

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

T.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Albany, NY, Employer**

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**Docket No. 17-0336
Issued: October 23, 2017**

Appearances:

Stephen Larkin, Esq., for the appellant¹
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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On December 3, 2016 appellant, through counsel, filed a timely appeal from a September 8, 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.³

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.*

³ The Board notes that appellant submitted new evidence following the September 8, 2016 decision. However, since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

ISSUE

The issue is whether appellant met her burden of proof to establish an injury causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On February 10, 2015 appellant, then a 46-year-old part-time flexible sales and service distribution associate, filed an occupational disease claim (Form CA-2) alleging an exacerbation of her back sprain as a result of her federal employment duties. She has a previously accepted June 3, 2013 lumbar injury under OWCP File No. xxxxxx617. Appellant related that on June 17, 2013 her condition worsened when she bent down to pick up a package. She sought medical treatment on June 19, 2013 and was examined by Scott Beeles, a physician assistant, who recommended that she stop work. Appellant reported that she stopped work from June 19 until September 8, 2013. She returned to limited duty on September 9, 2013 and returned to full duty on September 23, 2013.

As a part-time flexible sales and service distribution associate, appellant noted that she lifted packages weighing up to 70 pounds on a daily basis. She indicated that her duties included handling approximately 100 packages a day, including pulling P.O. Box mail letters, flats, packages, claims, and inquiries; pulling redelivery of packages for carriers; marking and placing packages on shelves; writing second notices on packages; and reorganizing packages according to date.

Dr. Kelly Scott, a Board-certified internist, began to treat appellant in early 2015. In a January 7, 2015 narrative letter, she indicated that Mr. Beeles of her office had seen appellant in 2013. At that time, Dr. Scott diagnosed a lumbar sprain/strain with possible disc herniation. She explained that a magnetic resonance imaging (MRI) scan was completed on January 21, 2014 which demonstrated significant degenerative changes and disc bulging in the L5-S1 region. Dr. Scott opined that her current lumbar conditions of lumbar sprain/strain and radiculopathy condition were causally related to her prior June 3, 2013 injury. She provided prescription notes dated January 5 to March 23, 2015, which recommended that appellant remain out of work from January 6 to April 15, 2015 due to a back injury.

Dr. Scott also explained the prior work injury and that appellant had worked part time until she lifted a package on June 17, 2013 and aggravated her earlier June 3, 2013 condition. She opined that the “lifting motion affected the already bulging L5-S1 dis[c] and the nerves and muscles in the lower back region.” Dr. Scott noted that appellant had no history of back difficulties before the June 3, 2013 incident. She opined that the description of the June 3 and 17, 2013 incidents were consistent with her ongoing symptoms.

The employing establishment controverted appellant’s claim in a March 19, 2015 letter. It pointed out that the only medical evidence submitted was a letter from Dr. Scott, but the letter was about her previous injury and did not contain any current medical information. The employing establishment also indicated that appellant’s postmaster had provided a statement that appellant had fallen down stairs at her residence more than once in the past and those falls could

have contributed to her current back problems. It further noted that appellant lifted 70 pounds infrequently.

In a handwritten February 18, 2015 statement, appellant's postmaster related that appellant had fallen down the stairs on the front porch as well as the stairs of her previous residence. She noted that this could be a concerning factor.

Appellant was also treated by Dr. Juan-Diego Harris, Board-certified in pain management and anesthesiology. In an April 15, 2015 progress note, Dr. Harris indicated that appellant had a history of worsening radicular low back pain secondary to a work-related accident on June 3, 2013. He related that she had recently fallen when her leg gave out. Upon examination, Dr. Harris observed tenderness in the right sacroiliac joint and in the lumbar facets, right trochanteric bursa tenderness, and significant tightness in the lower back. Flexion of the lower back was slightly diminished. Straight leg raise testing was positive on the right at approximately 70 degrees. Dr. Harris diagnosed lumbar radiculopathy with L5-S1 right paracentral disc protrusion causing the symptomatology and lumbar facet arthropathy. He opined that appellant had low back pain secondary to a work-related accident on June 3, 2013. Dr. Harris provided a work excuse note, which indicated that appellant was unable to work until June 11, 2015. He explained that appellant experienced a worsening of her radicular low back pain from a fall related to the work-related accident on June 3, 2013.

