United States Department of Labor
Employees' Compensation Appeals Board

L.D., Appellant	)	
and	)	**Docket No. 16-1083**
	)	**Issued: March 20, 2017**
U.S. POSTAL SERVICE, SOUTHEASTERN PROCESSING & DISTRIBUTION CENTER, Southeastern, PA, Employer	)	

Appearances:
Thomas R. Uliase, 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 April 25, 2016 appellant, through counsel, filed a timely appeal from a January 19, 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 to consider the merits of the case.

ISSUE

The issue is whether appellant 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.*

On appeal, counsel contends that there was a conflict of medical evidence requiring referral to an impartial medical examiner.

FACTUAL HISTORY

On February 4, 2009 appellant, then a 53-year-old small parcel bundle sorter, filed a traumatic injury claim (Form CA-1) alleging that she injured her lower back and both legs on February 3, 2009 while pulling stuck hampers apart. She underwent a lumbar magnetic resonance imaging (MRI) scan on March 3, 2009 which demonstrated desiccation throughout the lumbar disc spaces. The MRI scan also showed a probably small central disc protrusion at T11-12, as well as a small central herniation at L2-3 with central canal stenosis. At L4-5 appellant exhibited a central and left-sided disc protrusion. Appellant's attending physician, Dr. Janine M. Darby, a Board-certified family practitioner, diagnosed back pain, spinal stenosis of the lumbar region and herniated disc on March 13 and April 13, 2009.

In a note dated April 2, 2009, Dr. Russell Amundson, a Board-certified neurosurgeon, noted that appellant had a work incident of pulling hampers apart, which resulted in back pain. He reported no distinct radicular findings on motor, sensory, or reflex examination. Dr. Amundson found mild tenderness in the back to palpation at the lumbosacral region as well as limited lumbar range of motion. He interpreted appellant's MRI scan to show disc bulges, but no surgically significant pathology.

Dr. Darby completed a report on May 1, 2009 and diagnosed lumbar disc herniation with spinal stenosis and attributed this condition to appellant's February 3, 2009 employment injury.

OWCP accepted appellant's claim for lumbar sprain on April 29, 2009. Appellant returned to her date-of-injury position on May 4, 2009 with no restrictions.

Appellant sought treatment in the hospital emergency room on October 15, 2011 from Dr. Vibha Gambhir, a physician Board-certified in emergency medicine, due to buttock pain radiating to her right heel. She reported an exacerbation of her sciatica on October 14, 2012. Dr. Gambhir diagnosed lumbar radiculopathy and cervical strain.

On October 17, 2011 Dr. Darby described appellant's employment activities of pushing a heavy cart on Friday and her pain from her heel to the right side of her head. She found vertebral spine tenderness and paraspinal tenderness. Appellant was unable to complete straight leg raising due to pain. Her lower extremities had normal motor and sensory examinations. Dr. Darby diagnosed back pain and radiculopathy.

Appellant filed a claim for a recurrence of disability (Form CA-2a) on October 17, 2011 and alleged on October 14, 2011 that she sustained a recurrence of disability due to her February 3, 2009 employment injury. She alleged that she was pushing filled wire containers and felt a tightness and burn across her lower back. Appellant continued to work and experienced a sharp pain down her right buttock and leg. She alleged that she had two herniated discs and spinal stenosis from her February 3, 2009 employment injury.

Dr. Andrew A. Badulak, a Board-certified family practitioner and osteopath, examined appellant on November 18, 2011. He reported that she injured her back on October 14, 2011

moving a large iron cage full of mail weighing approximately 2,000 pounds. Dr. Badulak indicated that appellant developed acute back pain while pulling the iron cage. He noted her preexisting condition of advanced degenerative disease of the lumbar spine with spinal stenosis. Dr. Badulak found posterior gluteal and lateral thigh discomfort on the right with straight leg raising. Appellant's neurological examination was normal as was her motor function in both lower extremities. He diagnosed acute onset of right lower extremity radicular symptoms involving the L5 distribution and multilevel degenerative disc disease of the lumbar spine with spinal stenosis and neural foraminal narrowing.

