

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

T.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
North Metro, GA, Employer**

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**Docket No. 16-0977
Issued: December 22, 2016**

Appearances:
Martin Kaplan, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 7, 2016 appellant, through counsel, filed a timely appeal from a March 15, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met her burden of proof to establish that her claim should be expanded to include myofascial pain and cervicalgia as a result of the November 28, 2011 employment injury.

FACTUAL HISTORY

OWCP has accepted that on November 28, 2011 appellant, then a 43-year-old rural carrier associate, sustained multiple injuries when she was involved in a motor vehicle accident while delivering mail. By decisions dated January 18 and April 9, 2012, it accepted contusion of the right knee and lower right leg, sprain of the back thoracic region, sprain of the back lumbar region, and sprain of the neck. Appellant sought treatment with her treating physician, Dr. Brad Prybis, a Board-certified orthopedic surgeon.

This case has previously been before the Board. In a February 18, 2014 decision, the Board affirmed OWCP's June 19 and August 14, 2013 merit decisions finding that it met its burden of proof to terminate appellant's compensation benefits effective June 29, 2013.³ The Board found that the report of Dr. Howard Krone, the impartial medical specialist and Board-certified orthopedic surgeon, was entitled to special weight. Dr. Krone's opinion established that appellant had no continuing residuals of her work-related injury and that her current conditions were preexisting and unrelated to the November 28, 2011 work injury.⁴

By letter dated March 7, 2014, counsel for appellant filed a petition for reconsideration with the Board. He argued that the Board's February 18, 2014 decision improperly relied on the report from Dr. Krone, the impartial medical specialist.

By order dated July 1, 2014, the Board denied appellant's petition for reconsideration.⁵ The Board affirmed its prior decision finding that the opinion of Dr. Krone was entitled to special weight as that of the impartial medical specialist and was sufficiently rationalized to establish that appellant's work-related conditions had ceased.

³ Docket No. 13-1960 (issued February 18, 2014).

⁴ In his April 10, 2013 medical report, Dr. Krone provided a summary of appellant's past medical reports, reviewed previously taken diagnostic studies, and provided findings on physical examination. He noted that she was involved in a November 28, 2011 motor vehicle accident when she T-boned another vehicle. Appellant struck her right knee at the time and complained of pain in her neck, thoracic, and lower back regions. She had a prior work-related motor vehicle accident in 2009 for which she had mild low back pain and responded well to physical therapy. Dr. Krone noted that examination of the knees and neurologic examination of the upper left and lower extremities was normal. He noted preexisting degenerative osteoarthritic changes of the cervical spine, primarily at C6-7, and of the lumbar spine at L5-S1 which predated her work-related accident. Dr. Krone agreed with the opinion of Dr. Doman and found no objective findings of any disability related to the November 28, 2011 motor vehicle accident. He opined that appellant did not continue to suffer from a strain to the cervical, thoracic, or lumbar spine and that her symptoms should have resolved with treatment after six to eight weeks. Dr. Krone further concluded that the November 28, 2011 incident did not aggravate the preexisting degenerative disc disease at C6-7.

⁵ Docket No. 13-1960 (issued July 1, 2014).

On August 25, 2014 appellant, through counsel, requested reconsideration. Counsel argued that Dr. Krone's impartial medical report could not be used as the basis for termination of compensation as the report was unsigned and therefore of no probative value. He further argued that the questions provided to Dr. Krone were leading and factually incorrect, citing *Brenda C. McQuiston*⁶ and *Carl D. Johnson*⁷ for support. Finally, counsel argued that Dr. Krone's report revealed that he had been provided the December 17, 2012 notice of proposed termination. He argued that this was prejudicial because it implied that Dr. Krone should reach a conclusion in line with OWCP's preliminary determination. No new medical evidence was submitted in support of appellant's claim.

By decision dated September 25, 2014, OWCP denied modification of the termination of appellant's compensation benefits effective June 29, 2013. It found that, although counsel's request for reconsideration contained new legal arguments not previously considered, his arguments were insufficient to modify the prior termination decision.⁸

On October 1, 2014 appellant, through counsel, again appealed to the Board. By decision dated July 1, 2015, the Board affirmed OWCP's September 25, 2014 decision finding that OWCP had met its burden of proof to terminate appellant's compensation benefits effective June 29, 2013.⁹ The Board found that Dr. Krone's referee opinion constituted the weight of the medical evidence and that the arguments on appeal failed to establish that a conflict in medical opinion remained because of alleged deficiencies.