By letter dated April 30, 2015, OWCP advised appellant that the evidence submitted was insufficient to establish her occupational disease claim. It requested that she respond to the employing establishment's challenge to her claim, asked her to submit a response to the attached development questionnaire in order to substantiate the factual element of her claim, and requested that she submit additional medical evidence to establish a diagnosed medical condition causally related to factors of her employment. Appellant was afforded 30 days to submit the requested information.

On May 21, 2015 OWCP received appellant's response to its development questionnaire. Appellant related that on October 6, 2014 her right leg gave out because of her June 17, 2013 injury. She explained that she had two prior, nonemployment related falls. In one instance in November 6, 2011 appellant fell due to icy conditions by her home and on November 24, 2011 she fell down stairs at a friend's house. She noted that after these two falls she had returned to full, unrestricted regular duty. Appellant explained that until her June 3, 2013 injury she remained on full unrestricted duty, which required her to lift up to 70 pounds. She noted that she was the only person who worked in the facility at the time and handled all the packages and mail sacks regardless of weight. Appellant explained that she first noticed her back condition on June 3, 2013 when she returned to work, but it got very bad on June 19, 2013. She related that after returning to full duty on September 24, 2013 she felt the pain continuously. Appellant reported that she still experienced back pain and swelling in her right leg due to her lumbar radiculitis as stated by her doctor. She explained that she worked with continuing pain until January 5, 2015 when her back condition became so bad that Dr. Scott removed her from work on January 6, 2015 and kept her off work following a January 15, 2015 evaluation. Appellant explained that she had pain, burning, and weakness in her lower back and right leg.

OWCP denied appellant's claim in a decision dated June 10, 2015. It accepted her repetitive duties as a part-time flexible sales and service distribution associate and that she sustained a diagnosed back condition, but denied her claim because the medical evidence of record failed to establish that her back condition resulted from the accepted factors of her federal employment. OWCP noted that the medical evidence of record did not contain a well-reasoned medical opinion explaining how appellant's work factors either directly caused or aggravated her back condition.

On June 25, 2015 OWCP received appellant's request for a hearing before an OWCP hearing representative. Appellant resubmitted Dr. Scott's January 7, 2015 report. In a February 5, 2014 report, Dr. Scott opined that appellant sustained a lumbar sprain/strain and radiculopathy due to the work incident of June 3, 2013. She further opined that the conditions were aggravated on June 17, 2013 when appellant lifted a package at work.

Appellant also provided an unsigned January 21, 2014 MRI scan of the lumbar spine by an unknown provider. It indicated that appellant had mild degenerative anterolisthesis of L5 and S1, moderate-to-severe bilateral facet hypertrophy at L5 to S1, and mild-to-moderate posterior broad-based disc bulging at L5 to S1.

In a June 11, 2015 prescription note, Dr. Harris reported that appellant would be unable to work until further notice.

On February 9, 2016 a telephone hearing was held. Appellant reported that she had worked for the employing establishment as a part-time flexible sales and service distribution associate for 19 years. She related that her duties included pushing cages in the work area, handling approximately a hundred packages a day, sorting mail, doing post office mail, telephone inquiries, and accepting mail and processed packages up to 70 pounds. Appellant described the June 3, 2013 employment injury and noted that her claim had been accepted for lumbar sprain/strain with possible disc herniation. She indicated that in January 2014 she had a lumbar spine MRI scan and it was determined that she had significant lumbar sprain/strain and radiculopathy. Appellant asserted that Dr. Scott advised her that her job duties of lifting, turning, and bending after returning to work following her prior injury exacerbated her low back pain. She mentioned a specific incident on June 17, 2013 when she had bent over to pick up a package and felt pain in her lower back down her right leg.

