

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

S.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tomball, TX, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 17-0755
Issued: August 1, 2017**

Appearances:
*Douglas Sughrue, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 17, 2017 appellant, through counsel, filed a timely appeal from a December 12, 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 over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish an occupational disease causally related to factors of her federal employment.

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.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The facts relevant to the present appeal are set forth below.

On August 4, 2008 appellant, then a 42-year-old letter carrier, filed an occupational disease claim (Form CA-2), alleging that her preexisting pinched nerve developed into five herniated discs as a result of performing her letter carrier duties. She first became aware of her condition and realized that it was causally related to her employment on December 19, 2006. Appellant did not stop work at that time.

On August 29, 2007 appellant was treated by Dr. Chandler Mann, a Board-certified anesthesiologist, for chronic back pain since 1995. She related that she was working as a letter carrier in December when she bent over and felt an acute searing low back pain with radiation into her right buttock. In an October 25, 2007 report, Dr. Mann noted appellant's long history of lumbar degenerative disc disease, spondylosis, and low back syndrome. He noted that appellant had several medial branch blocks and radiofrequency ablation of the right L5-S1, but her pain recurred.

In a September 29, 2008 decision, OWCP denied appellant's claim as the evidence was insufficient to establish the events occurred as alleged. It noted that she had failed to provide a factual statement of what factors of employment she claimed had caused her injury.

Appellant requested a review of the written record by an OWCP hearing representative. She submitted reports from Dr. Leonard Trahan, a Board-certified orthopedist, who administered facet blocks and diagnosed lower back syndrome with spondylosis and facet joint dysfunction. On March 20, 2008 Dr. Trahan noted that the computerized tomography (CT) scan showed degenerative disc disease at L5-S1. On June 2, 2008 Dr. Mann noted appellant's long history of lumbar degenerative disc disease, spondylosis, and low back syndrome. He also noted that appellant underwent several medial branch blocks at L3-4, L4-5, L5-S1 and radiofrequency ablation of the right L5-S1, but her pain recurred.

An August 7, 2008 report from Dr. Stefan Pribil, a Board-certified neurosurgeon, noted that appellant was status post back surgery⁴ with minimal pain and spasm. In an undated addendum, Dr. Pribil noted the discogram CT showed disruption at L5-S1 and L4-5, delamination and fragmentation of the disc at the L5-S1 with central extravasation. He recommended a microdiscectomy.

In an April 8, 2009 decision, an OWCP hearing representative found that appellant had established the factual element of her claim, but denied the claim because she had not submitted sufficient medical evidence to establish causal relationship. On July 13, 2009 appellant

³ Docket No. 11-1749 (issued April 12, 2012).

⁴ The record does not contain an operative report regarding the referenced surgery.

requested reconsideration. In a decision dated July 27, 2009, OWCP denied modification of the April 8, 2009 decision.

On November 12, 2009 appellant requested reconsideration. She provided a June 25, 2009 report from Dr. Curtis Fandrich, an osteopath, who noted treating appellant for a condition directly related to her work duties. Appellant reported that her work duties consisted of repetitive bending, twisting, lifting, and carrying more than 10 pounds daily. Dr. Fandrich noted that the National Institutes of Health and Occupational Safety and Health Administration studies revealed that these daily activities can result in work-related injuries.

In a decision dated November 27, 2009, OWCP denied modification of the prior decision. On December 14, 2009 appellant requested reconsideration. In a December 29, 2009 decision, OWCP denied her request for reconsideration because the evidence submitted was insufficient to warrant a merit review.

Appellant requested reconsideration on November 29, 2010. Evidence submitted included a July 7, 2010 report from Dr. Fandrich who noted appellant's July 2008 L5-S1 discectomy. Appellant reported working for the employing establishment for 12 years and that she had been hired with a pinched nerve in her lower back from a prior lifting injury. Dr. Fandrich diagnosed right low back pain, right leg radiculopathy, right sciatica, and hamstring somatic dysfunction. Appellant submitted a December 6, 2010 duty status report from Dr. Michael J. Leahy, a Board-certified orthopedist.

