United States Department of Labor
Employees' Compensation Appeals Board

K.T., Appellant	)	
and	)	**Docket No. 15-1916**
	)	**Issued: February 1, 2016**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer	)	

Appearances:
Appellant, pro se
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 September 22, 2015 appellant filed a timely appeal from a July 8, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.[2]

ISSUE

The issue is whether appellant has met her burden of proof to establish a low back injury in the performance of duty.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence with her request for appeal. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision, pursuant to 20 C.F.R. § 501.2(c)(1). Therefore, the Board is precluded from considering the new evidence.

FACTUAL HISTORY

On May 13, 2015 appellant, then a 48-year-old city carrier, filed a traumatic injury claim (Form CA-1), alleging that at 2:32 p.m. on the same day she was bending over to pick up mail when she experienced back pain. Her supervisor, Katherine R. Baskin, noted on the claim form that appellant was in the performance of duty when injured and her knowledge of the facts about the injury agreed with appellant's statements. The employing establishment did not controvert continuation of pay. Appellant stopped work on May 13, 2015 and did not return.

Appellant explained, in a statement dated May 13, 2015, that as she was collecting mail on 53rd Street and Lexington Avenue, she bent over to lift a tub of mail, but she experienced a sharp pain in her back. She attempted to bend several times and was unable to do so. Appellant submitted a May 13, 2015 return to work slip signed by a nurse practitioner which indicated that she was off work for three days.

By letter dated May 29, 2015, OWCP advised appellant that her claim had originally been received as a simple, uncontroverted case which resulted in minimal or no time loss from work. The claim had been administratively handled to allow medical payments up to $1,500.00, but the merits of the claim had not been formally adjudicated. OWCP advised that because appellant had not returned to work her claim would be formally adjudicated.

OWCP requested that appellant submit additional information including a comprehensive medical report from her treating physician, to include a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to her claimed low back injury. It also requested that she respond to specific questions about the incident and any preexisting conditions. Appellant did not respond to OWCP's questionnaire.

Appellant submitted medical records from Mount Sinai Beth Israel Brooklyn where she was treated on May 13, 2015 by Dr. Ilyayev Aleksandr, a Board-certified internist. She had presented with middle to lower back pain from a workplace injury. Appellant reported experiencing lower back pain which started on May 13, 2015 after she bent over to pick up mail and had difficulty returning to a standing position. Findings on examination included left-sided lumbar paraspinal tenderness, muscle spasm, decreased range of motion, and intact sensory and motor function. Dr. Aleksandr diagnosed spasm of the lumbar paraspinous muscle and prescribed oral medications. He noted that appellant's condition had improved and that she was able to straighten out and rise from the laying position with ease. Dr. Aleksandr discharged her and recommended that she follow up with her primary physician. He noted that appellant was disabled for three days and then could return to work with a restriction of no heavy lifting. Dr. Aleksandr provided her discharge instructions for muscle spasms and pain.

Appellant submitted a report from Dr. Abha Chopra, a chiropractor, dated May 21, 2015, who noted that appellant was undergoing treatment for a recent injury of May 13, 2015. Dr. Chopra prescribed a treatment regimen of 12 to 16 visits. He noted that appellant would be disabled from work from May 18 to July 2, 2015. Dr. Chopra noted that she was to avoid lifting, carrying heavy objects, bending, twisting activities and standing or sitting for long periods of time.

In a decision dated July 8, 2015, OWCP denied appellant's claim finding that the evidence was unclear as to the events surrounding the incident as she had failed to respond to the development letter.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish 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 filed within the applicable time limitation 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. 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.[3]

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. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[4]

An employee's statement that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[5] Moreover, an injury does not have to be confirmed by eyewitnesses. The employee's statement, however, must be consistent with the surrounding facts and circumstances and her subsequent course of action. An employee has not met his or her burden in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Circumstances such as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast doubt on an employee's statement in determining whether a *prima facie* case has been established.[6]

Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, 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.[7]

[3] *Gary J. Watling*, 52 ECAB 357 (2001).