In a February 11, 2016 progress note, Dr. Scott noted that appellant was examined for follow-up of lumbar radiculopathy post-ablation procedure on the lumbar spine. Upon examination, she observed that appellant was able to arise from a seated position and walk a short distance. Dr. Scott also reported nontenderness over the spine and paraspinal muscles. She diagnosed lumbar radiculopathy and noted that appellant was unable to return to any employment position given her pain level and need for frequent position changes and inability to bend, push, pull, and lift.

By decision dated March 22, 2016, an OWCP hearing representative affirmed the June 10, 2015 decision denying appellant's claim. She found that appellant had failed to submit any medical evidence which contained a history of specific work activities, explaining how appellant's current back condition was causally related to the accepted employment factors.

On April 12, 2016 OWCP received appellant's request, through counsel, for reconsideration. Counsel indicated that he was providing new evidence from Dr. Harris who accurately explained the cause of appellant's injury. He asserted that Dr. Harris' report of April 4, 2016 provided a full explanation of how appellant's medical conditions resulted from the work she performed from June 10 to 17, 2013.

In his April 4, 2016 medical report, Dr. Harris indicated that he first evaluated appellant on April 15, 2015 due to complaints of back pain. He noted that she worked as a part-time flexible sales and service distribution associate and mentioned the history of her accepted June 3, 2013 employment injury for lumbar sprain and lumbosacral spondylosis without myelopathy. Dr. Harris also acknowledged her prior falls in November 2011, noting that she had returned to full, unrestricted duty after both falls. He related that a January 21, 2014 MRI scan of the lumbar spine showed bulging discs in the L5-S1 region. Dr. Harris reported that, based on his examination, appellant had the following diagnoses: lumbar sprain/strain, aggravation of lumbosacral spondylosis, and lumbar radiculopathy as well as disc herniation. He opined that appellant's conditions of lumbar radiculopathy, lumbar sprain, aggravation of lumbosacral spondylosis, and disc herniation were the result of the work performed by appellant from June 10 to 17, 2013. Dr. Harris explained that the "right turning motion of [appellant] during the week of [June 10 to 17, 2013] created a stress situation affecting the muscles and nerve in [appellant's] lumbar region. This created the disc bulge in the L5-S1 region of the back causing the pain felt by [appellant] on the right side of her back as well as the right leg; this is known as lumbar radiculopathy." Dr. Harris indicated that the fact that appellant continued doing work for a week after a back injury which involved lifting heavy parcels as part of her job duties resulted in aggravation of her lumbosacral spondylosis. He explained that a bulging disc would result from heavy lifting done by appellant during June 10 to 17, 2013, especially when the back was already weakened from the June 3, 2013 injury.

By decision dated September 8, 2016, OWCP denied modification of the March 22, 2016 decision. It found that the medical evidence of record failed to establish that appellant's lumbar condition was causally related to the accepted factors of her federal employment. OWCP determined that the additional medical report from Dr. Harris did not provide adequate medical rationale to support that appellant's work duties caused or contributed to her condition.

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 evidence⁴ including that he or she sustained an injury in the performance of duty and that any specific condition or disability from work for which he or she claims compensation is causally related to that employment injury.⁵ In an occupational disease claim, appellant's burden requires submission of the following: (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

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

⁵ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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.⁶

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁷ 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.⁸

ANALYSIS

The record reflects that appellant has a previously accepted claim for lumbar sprain/strain from a June 3, 2013 employment incident. She stopped work and returned to full duty on June 8, 2013. On February 10, 2015 appellant filed an occupational disease claim alleging that she sustained an exacerbation of her back sprain as a result of her employment duties as a part-time flexible sales and service distribution associate after returning to work following an accepted claim for a back condition. She has explained that she worked with continuing pain since September 2013 until January 5, 2015 when her back condition became so bad that Dr. Scott removed her from work on January 6, 2015. OWCP accepted appellant's employment duties and that she was diagnosed with a back condition, but it denied her claim finding insufficient medical evidence to establish that her back condition was causally related to the accepted factors of employment following her return to work on September 23, 2013.

