United States Department of Labor
Employees' Compensation Appeals Board

K.V., Appellant	)	
and	)	**Docket No. 16-0349**
	)	**Issued: November 25, 2016**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Wilmington, DE, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 18, 2015 appellant, through counsel, filed a timely appeal of an October 5, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider 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 a cervical condition causally related to factors of her employment.

FACTUAL HISTORY

On November 15, 2014 appellant, then a 44-year-old machine operator/delivery bar code sorter clerk, filed an occupational disease claim (Form CA-2) alleging that her neck strain and pain was due to her employment duties, including throwing trays of heavy mail. Appellant stopped work on November 15, 2014.

In a statement dated November 15, 2014, appellant related feeling neck pain on October 15, 2014 due to the processing of outgoing mail which included many trays with large envelopes. She related feeling neck pain immediately after throwing heavy trays, as well as after twisting her neck to clear jams in a machine.

In a November 20, 2014 disability certificate, Cara Orr, a certified physician assistant, requested that appellant be excused from work from November 15 to 25, 2014.

Ms. Orr, in a November 26, 2014 report, diagnosed lumbago and cervicalgia. In disability notes dated November 26 and December 11, 2014, she indicated that appellant was under her care for an exacerbation of her chronic neck pain. Ms. Orr reported that appellant was experiencing numbness, stiffness, and pain and that she was disabled from work until December 19, 2014.

In a November 28, 2014 report, Dr. Raquel Inniss, a treating Board-certified internist, diagnosed cervical disc disease, lumbago, carpal tunnel syndrome, and skin sensation disturbance. The billing diagnosis was cervicalgia.

On December 2, 2014 OWCP received an August 13, 2014 lumbar magnetic resonance imaging (MRI) scan diagnosing lumbago.

By letter dated December 17, 2014, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It also informed her that the evidence was insufficient to establish the employment factors alleged to have caused an injury or that she sustained a diagnosed medical condition caused or aggravated by identified work activities. Appellant was advised as to the medical and factual evidence required and afforded 30 days to provide this information. The employing establishment was asked if it disagreed with appellant's allegations and afforded it 30 days to provide any evidence of controversion. It did not respond until August 14, 2015.

In a December 23, 2014 attending physician's report (Form CA-20), Dr. Inniss diagnosed cervical herniated disc, carpal tunnel syndrome, lumbar disc disease, and cervical disc disease with myelopathy. She reported that due to lifting at work on November 15, 2014 appellant began having increased neck and arm pain. Dr. Inniss checked a box marked "yes" to the question of whether the diagnosed condition was employment related and explained that appellant's increased pain was due to a specific work incident. She reported appellant's

symptoms increased with lifting and prolonged standing. Dr. Inniss indicated the period of disability as November 15, 2014 to the present. In an attached December 23, 2014 work capacity evaluation (Form OWCP 5-c) she indicated that appellant was capable of working with restrictions, which would be in effect for three to six months. The restrictions included no prolonged sitting or standing; up to two hours of repetitive wrist movement; up to one hour of sitting, standing, bending/stooping, squatting, kneeling, and climbing; and no lifting.

By decision dated January 22, 2015, OWCP denied appellant's claim. It found the evidence insufficient to establish that the diagnosed medical condition was causally related to her employment duties of handling flat-sized mail and heavy trays.

In a February 9, 2015 report, Dr. Scott M. Fried, a treating Board-certified osteopath specializing in orthopedic surgery, noted appellant's complaints, medical history, job duties, injury history, objective evidence, and provided results on physical examination. He noted appellant's history of injury included an incident in 2009 when trays of mail fell off a cart and "came avalanching towards her." At that time appellant related that she injured her arms, back, and neck. In January 2014 she felt pain on the left side of her neck, brachial plexus, and arm after she attempted to grab a tray of mail that was slipping from her grasp. Appellant related that on November 15, 2014 she dealt with jams in a machine which required turning her neck and head and stretching her arm to yank the mail free of the jam. While doing this work she felt acute pain and tightness in her right neck, plexus, and upper trapezius and her left side was also symptomatic. An examination of the cervical spine revealed tenderness in the left C2-7 cervical paravertebral musculature, the occipital region, left trapezius muscle, and left superior medial scapular border; left cervical and trapezius muscle spasms; positive Phalen's and Tinel's tests; and synovitis. Dr. Fried diagnosed bilateral median neuropathy, left radial neuropathy, right ulnar neuropathy, left brachial plexopathy/cervical radiculopathy with long thoracic neuritis and grade 2 scapular winging; and carpal tunnel median neuropathy, which he attributed to appellant's work activities. He also diagnosed disc bulge with C4-5, C5-6, and C6-7 disc bulge, pain syndrome, and left side posterior occipital neuralgia with cervical plexus symptoms. Dr. Fried recommended electromyography (EMG)/nerve conduction velocity (NCV) studies be performed to assist in evaluating appellant's nerve complaints.

