United States Department of Labor
Employees' Compensation Appeals Board

K.K., Appellant	)	
and	)	**Docket No. 16-1348**
	)	**Issued: February 21, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Bedford, NY, Employer	)	

Appearances:
Paul Kalker, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 14, 2016 appellant, through counsel, filed a timely appeal from a May 24, 2016 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 over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained lumbar conditions are causally related to an accepted August 27, 2014 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.*

FACTUAL HISTORY

On October 10, 2014 appellant, a 59-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury to her lower back on August 27, 2014 as a result of lifting a full tray of mail from the cargo area to a shelf inside a long life vehicle (LLV). She stopped work on August 28, 2014 and returned to full duty without restrictions on November 14, 2014.

Appellant submitted a narrative statement reiterating that she injured her lower back due to lifting mail in a truck while out on route. She further submitted a witness statement from a coworker indicating that on August 27, 2014 she was in good health all day until she returned from her route and could barely walk. In an August 28, 2014 work excuse note, Dr. Victor Khabie, a Board-certified orthopedic surgeon, removed appellant from work until further notice.

On October 10, 2014 the employing establishment controverted the claim because appellant failed to submit sufficient medical evidence to establish fact of injury.

In an October 17, 2014 letter, OWCP advised appellant of the deficiencies of her claim and afforded her 30 days to submit additional evidence and respond to its inquiries.

In response, appellant submitted a narrative statement dated October 23, 2014 and a September 3, 2014 magnetic resonance imaging (MRI) scan of the lumbar spine which demonstrated right lateral recess to right foraminal L3-4 disc protrusion with right L3 and right L4 nerve root impingement, right foraminal L4-5 annual tear abutting the right L4 nerve root, and moderate L2-3 and severe L3-4 congenital and degenerative spinal canal stenosis.

On October 23, 2014 Dr. Andrew M. Peretz, a Board-certified orthopedic surgeon, noted that appellant was evaluated for low back pain and numbness down her right leg. He reported that she had symptoms since she lifted a tray at work on August 27, 2014 and continued to have right leg numbness and some pain in her right buttock. Upon examination, Dr. Peretz found that appellant experienced more pain with extension than flexion and she was neurologically intact with negative straight leg raising. He diagnosed "radicular symptoms resolving" and recommended that appellant continue physical therapy.

In an October 23, 2014 duty status report (Form CA-17) an unidentifiable healthcare provider referenced the history of injury and advised that appellant was totally disabled.

By decision dated November 21, 2014, OWCP denied the claim because the medical evidence was insufficient to establish a causal relationship between appellant's diagnosed conditions and the August 27, 2014 employment incident.

On February 23, 2015 appellant, through counsel, requested reconsideration and submitted an August 28, 2014 report from Dr. Khabie. In this note Dr. Khabie diagnosed acute low back pain and reported that appellant was seen "a month ago for her knee and had some low back pain at that time, but no radicular symptoms." He explained that appellant had been previously treated by a Dr. Foster who opined that her back pain may have been caused by the way she was walking due to a knee condition but, on August 27, 2014, she did a lot of lifting and felt pain in her low back and right lower lumbar region with radiating symptoms down the right

leg. On September 11, 2014 Dr. Khabie reiterated the findings from the September 3, 2014 MRI scan and advised that appellant would require epidural steroid injections if her symptoms persisted.

In a November 20, 2014 report, Dr. Peretz diagnosed "continued radicular symptoms" and found that appellant still had pain in the right lower lumbar region towards her right buttock area. On January 2, 2015 he opined that lifting a tray at work on August 27, 2014 caused appellant's low back pain and pain down her right leg.

On January 14, 2015 Dr. Jason Melnick, a Board-certified physiatrist, diagnosed glaucoma and also opined that lifting a tray at work on August 27, 2014 caused "right lower extremity radicular complaint sta[r]ting one month ago with right knee pain." He noted that appellant was "seen one to two times prior with Dr. Foster regarding the knee before August 27, 2014."

By decision dated May 18, 2015, OWCP denied modification of its prior decision.

