

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

S.K., Appellant

and

**U.S. POSTAL SERVICE, AIR CARGO
CENTER, Portland, OR, Employer**

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**Docket No. 15-541
Issued: June 3, 2015**

Appearances:
Thomas J. Flaherty, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 16, 2015 appellant, through counsel, filed a timely appeal from a December 5, 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 merits of this case.

ISSUE

The issue is whether appellant has established an injury in the performance of duty on July 16, 2013.

FACTUAL HISTORY

On July 25, 2013 appellant, then a 46-year-old automated parcel bundle sorter clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained a back injury on July 16, 2013. She stated that she was bending over a cart and felt a pull in her lower back. In an accident

¹ 5 U.S.C. § 8101 *et seq.*

report dated July 16, 2013, appellant stated that she was bending over a utility cart and apparently overextended her body and felt a pull in her lower back. The record contains a Form CA-16 (authorization for examination and/or treatment) signed by an employing establishment management specialist on July 25, 2013. The form authorized medical treatment at the Providence Medical Center. In an August 11, 2013 statement, appellant acknowledged prior back injuries and that the July 16, 2013 incident may have caused a new injury as well as aggravating her preexisting conditions.

Appellant received treatment on July 17, 2013 at the Providence Medical Center emergency department. In a report of that date, Dr. Aaron Burchfield, Board-certified in emergency medicine, stated that she had a history of chronic back pain and that appellant had been bending over when she felt pain in the right lumbar area. He provided results on examination and stated that it appeared appellant had exacerbated her back pain by bending over. Dr. Burchfield diagnosed lumbar strain. Appellant also received treatment from a nurse practitioner on July 17, 2013.

In a report dated July 23, 2013, Dr. Joseph Smith, Board-certified in occupational medicine, noted that appellant had been seen by a nurse practitioner for low back pain. He stated that approximately 10 months ago she had aggravated a nonwork-related “discogenic medical issue,” and though it had subsided, she apparently had some ongoing pain since that time. According to Dr. Smith, appellant felt that her current symptoms were due to lifting some items out of a bin at work, but she was not precise about a specific incident and felt it was a cumulative effect of working out of a bin. He provided results on examination. Dr. Smith stated that, after his examination, and reviewing nurse practitioner notes, he did not find that “the standard of 51 percent of work-related events as causing [appellant’s] current presentation as being present in this patient.” He noted that she had a long-standing history of the same symptoms, though under different circumstances, some 10 months earlier. Dr. Smith stated that appellant “has had ongoing pain that in my clinical opinion has merely built over time to finally culminate once again in the sciatic presentation that differs from her typical baseline of low back pain. I think it is more likely than not that this is the reason for her present symptoms of progressive increase from her baseline of her chronic low back pain and degenerative disc medical issues.” Dr. Smith stated that appellant “clearly has some significant chronic underlying issues that I am sure her work duties do provoke. I think all we are noting in this instance is that the preponderance of the clinical examination, clinical picture, and clinical evidence does not support the fact that at least 51 percent responsibility for her current more acute presentation is due to workplace activities that she describes.” Dr. Smith reported that appellant’s job involved lifting pieces of mail out of a bin and sorting it, although there was “no specific incident really to note.” He concluded that her present symptoms were “the natural progression of her chronic preexisting degenerative disc medical issue.”

With respect to diagnostic studies, the record contains an August 2, 2013 lumbar x-ray report from Dr. Michael Evitts, an osteopath, who diagnosed lumbar spondylolisthesis L5-S1, with about 25 percent anterior subluxation that appeared to have worsened somewhat from a prior August 12, 2011 magnetic resonance imaging (MRI) scan. Dr. Evitts noted progressive disc degeneration at L5-S1.

By decision dated September 6, 2013, OWCP denied the claim for compensation. It found the medical evidence was insufficient to establish an injury causally related to the July 16, 2013 incident.

On September 24, 2013 OWCP received a request for a hearing before its hearing representative. No action was initially taken on the hearing request.

In a Form CA-20 report dated September 1, 2013, Dr. Robert Kaye, a family practitioner, diagnosed spondylolisthesis L4-S1. He checked a box “yes” that the condition was employment related.

Appellant submitted a report dated September 3, 2013 from Dr. Laurens Johansen, Board-certified in family medicine, who provided a history that she was lifting a “bale of mail” when she felt a pop in her back. Dr. Johansen provided results on examination, stating that she had low back pain with right leg radiculopathy since a July 16, 2013 work injury. According to him, this was “the major contributing cause of appellant’s current condition” and need for treatment.

In a report dated September 11, 2013, Dr. Darrell Brett, a Board-certified neurosurgeon, provided results on examination. He stated that appellant would require lumbar surgery, including L4-S1 laminectomy and L5-S1 fusion. Dr. Brett stated that a “pathologic worsening occurred with her work injury/activity of [July 16, 2013] which is a major contributing factor, combining with preexisting degenerative changes and prior surgery.”