In February 9, 2015 disability certificate, Dr. Fried indicated that appellant was being treated for work injuries and was totally disabled for the period February 9 to March 24, 2015.

In a letter dated April 7, 2015, counsel requested reconsideration and submitted additional evidence.

A February 25, 2015 EMG and evaluation reported mild right upper brachial plexus nerve impairment, significant left median nerve impairment, and borderline or marginal right median wrist impairment.

In reports dated February 26 and March 2, 2015, Dr. Fried diagnosed bilateral upper extremity sympathetic pain syndrome; C4-5, C5-6, and C6-7 disc bulges with radiculopathy; posterior occipital neuralgia with cervical plexus symptoms; bilateral median neuropathy; left radial neuropathy; right ulnar neuropathy; left brachial plexopathy/cervical radiculopathy with long thoracic neuritis and grade 2 scapular winging; and bilateral carpal tunnel median

neuropathy, which were all due to appellant's work activities. The February 26, 2015 report noted physical examination findings of negative Tinel's sign, bilateral negative Phalen's test, limited cervical spine range of motion and spasm. This report also noted that appellant had been out of work since her November 15, 2014 work injury, she remained symptomatic and was unable to perform her usual job duties.

In a letter dated April 27, 2015, OWCP informed appellant that it was unclear whether she was claiming an occupational or traumatic injury. It requested that she provide a statement explaining whether she was filing an occupational disease claim and, if yes, to complete the enclosed questionnaire. Appellant did not respond within the allotted time.

By decision dated June 1, 2015, OWCP denied the claim as it found the evidence was insufficient to establish the factual element of appellant's claim. It noted that she had been asked to provide a statement explaining the basis for her claim and to complete the attached questionnaire. No statement or completed questionnaire was submitted. Thus, OWCP found appellant failed to establish the factual part of her claim.

In a letter dated July 7, 2015, counsel requested reconsideration.

On August 14, 2015 OWCP received a letter from the employing establishment providing information regarding appellant's duties as a sweeper. The position required a team of two mail processors working to set up and dispatch mail. As a sweeper, appellant's duties required her to load several trays of mail into the feed table. If a tray was too heavy to lift the sweeper could move smaller amounts of mail until the tray can be lifted safely. It acknowledged that there were 200 stackers and that sweepers were required to work continuously, but denied that frequent turning of the neck was required.

In an August 27, 2015 report, Dr. Fried diagnosed bilateral upper extremity sympathetic pain syndrome; C4-5, C5-6, and C6-7 disc bulges with radiculopathy; posterior occipital neuralgia with cervical plexus symptoms; bilateral median neuropathy; left radial neuropathy; right ulnar neuropathy; left brachial plexopathy/cervical radiculopathy with long thoracic neuritis and grade 2 scapular winging; and bilateral carpal tunnel median neuropathy. A physical examination revealed positive Phalen's test for median nerve distribution dysesthesias, limited cervical range of motion, tenderness over the bilateral elbows and forearms, positive bilateral median nerve Tinel's sign, positive left elbow radial nerve Tinel's sign, and positive Roos and Hunter tests. Dr. Fried noted that the positive Roos and Hunters tests were indicative of brachial plexus inflammation and scarring at the thoracic outlet level.

On September 21, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Robert A. Smith, a Board-certified orthopedic surgeon, to determine whether appellant sustained a diagnosed medical condition causally related to the identified employment factors.

