

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

K.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bedford Park, IL, Employer**

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**Docket No. 14-1160
Issued: September 3, 2014**

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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 22, 2014 appellant filed a timely appeal from a November 5, 2013 merit decision and a February 21, 2014 nonmerit 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 merits of this case.²

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that her diagnosed back condition was causally related to the May 30, 2013 employment incident; and (2) whether OWCP properly denied appellant's November 25, 2013 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence following the February 21, 2014 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

FACTUAL HISTORY

On July 2, 2013 appellant, then a 40-year-old mail processor, filed a traumatic injury claim³ alleging that on May 30, 2013 she sustained a back injury after lifting heavy trays. She stopped work on June 1, 2013.

In handwritten progress notes dated July 1, August 5 and September 9, 2013, Dr. Robert Fink, a Board-certified orthopedic surgeon, indicated that appellant experienced back pain at work. He provided illegible findings on examination and noted a diagnosis of bulging disc and lumbar sprain. Dr. Fink recommended compression therapy. In work status forms dated July 1 to October 23, 2013, he indicated that appellant sustained a lumbar sprain and was unable to work until November 27, 2013.

By letter dated September 18, 2013, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested additional evidence to establish that her back condition was causally related to the May 30, 2013 employment injury.

Appellant submitted various medical reports pertaining to her previous back injury. In an October 21, 2009 magnetic resonance imaging (MRI) scan report of the lumbar spine, Dr. John A. Aikenhead, a diagnostic radiologist, reported an essentially negative examination of the lumbar spine. In a February 24, 2010 MRI scan of the lumbar spine, Dr. Amjad Safvi, a Board-certified diagnostic radiologist, reported a normal lumbar lordosis and well-maintained lumbar vertebral body heights. He observed a subtle less than 2 mm diffuse disc bulge at L4-5 and a mild approximately 2.9 mm predominantly left central disc bulge at L5-S1. Dr. Safvi diagnosed early lumbar spondylosis and mild, bilateral neural foraminal stenosis at L5-S1 and L4-5. In a March 17, 2010 nerve conduction velocity (NCV) study and electromyography (EMG) report of the lower extremities, Dr. Anatoly Rozman, Board-certified in physical medicine and rehabilitation, diagnosed left lumbar radiculopathy at L5-S1 on the basis of prolonged latency of the left common peroneal nerve. He also stated that he could not completely rule out right lower lumbar radiculopathy on the basis of decreased amplitude of the tibial nerve.

In an August 27, 2011 narrative report, Dr. Fink stated that he first examined appellant on August 24, 2011 for complaints of lower back pain after she lifted a heavy tray of mail at work. Upon examination, he observed positive lumbar spine tenderness, left paravertebral muscle tenderness, left facet tenderness and left sacroiliac joint tenderness. Sensation was decreased on the left leg but intact on the right leg. Dr. Fink provided findings for range of motion and reported negative flip, Burn and Lasegue tests. He recommended a provocative lumbar discogram followed by laminectomy and discectomy since appellant still complained of pain after receiving therapy and epidural steroid injections.

In various handwritten progress notes and work status forms dated August 24 and September 28, 2011 and February 1 and March, 2012, Dr. Fink stated that appellant was off work from August 23 to September 1, 2011 and from December 22, 2011 to January 18, 2012

³ Appellant initially filed a recurrence claim for a previously accepted November 7, 2010 back injury (File No. xxxxxx037), but OWCP converted the claim into a new traumatic injury claim.

due to severe low back pain. He noted a diagnosis of bulging discs lumbar sprain and recommended physical therapy.

In a decision dated November 5, 2013, OWCP accepted that the May 30, 2013 incident occurred as alleged. However, it denied appellant's claim finding insufficient medical evidence to establish that her back condition was causally related to the accepted incident.

In an appeal request form dated November 17, 2013 and received on November 25, 2013, appellant requested reconsideration.

In a handwritten October 23, 2013 note, Dr. Fink stated that on May 31, 2013 appellant was at work and reagravated her lower back problem from lifting heavy trays of mail.

In a November 27, 2013 work status form, Dr. Fink noted that appellant was off work from November 27, 2013 to June 5, 2014.

By decision dated February 21, 2014, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review under 5 U.S.C. § 8128(a). It determined that the evidence submitted was cumulative and substantially similar to evidence previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence⁵ 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.⁶

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.⁷ 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.⁸ 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.⁹ An employee may establish that the

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁶ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁷ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

⁸ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

⁹ *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

employment incident occurred as alleged but fail to show that his or her disability or condition relates to the employment incident.¹⁰

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.¹¹ 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.¹² 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.¹³

ANALYSIS -- ISSUE 1

Appellant alleged that on May 30, 2013 she sustained a back injury as a result of lifting heavy trays of mail at work. In a decision dated November 5, 2013, OWCP accepted that the employment incident occurred as alleged, but denied her claim finding insufficient medical evidence to establish that her back condition was causally related to the May 30, 2013 incident. The Board finds that appellant did not meet her burden of proof to establish her traumatic injury claim.