In a report dated January 20, 2012, Dr. Darby described appellant's February 3, 2009 employment injury and reviewed her MRI scan. She noted that appellant returned to full-duty work on May 4, 2009. Appellant reported in 2009 through 2010, her job duties changed to require her to handle and process extreme weight loads. On October 17, 2011 she sought treatment for severe back pain with radiation down the right leg. Dr. Darby diagnosed lumbosacral radiculopathy and back pain. Appellant underwent an additional MRI scan dated October 26, 2011, which demonstrated a disc bulge at L4-5 and a disc herniation at L5-S1. Dr. Darby attributed appellant's conditions to repetitious and excessive lifting, pushing, pulling, tugging, or throwing of heavy weights of more than 30 pounds. She alleged that appellant's back condition was exacerbated by dispatching weights in excess of 1,500 pounds. Dr. Darby provided work restrictions.

In a letter dated April 6, 2012, OWCP informed appellant that she had not sustained a recurrence of her back condition as defined under FECA. It further explained that her claim was more appropriately considered a new injury from either a traumatic injury or an occupational disease.

Dr. Darby completed a report on May 11, 2012 and diagnosed herniated disc syndrome and lumbosacral radiculopathy due to her October 14, 2011 employment injury. She provided work restrictions. Dr. Darby completed an attending physician's form report (Form CA-20) on June 18, 2012 and diagnosed herniated disc syndrome and lumbosacral radiculopathy. She listed appellant's history of injury as "herniated discs due to pulling injury on the job." Dr. Darby indicated by checking a box marked "yes" that appellant's condition was caused or aggravated by her employment activities.

The employing establishment controverted appellant's claim on May 30, 2012. Appellant's supervisor noted that appellant had returned to work on October 11, 2011 following a leave of absence since August 30, 2011. She confirmed that on October 14, 2011 due to low mail volume that appellant and her coworkers were granted leave at the end of their shift. Appellant reported her back pain on October 15, 2011 and had not reported her condition on October 14, 2011. The employing establishment provided her job duties as lifting and carrying 10 to 12 pounds for approximately eight hours a day, pushing and pulling up to 40 pounds, sitting continuous for approximately four hours a day and twisting, bending, and stooping for two hours intermittently. The employing establishment reported that during the last year mail volume had decreased and that consequentially there were days when appellant and her coworkers were allowed to use leave or were moved to another operation.

On June 29, 2012 Dr. Badulak indicated that appellant sustained an injury on October 14, 2011 and listed her symptoms of low back and leg pain. Appellant's neurological examination was normal. Dr. Badulak diagnosed lumbar and thoracic radiculopathy.

Appellant completed a narrative statement on September 5, 2012 and asserted that on October 11, 2011 the employing establishment instituted new carrier route revision testing schemes, which resulted in an unequal distribution of dispatched mail on one side of her machine.[3] On October 12, 2011 she began to alternate keying and dispatching mail in half hour increments. Appellant asserted that she and her partner dispatched 30 wire containers weighing in excess of 2,000 pounds each half hour rotation as compared to the previous scheme of 8 to 15 containers in that time period. She was required to maneuver the iron containers for 50 feet with both right and left turns. Appellant alleged that the wheels were frequently clogged with string and strapping. She developed tightness in her back. Appellant was required to push the containers further because of the volume of containers amassed. On October 13, 2011 she continued with the new scheme and again experienced back tightness and strain. Appellant alleged that the mail volume was overflowing and could not be controlled by two people. By October 14, 2011 her back was very tight and felt as if it were burning. Appellant was dispatching a very full container from the machine and felt a sharp pain go down her right buttock and leg. She completed her tour by sitting and had difficulty walking from the building.

On September 12, 2012 OWCP converted appellant's claim to an occupational disease based on her September 5, 2012 statement. It requested additional medical evidence in support of her occupational disease claim and provided 30 days for a response.

