6, 2012 appellant, then a 28-year-old mailhandler, filed a traumatic injury claim alleging that on September 4, 2012 she sustained left side lower back pain while working out a bulk mail center and carrying a box. She stated that the pain spread to both sides and her

[1] 5 U.S.C. § 8101 *et seq.*

upper spine. Appellant stopped work. The employing establishment noted that appellant went to the physician on September 5, 2012, but provided no documentation following the appointment.

In a September 10, 2012 report, Dr. Roland Rose, a chiropractor, stated that appellant was under his care for work-related injuries of lumbar derangement and radiculopathy sustained on September 4, 2012. He noted that she was unable to work from September 5 to 18, 2012 and would be reevaluated on September 19, 2012.

By letter dated October 3, 2012, OWCP advised appellant that her claim was initially accepted as a minor injury but would be reopened because she had not yet returned to work. It requested additional evidence to establish that the September 4, 2012 incident occurred as alleged and that she sustained a diagnosed condition as a result of the alleged incident.

In September 19 and 26, 2012 duty status reports, Dr. Rose indicated that appellant was a mailhandler who sustained a lower back injury on September 4, 2012 when she lifted parcels all night at work. He noted that she was not able to resume work.

In October 5 and 19, 2012 reports, Dr. Rose stated that appellant was under his care for September 4, 2012 work-related injuries of lumbar derangement and radiculopathy. He noted that she was unable to work from October 5 to November 1, 2012. Dr. Rose also submitted a duty status report.

In a handwritten November 14, 2012 attending physician's report, Dr. Rose stated that on September 4, 2012 appellant was working and injured her back when she lifted a box. He provided findings on examination. Dr. Rose checked "yes" that he believed that appellant's condition was caused or aggravated by an employment activity. He reported that she was disabled from work beginning September 5, 2012 and could return to work on November 16, 2012.

In a November 9, 2012 report, Dr. Rose stated that appellant was under his care for a September 4, 2012 work-related injury of lumbar derangement and radiculopathy. He indicated that she was unable to work from November 9 to 15, 2012. Dr. Rose noted that appellant would be able to return to light duty with restrictions of no lifting 10 to 15 pounds, bending, twisting or prolonged standing or sitting. He included a duty status report.

Appellant also submitted a November 14, 2012 nerve conduction study report, in which Dr. John M. Syrotynski, a chiropractor, related her complaints of low back pain from a work injury. Dr. Syrotynski suspected that she had some degree of radiculopathy or neuropathy. He reported that evaluation of the right peroneal motor and right antisensory nerves revealed reduced amplitude and that all remaining nerves were within normal limits. Dr. Syrotynski opined that appellant had mild bilateral S1 radiculopathy.

In a November 29, 2012 decision, OWCP denied appellant's claim finding insufficient factual evidence to demonstrate that the September 4, 2012 incident occurred as alleged and insufficient medical evidence to establish that she sustained any diagnosed condition as a result of the alleged incident.

On December 28, 2012 appellant requested a review of the written record.

In a December 3, 2012 report, Dr. Rose stated that appellant was under his care for September 4, 2012 work-related injuries of lumbar derangement and radiculopathy. He authorized her to return to work with restrictions of no sitting, standing for a prolonged period of time, continuous bending or lifting more than 20 pounds. Dr. Rose submitted a duty status report.

In a December 7, 2012 orthopedic examination report, Dr. Christian Bannerman, Board-certified in emergency medicine, indicated that appellant had complaints of mid-back and lower back pain after a September 4, 2012 slip and fall injury at work. He reviewed her history and conducted an examination. Dr. Bannerman observed moderate tenderness along the lumbosacral junction at levels L1 and L2 and significant muscle spasm. Flexion was to 40 degrees and extension was to 15 degrees. Straight leg raise testing was positive bilaterally at the sitting and supine position. Dr. Bannerman also reported that appellant had trouble getting dressed and undressed and getting on and off the examination table. He diagnosed acute lumbar sprain/strain and stated that she was partially disabled. Dr. Bannerman opined that appellant's diagnosis was related to the September 4, 2012 work-related accident. He stated that if the history of the accident was correct there was a cause and effect relationship between the original complaints and the reported accident.

In a September 5, 2012 initial consultation chiropractic report, Dr. Rose noted that on September 5, 2012 appellant sustained an injury to her mid to low back after she lifted boxes at work and related her complaints of severe mid to low back pain and stiffness with bilateral radiation from the lumbosacral junction into buttocks and superiorly to mid thoracic with associated tingling. He provided findings on examination and noted that Braggards, Kemps and Straight leg raise testing were positive. Dr. Rose reported thoracic subluxation, lumbar subluxation, lumbosacral joint ligament sprain, lumbar nerve root injury and sacroiliac dysfunction. He stated that, in his professional opinion, based on the history presented by the patient and the examination findings, the injuries indicated in this report were a direct result of the accident noted above.