In an October 2, 2015 report, Dr. Smith reviewed the statement of accepted facts, medical records, and provided findings on examination. He noted appellant's history included a history of bilateral carpal tunnel syndrome, right carpal tunnel surgery in 2009, a neck injury in 2009, an upper extremity and neck injury in January 2014, and that appellant had not worked since November 2014. A physical examination provided no cervical spasm, atrophy, deformity or

trigger points, no allodynia, essentially normal upper extremity range of motion, no signs of upper extremity instability or derangement, no scapular winging, negative Phalen and Tinel's tests, and no evidence of thoracic outlet syndrome. Dr. Smith noted an April 2014 MRI scan showed a small C6-7 disc herniation, but it was not in the record OWCP provided for his review. He also noted that Dr. Fried had conducted a number of diagnostic tests including ultrasounds and electrodiagnostic tests, but that these test reports were not available for review. There is no mention regarding findings from these tests. Dr. Smith opined that there was no clinical or objective evidence of any diagnosis due to appellant's identified employment factors by aggravation, direct cause, or precipitation. He reported that appellant had a significant preexisting history of carpal tunnel and cervical injuries. Dr. Smith opined that appellant's carpal tunnel syndrome was more likely due to her morbid obesity and smoking.

By decision dated October 5, 2015, OWCP granted modification as it found appellant had established the factual portion of her claim. However, it denied the claim as it found the medical evidence insufficient to establish a causal relationship between a diagnosed medical condition and the identified employment factors.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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; that an injury was sustained while 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.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[6]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[7] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on

[3] 5 U.S.C. § 8101 *et seq.*

[4] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[5] *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *D.U.*, Docket No. 10-144 (issued July 27, 2010); *R.H.*, 59 ECAB 382 (2008); *Roy L. Humphrey*, 57 ECAB 238 (2005); *Donald W. Wenzel*, 56 ECAB 390 (2005).

[7] *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.[8] 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.[9]

ANALYSIS

The Board finds this case is not in posture for decision regarding whether appellant has an employment-related neck condition.

In support of her claim, appellant submitted reports from Dr. Inniss and Dr. Fried. Dr. Inniss diagnosed cervical disc disease with myelopathy, herniated cervical disc, carpal tunnel syndrome, lumbar disc disease lumbago, skin sensation disturbance, and cervicalgia, which she opined was work related in a December 23, 2014 Form CA-20. She attributed appellant's increased neck and arm pain to the prolonged standing and lifting required of her job. Dr. Fried, in multiple reports, diagnosed bilateral upper extremity sympathetic pain syndrome; C4-5, C5-6, and C6-7 disc bulges with radiculopathy; posterior occipital neuralgia with cervical plexus symptoms; bilateral median neuropathy; left radial neuropathy; right ulnar neuropathy; left brachial plexopathy/cervical radiculopathy with long thoracic neuritis and grade 2 scapular winging; and bilateral carpal tunnel median neuropathy. He opined that these conditions were employment related, which he opined was due to appellant's work duties which required stretching her arm to yank mail from jams and turning her neck and head while working with machine jams.

OWCP referred appellant to Dr. Smith for a second opinion evaluation on whether appellant sustained any diagnosed condition causally related to the accepted employment factors. Dr. Smith opined that there was no objective or clinical evidence supporting any medical condition causally related to the identified employment factors. He noted that Dr. Fried conducted a number of objectives tests, including EMG tests, which were not mentioned or reviewed by Dr. Smith as they were not included in the record provided by OWCP, despite OWCP's possession of these diagnostic test reports. The record establishes that the MRI scan report was received by OWCP on December 2, 2014 and the EMG test report was received on April 13, 2015.

The Board finds that Dr. Smith's report was based upon an incomplete record as he did not review appellant's diagnostic tests when he provided his opinion. It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[10] While appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[11] Accordingly, once

[8] *J.J.*, Docket No. 09-27 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

[9] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[10] *R.B.*, Docket No. 08-1662 (issued December 18, 2008); *A.A.*, 59 ECAB 726 (2008); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Vanessa Young*, 55 ECAB 575 (2004).

[11] *D.N.*, 59 ECAB 576 (2008); *Richard E. Simpson*, 55 ECAB 490 (2004).

OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[12] As it undertook the development of the medical evidence by referring appellant for a second opinion evaluation with Dr. Smith, it had an obligation to secure a report based upon an accurate medical record and that addressed the relevant issue.[13] Therefore, the case shall be remanded to OWCP to provide all MRI scans and the EMG tests Dr. Fried performed for Dr. Smith's review. Once it has provided Dr. Smith these items for his review and opinion, Dr. Smith should provide a supplemental report based on the additional materials. After such further development as it deems necessary, OWCP should issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 5, 2015 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: November 25, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[12] *Richard F. Williams*, 55 ECAB 343 (2004).

[13] *P.K.*, Docket No. 08-2551 (issued June 2, 2009); *Id.*