United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 17-0839**
	)	**Issued: October 12, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Omaha, NE, Employer	)	

Appearances:
Appellant, pro se
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 March 6, 2017 appellant filed a timely appeal from a December 15, 2016 merit decision and February 16, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish a chest injury causally related to factors of her federal employment; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted a timely request for oral argument with her March 9, 2017 appeal. By letter dated March 19, 2017, appellant requested that the Board withdraw her oral argument request and proceed with a decision based on review of the case record.

FACTUAL HISTORY

On September 7, 2016 appellant, then a 33-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed chest pain due to factors of her federal employment. She stopped work and notified her supervisor on June 14, 2016.

In an attached narrative statement, appellant explained that her chest pain had gradually worsened causing her to seek medical treatment in June 2016. After a series of medical visits and testing which revealed normal cardiac findings, her physician suspected that her condition could be muscular in nature and related to her work duties. Appellant subsequently sought physical therapy treatment which revealed that her ribs were being positioned upward and the muscle was rotating out as a result of her work-related duties. In another narrative statement dated August 26, 2016, she reported that approximately one and a half years prior she experienced chest pain in a specific area of her chest and was diagnosed with an inverted rib which resolved about a year ago. Appellant explained that her current condition was unrelated and began several months ago, which encompassed her entire chest and pressed against her sternum.

In a July 5, 2016 medical report, Dr. Jeffrey S. Nelson, a Board-certified pediatric pulmonologist, reported that appellant presented for evaluation of possible asthma as a cause of hyperinflation that was seen on a recent chest x-ray. He reported that appellant worked as a rural carrier and complained of chest pain and chest tightness. Dr. Nelson provided findings on physical examination and diagnosed chest tightness, chest wall pain on the left side of the sternum around the fourth and fifth rib, and nonallergic rhinitis. He noted that appellant had chest pain about one year prior which resolved with physical therapy. Appellant was doing well until recently when she entered another exercise regimen and the high intensity version of this resulted in additional chest pain in the same area and also spread across the superior aspect of the chest. Dr. Nelson opined that her pain was likely chest wall in nature and recommended Ibuprofen tablets for two weeks.

A Melham Medical Center discharge note indicated that appellant was admitted on July 14, 2016 for chest pain and released on July 15, 2016 to follow-up with her physician and physical therapy.

In a July 14, 2016 diagnostic report, Dr. Ladd D. Lake, a Board-certified diagnostic radiologist, reported that a chest x-ray revealed no acute cardiopulmonary findings and sequela from prior granulomatous infection.

In an August 2, 2016 medical report, Dr. Clayton J. Friesen, Board-certified in cardiovascular disease, reported that appellant complained of chest pain which had been recurrent since her last visit. He reported that testing revealed no cardiogenic etiology of her symptoms. Dr. Friesen opined that based on her history and examination, she was experiencing musculoskeletal-type pain. He noted possible diagnosis of a pinched nerve or herniated disc and recommended continued physical therapy.

In an August 26, 2016 physical therapy note, Lindsay Myers, a physical therapist, released appellant to full-duty work on August 29, 2016. She diagnosed pain in the thoracic spine and generalized muscle weakness.

By letter dated September 26, 2016, OWCP informed appellant that the evidence of record was insufficient to support her claim. It provided a questionnaire for completion and advised her to describe in detail the employment-related activities which she believed caused or contributed to her condition. Appellant was informed of the medical and factual evidence needed and was afforded 30 days to respond. In another letter of that same date, OWCP requested additional factual information from the employing establishment.

In an October 18, 2016 narrative statement, appellant responded to OWCP's questionnaire and described her employment duties as a rural carrier. She noted that her duties required about five to six hours of driving per day and pulling about five to seven bundles per day. Appellant explained that she drove with her left arm and would have to reach to open mail boxes and to make sharp turns on the steering wheel. Her duties involved repeatedly pulling bundles and packages from the back seat with her left arm while driving her route. Appellant reported that her chest pain began in May 2016 and continued to worsen, causing her to seek medical treatment. She noted that testing revealed normal cardiac findings and physical therapy treatment revealed that her ribs on the left side had rotated out. Appellant further noted no prior injury to this area of her chest.

