

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

J.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Keyport, NJ, Employer**

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**Docket No. 16-1724
Issued: April 20, 2017**

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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 25, 2016 appellant, through counsel, filed a timely appeal from a May 27, 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 to consider the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish a traumatic injury causally related to the accepted August 9, 2013 employment incident.

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.*

On appeal counsel argues that appellant had submitted sufficient evidence to establish *prima facie* evidence of a traumatic injury through the reports of her attending physicians.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the prior decision are incorporated herein by reference.

On August 12, 2013 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2013 she injured her back bending over to lift a tray of mail at the employing establishment. She noted that she felt something move in her back. Appellant's attending physician, Dr. Mark Filippone, a Board-certified physiatrist, recommended physical therapy on August 14, 2013. He completed a form report on the same date and diagnosed lumbar radiculitis.

In a September 4, 2013 letter, OWCP requested additional factual and medical evidence in support of the claim. Dr. Filippone completed an August 14, 2013 report noting appellant's history of bending and lifting in the performance of duty and having a pop in her back. He noted that appellant had been involved in a motor vehicle accident in 2008, which resulted in epidural steroid injections of the low back and neck. Dr. Filippone noted that appellant returned to full-time regular duty after the 2008 accident. On examination he diagnosed low back pain with radiation into the left leg with flexion at the waist. Dr. Filippone noted that appellant experienced more pain on the left side of her back. He diagnosed acute injury to the lumbosacral spine and opined that this condition was solely the result of the employment injuries on August 9, 2013. Dr. Filippone completed a form report on September 4, 2013 and diagnosed an acute injury of the lumbar spine and indicated by checking a box marked "yes" on a form report that he believed that this condition was caused or aggravated by an employment activity.

A lumbar spine magnetic resonance imaging (MRI) scan dated August 13, 2008 demonstrated left lateral disc herniation at L4-5 and central disc herniation at L5-S1. A cervical spine MRI scan on August 13, 2008 showed cervical spondylosis at C5-6 and disc bulges from C4-7. Appellant's thoracic spine MRI scan on August 31, 2008 demonstrated small central disc protrusion at T7-8 and T8-9. Chest x-rays dated August 10, 2008 showed a compression fracture at T9. A computerized tomography of appellant's chest demonstrated a probable rib fracture. Appellant underwent a bone scan on August 22, 2008 which revealed an abnormal mid right rib anteriorly and abnormal sternum which were likely probable fractures.

Appellant submitted an August 31, 2013 narrative statement and described her job. She noted her nonwork-related motor vehicle accident on August 10, 2008. Appellant noted that she pulled something in her back while working on August 9, 2013. In a statement dated August 10, 2013, she reported on August 9, 2013 that she bent over to pick up a foot-long tray of letters, when she felt something pull in her lower back. Appellant noted that she felt sore, but continued to work. She reported the incident to her supervisor and proceeded with her duties. Appellant noted that as the day progressed the pain worsened in her back and traveled from her hip down into her knee and ankle. She utilized leave on August 10, 2013.

³ Docket No. 14-1673 (issued November 14, 2014).

By decision dated October 8, 2013, OWCP denied appellant's claim finding that she failed to submit medical evidence of a specific condition resulting from the August 9, 2013 employment incident. It found that Dr. Filippone's diagnoses of acute injury to the lumbosacral spine was insufficient to meet her burden of proof.

Appellant requested an oral hearing on October 15, 2013. In a report dated October 7, 2013, Dr. Filippone diagnosed lumbar spine trauma. He again indicated by checking a box marked "yes" that he believed appellant's diagnosed condition was due to her employment activity. Dr. Filippone completed narrative reports on September 4 and October 7, 2013 and noted her complaints of low back pain. He requested authorization for additional lumbar MRI scan and electrodiagnostic testing. Dr. Filippone completed a report on October 31, 2013 and diagnosed cervical radiculopathy, occipital headache, internal derangement of the shoulders, elbows and wrists, and lumbar radiculopathy. He noted, "In my professional medical opinion, it is well within reasonable medical probability that all of the [appellant's] present complaints and physical abnormalities are directly and solely the result of the injury sustained while at work on August 9, 2013...."

Appellant underwent the additional lumbar spine MRI scan on October 22, 2013 which demonstrated disc desiccation and an annular tear at L3-4, with disc bulges at L4-5 and L5-S1. Dr. Filippone reviewed this test on November 8, 2013 and attributed her diagnosed condition to the acute low back injury. In a December 5, 2013 report, he found appellant's condition unchanged. On January 9, 2014 Dr. Filippone noted that she reported back pain, rated 7 out of 10, radiating into the left lower extremity and down into the left foot. He found pain, guarding, and spasm in the lumbar paraspinals. Dr. Filippone noted that appellant's prior low back condition had resolved completely such that she was able to return to regular full-time duty.