In a July 27, 2012 report, Dr. Badulak noted appellant's worsening back pain. He stated that her injury occurred on October 14, 2011 and found that she was disabled. Dr. Badulak reviewed appellant's October 26, 2011 MRI scan and found multilevel degenerative changes with a central disc herniation at L5-S1. He diagnosed lumbar and thoracic radiculopathy.

On October 3, 2012 Dr. Darby diagnosed lumbar/thoracic radiculopathy and right L5 radicular pain and attributed appellant's current condition to an October 14, 2011 injury. She opined that appellant had been totally disabled since October 17, 2011.

Dr. Darby completed a report on October 15, 2012. She reported that appellant sought emergency room treatment on October 15, 2011 for severe back pain radiating down the right leg. Dr. Darby explained the process change at the employing establishment on October 11, 2011 on appellant's bundle sorting machine and the resulting increase in mail volume through appellant's duty station. Appellant related that her back pain increased from October 11 through 14, 2011 when she moved a full container and felt a sharp back pain radiating down her right leg. Dr. Darby diagnosed lumbosacral radiculopathy and back pain. She noted that an MRI scan showed a new disc herniation at L5-S1. Dr. Darby opined that appellant's current conditions were causally related to repetitious and excessive lifting, pushing, pulling, tugging, or throwing of weights greater than 30 pounds. She also attributed appellant's condition to intense strain of skeletal lumbosacral areas by dispatching weights in excess of 1,500 pounds. Dr. Darby noted, "The modifications made to the machine necessitated unusually heavy volume of mail to be

[3] Appellant submitted a duplicate statement on October 15, 2012.

dispatched in a much more frequent design than normal, causing further strain and aggravation leading to the injury on October 14, 2011."

In a November 19, 2013 decision, OWCP denied appellant's occupational disease claim finding that she had not established her employment duties as alleged. It indicated that the employing establishment disputed her description of her position requirements.

Counsel requested an oral hearing on December 9, 2013. On May 19, 2014 he submitted additional evidence. One of appellant's coworkers, Ms. M., completed a statement on May 15, 2014 and confirmed that during the week of October 11 through 14, 2011 normal schemes were not used on the small parcel bundle sorter machine. She asserted that the test schemes were not well planned and that 90 percent of the mail fell on one side of the machine. Ms. M. alleged, "The amount of mail that fell was extreme to say the least. We were bombarded with an overwhelming portion of the entire mail volume falling to our side of the machine." She further noted that the dispatch of containers was more than doubled from the normal 10 to 15 containers per half hour. Ms. M. reported that the aisles were clogged with the number of wire containers dispatched forcing both appellant and her to push and pull the containers in a tight area for longer distances. She noted that the testing scheme continued for three weeks before the severe imbalance of the mail flow was adjusted.

During the hearing, held on May 21, 2014, counsel submitted a report from Dr. Darby dated June 30, 2014. Dr. Darby concluded, "It is my professional opinion that [appellant's] disc herniation at L5-S1 [with] moderate central canal narrowing was a direct result of her work injury that began on October 11, 2011." In an August 5, 2014 decision, OWCP's hearing representative vacated the November 19, 2013 decision finding that appellant had established her work factors occurred as alleged. She remanded the case for OWCP to further develop the medical evidence by referral to a second opinion physician.

On October 17, 2014 OWCP referred appellant, a statement of accepted facts, and a list of questions for a second opinion evaluation by Dr. Steven J. Valentino, an osteopath with certifications in orthopedic surgery and spine surgery. In a November 5, 2014 report, Dr. Valentino noted her work history of increasing back pain over the course of three days due to a new scheme on the sorting machine. He reviewed appellant's medical history including x-rays, which demonstrated degenerative changes without compression fracture or subluxation. Dr. Valentino found that her March 3, 2009 MRI scan revealed multilevel spondylosis. He performed a physical examination and found no spasm, malalignment, trigger points, or subluxation of the spine. Dr. Valentino also reported that appellant's neurologic examination was normal. He diagnosed preexisting lumbar degenerative disc disease. Dr. Valentino opined that appellant did not sustain an injury related to her employment activities as there were no acute findings to collaborate her radicular-like symptoms. He concluded that she could return to her date-of-injury position with no restrictions.

