United States Department of Labor
Employees' Compensation Appeals Board

D.J., Appellant	)	
and	)	**Docket No. 14-52**
	)	**Issued: March 21, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Shaker Heights, 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:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On October 16, 2013 appellant, through her attorney, filed a timely appeal from the August 21, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), finding that she failed to establish that she sustained an injury as alleged. 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 has met her burden of proof to establish that she sustained an injury in the performance of duty, causally related to factors of her federal employment.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 24, 2012 appellant, then a 46-year-old custodian, filed an occupational disease claim alleging that her chronic pain increased while performing her job duties. She indicated that she sustained lumbar spondylolisthesis L5-S1 and her pain level became intolerable on March 20, 2012. Appellant indicated that she first became aware of the injury and its relation to her work on March 20, 2012. She stopped work on that date.

By letter dated April 23, 2012, OWCP advised appellant that additional factual and medical evidence was needed. It explained that a physician's opinion was crucial to her claim and allotted appellant 30 days within which to submit the requested information.

Appellant provided an April 9, 2012, attending physician's report from Dr. Dane J. Donich, a Board-certified neurosurgeon, who diagnosed spondylolisthesis and disc herniation. Dr. Donich noted that she had an approximate history of six months of low back pain radiating into the lower extremities. He checked the box "yes" in response to whether appellant's condition was caused or aggravated by work activity. Dr. Donich noted that she was engaged in repetitive twisting, turning, bending, pushing, pulling and lifting with her low back and recommended lumbar fusion surgery. He advised that appellant was totally disabled from March 26 to July 25, 2012 and noted that appellant was having a lumbar fusion.[2]

In a May 11, 2012 statement, appellant indicated that on March 20, 2012 she was performing her custodial duties when she started feeling severe pain in her lower back and legs. She advised that she started work at 6:00 a.m. and after getting her supplies, a cart and trash can, she went to her route to begin her duties. Appellant noted that this particular route, to which she was assigned for about a month, required a lot of bending. She stated that she bent down to clear around an empty trash can and she could barely stand the pain. Appellant explained that she believed that the twisting, turning, lifting, bending, pushing, pulling of equipment caused her injury.

By decision dated June 21, 2012, OWCP denied appellant's claim. It found that the evidence supported that the claimed work events occurred but that appellant failed to submit the necessary medical evidence in support of her claim. OWCP noted that the medical evidence did not explain how the diagnosis was causally connected to the alleged employment factors.

On June 25, 2012 appellant's representative requested a telephonic hearing, which was held on October 15, 2012. At the hearing, appellant testified that her low back problems began around December 2011 when she began a more physical route at work. She denied any prior back problems.

Appellant submitted additional reports from Dr. Donich. In an August 27, 2012 report, Dr. Donich noted that appellant returned for follow up and complained of cervical spine pain radiating into the scapular and interscapular region, bilaterally and into the shoulders. Additionally, he noted diminished sensation, coordination and strength in her hands and advised

[2] Submitted with Dr. Donich's report were preoperative instructions for a lumbar reexploration, decompression fusion at L5-S1 scheduled for April 25, 2012. An operative report is not of record.

that she was postbilateral carpal tunnel release. Appellant also noted neck pain. Dr. Donich recommended a computerized tomography (CT) scan and myelogram of her lumbar spine for a separate problem and recommended a CT myelogram of her cervical spine as well.

In a November 8, 2012 report, Dr. Donich noted that appellant returned for follow up following an April 2012 L5-S1 decompression. He advised that she had severe pain, including back radiating bilaterally to the hips, gluteal area and more distally in her right lower extremity down to her lower calf. Dr. Donich reviewed diagnostic testing and noted that appellant had prior surgery at L4-5 and had expected postoperative changes at L4-5 and L5-S1 with the possibility of some arachnoiditis and a considerable degree of neural compression at L3-4. He advised that appellant was symptomatic and discussed her treatment options including further surgery. Dr. Donich indicated that she had advanced degenerative changes at L4-5.

By decision dated December 28, 2012, OWCP's hearing representative affirmed the June 21, 2012 decision.

Thereafter, OWCP received a December 14, 2012 report from Dr. Donich, who noted performing on that date a lumbar reexploration of the prior fusion L5-S1, removal of hardware L3 through S1 decompression.

On March 26, 2013 appellant's counsel requested reconsideration and asserted that appellant had submitted sufficient evidence to establish her claim.