Appellant testified at the oral hearing on February 19, 2014. She noted a preemployment back injury in 1987, which did not interfere with her job as letter carrier. Appellant noted that her mailbag averaged 30 pounds and that she was required to lift up to 75 pounds. She described the 2008 motor vehicle accident which was not related to her employment. Appellant noted that she was out of work for five weeks with neck and low back pain, but returned to full duty. On September 27, 2008 she sustained a work-related meniscus tear due to twisting her right knee while walking down steps in the performance of duty. Appellant again returned to full duty and was in full-duty status on August 9, 2013 when she injured her back. She noted that she had bent down to lift up a tray of mail and felt something move in her back. Appellant experienced soreness and tightness, reported the incident to her acting supervisor, and continued to work. She noted that the pain increased and that she could not take normal size steps. Appellant had difficulty locating a physician who would accept workers' compensation cases and eventually visited Dr. Filippone on August 14, 2013.

Dr. Filippone completed a report on February 18, 2014 and reviewed appellant's electrodiagnostic studies. He found a partial denervation in muscles innervated by the bilateral L5-S1 lumbosacral nerve roots and to a lesser extent in muscles innervated by the left L3-4 lumbar nerve roots. Dr. Filippone concluded that appellant had electrodiagnostic evidence of left L3-4 and L5-S1 lumbosacral radiculopathy and right L5-S1 lumbosacral radiculopathy. He opined, "In my professional medical opinion, the above abnormalities are totally consistent with the injuries sustained at work ... and it is consistent with the pathology noted on the MRI [scan]

of the lumbar spine....” Dr. Filippone also examined appellant on February 26 and March 24, 2014.

By decision dated May 9, 2014, the hearing representative found that Dr. Filippone’s reports were not sufficiently rationalized to meet appellant’s burden of proof. The Board reviewed this decision on November 14, 2014 and found that appellant had failed to provide the necessary medical opinion evidence, based on a proper factual background, to establish her traumatic injury claim.⁴

After the Board’s November 14, 2014 decision, appellant submitted additional medical evidence. Dr. Filippone submitted a series of notes and form reports dated April 29, May 29, July 8, August 12 and 26, and September 4, 2014 indicating his opinion that her current back condition was due to her employment. On August 14, 2014 appellant underwent an additional lumbar MRI scan which demonstrated mild annular disc bulge at L2-3 which reflected an increase from the October 22, 2013 scan. The August 14, 2014 MRI scan also showed similar findings in regard to disc bulges at L3-4, L4-5, and the disc bulge and herniation at L5-S1.

On September 30, 2014 Dr. Thomas R. Peterson, a Board-certified neurosurgeon, submitted a report relating appellant’s history of injury on August 9, 2013. He diagnosed low back pain and lumbar radiculopathy causally related to an August 9, 2013 work-related injury.

Counsel requested reconsideration on November 19, 2014 based on the additional medical evidence. Dr. Filippone completed an additional form report on December 23, 2014 and continued to indicate by checking a box marked “yes” that appellant’s diagnosed condition of lumbosacral radiculopathy was caused or aggravated by an employment activity.

By decision dated February 12, 2015, OWCP denied modification of the prior decisions finding that appellant had failed to submit the necessary rationalized medical opinion evidence to establish her claim. Counsel appealed this decision to the Board on April 14, 2015.

In a letter dated May 13, 2015, counsel requested that the Board dismiss the appeal and requested reconsideration from OWCP based on additional reports from Dr. Filippone. The Board issued an Order Dismissing Appeal on July 31, 2015 in response to a May 20, 2015 request from counsel.⁵

Dr. Filippone completed a report on December 23, 2014 noting appellant’s history of low back pain and her previous motor vehicle accident in 2008. He opined that she sustained a neck injury in the motor vehicle accident and that her symptoms had resolved before her August 9, 2013 work injury. Dr. Filippone noted that his reports were supported by medical rationale. On March 17, 2015 he again noted that his prior reports provided ample medical reasoning. Dr. Filippone indicated that all of the abnormalities found on examination and diagnostic studies were solely the result of injuries appellant sustained at work on August 9, 2013. He completed a note on April 18, 2015 and provided his findings based on examination. Dr. Filippone opined

⁴ *Id.*

⁵ Docket No. 15-1059 (issued July 31, 2015).

that appellant was totally disabled as a result of work injuries. On August 31, 2015 he found persistent lumbar paraspinal pain associated with guarding and spasms. Dr. Filippone reported his opinion that, "It is evident to this examiner that something dreadful happened to [appellant] on the day of the workers' compensation injury."

Counsel again requested reconsideration on October 5, 2015. He submitted a September 29, 2015 report from Dr. Filippone who had noted initially examining appellant on August 14, 2013 and opined that she sustained an acute lumbar spine injury at work on August 9, 2013. Counsel found that she developed atrophy of the left leg since his initial examination. Dr. Filippone also reviewed a 2011 electromyogram (EMG), which reported no denervation in either leg in contrast with the February 18, 2014 EMG, which showed partial denervation of the L3-4 and L5-S1 nerve roots consistent with a left polyradiculopathy from L2-S1 and a right L5-S1 lumbar radiculopathy. He noted that appellant's MRI scan findings had changed from 2008 to 2013 from a L3-4 disc bulge to L3-4 disc desiccation and annular tear. Dr. Filippone found that there were postemployment incident changes in the electrophysiologic studies, annular tears on MRI scan, and developing atrophy as well as more symptomatic radicular pain in the left leg all of which showed that she was "grossly injured on August 9, 2013."