By decision dated December 2, 2014, OWCP denied appellant's occupational disease claim finding that the medical evidence of record did not establish a diagnosed condition as a result of her accepted employment activities in October 2011.

Counsel requested an oral hearing on December 8, 2014, which was held on March 26, 2015. He argued that the statement of accepted facts provided to Dr. Valentino was insufficient as it did not describe the impact of the change in sorting scheme on appellant's workload or activities.

By decision dated May 8, 2015, OWCP's hearing representative vacated the December 2, 2014 decision. She noted that the statement of accepted facts had improperly indicated that the new sorting scheme began on October 12, 2011 rather than October 11, 2011. The hearing representative also found that the statement of accepted facts failed to describe the increased volume of mail on her side of the machine due to uneven distribution caused by the new sorting scheme resulting in more than 30 wire containers per hour rather than the normal 8 to 15. She noted the greater distance that appellant was required to move the wire containers. The hearing representative further found that Dr. Valentino had not clearly reviewed the October 26, 2011 MRI scan and had not provided medical rationale in support of his opinion regarding appellant's preexisting lumbar degenerative disc disease. She remanded the case for OWCP to request a supplemental report based on an updated statement of accepted facts to include a complete description of appellant's altered job duties beginning October 11, 2011. The hearing representative directed OWCP to request that Dr. Valentino address both MRI scans, clarify whether the identified herniated disc was responsible for her radicular symptoms, and to explain whether appellant's degenerative disc disease was preexisting. She noted that his opinion should be well reasoned, based on an accurate definition of causal relationship, and supported by the evidence of record.

OWCP formulated a new statement of accepted facts on June 9, 2015, noting that appellant's work output per hour doubled with the adjusted machine scheme from October 11 through 14, 2014. It also provided Dr. Valentino with a new list of questions. OWCP asked that he address the findings on both MRI scans, clarify the impact of the L5-S1 disc herniation, explain whether appellant's degenerative disc disease was preexisting, provided the definition of causal relationship, and asked that he support his opinions with evidence in the record and medical reasoning.

Dr. Valentino provided a supplemental report on June 15, 2015. He reviewed the March 3, 2009 MRI scan and found desiccation throughout the lumbar discs as well as transitional anatomy. Dr. Valentino noted a small central herniation at L2-3, a disc protrusion at L4-5, and a L5-S1 transitional level. He found that the October 26, 2011 MRI scan did not note transitional anatomy, but a disc bulge at L3-4 and a protruding disc at L5-S1. Dr. Valentino concluded, "[W]hen one takes into account the transitional anatomy, there is no evidence of a new disc herniation or protrusion on the October 26, 2011 MRI [scan]." He further opined, "Given this finding as well as the lack of specific radicular complaints, I do not find that [appellant] sustained a work-related back condition as a result of her working the new sorting scheme for the period of October 11, 2014 through October 14, 2015." Dr. Valentino found that appellant had a prior history of disc herniation, sciatica, stenosis, and degenerative change. He concluded that her degenerative disc disease was preexistent and not aggravated by work factors.

In a July 24, 2015 decision, OWCP denied appellant's claim for an occupational disease finding that Dr. Valentino's report was entitled to the weight of the medical evidence.

On August 5, 2015 counsel requested an oral hearing, which was held on November 13, 2015. He argued that Dr. Valentino failed to explain what transitional anatomy was in his June 15, 2015 report. Counsel further pointed out factual errors in Dr. Valentino's report as well as contractions regarding the presence of radicular complaints.

By decision dated January 19, 2016, OWCP's hearing representative affirmed the July 24, 2015 decision. He found that Dr. Valentino had provided an accurate history of injury, definitive diagnosis, and provided medical reasoning supporting that appellant did not sustain an injury as a result of her occupational activities. The hearing representative found that appellant had failed to meet her burden of proof to establish an injury due to her employment duties from October 11 through 14, 2011.

