United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 16-1617**
	)	**Issued: January 24, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Chemung, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 8, 2016 appellant, through counsel, filed a timely appeal from a July 15, 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 a back injury causally related to the September 9, 2013 accepted 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 contends that OWCP's decision is contrary to fact and law.

FACTUAL HISTORY

On September 13, 2013 appellant, then a 52-year-old postmaster, filed a traumatic injury claim (Form CA-1) alleging that on September 9, 2013 she strained her lower back as a result of lifting heavy tubs and bundles at work. She stopped work on September 12, 2013.

An OWCP Form CA-16, authorization for examination, was issued by the employing establishment on September 13, 2013. Dr. Michael J. Landolf, a Board-certified internist, completed this form on September 16, 2013 and described appellant's history of experiencing low back pain on September 9, 2013. He diagnosed low back pain and indicated by checking a box marked "yes" that this condition was possibly caused or aggravated by an employment activity. Dr. Landolf released appellant to return to light work on September 16, 2013.

Appellant submitted additional reports from Dr. Landolf. In a September 16, 2013 duty status report (Form CA-17), Dr. Landolf provided a clinical finding of decreased range of motion (ROM) of the lower back. He noted that appellant's condition was partially due to a September 9, 2013 injury. Dr. Landolf indicated that she could resume work with restrictions as of September 17, 2013. In reports dated September 16 to October 11, 2013, he noted a history that on September 9, 2013 appellant felt a pull in her lower back while sorting tubs of magazines at work. Dr. Landolf also noted her history of back pain and medical, family, and social background. He reported findings on physical examination and diagnosed low back pain beginning in 1999. Dr. Landolf advised that based on appellant's history and symptoms she appeared to have chronic low back pain of an uncertain direct cause, but noted her statement that her symptoms worsened while at work and her history of significant back pathology that predated her discomfort at work. He concluded that she could return to work with restrictions following each of his examinations.

A September 26, 2013 Form CA-17 report bearing an unknown signature provided clinical findings of decreased ROM of the lower back and pain. The report indicated that appellant's conditions were partially due to a September 9, 2013 injury and that she could resume light work as of October 3, 2013.

In a report and treatment note dated October 9, 2013, Kristin Kawzeduk, a physical therapist, noted the treatment of appellant's lumbago condition.

By letter dated November 6, 2013, OWCP advised appellant of the deficiencies of her claim and afforded her 30 days to submit additional evidence and respond to its inquiries.

Form CA-17 reports dated September 19 to November 25, 2013 and bearing the same previous unknown signature reiterated the clinical findings of decreased ROM and low back pain. The reports reiterated that appellant's conditions were partially due to a September 9, 2013 injury and that she could return to light work with restrictions.

In an October 3, 2013 lumbar magnetic resonance imaging (MRI) scan report, Dr. Joseph A. Ronsivalle, a Board-certified radiologist, noted a history that appellant experienced low back pain and sustained a heavy lifting injury on September 9, 2013. He

provided an impression of L4-5 small left paracentral disc protrusion with left foraminal encroachment and L3-4 left lateral disc bulge with mild left foraminal encroachment.

In an October 3, 2013 addendum to Dr. Ronsivalle's report, Dr. Niksa Vlasic, a Board-certified radiologist, reviewed the physician's findings and the findings of lumbar MRI scans performed in 2004.[3] He related that, given the appearance of L4-5 disc disease on the current examination, there was possibly interval encroachment which was clearly seen on this examination.

In reports dated October 3 and 21 and November 4, 2013, Dr. Landolf noted that appellant's symptoms remained the same. Appellant was not working because no light-duty work was available. Dr. Landolf reported examination findings and reiterated his diagnosis of low back pain with a history of this condition beginning in 1999. He again related that the cause of appellant's condition was uncertain while noting her preexisting back pain.

In a November 26, 2013 report, Dr. David C.Y. Kung, a Board-certified neurosurgeon, provided a history of appellant's back condition, noting that she sustained a back injury at work on September 12, 2013 while lifting boxes of mail that each weighed 30 to 40 pounds. He also reported findings on physical and neurological examination. Dr. Kung listed an impression that ruled out L4-5 discogenic pain. He advised that appellant had an abnormal disc that was bulging out more on the left than the right. Dr. Kung did not detect any severe nerve compression. He doubted that the weakness of dorsiflexion of the toes was due to this disc herniation pressing on the nerve.

A September 12, 2013 after care instructions note completed by Andrew Friebel, a physician assistant, documented treatment on that date for chronic pain exacerbation. In a note of the same date, he excused appellant from work through September 15, 2013.

In a December 3, 2013 response to OWCP's development letter, appellant described the September 9, 2013 incident. Her back began to hurt while sorting and moving 14 full tubs of mail and bundles approximately weighing 35 to 45 pounds. Appellant continued to perform her work duties despite pain and discomfort in her left lower back. She believed that the pain would go away after she went home and rested. Appellant worked from the date of injury until she stopped work on September 12, 2013. At that time she informed the employing establishment about her back injury and sought medical treatment on the following day. Appellant related that she had not sustained any other injury on or off duty between the claimed date of injury and the date she first reported the injury to her supervisor and physician. She had no similar disability or symptoms before the claimed injury.

By decision dated December 11, 2013, OWCP accepted that the September 9, 2013 incident occurred as alleged. However, it denied appellant's claim and determined that the medical evidence was insufficient to establish a medical diagnosis in connection with the work event. OWCP noted that a diagnosis of pain was a symptom and not a diagnosed medical condition.

[3] The Board notes the 2004 lumbar MRI scan reports are not contained in the case record.

