United States Department of Labor
Employees' Compensation Appeals Board

D.J., Appellant	)	
and	)	**Docket No. 16-0288**
	)	**Issued: May 25, 2016**
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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 2, 2015 appellant, through counsel, filed a timely appeal of a June 25, 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish a low back injury causally related to factors of her federal employment.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been on appeal before the Board. In a March 21, 2014 decision, the Board found the case was not in posture for decision.[2] The Board found that the medical evidence was generally supportive that appellant's work activities as a laborer custodian caused or aggravated her claimed low back conditions. The Board specifically referred to the reports of Dr. Dane Donich, a neurosurgeon, who opined that her diagnoses, including: L3-4, L4-5, and L5-Sl disc herniations and 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." The Board found that while his reports were not sufficiently rationalized and did not sufficiently address the impact of appellant's 2010 low back surgery to her present condition, Dr. Donich's opinion was uncontroverted and consistent in indicating that appellant had a work-related condition. The Board remanded the case for OWCP to request appellant's medical records regarding her low back condition, including her operative reports from 2010 and 2012. OWCP was to then 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, and issue a *de novo* decision. The facts and history contained in the prior appeal are incorporated herein by reference.

By letter dated April 7, 2014, OWCP informed appellant that it needed her medical records from her 2010 and 2012 surgeries and treatment.[3] Appellant was afforded 30 days to submit the requested evidence.

In a June 4, 2014 letter to appellant, OWCP noted that, although it had not received the requested documentation, it was referring her for a second opinion examination. It repeated its request for the documentation.

In a separate letter also dated June 4, 2014, OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Manhal Ghanma, a Board-certified orthopedic surgeon.

In June 2014 appellant submitted medical records that included the operative reports for her 2012 surgeries. She noted that she was still waiting for the reports from 2010 and would be submitting diagnostic test results in a timely fashion. The medical evidence included April 25 and December 14, 2012 operative reports from Dr. Donich as well as status reports and several disability certificates placing appellant on light duty.

[2] Docket No. 14-52 (issued March 21, 2014). Appellant worked as a custodian and engaged in duties which required using a cart and trash can. It also involved frequent bending, as well as twisting, turning, lifting, pushing, and pulling of equipment. Appellant filed an occupational disease claim (Form CA-2) on March 24, 2012 when her "chronic pain became unbearable."

[3] OWCP noted that they had Dr. Donich's reports dated March 26 and April 9, 2012, her pre-surgery testing schedule from Akron City Hospital dated April 25, 2012, and Dr. Donich's reports dated August 27, November 8, and December 14, 2012 and March 4, 2013, a medical authorization request dated September 24, 2012 and the December 14, 2012 operative report from Medina Hospital.

OWCP also included a copy of the previously received March 4, 2013 report from Dr. Donich, who attributed appellant's condition to her strenuous job duties as a custodian over the past 15 years. Dr. Donich advised that in December 2011 she had increased low back symptoms. Thereafter, he saw appellant in consultation.[4] Dr. Donich explained that she was involved in a long-standing physically strenuous occupation for years. He opined that the activities of appellant's position included a significant requirement for mechanical motion at the waist which was a direct and proximate cause of the disc herniations at L3-4, L4-5, and L5-S1, as well as the L5-S1 spondylolisthesis.

In an October 28, 2013 report, Dr. Donich noted that appellant returned for follow up and complained of pain in the left hip and gluteal area. He noted review of a magnetic resonance imaging (MRI) scan from April 2013, and confirmed left foraminal stenosis at L3. In a January 30, 2014 report, Dr. Donich reported that appellant was one year postoperation and had fairly constant left gluteal and hip pain, resulting in a limp. He recommended an MRI scan and x-rays.[5] In a May 7, 2014 report, Dr. Donich noted that appellant was involved in a motor vehicle accident on April 11, 2014 when she was rear-ended. He opined that her low back symptoms had worsened.

In a report dated June 26, 2014, Dr. Ghanma described appellant's history of injury. He also noted that appellant was involved in a motor vehicle accident on April 11, 2014, which resulted in worsening low back complaints that included sensory deficits in the legs, weakness, falls, and radiating pain to both legs. On examination, appellant complained of decreased left lateral and right medial leg sensation as well as decreased left lateral foot sensation. She had normal motor sensation in both legs, decreased sensation in the left heel, and slight breakaway weakness to left ankle dorsiflexion. Dr. Ghanma determined that appellant's gait, stance and balance were normal. Heel and toe walking were not attempted. Dr. Ghanma opined that the original surgery was unrelated to the work factors reported by appellant, as it predated the injury. He noted that imaging studies revealed lumbar stenosis, which was not caused or aggravated by her occupational exposure. Dr. Ghanma advised that spondylolisthesis at L5-S1 was also reported by Dr. Donich, who performed a fusion which was extended through L3 in December 2012, and prior hardware was removed. He explained that it was "unclear whether her spondylolisthesis was related to the work activity, but it may have been aggravated by her work activity, resulting in her subsequent symptoms." Dr. Ghanma noted that Dr. Donich also diagnosed pars fractures and disc protrusions from L3 to S1, but Dr. Ghanma opined that it was "not possible to determine whether any of these fractures were directly caused, aggravated, accelerated, or precipitated by her occupational exposure." He further noted that the aggravation of the L5-S1 spondylolisthesis was corrected by the April 2012 surgery, and there was no evidence to support ongoing aggravation. Dr. Ghanma opined that the April 2012 surgery was related to the aggravation of spondylolisthesis, but it was not possible to determine the basis for the December 2012 surgery. He found that appellant was incapable of performing her date-of-injury duties due to the ongoing lumbar complaints. Dr. Ghanma assigned work restrictions, and found that her current limited-duty position was suited to her abilities.