Counsel provided a March 4, 2013 report, from Dr. Donich noting appellant's history and treatment. Dr. Donich advised that, since 2008, her job has been as a laborer-custodian and her job duties required her to do significant physically strenuous activity, including sweeping and mopping floors, filling and emptying buckets of water, emptying trash cans, shoveling snow, moving furniture, scrubbing baseboards and moving large hampers of waste mail. He explained that, over the course of time, she has had gradually increasing lumbar symptoms. Dr. Donich noted that in December 2011, while performing particularly strenuous activity, she began having increased low back pain. He advised that he first saw her on or about December 13, 2011. Appellant related a history of fairly severe low back pain with radiation into her legs, for which she had undergone previous treatment and therapy that included low back surgery in 2010. Dr. Donich examined appellant and noted mild weakness in her legs, problems ambulating with unsteadiness and diminished deep tendon reflexes. X-rays revealed mobile spondylolisthesis at L5-Sl. Dr. Donich indicated that appellant was managed conservatively and then had surgery in April 2012 for an L5-Sl decompression, laminectomy, pedicle screw fixation and fusion. He advised that appellant was markedly improved after surgery compared to before surgery but had continued issues related to right-sided low back pain and symptoms referable to her neck and arms.

Additional imaging studies were eventually performed and revealed increasing disc protrusions and resultant stenosis at L3-4 and L4-5, resulting in a second surgery on December 14, 2012, during which her decompression and fusion were extended to the L3 level. Dr. Donich noted that appellant was involved in a long-standing, physically strenuous occupation with the employing establishment. He advised that the activities required by appellant at work resulted in significant mechanical motion at the waist. Dr. Donich opined that appellant's

diagnoses, including: L3-4, L4-5 and L5-Sl disc herniations and the L5-S1 spondylolisthesis, were a "direct and proximate result of the prolonged mechanical wear and tear on her lumbar spine incurred by her work-related duties." He advised that all the treatment incurred was medically necessary, reasonable and appropriate. Dr. Donich noted that appellant was currently recovering from her recent fusion, which would take one year to skeletally mature fully.

By decision dated August 21, 2013, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

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 medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated 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.[6]

ANALYSIS

The Board finds that this case is not in posture for decision.

[3] 5 U.S.C. §§ 8101-8193.

[4] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[6] *Id*.

The evidence establishes that appellant who works as a custodian and was engaged in duties which required using a cart and trash can and frequent bending, as well as twisting, turning, lifting, pushing and pulling of equipment in the performance of her duties. While the medical evidence is insufficiently rationalized to establish that appellant sustained a work-related condition, the medical reports of record are generally supportive that appellant's work activities as a laborer custodian caused or aggravated her claimed low back conditions.

In his March 4, 2013 report, Dr. Donich related appellant's work history, particularly since December 2011 and explained that she has had increasing lumbar symptoms. He noted pertinent examination findings and the low back surgeries that he performed in April and December 2012. Dr. Donich explained that appellant's job as a custodian was physically strenuous and opined that her required work activities necessitated significant mechanical motion at the waist. He opined that her diagnoses, including: L3-4, L4-5 and L5-Sl disc herniations and the L5-S1 spondylolisthesis, were a "direct and proximate result of the prolonged mechanical wear and tear on her lumbar spine incurred by her work-related duties." Dr. Donich advised that all her treatment was medically necessary, reasonable and appropriate. In his April 9, 2012, attending physician's report, he noted appellant's history of low back pain and indicated that her condition was caused or aggravated by work activity. While these reports are not completely rationalized and do not sufficiently address the impact of appellant's 2010 low back surgery to her present condition,[7] Dr. Donich was consistent in indicating that appellant sustained an employment-related cervical condition. The Board further notes that there is no contradictory evidence.

Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, it shares responsibility in the development of the evidence to see that justice is done.[8] While Dr. Donich's reports do not contain sufficient medical reasoning discharge appellant's burden of proof, these reports raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by OWCP.[9]

On remand, OWCP should request appellant's medical records regarding her low back condition, including operative reports from 2010 and 2012, and refer appellant, the case record, and a statement of accepted facts to an appropriate Board-certified specialist for an evaluation and a rationalized medical opinion regarding the cause of appellant's claimed condition. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that this case is not in posture for decision.

[7] The Board notes an absence of contemporaneous medical evidence in the record relating to appellant's back condition, and its causes, before 2012.

[8] *William J. Cantrell*, 34 ECAB 1223 (1983).

[9] *See John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

ORDER

IT IS HEREBY ORDERED THAT the August 21, 2013 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision.

Issued: March 21, 2014
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