Physical therapy progress notes dated August 11 and October 14, 2016 were submitted in support of appellant's claim.

In an October 6, 2016 report, Dr. David A. Minnick, Board-certified in family medicine, reported that appellant was a patient with musculoskeletal chest pain secondary to her job duties. He noted that appellant was a rural mail carrier who sat on the right side of a left driver-sided car. Appellant performed repetitive twisting, reaching, and stretching which caused left rib discomfort and thoracic spine dysfunction. Dr. Minnick recommended job modification, physical therapy, and anti-inflammatories, noting no further repetitive twisting and reaching behind.

By decision dated December 15, 2016, OWCP denied appellant's claim finding that the medical evidence of record failed to provide a firm medical diagnosis which could be reasonably attributed to the accepted federal employment factors. It noted that the medical evidence submitted contained a diagnosis of "pain" which is a symptom and not a diagnosed medical condition.

On January 10, 2017 appellant requested reconsideration. No evidence was submitted with her reconsideration request.

By decision dated February 16, 2017, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included relevant and pertinent new evidence. It specifically noted that no medical evidence was received.

LEGAL PRECEDENT -- ISSUE 1

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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is whether the employee actually experienced the employment incident which is alleged to have occurred.[5] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, 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.[6]

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[7] 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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[8]

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[3] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[4] *Michael E. Smith*, 50 ECAB 313 (1999).

[5] *Elaine Pendleton*, *supra* note 3.

[6] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

[7] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[8] *James Mack*, 43 ECAB 321 (1991).

ANALYSIS -- ISSUE 1

OWCP accepted that appellant engaged in repetitive activities of reaching, twisting, and pulling in her employment duties as a rural carrier. The issue, therefore, is whether she submitted sufficient medical evidence to establish that the employment factor caused her to sustain an injury. The Board finds that the medical evidence of record is insufficient to establish a diagnosed medical condition causally related to factors of her federal employment as a rural carrier.[9]

In support of her claim, appellant submitted a July 5, 2016 medical report from Dr. Nelson who diagnosed chest tightness, chest wall pain left side of the sternum around the fourth and fifth rib. The Board notes that Dr. Nelson failed to establish a firm medical diagnosis and offered no opinion as to the cause of these symptoms. A claimant has the burden of proof to establish by the weight of the medical evidence a firm diagnosis of the condition claimed and a causal relationship between that condition and factors of federal employment.[10] The Board has long held that pain is a symptom, not a compensable medical diagnosis.[11] To establish personal injury the medical evidence of record must document a diagnosed condition and must explain how that condition is causally related to the accepted factors of employment.[12] Lacking a firm diagnosis and rationalized medical opinion regarding causal relationship, Dr. Nelson's report is of limited probative value.

Dr. Friesen's August 2, 2016 report also fails to establish a firm medical diagnosis as the physician reported normal cardiogenic findings and musculoskeletal-type pain. As previously noted, pain is a symptom and not a compensable medical diagnosis.[13] As such, the reports of Dr. Nelson and Dr. Friesen are insufficient to support appellant's claim as neither of the physicians diagnosed a medical condition causally related to factors of her federal employment.[14]

Dr. Minnick's October 6, 2016 report is also insufficient to establish appellant's occupational disease claim. He did not describe, explain, or diagnose a medical condition, noting only musculoskeletal chest pain secondary to her job duties. Moreover, while Dr. Minnick had some understanding of appellant's employment duties as a rural carrier which he opined caused her injury, he failed to describe the tasks and the frequency and duration of each task to which appellant attributes to her injury.[15] His statement on causation failed to provide a sufficient explanation as to the mechanism of injury pertaining to this occupational

[9] *See Robert Broome*, 55 ECAB 339 (2004).

[10] *See Roy L. Humphrey*, *supra* note 6; *see Naomi A. Lilly*, 10 ECAB 560, 574 (1959).