[4] Dr. Donich explained that he performed two surgeries to address stenosis and spondylolisthesis, but her recovery was incomplete.

[5] OWCP received a February 26, 2014 lumbar spine MRI scan.

By letter dated July 14, 2014, OWCP requested that Dr. Ghanma clarify his opinion with regard to whether any diagnosed conditions were directly caused, aggravated, accelerated or precipitated by appellant's occupational exposure. It also requested his opinion with regard to any consequential conditions, and noted that he must provide an unequivocal opinion.

In a September 4, 2014 response, Dr. Ghanma opined that his answers remained the same as it was not possible to know for certain what caused her symptoms to worsen, or when she developed pars defects. He explained that there was no medical science that he was aware of that would substantiate that spinal stenosis could be directly caused, aggravated, precipitated, or accelerated by her work activities. Dr. Ghanma noted that the level of proof in this case would require medical evidence revealing a physical worsening of the degree of spinal stenosis. He stated that such medical evidence did not exist to the best of his knowledge. Dr. Ghanma explained that the Carraggee studies revealed that there was no change in the lumbar MRI scan findings after the onset of disabling low back pain secondary to minor trauma. He opined that regarding the "aggravation" of spondylolisthesis, in this case would be based solely upon worsened spondylolisthesis, as opposed to any documented physical change in the degree of spondylolisthesis, which was why "it was difficult, if not impossible, to determine whether any such aggravation occurred, because the back pain and leg pain were subjective symptoms. Such symptoms may or may not have a physical cause/explanation." Dr. Ghanma stated that there was "no way to determine when she developed her pars 'fractures' or defects." He also opined that it was "not possible to determine with exact certainty when or why she developed disc protrusions." Dr. Ghanma related that the alleged mechanism of injury, feeling a pop in her back at work could not be independently verified and did not confirm that any "injury" occurred. He indicated that pars defects could be developmental in nature, or could occur slowly over time and that was why it was "not possible to provide conclusive answers to your questions." Dr. Ghanma further advised that occupational exposure based on simply doing her job was not known to result in pars defects or disc protrusions based on medical science. He surmised that it was "not possible to determine whether any of the documented imaging findings had any relationship to appellant's work activities. Medical science would suggest that her pathology developed spontaneously as a result of degenerative lumbar wine changes. Any 'aggravation' would be based solely on subjective complaints as opposed to objective examination findings. The determination of aggravation would then be an administrative one, as opposed to one based on objective physical evidence."

By decision dated September 11, 2014, OWCP denied appellant's claim for compensation due to an employment-related injury. It found that the evidence of record did not establish causal relationship.

On September 15, 2014 counsel for appellant requested a telephonic hearing, which was held before an OWCP hearing representative on April 15, 2014. He argued that Dr. Donich was a far more accomplished surgeon than Dr. Ghanma, who was biased against claimants. Counsel noted that Dr. Ghanma opined that it was not possible to assign causation in this case, which amounted to an admission that he did not have the medical expertise needed to offer an opinion on the subject. He also argued that OWCP could find a conflict in the medical opinion and refer appellant for a referee examination.

By decision dated June 25, 2015, the OWCP hearing representative affirmed the September 11, 2014 decision. It found that the reports of Dr. Ghanma carried the weight of the medical evidence.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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.[6] 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.[7]

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.[8]

ANALYSIS

OWCP found that appellant established that, as a custodian, she 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 prior appeal, the Board found that while the medical evidence of record was insufficiently rationalized to establish that appellant sustained a work-related condition, it was sufficient to require further development regarding whether appellant's work activities caused or aggravated her claimed low back conditions. The Board also directed that OWCP request additional medical records from appellant.

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

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

[8] *Id.*

On remand OWCP requested the medical history and referred appellant for a second opinion examination with Dr. Ghanma. The Board notes that OWCP received additional medical documentation but it did not receive the medical reports regarding her 2010 L4 surgery.