Following the issuance of the Board's July 1, 2015 decision, by letter dated July 16, 2015, counsel for appellant requested that OWCP add myofascial pain and cervicgia to the list of accepted conditions. He argued that Dr. Prybis' July 24, 2012 report and the March 19, 2013 report from Dr. Carlos Pulido, a Board-certified anesthesiologist, indicated that appellant suffered from myofascial pain and cervicgia secondary to her automobile accident. Counsel further asserted that the physicians provided objective findings based on a thorough examination, and diagnostic tests, as to how the myofascial pain and cervicgia resulted from the compensable injury.

By letters dated September 1 and 16, 2015, counsel argued that, although appellant's benefits were terminated in a formal decision, OWCP did not address whether appellant was entitled to medical benefits for additional conditions from the November 28, 2011 injury. He discussed Dr. Prybis' July 24, 2012 report and Dr. Pulido's March 19, 2013 report in support of the claim and requested OWCP issue a formal decision to add myofascial pain and cervicgia to the list of accepted conditions.

⁶ Docket No. 03-1725 (issued September 22, 2003).

⁷ Docket No. 94-404 (issued May 31, 1995).

⁸ OWCP improperly stated that it was affirming the Board's February 18, 2014 decision. The Board's *Rules of Procedure* provide that the decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. 20 C.F.R. § 501.6(d).

⁹ Docket No. 15-0001 (issued July 1, 2015).

In his July 24, 2012 report, which had been received by OWCP on August 21, 2012, Dr. Prybis reported that appellant complained of continued neck and shoulder pain following a November workers' compensation injury. He provided findings on physical examination and diagnosed neck and shoulder pain with bilateral intermittent arm symptoms with a history of workers' compensation injury in November 2011. Dr. Prybis also diagnosed C6-7 spondylosis and foraminal stenosis and radiculitis, as well as cervical and thoracic myofascial pain with a history of cervical strain. He concluded that appellant could continue to work without restrictions as tolerated.

In his March 19, 2013 report, which was received by OWCP on March 29, 2013, Dr. Pulido related that appellant presented for a follow-up postcervical epidural injection. He provided findings on physical examination and diagnosed cervical disc degeneration, cervical spondylosis without myelopathy, cervical facet arthropathy, and headache syndrome. Dr. Pulido reported that appellant's neck pain started after a motor vehicle accident while at work as a mail carrier. He noted myofascial pain component in the trapezius and paraspinals. Dr. Pulido explained that appellant was progressing well and continued to have good pain relief with her current medications.

By letter dated September 28, 2015, OWCP informed counsel that appellant's compensation benefits were terminated on June 19, 2013 and it had already been established that there were no remaining residuals related to her November 28, 2011 employment-related motor vehicle accident.

On December 3, 2015 counsel for appellant requested reconsideration of the July 1, 2015 decision.

By decision dated February 19, 2016, OWCP found that the evidence of record was insufficient to modify the July 1, 2015 decision because no new evidence or argument was submitted to support residuals of the accepted November 28, 2011 work injury.

By letter dated February 23, 2016, counsel for appellant argued that OWCP was required to issue a formal decision with regard to his request to add myofascial pain and cervicgia to the list of accepted conditions.

By decision dated March 15, 2016, OWCP denied appellant's claim for an expansion of the claim to include myofascial pain and cervicgia.

LEGAL PRECEDENT

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.¹⁰ To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence supporting such a causal

¹⁰ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

relationship.¹¹ 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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of 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.¹²

Neither the 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 causal relationship.¹³

ANALYSIS

OWCP accepted that appellant sustained a right knee and leg contusion, thoracic back sprain, lumbar back sprain, and neck sprain as a result of the November 28, 2011 work-related injury.

Following the Board's July 1, 2015 decision, counsel requested that OWCP issue a formal decision with regard to expansion of appellant's claim to include the additional conditions of myofascial pain and cervicalgia. In support of the claim, he cited Dr. Prybis' July 24, 2012 report and Dr. Pulido's March 19, 2013 report. The Board finds that the medical reports of Dr. Prybis and Dr. Pulido are insufficient to establish that the claim should be expanded to include myofascial pain and cervicalgia.

