

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish an injury causally related to an accepted September 12, 2013 employment incident; and (2) whether OWCP properly denied further merit review of appellant's case pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 29, 2008 appellant, then a 47-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on December 29, 2008 she sustained a back injury as a result of lifting a tub from an all-purpose container (APC) at work. She stopped work and returned to light duty on January 19, 2009. OWCP assigned File No. xxxxxx801. OWCP accepted appellant's claim for lumbosacral strain. Appellant continued to receive medical treatment for her accepted back injury.

On February 24, 2014 appellant filed a recurrence claim (Form CA-2a) alleging that on September 12, 2013 she experienced a worsening of her December 29, 2008 employment injury. She explained that she stopped work on January 29, 2014 because her treating physician restricted her to no lifting over 20 pounds and her employing establishment was unable to accommodate the new work restrictions.

By letters dated March 31 and April 14, 2014, OWCP advised appellant that based on her description of the September 12, 2013 incident, it was determined that she was claiming a new traumatic injury³ due to new work factors, not a recurrence of the December 29, 2008 employment injury. It informed her that because the employing establishment did not complete and sign the second page of the Form CA-2a, OWCP could not administratively create a new traumatic injury claim. OWCP requested that appellant obtain a blank Form CA-1 and file a new traumatic injury claim.

On May 7, 2014 appellant filed a traumatic injury claim (Form CA-1) alleging that on September 12, 2013 she sustained a back injury as a result of pushing equipment at work. She stopped work on January 29, 2014. OWCP assigned File No. xxxxxx163.

Appellant was treated at employee health by Dr. Dorian D. Moore, a Board-certified internist. In examination notes dated September 17, 2013 to April 1, 2014, Dr. Moore related that appellant had a history of chronic back pain with acute exacerbations. She explained that once or twice a year appellant developed severe exacerbations of her back injury, which were only helped with physical therapy. Dr. Moore noted that appellant currently had an exacerbation of back pain since September and was awaiting approval for physical therapy. Upon examination of appellant's back, she observed tenderness in the lumbar paraspinal muscles with palpable spasms. Dr. Moore related appellant's complaints of pain with straight leg raising

³ OWCP regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

past 45 degrees. Lower extremity strength was normal. Dr. Moore diagnosed chronic back pain with acute exacerbation.

Dr. Moore also provided narrative reports dated January 20 and February 20, 2014. She indicated that appellant was currently her patient for chronic back pain due to a lumbosacral sprain sustained in 2008. Dr. Moore explained that since the sprain, appellant experienced ongoing issues with frequent acute exacerbations. She reported that current examination findings revealed extreme tenderness of the paraspinous muscles in appellant's lumbar region, limited range of motion with flexion of the back, and difficulty ambulating. Dr. Moore noted that appellant was capable of working with restrictions of no lifting and provided a duty status report.

On May 12, 2014 appellant filed a claim for wage-loss compensation (Form CA-7) for the period March 22 to May 16, 2014. She continued to file claims for wage-loss compensation for continued disability.

By letter dated May 12, 2014, OWCP advised appellant that the evidence submitted was insufficient to establish her traumatic injury claim. It requested that she respond to an attached questionnaire in order to substantiate the factual elements of her claim and provide medical evidence to establish a diagnosed condition as a result of her employment. Appellant was afforded 30 days to submit the requested information.

In a May 14, 2014 treatment note, Dr. Moore related that appellant continued to have severe low back pain while awaiting physical therapy. Upon examination of appellant's back, she observed diffuse tenderness in the lumbar paraspinous muscles and limited range of motion with flexion. Straight leg raise testing was positive at 30 degrees bilaterally. Dr. Moore completed a duty status report with appellant's current work restrictions.