[11] *Supra* note 9.

[12] *George A. Davis*, Docket No. 95-1684 (issued April 3, 1997).

[13] *See B.P.*, Docket No. 12-1345 (issued November 13, 2012) (regarding pain); *C.F.*, Docket No. 08-1102 (issued October 10, 2008) (regarding pain); *J.S.*, Docket No. 07-881 (issued August 1, 2007) (regarding spasm).

[14] *R.S.*, Docket No. 15-1364 (issued February 22, 2016).

[15] *See O.M.*, Docket No. 15-1723 (issued November 5, 2015).

disease claim as alleged by appellant, namely, how repetitive twisting, reaching, and stretching would cause or aggravate a chest injury.[16] Without explaining how, physiologically, the movements involved in appellant's employment duties caused or contributed to a diagnosed condition, his opinion is equivocal in nature and of limited probative value.[17]

The remaining medical evidence of record is also insufficient to establish appellant's occupational disease claim. Dr. Lake's July 14, 2016 diagnostic report interpreted imaging studies related to the chest, but provided no opinion on the cause of appellant's injury.[18]

The physical therapy reports documenting treatment for her chest are also insufficient to establish her claim. Registered nurses, physical therapists, and physician assistants are not considered physicians as defined under FECA, their opinions are of no probative value.[19]

An award of compensation may not be based on surmise, conjecture, or speculation.[20] To establish a firm medical diagnosis and causal relationship, appellant must submit a physician's report in which the physician reviews those factors of employment alleged to have caused her condition and, taking these factors into consideration, as well as findings upon examination and appellant's medical history, explain how these employment factors caused or aggravated any diagnosed condition, and present medical rationale in support of his opinion.[21] Appellant's recitation of the facts does not support her allegation that her employment factors as a rural carrier caused her injury.[22] As there is no probative, rationalized medical evidence containing a medical diagnosis explaining how a diagnosed condition was causally related to the accepted employment duties, she has not established that an injury occurred as alleged.[23]

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

[16] *S.W.*, Docket 08-2538 (issued May 21, 2009).

[17] *See L.M.*, Docket No. 14-973 (issued August 25, 2014); *R.G.*, Docket No. 14-113 (issued April 25, 2014); *K.M.*, Docket No. 13-1459 (issued December 5, 2013); *A.J.*, Docket No. 12-548 (issued November 16, 2012).

[18] *J.P.*, Docket No. 14-87 (issued March 14, 2014).

[19] 5 U.S.C. § 8102(2) of FECA provides as follows: (2) 'physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See also Roy L. Humphrey*, *supra* note 6. A physical therapist is not considered a physician as defined by FECA. *See E.R.*, Docket No. 16-1634 (issued May 25, 2017).

[20] *D.D.*, 57 ECAB 734 (2006).

[21] *Supra* note 6.

[22] *Paul Foster*, 56 ECAB 1943 (2004); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[23] *Tracey P. Spillane*, 54 ECAB 608 (2003); 5 U.S.C. § 8101(5).

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[24] Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[25]

ANALYSIS -- ISSUE 2

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, and she did not advance a new and relevant legal argument not previously considered. Consequently, appellant is not entitled to review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board notes that the underlying issue in this case was whether appellant sustained an injury causally related to her accepted federal employment factors as a rural carrier. That is a medical issue which must be addressed by relevant medical evidence not previously considered.[26] Appellant failed to submit any evidence with her reconsideration request. A claimant may obtain a merit review of an OWCP decision by submitting relevant and pertinent new evidence not previously considered. In this case, appellant failed to submit any relevant and pertinent new evidence addressing a firm medical diagnosis involving a chest injury and causal relationship in support of her claim.[27]

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

[24] *D.K.*, 59 ECAB 141 (2007).

[25] *K.H.*, 59 ECAB 495 (2008).

[26] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[27] *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish a chest injury causally related to factors of her federal employment. The Board also finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated February 16, 2017 and December 15, 2016 are affirmed.

Issued: October 12, 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