In an October 4, 2012 diagnostic report, Dr. Paul Bonheim, a Board-certified diagnostic radiologist, noted that appellant was injured on September 4, 2012. He observed some levoscoliosis and normal height and marrow consistency of the lumbar spine vertebral bodies. Dr. Bonheim noted that the cauda equina was normally identified and posterior joints, existing nerve roots and neural foramina were all normally observed. There was no evidence of spondylolysis or suggestion of spondylolisthesis. Dr. Bonheim diagnosed mild lumbar straightening with a C-shaped nonrotatory levoscoliosis and disc bulge with effacement of the ventral dura at L5-S1 level.

By decision dated March 27, 2013, an OWCP hearing representative determined that the September 4, 2012 incident occurred as alleged but denied the claim finding insufficient medical evidence to establish that her lumbar sprain was causally related to the accepted incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence[3] including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether "fact of injury" has been established.[5] There are two components involved in establishing the fact of injury. 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.[6] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[7] An employee may establish that the employment incident occurred as alleged but fail to show that his or her disability or condition relates to the employment incident.[8]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.[9] The opinion of the physician must be based on a complete factual and medical background of the employee, 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.[10] The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[11]

Section 8101(2) 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

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[2] 5 U.S.C. §§ 8101-8193.

[3] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[4] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[6] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

[7] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[8] *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[9] *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

[10] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

[11] *James Mack*, 43 ECAB 321 (1991).

spine to correct a subluxation as demonstrated by x-ray to exist.[12] OWCP's regulations have defined subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.[13] If the diagnosis of a subluxation as demonstrated by x-ray is not established, the chiropractor is not a physician as defined under FECA and his or her report is of no probative value to the medical issue presented.[14]

ANALYSIS

Appellant alleges that on September 4, 2012 she sustained a lumbar condition as a result of lifting heavy parcels and boxes at work. By decision dated March 27, 2013, OWCP accepted that the incident occurred as alleged, but denied the claim finding insufficient evidence to establish that she sustained a lumbar condition as a result of the September 4, 2012 employment incident.

Appellant was treated by Dr. Rose, a chiropractor, who related that on September 4, 2012 she sustained work-related lumbar derangement and radiculopathy as a result of lifting heavy parcels and boxes all night. In a September 5, 2012 initial consultation report, Dr. Rose conducted an examination and noted that Braggards, Kemps and Straight leg raise testing were positive. He diagnosed thoracic subluxation, lumbar subluxation, lumbosacral joint ligament sprain, lumbar nerve root injury and sacroiliac dysfunction. Dr. Rose stated that, in his professional opinion, based on the history presented by the patient and the examination findings, the injuries indicated in this report were a direct result of the accident noted above. As previously stated, chiropractors are considered physicians and their medical opinions considered probative medical evidence, 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.[15] Although Dr. Rose diagnosed lumbar subluxation, he did not note whether his diagnosis was based on x-rays. The record also does not contain x-rays to confirm Dr. Rose's diagnosis of subluxation. Accordingly, Dr. Rose's reports do not constitute probative medical evidence. Similarly, the November 14, 2012 report of Dr. Syrotynski, a chiropractor, is also of no probative medical value as he does not diagnose spinal subluxation or document whether x-rays were obtained.

Appellant also submitted a December 7, 2012 report by Dr. Bannerman, who reported that on September 4, 2012 she experienced mid-back and lower back pain after a September 4, 2012 slip and fall injury at work. Dr. Bannerman provided examination findings and diagnosed acute lumbar strain. He opined that appellant's diagnosis was related to the September 4, 2012 work-related accident. The Board has held, however, that medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an

[12] 5 U.S.C. § 8101(2).

[13] 20 C.F.R. § 10.5(bb); *see also Bruce Chameroy*, 42 ECAB 121 (1990).

[14] *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

[15] *Supra* note 12.

incomplete or inaccurate history are of limited probative value.[16] Although Dr. Bannerman provides an opinion on causal relationship, he relates appellant's injury to a slip and fall injury at work, not lifting heavy parcels and boxes. Because his report is based on inaccurate history, his opinion on causal relationship is insufficient to establish her claim.

Appellant was also treated by Dr. Bonheim. In an October 4, 2012 diagnostic report, Dr. Bonheim found no evidence of spondylolysis or suggestion of spondylolisthesis. He diagnosed mild lumbar straightening with a C-shaped nonrotatory levoscoliosis and disc bulge with effacement of the ventral dura at L5-S1 level. Dr. Bonheim does not provide any opinion on the cause of appellant's lumbar condition. The Board has held that 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.[17]

On appeal, appellant describes the September 4, 2012 incident at work and the medical treatment she received. She alleges that she has provided current and supporting documents for her appeal. The Board's jurisdiction, however, is limited to evidence that was before OWCP at the time it issued its final decision.[18] Because this evidence was not before OWCP at the time it issued its March 27, 2013 hearing representative decision, the Board may not consider this evidence for the first time on appeal.

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 her lumbar condition was causally related to the September 4, 2012 employment incident.

[16] *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

[17] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

[18] 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2013 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 30, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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