In a report dated June 26, 2014, Dr. Ghanma described appellant's history and provided findings. He explained that it was "unclear whether her spondylolisthesis was related to the work activity, but it may have been aggravated by her work activity, resulting in her subsequent symptoms." Dr. Ghanma noted that Dr. Donich also diagnosed pars fractures and disc protrusions from L3 to S1, but Dr. Ghanma opined that it was "not possible to determine whether any of these fractures were directly caused, aggravated accelerated or precipitated by her occupational exposure." He opined that the aggravation of the spondylolisthesis at L5-S1 was corrected by the April 2012 surgery, and there was no evidence to support ongoing aggravation. Dr. Ghanma opined that the April 2012 surgery was related to the aggravation of spondylolisthesis, but it was not possible to determine the basis for the December 2012 surgery. He found that appellant was incapable of performing her date-of-injury duties due to the ongoing lumbar complaints but could perform her limited-duty job.

The Board notes, however, that this report was speculative and failed to adequately address the question he was asked to address.[9] On July 14, 2014 OWCP properly requested that Dr. Ghanma clarify his opinion with regard to whether any diagnosed conditions were caused, aggravated, accelerated or precipitated by appellant's occupational exposure. However, the Board finds that Dr. Ghanma did not adequately explain his opinion.

In a September 4, 2014 response, Dr. Ghanma opined that his answers remained the same as it was not possible to know for certain what caused her symptoms to worsen, or when she developed pars defects. He explained that there was no medical science that he was aware of that would substantiate that spinal stenosis could be directly caused, aggravated, precipitated, or accelerated by her work activities. Dr. Ghanma noted that the level of proof in this case would require medical evidence revealing a physical worsening of the degree of spinal stenosis. He stated that such medical evidence did not exist to the best of his knowledge. Dr. Ghanma noted that certain studies showed that there was no change in lumbar MRI scan findings after the onset of disabling low back pain secondary to minor trauma. Regarding the "aggravation" of spondylolisthesis, he explained that it would be based solely upon worsened spondylolisthesis, as opposed to any documented physical change in the degree of spondylolisthesis, which was why "it was difficult, if not impossible, to determine whether any such aggravation occurred, because the back pain and leg pain were subjective symptoms" and such symptoms may not have a physical explanation. Dr. Ghanma also explained that there was "no way to determine when she developed her pars 'fractures' or defects" and that it was "not possible" to determine exactly when or why appellant developed disc protrusions. He related that the alleged mechanism of injury in this case of feeling a pop in her back at work could not be independently verified and did not confirm that any "injury" occurred.

However, the record reflects that appellant attributed her condition to her work activities, which included continuous bending, twisting, pushing, and pulling of equipment. Dr. Ghanma

[9] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.3(f)(2) (July 2011).

referenced appellant's job duties in a June 26, 2014 report, however, he did not address these activities in his September 4, 2014 supplemental report. Instead, he referenced a mechanism of injury as a "pop" which could not be independently verified. He also noted that pars defects could be developmental in nature, or could occur slowly over time and that was why it was "not possible" to provide conclusive answers regarding this. Dr. Ghanma further advised that occupational exposure based on simply doing her job was not known to result in pars defects or disc protrusions based on medical science. However, he then opined that it was "not possible to determine whether any of the documented imaging findings had any relationship to her work activities" as medical science would suggest that her pathology developed spontaneously as a result of degenerative lumbar spine changes. Dr. Ghanma opined that any aggravation would be based solely on subjective complaints as opposed to objective findings and noted that the determination of aggravation would be "an administrative one, as opposed to one based on objective physical evidence."

The Board finds his opinions are inconsistent and insufficiently rationalized. In his initial report, Dr. Ghanma indicated that appellant's spondylolisthesis may have been aggravated by her work activity but in his later report he found it "difficult, if not impossible, to determine whether any such aggravation occurred" because the back pain and leg pain were subjective symptoms. He did not sufficiently explain the change in his opinion. Furthermore, the Board notes that it is not necessary to prove a significant contribution of employment factors to a condition for the purpose of establishing causal relationship.[10] In reaching his conclusions in his most recent report, Dr. Ghanma did not sufficiently explain how findings of Dr. Donich and diagnostic testing of record supported his opinion.

As Dr. Ghanma has indicated that he is unable to clearly answer all questions posed to him by OWCP, appellant must be referred to another Board-certified specialist. Once OWCP undertakes development of the record, it has the responsibility to obtain an evaluation which will resolve the issue involved in the case.[11] The case is remanded to OWCP to refer appellant to another specialist for a rationalized medical opinion on whether appellant's work duties caused or aggravated her diagnosed low back conditions. Following this and any further development deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim.

CONCLUSION

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

[10] *See Glenn C. Chasteen*, 42 ECAB 493 (1991); *Beth P. Chaput* , 37 ECAB 158 (1985) (where the medical evidence reveals that factors of employment contributed in any way to the disabling condition, such condition is considered employment related for the purpose of compensation under FECA).

[11] *See Mae Z. Hackett*, 34 ECAB 1421 (1983).

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2015 decision of the Office of Workers' Compensation Programs is set aside and remanded for further proceedings consistent with this decision of the Board.

Issued: May 25, 2016
Washington, DC

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

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

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