On February 14, 2011 OWCP denied appellant's request for reconsideration as the evidence submitted was insufficient to warrant a merit review. On July 26, 2011 appellant appealed to the Board. In an April 12, 2012 order, the Board set aside OWCP's February 14, 2011 decision.⁵ The Board noted that OWCP did not review Dr. Leahy's December 6, 2010 report before issuing its February 14, 2011 decision. The Board remanded the case so that OWCP could properly consider all evidence submitted at the time of the February 14, 2011 decision. In an August 7, 2012 decision, OWCP noted reviewing Dr. Leahy's December 6, 2010 report and denied modification of the November 27, 2009 decision.

On July 24, 2013 appellant requested reconsideration. She submitted a June 26, 2013 report from Dr. Frank L. Barnes, a Board-certified orthopedist, who treated her for radiating lumbar pain. Dr. Barnes noted that appellant initially injured her back in 1996 when she lifted an obese person. Despite surgery, appellant's pain persisted with numbness of her feet. Dr. Barnes diagnosed herniated lumbar disc at L4-5 and L5-S1 and L2-3 herniated disc. He noted appellant's work as a letter carrier required repeated lifting which placed stress on her lumbar spine and caused the herniated discs and current symptoms. Dr. Barnes opined that appellant could perform sedentary work with lifting restrictions. In a decision dated October 2, 2013, OWCP denied modification of the prior decision.

On June 16, 2014 appellant, through counsel, requested reconsideration. In an April 10, 2014 report, Dr. Barnes noted appellant's history and advised that she reported reinjuring her

⁵ Docket 11-1749 (issued April 12, 2012).

back at work on December 19, 2006 when she bent over and got a “pinch in the back.” He opined that appellant’s work injury aggravated the 1996 injury. Dr. Barnes reviewed his treatment of appellant and advised that she could return to sedentary work. A February 4, 2013 electromyogram (EMG) and nerve conduction velocity (NCV) studies report revealed no abnormalities and no evidence of lumbosacral radiculopathy.

In a decision dated August 25, 2014, OWCP denied modification of the prior decision. Appellant appealed to the Board. In its September 22, 2015 decision, the Board affirmed the August 25, 2014 OWCP decision finding that appellant had submitted insufficient medical evidence to establish causal relationship.⁶

On September 14, 2016 appellant, through counsel, requested reconsideration. Appellant noted that OWCP’s reason for denying her claim for disability compensation and medical benefits was that she failed to show that her December 19, 2006 injury at work caused her to be disabled. She asserted that she submitted sufficient evidence to meet her burden of proof. Appellant referenced Dr. Fandrich’s report dated July 1, 2016 in which he provided a history of appellant’s injury, medical care, and analyzed her condition. She indicated that he had provided a diagnosis and the details of work factors and the specific work-related event on December 19, 2006 in which she alleged her preexisting injury became aggravated. Appellant argued that Dr. Fandrich opined that work factors (specifically bending and lifting heavy objects) caused the preexisting herniated discs at L2-3, L4-5, and L5-S1 to become aggravated. She contended that she had shown a significant contribution by factors of employment which had aggravated her preexisting low back condition.

Appellant submitted a July 1, 2016 report from Dr. Fandrich who provided a summary of his recent treatment. Dr. Fandrich evaluated her on April 5, 2016 for persistent low back pain since lumbar laminectomy surgical fusions in “2010.” Appellant indicated that from 2012 to 2013 she had right leg pain and dysfunction with inability to sleep. She had osteopathic manipulative therapy and prolotherapy for her low back and S1 joint ligaments and high absorption magnesium. On April 26, 2016 appellant presented with shingles. Her back was a bit better after her prolotherapy which was repeated. On May 17, June 7 and 27, 2016 appellant presented with persistent low back pain worsening and right leg radiculopathy. Dr. Fandrich noted a February 2016 magnetic resonance imaging (MRI) scan of the low back revealed intrathecal clumping consistent with arachnoiditis. He noted that appellant worked for the employing establishment for 12 years and her work activities included repetitive bending/twisting, turning, walking, lifting and carrying more than 10 pounds daily for 5 to 6 days a week, and up to 8 to 10 hours daily. Dr. Fandrich opined that this work activity certainly caused appellant’s diagnosed herniated discs at L2-3, L4-5 and L5-S1. He further indicated that the conditions resulted in surgical treatments of the same lumbar levels. Dr. Fandrich indicated that ongoing care and management of appellant’s work-related injury was required as the conditions were permanent.