Appellant underwent lumbar surgery on October 23, 2013. In a report dated January 4, 2014, Dr. Kaye found appellant unable to return to work.

By letter dated September 8, 2014, OWCP noted that appellant had timely submitted a hearing request and a hearing scheduled for October 20, 2014. On October 7, 2014 appellant submitted a March 24, 2014 report from Dr. Kaye. According to Dr. Kaye, she was treated on July 26, 2013 by a colleague, Dr. Darnell D. Orton, a family practitioner, found that right sciatic pain was essentially gone, but there was residual low back pain. He noted that appellant had a preexisting back condition, referring to a June 7, 2011 MRI scan showing L4-5 annular tear, and L5-S1 nerve impingement. Dr. Kaye further stated, “The obvious problem this case presents appears to be one of the percentage of deterioration and causation of the preexisting problems versus the active bending over a postal cart and retrieving something from inside it. In this case, I do not feel intellectually gifted enough to make a decision on that issue, especially with the preexisting problems that have gone on.” Dr. Kaye noted that Dr. Brett had stated that the work injury was a major contributing factor.

In a report dated July 7, 2014, Dr. Brett stated that “the work injury of July 16, 2013 likely resulted in annular tearing and increased disc bulging at L4-5 and/or L5-S1 with nerve root impingement, resulting in her radicular pain and need for treatment after she failed to respond to three months of conservative care.” He again stated that there was a pathologic worsening with the work injury.

A hearing was held on October 20, 2014.²

By decision dated December 5, 2014, the hearing representative affirmed the September 6, 2013 OWCP decision. He found the medical evidence was insufficient to establish an injury causally related to the July 16, 2013 employment incident.

LEGAL PRECEDENT

FECA provides for the payment of compensation for “the disability or death of an employee resulting from personal injury sustained while in the performance of duty.”³ The phrase “sustained while in the performance of duty” in FECA is regarded as the equivalent of the commonly found requisite in workers’ compensation law of “arising out of and in the course of employment.”⁴ An employee seeking benefits under FECA has the burden of establishing that he or she sustained an injury while in the performance of duty.⁵ In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether “fact of injury” has been established. Generally “fact of injury” consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the employment incident caused a personal injury, and generally this can be established only by medical evidence.⁶

OWCP’s procedures recognize that a claim may be accepted without a medical report when the condition is a minor one which can be identified on visual inspection.⁷ In clear-cut traumatic injury claims, such as a fall resulting in a broken arm, a physician’s affirmative statement is sufficient and no rationalized opinion on causal relationship is needed. In all other traumatic injury claims, a rationalized medical opinion supporting causal relationship is required.⁸

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is

² The transcript indicated that the hearing lasted for 26 minutes. Counsel questioned appellant regarding the incident and her medical history. The hearing representative advised counsel when there was approximately 10 minutes remaining. Counsel finished questioning appellant and provided a concluding statement, arguing the medical evidence was sufficient to establish the claim.

³ 5 U.S.C. § 8102(a).

⁴ *Valerie C. Boward*, 50 ECAB 126 (1998).

⁵ *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

⁶ *See John J. Carlone*, 41 ECAB 354, 357 (1989).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(c) (January 2013).

⁸ *Id.* at Chapter 2.805.3(d) (January 2013).

determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.⁹

ANALYSIS

In the present case, appellant alleged that she sustained injuries in the performance of duty on July 16, 2013. The employment incident that she described was bending over a cart. OWCP has accepted that the incident occurred as alleged. The issue is whether there was sufficient medical evidence to establish an injury causally related to the incident.

The Board has reviewed the medical evidence and finds appellant did not meet her burden of proof in this case. The emergency room physician, Dr. Burchfield, treated appellant on July 17, 2013. He noted a chronic back pain, but did not otherwise discuss her medical history. Dr. Burchfield stated that it appeared appellant had exacerbated her back pain by bending over, without providing additional detail. He does not provide an opinion with supporting rationale that is sufficient to establish an employment-related injury.

The report dated July 17, 2013 from a nurse practitioner is of no probative medical value. Section 8101(2) of FECA provides that a physician includes, "surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law."¹⁰ A nurse practitioner is not a physician under FECA and her report is not considered probative medical evidence.¹¹

Appellant was also treated on July 23, 2013 by Dr. Smith, but his report clearly does not support her claim. Dr. Smith discussed her medical history and he noted a history of back pain. He unequivocally opined that appellant's current condition was related to progression of her underlying degenerative back condition, not to a July 16, 2013 employment incident.¹² Dr. Smith provided a probative medical opinion that does not support her claim for an injury causally related to a July 16, 2013 incident.