Appellant submitted various medical notes from Dr. Fink. In handwritten progress notes dated July 1, August 5 and September 9, 2013, Dr. Fink stated that appellant experienced back pain at work and noted a diagnosis of bulging disc lumbar sprain. He recommended compression therapy and reported that appellant was unable to work until November 27, 2013. Although Dr. Fink provided a medical diagnosis based on his physical examination, he did not provide any opinion on the cause of appellant's condition nor specifically mention any May 30, 2013 employment incident. As previously noted, to be of probative value a physician's report must be based upon a complete medical and factual history. The physician's opinion regarding the cause of the diagnosed condition must explain, with medical rationale, how physiologically appellant's accepted employment duties would have caused the diagnosed conditions.¹⁴ The Board has found 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.¹⁵ Thus, these reports are insufficient to establish appellant's claim.

The additional medical reports and diagnostic reports are likewise insufficient to meet appellant's burden of proof. The MRI scan and NCV/EMG reports dated from October 21, 2009

¹⁰ *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

¹¹ *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

¹² *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

¹³ *James Mack*, 43 ECAB 321 (1991).

¹⁴ *See K.M.*, Docket No. 13-1459 (issued December 5, 2013).

¹⁵ *R.E.*, Docket No. 10-679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007).

to March 17, 2010 by Drs. Aikenhead, Safvi, and Rozman relate to appellant's previous back injury, not her current claim for an alleged May 30, 2013 employment injury. Similarly, the August 27, 2011 narrative report and progress reports by Dr. Fink are also irrelevant to appellant's present claim that the May 30, 2013 employment incident caused or contributed to her current back condition.

On appeal, appellant alleges that her claim should have been accepted as a recurrence claim. The Board notes that a recurrence of disability is defined as an inability to work after an employee has returned to work, caused by 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.¹⁶ As appellant attributed her condition to a May 30, 2013 incident when she lifted heavy trays at work, the Board notes that this constituted an intervening injury. Although the mechanism of injury may be similar to her previously accepted back injury, appellant did not describe a spontaneous change in her medical condition but noted a new injury. Accordingly, the Board finds that OWCP properly adjudicated her claim as a separate traumatic injury claim.

The issue of causal relationship is a medical question that must be established by probative medical opinion from a physician.¹⁷ Because appellant has not provided such probative medical opinion in this case, the Board finds that OWCP properly denied her claim.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.¹⁸ OWCP's regulations provide that OWCP may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his or her right through a request to the district Office.¹⁹

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously

¹⁶ 20 C.F.R. § 10.5(x).

¹⁷ *W.W.*, Docket No. 09-1619 (issued June 2, 2010); *David Apgar*, 57 ECAB 137 (2005).

¹⁸ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

¹⁹ 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.²⁰

If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.²¹

ANALYSIS

Following the November 5, 2013 decision denying her claim, appellant submitted a request for reconsideration that was received on November 25, 2013. The denial decision noted that none of the medical evidence submitted explained appellant's back condition resulted from the May 30, 2013 employment incident.

Along with her reconsideration request, appellant submitted a handwritten October 23, 2013 note and November 27, 2013 work status form by Dr. Fink. These forms, however, did not provide any new and relevant evidence to the underlying medical issue regarding how appellant's back condition was causally related to the May 30, 2013 employment incident. Dr. Fink's October 21, 2013 note did not refer to the accepted May 30, 2013 incident, but rather noted that she aggravated a preexisting back condition on May 31, 2013. Thus, the Board finds that Dr. Fink's reports did not provide any new, relevant and pertinent evidence with respect to the medical issue presented in this case.

On appeal appellant stated that she had been out of work for almost a year without any income and was under financial hardship. The Board notes that this information has not established that OWCP improperly denied further merit review of this case. Appellant did not meet any requirements of 20 C.F.R. § 10.606(b)(2). She did not submit any evidence along with her request for reconsideration to show that OWCP erroneously applied or interpreted a specific point of law, or advances a relevant legal argument not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608(b), OWCP properly declined to reopen the case for review of the merits.

The Board finds that appellant failed to submit relevant and pertinent new evidence, a relevant legal argument not previously considered by OWCP or evidence or argument which shows that OWCP erroneously applied or interpreted a specific point of law. Therefore, OWCP properly refused to reopen her case for further consideration of the merits of her claim under 5 U.S.C. § 8128.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that her back condition was causally related to the May 30, 2013 employment incident. The Board also finds

²⁰ 20 C.F.R. § 10.606(b); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

²¹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

that OWCP properly denied her November 25, 2013 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2014 and November 5, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 3, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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