In the July 24, 2012 report, Dr. Prybis provided findings on physical examination and diagnosed neck and shoulder pain with bilateral intermittent arm symptoms with a history of workers' compensation injury in November 2011; C6-7 spondylosis and foraminal stenosis and radiculitis; and cervical and thoracic myofascial pain with a history of cervical strain. The Board notes that, while Dr. Prybis noted additional diagnosed conditions, he failed to provide any opinion regarding the cause of appellant's conditions. Dr. Prybis only generally referenced the November 2011 workers' compensation injury when discussing his findings of pain. Without any explanation or medical rationale explaining how the diagnoses reached were caused by the accepted injury, Dr. Prybis' report is insufficient to establish that any additional conditions are causally related to her original November 28, 2011 work injury.¹⁴

In a March 19, 2013 report, Dr. Pulido provided findings on physical examination and diagnosed cervical disc degeneration, cervical spondylosis without myelopathy, cervical facet arthropathy, and headache syndrome. He reported that appellant's neck pain started after a

¹¹ See 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

¹² *James Mack*, 43 ECAB 321 (1991).

¹³ *Ernest St. Pierre*, 51 ECAB 623 (2000).

¹⁴ *Deborah L. Beatty*, 54 ECAB 334 (2003).

motor vehicle accident while at work as a mail carrier. Dr. Pulido noted myofascial pain component in the trapezius and paraspinals and reported that appellant was progressing well with good pain relief. The Board finds that Dr. Pulido's report is insufficiently rationalized as he failed to provide any opinion regarding the cause of appellant's cervical disc degeneration, cervical spondylosis without myelopathy, cervical facet arthropathy, and headache syndrome. Dr. Pulido made no mention of appellant's preexisting degenerative condition in the cervical and lumbar spine. He failed to provide an adequate and detailed medical history addressing how appellant's complaints were caused by the motor vehicle accident in 2011 and not caused by her preexisting condition.¹⁵ A well-rationalized opinion is particularly warranted when there is a history of a preexisting condition.¹⁶ Without explaining how the November 28, 2011 work injury caused or contributed to the diagnosed conditions, Dr. Pulido's opinion is insufficient to meet appellant's burden of proof.¹⁷

Appellant has not provided any evidence to establish any additional conditions stemming from the November 28, 2011 employment injury.¹⁸

On appeal, counsel for appellant argues that Dr. Prybis and Dr. Pulido provide uncontroverted opinions that consequential to her accepted conditions, appellant developed myofascial pain and cervicgia. For conditions not accepted by OWCP as being employment related, it is the claimant's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship.¹⁹ For the reasons explained above, the Board finds that appellant has not established myofascial pain and cervicgia causally related to the November 28, 2011 employment injury.²⁰

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

¹⁵ *R.E.*, Docket No. 14-868 (issued September 24, 2014).

¹⁶ The Board has held that an opinion that a condition is causally related because the employee was asymptomatic before the injury is insufficient, without adequate rationale, to establish causal relationship. *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

¹⁷ See *L.M.*, Docket No. 14-973 (issued August 25, 2014); *R.G.*, Docket No. 14-113 (issued April 25, 2014); *K.M.*, Docket No. 13-1459 (issued December 5, 2013); *A.J.*, Docket No. 12-548 (issued November 16, 2012).

¹⁸ The Board has held that stale medical evidence cannot form the basis for current evaluation of residual symptomology or disability determination. See *Keith Hanselman*, 42 ECAB 680 (1991); *Ellen G. Trimmer*, 32 ECAB 1878 (1981) (reports almost two years old deemed invalid basis for disability determination and loss of wage-earning capacity determination).

¹⁹ *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Alice J. Tysinger*, 51 ECAB 638 (2000).

²⁰ *L.M.*, Docket No. 13-697 (issued September 18, 2013).

CONCLUSION

The Board finds that appellant has failed to meet her burden of proof to expand the accepted conditions to include myofascial pain and cervicgia as causally related to the accepted November 28, 2011 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 22, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board