OWCP denied appellant's claim in a decision dated June 17, 2014. It found that the factual evidence was insufficient to establish that the alleged September 12, 2013 employment incident occurred as alleged. OWCP noted that appellant failed to respond to its May 12, 2014 development letter and therefore did not provide detailed information explaining the factual surroundings of how she injured her back at work on September 12, 2013. It also determined that the medical evidence of record failed to establish a diagnosed medical condition as a result of the alleged incident.

On August 22, 2014 OWCP received appellant's request for reconsideration. In a statement, appellant explained that she was requesting reconsideration of her workers' compensation claim and seeking payment for physical therapy treatment for exacerbation of spinal stenosis. She related that her traumatic back injury was caused on September 12, 2013 by pushing a heavy APC. Appellant noted that she was submitting additional evidence and information to show that the strenuous work activity caused her injury.

Along with her reconsideration request, appellant provided a July 17, 2014 narrative report by Dr. Moore. Dr. Moore indicated that she had treated appellant for symmetrical caudal sac stenosis at the L4-L5 level which began with a work-related injury prior to 2009. She explained that appellant experienced a severe exacerbation of her spinal stenosis due to another

work-related injury on September 12, 2013 when she pushed a heavy cart. Dr. Moore opined that it was clear that both the initial injury and the acute exacerbation occurred in the performance of work-related duties. Upon examination, she observed tenderness of the lumbar paraspinous musculature and limited range of motion. Dr. Moore noted that lower extremity strength was decreased due to pain. She reported a diagnosis of symmetrical caudal sac stenosis at L4-L5 level with acute exacerbation. Dr. Moore again requested that appellant be approved for a course of physical therapy.

Appellant also submitted a detailed statement dated July 26, 2014 regarding the September 12, 2013 employment incident. She related that she was working in the cage to set up the APC equipment to take out on the floor. Appellant noted that a loaded APC was extremely heavy and that three people were usually assigned to one APC. She indicated that on September 12, 2013, her supervisor asked her to take a second APC around after she had pushed one of the APCs around to distribute mail because the employing establishment was understaffed. Appellant reported that she asked for assistance because this APC was much heavier and exceeded her work restrictions. She stated that she began to experience a considerable amount of pain in her lower back while taking the second APC around. Appellant asked her supervisor for assistance, but he could not find anyone to help her. She discussed the pain and spasms she began to experience, various supervisors who tried to assist her, and the steps she took to try to alleviate the pain. Appellant reported that eventually she asked to leave work because she was in too much pain.

After the September 12, 2013 incident, appellant explained that she experienced problems regarding filing the proper paperwork for approval for physical therapy. She pointed out that as she waited, she lost more days at work due to the severity of the pain from the injury. Appellant related that on January 20, 2014 Dr. Moore put her on a no lifting restriction, but when she returned to work she was told that she could not work and was sent home. She submitted a letter from OWCP dated April 8, 2014, which informed her that her claim for recurrence (Form CA-2a) of disability beginning September 12, 2013 was being administratively changed to a claim for a new traumatic injury.

Appellant was also treated by Dr. Gary J. Peppin, a Board-certified internist. In an August 6, 2014 examination note, Dr. Peppin indicated that appellant had a history of back issues, was treating with Dr. Moore, and was currently complaining of increased back pain and right lateral thigh pain that worsened in the past few days. Upon examination of appellant's back, he observed tenderness over the right greater trochanter and in the low back. No acute distress or palpable abnormalities were noted. Dr. Peppin diagnosed right lateral thigh pain and elevated blood pressure.

In examination notes dated September 3 and November 7, 2014, Dr. Moore related that appellant was being treated for acute exacerbation of her chronic back pain and that she currently complained of right hip pain. Appellant remained off work and was still awaiting approval for physical therapy. Dr. Moore noted that appellant would likely be able to return to sedentary duties once physical therapy was initiated. Upon examination, she observed tenderness in the lumbar paraspinous muscles bilaterally and tenderness on the lateral aspect of the right hip. Range of motion was decreased with forward flexion. Dr. Moore diagnosed back pain.

