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

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| **J.S., Appellant** | ) | |
| | ) | **Docket No. 17-0987** |
| **and** | ) | **Issued: October 20, 2017** |
| **U.S. POSTAL SERVICE, POST OFFICE, Hornell, NY, Employer** | ) | |

*Appearances:*
*Thomas S. Harkins, 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 4, 2017 appellant, through counsel, filed a timely appeal from a January 9, 2017 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 condition causally related to a March 28, 2015 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 the factual and medical evidence of record establish a compensable employment-related injury.

## ***FACTUAL HISTORY***

On April 3, 2015 appellant, then a 46-year-old distribution window clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 28, 2015 she sustained a middle back strain at work while attempting to open a stuck all-purpose container (APC).

In reports dated April 17, May 20, and August 14, 2015, Dr. Seth M. Zeidman, an attending Board-certified neurosurgeon, noted that appellant presented on each day with symptoms related to a workers' compensation incident that occurred on March 28, 2015. Appellant had pain in her thoracic spine and the back of her neck radiating into her shoulder blades and arms, particularly in the C5, C6, and C7 distributions. Dr. Zeidman discussed her medical history, which included a L4-5 posterior lumbar interbody fusion (PLIF) and L4-S1 lumbar laminectomies that he performed in 2008. He noted a history of injury that on March 28, 2015 appellant was working as a full-time sales associate at the employing establishment when she felt pain in the middle of her back as she reached overhead to pick up a big APC filled with mail. Appellant became nauseous and sat for a few minutes. She continued to work with persistent pain. Dr. Zeidman advised that appellant's condition was directly related to the March 28, 2015 reaching injury as her cervical spine symptoms could manifest in her shoulder blades and go down into her arms. He discussed physical and neurological examination findings and reviewed diagnostic test results.

Dr. Zeidman diagnosed thoracic spondylosis without myelopathy, thoracic spine pain, and unspecified osteoporosis. Initially, Dr. Zeidman recommended, among other things, that appellant undergo a thoracic magnetic resonance imaging (MRI) scan to further evaluate any degenerative disease that may have been exacerbated by her recent work injury. Subsequently, he recommended and requested authorization for an anterior cervical discectomy and fusion (ACDF) surgery at C5-6 and C6-7 because appellant had retrolisthesis and cervical spondylosis at C5-6 and C6-7. At the end of his reports, Dr. Zeidman listed three questions which provided a "yes" or "no" answer. The questions were: was the incident the competent medical cause of her injury/illness; were the patient's complaints consistent with her history of the injury/illness; and was the history of injury/illness consistent with his objective findings. For each of these questions, he checked the box marked "yes."

In a May 13, 2015 thoracic spine MRI scan report, Dr. Keith Schroeder, a Board-certified radiologist, provided an impression of very minimal degenerative spine disease. He found no significant central or foraminal encroachment or evidence of cord compression at any level in the thoracic spine. The signal cord was normal. In an ancillary May 26, 2015 report, he noted a diagnosis of thoracic disc degeneration and pain in the thoracic spine.

On September 11, 2015 appellant filed a recurrence claim (Form CA-2a) alleging a recurrence of disability on August 19, 2015 due to her March 28, 2015 injury. She claimed that her condition worsened as she continued to work after the March 28, 2015 injury.

OWCP received an April 24, 2015 cervical MRI scan report from Dr. Alan Storch, a Board-certified radiologist, who provided an impression of moderate cervical spondylosis, particularly at C5-6 where mild central and moderate to marked bilateral foraminal stenosis were noted.

In a partial May 28, 2015 report and a July 10, 2015 report, Dr. Zeidman noted appellant's cervical and thoracic symptoms, provided examination findings, and reviewed test results. He reiterated his prior assessment of appellant's thoracic spine and bone conditions, surgical recommendation and temporary impairment.

An August 14, 2015 thoracic spine x-ray report from Dr. Frederick Cohn, a Board-certified radiologist, contained an impression of mild degenerative changes. In a cervical spine x-ray report of the same date, he noted an impression of degenerative changes at C5-6. In a cervical and thoracic spine x-ray report dated September 4, 2015, Dr. Cohn provided an impression of fairly advanced degenerative changes at C5-6 and minimal degenerative changes in the thoracic spine.