In a prescription dated December 31, 2013, Jennifer Hubbell, a nurse practitioner, ordered a sample of appellant's urine and pain medication monitoring. She indicated a diagnosis of lumbago. A January 6, 2014 drug monitoring report revealed positive test results for prescribed medication.

On October 22, 2014 appellant requested reconsideration of the December 11, 2013 decision.

In a July 15, 2016 decision, OWCP denied modification of the December 11, 2013 decision. It found that the medical evidence failed to provide a diagnosis of a medical condition in connection with the accepted September 9, 2013 employment incident or a well-reasoned medical explanation on the issue of causal relationship.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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[4] 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.[5]

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.[6] 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.[7]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[8] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[9] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.[10]

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

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

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

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

[8] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

[9] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[10] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a traumatic injury caused by the accepted September 9, 2013 employment incident. Appellant failed to submit sufficient medical evidence to establish that she sustained a back injury causally related to the accepted employment incident.

Dr. Landolf's reports dated September 16 to November 4, 2013 noted appellant's history of injury and diagnosed low back pain with a preexisting history of this condition beginning in 1999. However, his finding is of no probative value as he is describing a symptom rather than a clear diagnosis of a medical condition.[11] The Board has held that pain is a symptom, rather than a compensable medical diagnosis.[12] Further, Dr. Landolf's opinion is speculative regarding causal relationship. He related that the direct cause of appellant's condition was "uncertain." The Board has held that speculative and equivocal medical opinions regarding causal relationship have no probative value.[13] Moreover, while Dr. Landolf noted appellant's statement that her back symptoms worsened at work and the knowledge of her preexisting history of back symptoms, he did not provide his own rationalized medical opinion as to whether the accepted September 9, 2013 employment incident caused or aggravated appellant's back condition.[14]

Similarly, Dr. Landolf's September 16, 2013 form report is of diminished probative value. He diagnosed low back pain and indicated by checking a box marked "yes" that this condition was "possibly" caused or aggravated by the accepted September 9, 2013 employment incident. Dr. Landolf's did not identify a compensable medical diagnosis or offer a medical opinion expressed in terms of a reasonable degree of medical certainty. As noted, pain is not a diagnosis, rather it is a symptom[15] and speculative and equivocal medical opinions regarding causal relationship have no probative value.[16] Dr. Landolf did not explain how the diagnosed condition was caused or aggravated by the accepted work incident. Medical reports without adequate rationale on causal relationship are of diminished probative value and do not meet an employee's burden of proof.[17]

In a November 26, 2013 report, Dr. Kung examined appellant and ruled out L4-5 discogenic pain. Although he diagnosed a lumbar condition, he did not provide a firm diagnosis

[11] *K.B.*, Docket No. 16-0122 (issued April 19, 2016).

[12] *Id.*

[13] *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

[14] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[15] *Supra* note 11.

[16] *Supra* note 13.

[17] *See R.C.*, Docket No. 15-315 (issued May 4, 2015); *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

of a particular medical condition.[18] Further, Dr. Kung noted a history of a September 12, 2013 work incident,[19] but did not offer a specific opinion as to whether this incident caused or aggravated a diagnosed condition.[20]

Dr. Ronsivalle's October 3, 2013 MRI scan results revealed L4-5 small left paracentral disc protrusion with left foraminal encroachment and L3-4 left lateral disc bulge with mild left foraminal encroachment. While he noted a history of the accepted September 9, 2013 work incident, he did not provide an opinion on causal relationship between the accepted employment incident and the diagnosed conditions.[21] Likewise, Dr. Vlasic's October 3, 2013 addendum to Dr. Ronsivalle's report is of limited probative value as he did not offer an opinion as to the cause of the lumbar conditions.[22]

Evidence received from appellant's physical therapist, a physician assistant, and a nurse practitioner has no probative medical value. Healthcare providers such as, a physical therapist, physician assistant, or nurse practitioner, are not considered physicians as defined under FECA.[23] Likewise, the Form CA-17 reports dated September 19 to November 25, 2013, without legible signatures, have no probative medical value, as it cannot be established that the author is a physician.[24]

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.

The Board notes that the employing establishment executed a Form CA-16 on September 13, 2013 authorizing medical treatment. The Board has held that where an employing establishment properly executes a Form CA-16, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, it creates a contractual obligation, which does not involve the employee directly, to pay the cost of the examination or treatment regardless of the action taken on the claim.[25] Although OWCP denied appellant's claim for an injury, the

[18] *See Deborah L. Beatty*, 54 ECAB 340 (2003) (where the Board found that, in the absence of a medical report providing a diagnosed condition and a reasoned opinion on causal relationship with the employment incident, appellant did not meet her burden of proof).

[19] The Board notes that while Dr. Kung provided an incorrect date of injury, his description of appellant's employment incident corresponds with the history provided on her claim form.

[20] *See* cases cited, *supra* note 14.

[21] *Id*.

[22] *Id.*

[23] The term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. *See* 5 U.S.C. § 8102(2); *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as nurses, physician assistants and physical therapists are not competent to render a medical opinion under FECA).

[24] *See D.D.*, 57 ECAB 734 (2006); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[25] *See D.M.*, Docket No. 13-535 (issued June 6, 2013). *See also* 20 C.F.R. §§ 10.300 through 10.304.

record does not reflect whether OWCP addressed reimbursement of medical expenses pursuant to the Form CA-16. Upon return of the case record, it should address that issue.

CONCLUSION

The Board finds that appellant has failed to meet her burden of proof to establish a back injury causally related to the accepted September 9, 2013 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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