LEGAL PRECEDENT

OWCP's regulations define an occupational disease as "a condition produced by the work environment over a period longer than a single workday or shift."[4] To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.[5]

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.[6] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[7]

ANALYSIS

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

[4] 20 C.F.R. § 10.5(q).

[5] *Lourdes Harris*, 45 ECAB 545, 547 (1994).

[6] 5 U.S.C. §§ 8101-8193, 8123; *B.C.*, 58 ECAB 111 (2006); *M.S.*, 58 ECAB 328 (2007).

[7] *R.C.*, 58 ECAB 238 (2006).

Beginning October 14, 2011, appellant, who had a previously accepted claim for back strain, attributed her ongoing back condition to a change in machine scheme on October 11 through 14, 2011. She provided a detailed description of the change in her duties during this period. Appellant also provided a statement from a coworker supporting her increased duties beginning October 11, 2011.

Appellant also submitted medical evidence of an additional back condition, including a diagnosis of cervical strain, and lumbar radiculopathy from Dr. Gambhir. She submitted a series of reports from Drs. Darby and Badulak beginning October 17, 2011 diagnosing radiculopathy due to her duties. Appellant underwent an additional MRI scan dated October 26, 2011, which demonstrated a disc bulge at L4-5 and a disc herniation at L5-S1. Dr. Badulak reviewed her October 26, 2011 MRI scan and found multilevel degenerative changes with a central disc herniation at L5-S1. He diagnosed lumbar and thoracic radiculopathy.

OWCP referred appellant for a second opinion evaluation with Dr. Valentino. Dr. Valentino examined her on November 5, 2014 over three years since her October 11, 2011 employment duties changed, and found no spasm, malalignment, trigger points, or subluxation of the spine. He also reported that appellant's neurologic examination was normal. Dr. Valentino diagnosed preexisting lumbar degenerative disc disease. He opined that she had not sustained an injury related to her employment activities as there were no acute findings to collaborate her radicular-like symptoms. Dr. Valentino concluded that appellant could return to her date-of-injury position with no restrictions. In his June 15, 2015 supplemental report, he reviewed the March 3, 2009 MRI scan and found desiccation throughout the lumbar discs as well as transitional anatomy. Dr. Valentino found that the October 26, 2011 MRI scan did not note transitional anatomy, but a disc bulge at L3-4 and a protruding disc at L5-S1. Dr. Valentino found no evidence of a new disc herniation or protrusion on the October 26, 2011 MRI scan. Dr. Valentino further opined that appellant had not sustained a work-related back condition as a result of her working the new sorting scheme for the period October 11, 2014 through October 14, 2015.

The Board finds that there is a conflict of medical opinion between appellant's physicians, Drs. Darby and Badulak, and Dr. Valentino, OWCP's second opinion physician, regarding results of her MRI scans, the relationship between her condition and her employment, and her diagnosed conditions. Beginning October 17, 2011 Drs. Darby and Badulak diagnosed work-related radiculopathy. Dr. Valentino, however, diagnosed preexisting lumbar degenerative disc disease and opined that appellant did not sustain an injury related to her employment activities. The Board therefore finds that there is a conflict regarding appellant's specific diagnosis and whether this diagnoses is employment related. Dr. Badulak also reviewed the October 26, 2011 MRI scan and found multilevel degenerative changes with a central disc herniation at L5-S1. On the contrary, Dr. Valentino found no evidence of a new disc herniation or protrusion on the October 26, 2011 MRI scan. The Board further finds that there is a conflict of medical opinion regarding the findings demonstrated on the October 26, 2011 MRI scan. Due to the equal probative value of these reports, the Board finds that appellant's claim must be referred to an impartial medical specialist to resolve this conflict. After this and such other development as OWCP deems necessary, it should issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision and must be remanded for further development consistent with this decision of the Board.

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2016 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development.

Issued: March 20, 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