[4] *T.H.*, 59 ECAB 388 (2008).

[5] *R.T.*, Docket No. 08-408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 277 (2005).

[6] *Betty J. Smith*, 54 ECAB 174 (2002).

[7] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

ANALYSIS

OWCP denied the claim finding that appellant had failed to establish that the claimed event occurred as alleged because she had failed to respond to the development letter. However, the Board finds that the record contains sufficient information to establish incident. It is not disputed that on May 13, 2015 appellant was collecting mail on 53rd Street and Lexington Avenue and bent over to pick up a tub of mail at 2:32 p.m. Appellant promptly reported the incident and received medical treatment on the date of the incident. Appellant's supervisor, Ms. Baskin, noted on the CA-1 form that appellant was in the performance of duty when injured. She also indicated her knowledge of the facts about the injury agreed with appellant's statements. As noted, an employee's statement that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[8] Consequently, the Board finds that appellant has established that the May 13, 2015 bending incident occurred as alleged. However, the Board finds that appellant has failed to submit sufficient medical evidence to establish that her diagnosed conditions were caused or aggravated by this May 13, 2015 incident.

Appellant submitted medical records from Dr. Aleksandr dated May 13, 2015 who noted that appellant had presented with middle to lower back pain from a workplace injury. She reported experiencing lower back pain after she bent over to pick up an item and had difficulty straightening out. Dr. Aleksandr noted findings on examination of left-sided lumbar paraspinal tenderness, muscle spasm and decreased range of motion. He diagnosed spasm of the lumbar paraspinous muscle and noted that appellant was disabled for three days. Dr. Aleksandr did not clearly explain how the work incident caused or aggravated any diagnosed medical condition. The Board has held that medical reports that fail to contain rationale on causation are of limited probative value.[9]

Appellant submitted a report from Dr. Chopra, a chiropractor, dated May 21, 2015, who treated appellant for a May 13, 2015 injury. Section 8101(2) of FECA provides that chiropractors are considered physicians "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 and subject to regulation by the Secretary."[10] Thus, where x-rays do not demonstrate a subluxation (a diagnosis of a subluxation based on x-rays has not been made), a chiropractor is not considered a "physician," and his or her reports cannot be considered as competent medical evidence under FECA.[11] Dr. Chopra is not a physician as he did not diagnose a spinal subluxation demonstrated by x-ray. Thus, his reports are of no probative medical value.

[8] *See supra* note 5.

[9] *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001).

[10] 5 U.S.C. § 8101(2); *see also* section 10.311 of the implementing federal regulation provides: "(c) A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. OWCP will not necessarily require submittal of the x-ray, or a report of the x- ray, but the report must be available for submittal on request."

[11] *See Susan M. Herman*, 35 ECAB 669 (1984).

Appellant submitted a return to work slip from a nurse practitioner dated May 13, 2015. The Board has held that nurse practitioners are not considered physicians for the purposes of FECA and thus the reports do not constitute medical evidence, and their findings and opinions do not suffice for purposes of establishing FECA benefits.[12]

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor, the belief that her condition was caused, precipitated or aggravated by her employment is sufficient to establish causal relationship. Causal relationship must be established by rationalized medical opinion evidence.[13] Appellant failed to submit such evidence, and therefore has not met her burden of proof.

On appeal appellant asserts that OWCP improperly denied her claim and believed that she had submitted sufficient evidence to establish a low back injury on May 13, 2015 while in the performance of duty. As noted above, the Board found appellant had failed to submit a physician's report, based on an accurate history, which describes how work activities on May 13, 2015 caused or aggravated a low back condition.

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 failed to establish a low back injury in the performance of duty.

[12] *See Charlie V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be provided by a qualified physician) and *Paul Foster*, 56 ECAB 208 (2004); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

[13] *See Dennis M. Mascarenas*, 49 ECAB 215 (1997).

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2015 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: February 1, 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