In a decision dated December 12, 2016, OWCP denied modification of the September 22, 2015 decision.

⁶ Docket No. 15-0622 (issued September 22, 2015).

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim. When an employee claims that he or she sustained an injury in the performance of duty, he or she must submit sufficient evidence to establish a specific event, incident, or exposure occurring at the time, place, and in the manner alleged. The employee must also establish that such event, incident, or exposure caused an injury.⁷

Whether an employee actually sustained an injury in the performance of duty begins with an analysis of whether fact of injury has been established.⁸ To establish fact of injury in an occupational disease claim, 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.⁹

The medical evidence required to establish causal relationship is generally 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.¹⁰

ANALYSIS

It is undisputed that appellant's work duties as a letter carrier included repetitive bending, twisting, turning, walking, and lifting. However, the Board finds that appellant has failed to submit sufficient medical evidence to establish an injury causally related to specific factors of her federal employment.

Appellant submitted a July 1, 2016 report from Dr. Fandrich who noted that appellant worked for the employing establishment for 12 years and that her work activities included repetitive bending/twisting, turning, walking, lifting and carrying more than 10 pounds daily for 5 to 6 days a week, and up to 8 to 10 hours daily. He opined that this work activity certainly caused appellant's diagnosed herniated discs at L2-3, L4-5 and L5-S1 and the need for surgery. Dr. Fandrich summarized his treatment of appellant noting that she had persistent low back pain

⁷ See *Walter D. Morehead*, 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury). See generally *John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁸ *S.P.*, 59 ECAB 184, 188 (2007).

⁹ *R.R.*, Docket No. 08-2010 (issued April 3, 2009); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005).

¹⁰ *Solomon Polen*, 51 ECAB 341 (2000).

since lumbar laminectomy surgical fusions in “2010.” Appellant reported that since 2012 to 2013 she had right leg pain and dysfunction with an inability to sleep. Dr. Fandrich noted an MRI scan of the low back from February 2016 revealed intrathecal clumping consistent with arachnoiditis. He indicated that ongoing care and management of the appellant’s permanent work injury was required. The Board finds that, although Dr. Fandrich supported causal relationship, he did not provide medical rationale explaining the basis of his conclusory opinion that appellant’s diagnosed herniated discs at L2-3, L4-5 and L5-S1 were caused or aggravated by factors of employment.¹¹ Dr. Fandrich did not explain the process by which daily bending/twisting, turning, walking, lifting and carrying at work caused or aggravated the diagnosed conditions.¹² Therefore, these reports are insufficient to meet appellant’s burden of proof.

On appeal, counsel provides a detailed summary of appellant’s injury, subsequent medical treatment, and the procedural history of the instant claim. He asserts that reports from Dr. Barnes provide ample evidence that her repetitive work duties cumulatively resulted in the permanent aggravation of her herniated discs. Counsel cited *Henry Klaus*, 9 ECAB 333 (1957) noting that “Where a person has a preexisting condition which is not disabling but which becomes disabling because of aggravation causally related to the employment, then regardless of the degree of such aggravation, the resulting disability is compensable.” However, the primary issue on appeal is whether appellant has established that an aggravation of her preexisting condition was causally related to her employment. As found above, Dr. Fandrich provided a conclusory opinion on causal relationship and did not provide medical rationale explaining how repetitive bending/twisting, turning, walking, lifting and carrying more than 10 pounds daily caused or aggravated the diagnosed conditions.

Appellant also cited *Beth P. Chaput*, 37 ECAB 158, 161 (1985) noting, “It is not necessary to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relationship. If the medical evidence revealed that the fumes to which appellant was exposed during the course of her federal employment contributed in any way to her disabling obstructive pulmonary condition, such condition would be considered employment related for the purpose of compensation benefits under [FECA].” Again, as found, appellant has not established, through a rationalized medical opinion, that her diagnosed conditions were caused or aggravated by factors of employment.¹³ Dr. Fandrich did not sufficiently explain how particular work factors caused or aggravated the diagnosed conditions.

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.

¹¹ See *T.M.*, Docket No. 08-0975 (issued February 6, 2009) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

¹² *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

¹³ See *supra* note 11.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish an occupational disease causally related to factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 1, 2017
Washington, DC

Christopher J. Godfrey, 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