Dr. Evitts diagnosed lumbar spondylolisthesis L5-S1, and progressive disc degeneration at L5-S1, based upon an August 2, 2013 lumbar x-ray. He did not, however, offer any opinion regarding the cause of these conditions.

In a September 3, 2013 report, Dr. Johansen described the July 16, 2013 incident as appellant lifting a bale of mail. This was not the incident described by appellant in her claim form or contemporaneous statements. She stated that she was bending over a cart when she felt a pull in her back. Moreover, Dr. Johansen provided no medical rationale for his opinion that the incident was a "major contributing cause" to appellant's current condition. He did not provide a

⁹ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

¹⁰ 5 U.S.C. § 8101(2).

¹¹ *S.H.*, Docket No. 15-336 (issued April 14, 2015).

¹² Although Dr. Smith refers to underlying issues that the "work duties do provoke," the claim in this case was for an injury resulting from a July 16, 2013 incident, not the performance of work duties over a period of time.

medical history, a clear diagnosis, or explain the pathophysiological process by which the employment incident caused or aggravated a diagnosed condition.¹³

The reports from Dr. Kaye do not provide a rationalized medical opinion as to an injury causally related to the July 16, 2013 incident. Dr. Kaye diagnosed spondylolisthesis, but the checking of a box “yes” in a form report, without additional explanation or rationale, is not sufficient to establish causal relationship.¹⁴ In his March 24, 2014 report, he refers to appellant’s preexisting back condition and declines to provide an opinion on the issue presented. Dr. Kaye notes the opinion of Dr. Brett, but the evidence of record from Dr. Brett is of diminished probative value.

Dr. Brett stated in his September 11, 2013 report that there was a pathologic worsening of appellant’s back condition from the July 16, 2013 incident, but he does not provide any explanation describing how this occurred. Similarly, in his July 7, 2014 report he states, without explanation, that the employment incident caused annular tearing and increased disc bulging at L4-5 and/or L5-S1 with nerve root impingement. As noted above, a rationalized report would provide a complete history and an explanation of the process by which the July 16, 2013 incident caused or aggravated the diagnosed conditions. Dr. Brett does not provide a rationalized medical opinion.

The Board accordingly finds that appellant did not meet her burden of proof in this case. The medical evidence of record does not establish a diagnosed condition causally related to the July 16, 2013 employment incident. According to Dr. Smith, who addressed appellant’s preexisting back pain, stated that her condition was related to progression of her underlying back condition.

The Board notes that the employing establishment did issue a Form CA-16 authorization for medical treatment in this case. OWCP did not discuss the Form CA-16. Where an employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee’s claim for an employment-related injury, the Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim.¹⁵ The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP.¹⁶ On return of the case record OWCP should properly address the issue of medical treatment pursuant to the Form CA-16.

On appeal, appellant argues that the hearing representative abused her discretion by limiting the time for the oral hearing. She argues that she was deprived of due process in this case because the time allotted for the hearing deprived her of an opportunity to be heard. Under

¹³ See *J.P.*, Docket No. 14-1966 (issued January 23, 2015); *M.D.*, Docket No. 14-1498 (issued January 8, 2015); *C.T.*, Docket No. 11-625 (issued October 17, 2011).

¹⁴ See *Barbara J. Williams*, 40 ECAB 649, 656 (1989).

¹⁵ *Tracey P. Spillane*, 54 ECAB 608 (2003).

¹⁶ See 20 C.F.R. § 10.300(c).

OWCP regulations, the hearing representative has “complete discretion to set the time, place, and method of the hearing, including the amount of time allotted for the hearing, considering the issues to be resolved.”¹⁷ The issue in this case was a medical issue, and the hearing representative limited the hearing to approximately 30 minutes. There was no evidence that this constituted an abuse of discretion in this case. Appellant did not request additional time at the hearing, or otherwise raise the issue at the October 20, 2014 hearing. Nor has she explained what specific evidence or argument she did not have an opportunity to present. Appellant had an opportunity to submit relevant medical evidence, and did submit evidence. In addition, there was opportunity to submit additional argument or evidence prior to the issuance of the hearing representative decision. The Board finds that appellant had an opportunity to present her arguments and there is no evidence that the hearing representative abused her discretion in this case with respect to the time allotted for the hearing.

Appellant also argues that the medical evidence was sufficient to establish the claim. For the reasons discussed above, the Board finds that she did not meet her burden of proof. The record indicated that appellant had a preexisting back condition. The physician must provide an accurate background, explain how the July 16, 2013 incident physiologically affected her back condition, and why the opinion on causal relationship is consistent with the medical evidence and the medical history.

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 has not established an injury in the performance of duty on July 16, 2013. On return of the case record, OWCP should address the issue with respect to the Form CA-16.

¹⁷ *Id.* at § 10.617.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 5, 2014 is affirmed.

Issued: June 3, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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