By decision dated November 18, 2014, OWCP found that the factual evidence was sufficient to establish that the September 12, 2013 employment incident occurred, but denied appellant's claim finding that the medical evidence of record failed to establish that her preexisting back condition, spinal stenosis at L4-L5, was worsened or exacerbated by the accepted employment incident.

On October 30, 2015 OWCP received a letter from counsel dated October 26, 2015, which requested that OWCP review Dr. Moore's additional report. He alleged that the well-reasoned report of Dr. Moore addressed OWCP's concerns and met its standards.⁴

The narrative report from Dr. Moore was dated July 1, 2015. Dr. Moore related that appellant had initially sustained a work-related back injury in 2008 and had received treatment. She noted that appellant had experienced several acute exacerbations of her back pain. Dr. Moore explained that on September 12, 2013 appellant pushed two large carts full of mail at work, despite her restrictions, and began to experience low back pain. She indicated that the pain continued and increased so appellant sought treatment on September 17, 2013. Dr. Moore related that appellant had not returned to work since January 20, 2014 and opined that physical therapy could likely facilitate her return to work. She reported that current examination showed persistent spasm and tenderness in appellant's lower lumbar region, which had remained virtually unchanged since her initial examination. Dr. Moore opined that "the pushing of the heavy APC cart in 2013 caused muscle strain and injury which caused an increase in her pain." She requested that appellant be afforded full consideration so that she could reach maximum medical improvement and return to work in the near future.

Dr. Moore provided an October 25, 2015 duty status report which indicated that appellant could work with restrictions of no climbing, kneeling, bending, stooping, twisting, pulling, pushing, reaching above the shoulder, and lifting.

On January 19, 2016 OWCP received a letter dated January 13, 2016 from counsel. Counsel asserted that he was repeating his request for reconsideration and pointed out that the additional medical report of Dr. Moore was new evidence that supported appellant's claim on the issue of causation in a favorable manner. Dr. Moore related that upon review of appellant's records, she realized that she had a previously accepted claim for which she was under work restrictions when the September 12, 2013 work incident occurred. Counsel alleged that appellant's compliance with her supervisor's request to push a heavy APC cart, which exceeded her restrictions, led to the reported injury of the second claim.

In a decision dated February 2, 2016, OWCP denied modification of the November 18, 2014 decision because the medical evidence failed to establish that she sustained a back injury causally related to the accepted September 12, 2013 employment incident. It specifically noted that Dr. Moore did not sufficiently explain how the accepted incident contributed to or exacerbated appellant's preexisting back condition.

On February 23, 2016 appellant retired from federal service due to disability.

⁴ OWCP considered this letter as a request for reconsideration.

In a letter dated April 15, 2016, received by OWCP on April 22, 2016, appellant, through counsel, requested reconsideration. Counsel reiterated that appellant was working with restrictions associated with a previously accepted claim File No. xxxxxx801 when she experienced another injury to her back on September 12, 2013. He noted that OWCP had informed appellant to file a claim for a new injury instead of referring to her previously accepted claim. Counsel asserted that OWCP had a duty to pay wage-loss compensation benefits when an employing establishment elected to pay wage-loss benefits instead of paying wages after an injured employee is removed from limited duty. He further alleged that OWCP had placed appellant in a situation of bureaucratic contradiction. Counsel pointed out that under File No. xxxxxx632, OWCP denied appellant's claim because the medical evidence did not show a change of the prior condition sufficient to establish a new injury. He noted that OWCP determined that her condition was the same as the one in her previously accepted claim under File No. xxxxxx801 for a 2008 injury, but under that claim, OWCP refused to pay wage-loss compensation benefits because appellant was off work due to the claim under File No. xxxxxx632 for a 2013 injury. Counsel asserted that OWCP improperly decided not to award wage-loss benefits for the 2008 injury and based its decision on the denial of the 2013 claim even though it decided that appellant's 2013 claim was a new injury, and not a continuation of her 2008 accepted injury. He asserted that the ruling in the 2013 claim for no new injury should not be a basis for not paying the accepted claim for wage-loss compensation benefits in the 2008 employment injury.