Appellant underwent an additional lumbar MRI scan on November 11, 2015 which indicated disc bulges at L2-3, L3-4, L4-5, and L5-S1. A cervical MRI scan on November 11, 2015 showed straightening of the cervical lordosis, as well as anterior spondylosis and disc bulge at C5-6.

Dr. Jeffrey Oppenheimer, a Board-certified neurosurgeon, initially examined appellant on November 4, 2015. He described her history of low back pain with radiation to her feet as well as complaints of neck pain since 2008. Dr. Oppenheimer noted that appellant believed that her conditions were related to her work factors which later were exacerbated by the 2008 motor vehicle accident. He diagnosed cervicgia with right cervical radiculitis and lumbago with bilateral lumbar radiculitis. Dr. Oppenheimer examined appellant again on November 19, 2015 and diagnosed cervicgia with right cervical radiculitis secondary to C4-5, C5-6, and C6-7 spondylosis and disc herniation as well as bilateral lumbar radiculitis secondary to L3-4, L4-5, and L5-S1 spondylosis. He recommended surgery. Dr. Oppenheimer performed bilateral laminoforaminotomes at L2-3, L3-4, L4-5, and L5-S1 on January 13, 2016.

By decision dated May 27, 2016, OWCP denied modification of its prior decisions denying appellant's traumatic injury claim.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of FECA and 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

⁶ *Supra* note 2.

disability or specific condition for which compensation is claimed is causally related to the employment injury.⁷ 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.⁸

OWCP defines 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.”⁹ To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. 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.¹⁰ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.¹¹

A medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.¹² Medical rationale includes a physician’s detailed opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment activity. The opinion of the physician must be based on a complete factual and medical background of the claim, 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 specific employment activity or factors identified by the claimant.¹³

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a traumatic injury causally related to the accepted August 9, 2013 employment incident.

Appellant has submitted medical evidence of a diagnosed condition, lumbosacral radiculopathy, and has attributed this condition to her bending incident on August 9, 2013. In the previous review of this case, the Board found that there was no rationalized medical opinion evidence establishing that her ongoing back condition was causally related to the accepted employment incident. Dr. Filippone has submitted a series of reports opining that appellant’s current back condition was causally related to her bending and lifting August 9, 2013

⁷ *Kathryn Haggerty*, 45 ECAB 383, 388 (1994); *Elaine Pendleton*, 41 ECAB 1143 (1989).

⁸ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁹ 20 C.F.R. § 10.5(ee).

¹⁰ *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *J.Z.*, 58 ECAB 529 (2007).

¹² *T.F.*, 58 ECAB 128 (2006).

¹³ *A.D.*, 58 ECAB 149 (2006).

employment activities. He has, however, not offered sufficient medical rational or explanation for his opinions. Dr. Filippone did not explained how the bending incident resulted in appellant's lumbosacral radiculopathy. Without any medical explanation or reasoning in support of his opinion of causal relationship, his reports are insufficient to establish that her accepted August 9, 2013 incident of bending over to lift a tray of mail resulted in her diagnosed conditions. The Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's diagnosed condition was related to the history given is of little probative value. Without any explanation or rationale for the conclusions reached, such reports are insufficient to establish causal relationship.¹⁴

Dr. Peterson's September 30, 2014 report exhibits the same defects noted in Dr. Filippone's reports. While he mentions appellant's employment incident, diagnoses lumbar radiculopathy, and opines that this condition was causally related to her August 9, 2013 incident, Dr. Peterson also failed to provide any medical explanation in support of his opinion. Further, he failed to provide a complete history of injury including her previous back injuries. Without a detailed report taking into account appellant's complicated history of back conditions and explaining how and why her bending incident caused, contributed to, or aggravated her current diagnosed conditions, his report is insufficient to meet her burden of proof.

Dr. Oppenheimer provided a seemingly different history of injury indicating that appellant's current condition was the result of her employment duties over a period of time prior to her 2008 motor vehicle accident. He indicated that the motor vehicle accident aggravated her underlying employment-related condition. Dr. Oppenheimer's reports do not support appellant's claim for a traumatic injury on August 9, 2013 as he provided a history inconsistent a traumatic injury on August 9, 2013.

The Board finds, contrary to counsel's argument on appeal, that appellant has not established *prima facie* evidence of a traumatic injury.

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 not met her burden of proof to establish a traumatic injury causally related to the accepted August 9, 2013 employment incident.

¹⁴ *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

ORDER

IT IS HEREBY ORDERED THAT the May 27, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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