The Board finds that appellant has not submitted any medical opinion evidence sufficient to establish that her current back condition is causally related to the accepted factors of her federal employment after her return to work following her prior, accepted back claim. Therefore, the Board finds she has not met her burden of proof to establish a new occupational injury as alleged.

Appellant submitted reports of Dr. Harris dated April 15, 2015 to April 4, 2016. Dr. Harris provided an accurate history of appellant's previous June 3, 2013 employment injury, described her history of nonwork-related conditions, and noted the accepted factors of her federal employment. He related that appellant continued to experience a worsening of radicular low back and indicated that a January 21, 2014 MRI scan of the lumbar spine showed bulging discs in the L5-S1 region. Dr. Harris provided examination findings and diagnosed lumbar sprain/strain, aggravation of lumbosacral spondylosis, and lumbar radiculopathy as well as disc herniation. He opined that appellant's various back conditions resulted from the work she performed from June 10 to 17, 2013. While Dr. Harris reasoned that the "right turning motion ... during the week of [June 10, through 17, 2013] created a stress situation" affecting appellant's lumbar spine, which then created the disc bulge in her L5-S1 region, he failed to

⁶ *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

⁷ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

⁸ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

provide a medical opinion explaining how appellant's employment duties, after she returned to employment on September 23, 2013, resulted in a new occupational injury in January 2015 as alleged in the CA-2 form filed on February 15, 2015.⁹ Rather, Dr. Harris' opinion is limited to whether there was an exacerbation of appellant's back condition between the period June 10 and 17, 2013. That opinion is insufficient to establish that appellant's employment duties following her return to work on September 23, 2013 resulted in a new occupational injury. The Board therefore finds that the opinions of Dr. Harris are insufficient to meet appellant's burden of proof.

Appellant also submitted medical reports dated July 3 and September 3, 2013 and January 5, 2015 and prescription notes dated January 5 to March 23, 2015 from Dr. Scott. Only the January 5, 2015 report of Dr. Scott contains an opinion as to the cause of appellant's back condition. In that note Dr. Scott reported that she had reviewed appellant's history, including her previous June 3, 2013 employment injury, and noted that on June 17, 2013 appellant was lifting a package at work. She explained that the "lifting motion affected the already bulging L5-S1 disc and the nerves and muscles in the lower back region." However, Dr. Scott's opinion is insufficient to establish that appellant's employment duties following her return to work on September 23, 2013 resulted in a new occupational injury, as she only provided consideration of whether work duties or incidents between June 3 and 17, 2013 caused injury. A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background.¹⁰ Dr. Scott's opinion did not consider whether appellant's employment duties after her September 23, 2013 return to work resulted in a new occupational injury. The Board therefore finds the opinions of Dr. Scott are insufficient to meet appellant's burden of proof.

Appellant also submitted a January 21, 2014 MRI scan of her lumbar spine in support of her claim. The MRI scan report is insufficient to establish her claim as this report is merely a diagnostic report and contains no opinion as to the cause of the medical conditions identified on the scan.¹¹

Accordingly, the medical evidence contained in this case record is without a well-rationalized medical opinion establishing that appellant's lumbar spine condition is causally related to the accepted factors of her federal employment following her September 23, 2013 return to work.¹²

On appeal counsel contends that the opinions of Drs. Harris and Scott are sufficient to meet appellant's burden of proof to establish her claim. As explained above, the medical evidence is insufficient to establish the claim.

⁹ *K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006)

¹⁰ *Victor J. Woodhams*, *supra* note 8.

¹¹ *T.D.*, Docket No. 17-0649 (filed June 16, 2017).

¹² Should appellant believe that she has a recurrence of total disability due to her accepted June 3, 2013 injury, she may file a recurrence claim under OWCP File No. xxxxxx617.

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 did not meet her burden of proof to establish an injury causally related to the accepted factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board