Effective April 29, 2016, OWCP combined appellant's previously accepted 2008 traumatic injury claim under File No. xxxxxx801 with the current File No. xxxxxx632, with the master file as File No. xxxxxx801.

By decision dated July 22, 2016, OWCP denied further merit review of appellant's claim. It found that appellant's reconsideration letter neither raised a substantive legal question nor submitted relevant and pertinent new evidence sufficient to warrant merit review according to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence⁶ including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁷

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.⁸

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁷ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

There are two components involved in establishing the 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.⁹ Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.¹⁰ An employee may establish that the employment incident occurred as alleged but fail to show that his or her disability or condition relates to the employment incident.¹¹

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.¹² 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.¹³ The weight of the 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.¹⁴

While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.¹⁵

ANALYSIS -- ISSUE 1

Appellant alleged an exacerbation of her preexisting back condition on September 12, 2013 when she pushed a heavy cart at work. OWCP accepted that on September 12, 2013 she pushed a large APC at work and that she was diagnosed with spinal stenosis at L4-L5. It denied appellant's claim finding that the medical evidence of record failed to establish how the accepted September 12, 2013 employment incident aggravated or exacerbated her preexisting back condition.

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

Appellant submitted various reports of Dr. Moore dated September 17, 2013 to July 5, 2015. In a July 17, 2014 narrative report, Dr. Moore related that she had treated appellant for spinal stenosis at L4-L5 of her lumbar spine following a 2008 work injury. She opined that

⁹ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

¹⁰ *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

¹² *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

¹³ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

¹⁴ *James Mack*, 43 ECAB 321 (1991).

¹⁵ *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

appellant sustained a severe exacerbation of her spinal stenosis on September 12, 2013 when she pushed a heavy cart at work, despite work restrictions. Dr. Moore explained that appellant's December 2008 employment injury and her September 12, 2013 employment incident caused an exacerbation of her L4-L5 stenosis. In a July 1, 2015 report, she further explained that pushing the heavy APC cart in 2013 caused muscle strain and injury. Dr. Moore reported that appellant's chronic back pain and exacerbation of her back pain were directly related to her work duties. The Board concludes that although these reports do not provide sufficient medical rationale explaining how the accepted employment incident caused or contributed to an exacerbation of appellant's preexisting back condition, they strongly suggest and support a relationship between the accepted September 12, 2013 incident and appellant's back condition.¹⁶

The Board finds that, while the reports from Dr. Moore are not completely rationalized, they are consistent in indicating that appellant sustained an exacerbation of her preexisting back condition.¹⁷ Although the reports are insufficient to meet appellant's burden of proof to establish her claim, they are sufficient to require OWCP to further develop the medical evidence.¹⁸

It is well-established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹⁹ While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.²⁰ Thus, the Board will remand the case to OWCP for further development to obtain a rationalized medical opinion as to whether appellant's condition is causally related to the employment incident and issue a *de novo* decision on whether she sustained an injury in the performance of duty on September 12, 2013, as alleged.²¹

CONCLUSION

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

¹⁶ See *L.F.*, Docket No. 14-1906 (issued August 13, 2015) (the Board determined that while reports by a claimant's treating physician were not completely rationalized to establish a work-related injury they strongly supported a relationship between the employment incident and diagnosed condition and remanded the case for OWCP to further develop the medical evidence).

¹⁷ See *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

¹⁸ *Richard E. Simpson*, 55 ECAB 490, 500 (2004); *John J. Carlone*, *supra* note 10.

¹⁹ See *Vanessa Young*, 56 ECAB 575 (2004).

²⁰ *Supra* note 15.

²¹ Because of the disposition of the first issue, the second nonmerit issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: April 4, 2017
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