On December 28, 2015 counsel requested reconsideration and submitted an October 20, 2015 report from Dr. Peretz who noted that he first examined appellant on October 23, 2014 regarding low back pain and pain down her right leg with numbness. He noted that appellant began having symptoms on August 27, 2014 while lifting trays at work. Dr. Peretz reviewed the history of his medical treatment of appellant and reiterated his opinion that appellant's conditions were causally related to the August 27, 2014 work incident. He advised that appellant's conditions could certainly disable her from her work duties given the increasing activities and ambulation would certainly not only bring on symptoms, but could make the symptoms worse.

By decision dated May 24, 2016, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 timely filed within the applicable time limitation period of FECA, that an injury[3] was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[4]

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. A fact of injury determination is based on two elements. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the

[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).

[4] *See T.H.*, 59 ECAB 388 (2008).

time, place, and in the manner alleged. 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. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[5]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. 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.[6]

ANALYSIS

OWCP has accepted that the employment incident of August 27, 2014 occurred at the time, place, and in the manner alleged. Therefore, the issue currently under consideration is whether appellant's lumbar conditions are causally related to the August 27, 2014 employment incident. The Board finds that appellant did not meet her burden of proof to establish a causal relationship between the conditions for which compensation is claimed and the employment incident.

In his reports, Dr. Peretz diagnosed "radicular symptoms resolving" and "continued radicular symptoms" and opined that lifting a tray at work on August 27, 2014 caused appellant's low back pain and pain down her right leg. The Board finds that Dr. Peretz's diagnosis of low back pain, right leg pain, and radicular symptoms are descriptions of a symptom rather than a clear diagnosis of the medical condition.[7] Moreover, the Board has held that the mere fact that appellant's symptoms arise during a period of employment or produce symptoms revelatory of an underlying condition does not establish a causal relationship between appellant's condition and her employment factors.[8] Therefore, the Board finds that Dr. Peretz's reports are insufficient to establish that appellant sustained an employment-related injury.

On August 28, 2014 Dr. Khabie diagnosed acute low back pain and reported that appellant was previously treated by a Dr. Foster a month ago for her knee and low back pain that may have been caused by the way she was walking due to her knee condition. On January 14, 2015 Dr. Melnick opined that lifting a tray at work on August 27, 2014 caused "right lower extremity radicular complaint sta[r]ting one month ago with right knee pain" and noted that appellant was "seen one to two times prior with Dr. Foster regarding the knee before August 27, 2014." The Board finds that Drs. Khabie and Melnick failed to provide sufficient medical rationale explaining how appellant's new or preexisting lumbar conditions were caused

[5] *Id.*

[6] *Id.*

[7] The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis. *See P.S.*, Docket No. 12-1601 (issued January 2, 2013); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

[8] *See Richard B. Cissel*, 32 ECAB 1910, 1917 (1981); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

or aggravated by lifting a tray of mail at work on August 27, 2014. The need for rationale is particularly important as the evidence indicates that appellant had a preexisting knee condition for which she had been under medical treatment. Therefore, the Board finds that the reports from Drs. Khabie and Melnick are insufficient to establish causal relationship.

Appellant submitted an October 23, 2014 duty status report (Form CA-17) in support of her claim. However, this report is from a healthcare provider whose identity cannot be discerned from the record. Because it cannot be determined whether this record is from a physician as defined in 5 U.S.C. § 8101(2), it does not constitute competent medical evidence.[9]

The MRI scan is of limited probative medical value as it does not specifically address whether appellant's lumbar conditions are attributable to her accepted work injury.[10]

On appeal, counsel contends that the evidence of record proves beyond all doubt that appellant's conditions are causally related to the August 27, 2014 work incident. However, based on the findings and reasons stated above, the Board finds that appellant failed to submit rationalized medical evidence sufficient to support her allegation that she sustained an injury causally related to the August 27, 2014 employment incident.

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 that her lumbar conditions are causally related to an accepted August 27, 2014 employment incident.

[9] *R.M.*, 59 ECAB 690, 693 (2008). *See C.B.*, Docket No. 09-2027 (issued May 12, 2010) (a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2) and reports lacking proper identification do not constitute probative medical evidence).

[10] *K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006); *Linda I. Sprague*, 48 ECAB 386 (1997) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 21, 2017
Washington, DC

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

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

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