By letter dated October 5, 2015, OWCP advised appellant that when her initial claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work and, since the employing establishment did not controvert continuation of pay or challenge the merits of the case, a limited amount of medical expenses were administratively paid. However, the merits of the claim were not formally considered. Since appellant filed a claim for a recurrence, OWCP reopened the claim for consideration. Appellant was requested to submit additional factual and medical information, including a physician's opinion supported by a medical explanation as to how the reported work incident caused or aggravated the claimed injury. In addition, her physician must explain how her recurrence of disability was due to her original injury/illness and how her condition materially worsened/changed, without intervening cause, to the point that she was disabled/further disabled.

In an October 21, 2015 statement, appellant explained that on Saturday, March 28, 2015 she was unloading mail for transfer offices at the back dock which involved pushing, pulling, emptying, and refilling rolling APCs. Appellant related that she attempted to open the webbing on the front of an APC to unload the mail. The APC was overfilled with mail and packages of all sizes protruded at least six to eight inches from the top of the APC and through the webbing. This was more than double the safety capacity of the APC. There was so much pressure on the distended APC that, when she pulled the small lever to release the top bar, it would not move and it remained cradled in the latch. Appellant became frustrated and grabbed the bar with both hands and tried to rock it back and forth. With both hands still on the bar, she pushed her body forward onto her tip toes and with all of her might attempted to lift up, push in, and pull back the bar in one great motion. When she pulled back, the bar did not move which caused her entire body to jerk violently and stop suddenly. A transfer driver then assisted her with the APC and a clerk unloaded it without any further issues. Appellant related reporting this incident to her immediate supervisor that morning as well as to the postmaster on the following Monday morning. She noted that she had pain in her upper body, groin, and middle back and nausea, but continued to work. Appellant noted that she suffered from osteoporosis, arthritis, and fibromyalgia.

In March 9, May 7, and September 4, 2015 reports, Dr. Zeidman noted appellant's bilateral leg and cervical symptoms and medical treatment. He reported findings and reviewed diagnostic test results. Dr. Zeidman reiterated diagnoses from his prior reports, in addition to lumbar intervertebral disc degeneration, post-laminectomy lumbar syndrome, cervicalgia, lumbago, and cervical spondylosis with myelopathy.

A March 25, 2015 bilateral upper extremity electromyogram and nerve conduction velocity (EMG/NCV) study performed by Dr. Clifford J. Ameduri, a Board-certified physiatrist, revealed bilateral median motor loss of amplitude across the wrist, right greater than left which was consistent with a focal entrapment at the level of the wrists, bilateral mild-to-moderate right greater than left carpal tunnel syndrome, and no evidence of a cervical radiculopathy. He advised that appellant's complaint of more proximal pain could be a result of a referred pain syndrome caused by injuries and degenerative changes to the cervical spinal tissues. An EMG/NCV study performed on April 2, 2015 by Dr. Ameduri found no evidence of a lower extremity peripheral neuropathy of all tested nerves or active radiculopathy. Regarding the back, Dr. Ameduri found mild bilateral chronic findings at the L5 and S1 level that were likely due to previous radiculopathy.

In reports dated March 25 and April 2, 2015, Dr. Jared Anderson, a chiropractor, noted the date of injury as March 18, 2015, appellant's complaints of low back and left leg soreness and pain, and her continued limp. He reported physical examination findings and noted that a recent EMG of the bilateral lower extremities had been performed, but was not available to him. Dr. Anderson assessed nonallopathic lesion in the lumbar region not elsewhere class, lumbago, unspecified thoracic or lumbosacral neuritis or radiculitis, and unspecified myalgia and myositis, limb pain, and postlaminectomy syndrome in the lumbar region.

By decision dated December 10, 2015, OWCP denied appellant's traumatic injury claim because the medical evidence of record failed to provide a rationalized medical opinion sufficient to establish causal relationship between her diagnosed conditions and the accepted March 28, 2015 employment-related incident.

OWCP received reports dated November 19, 2015 and July 22, 2016 from Dr. Zeidman who noted appellant's cervical, bilateral shoulder blade, and bilateral hand symptoms. He listed examination findings and reviewed diagnostic test results. Dr. Zeidman again assessed thoracic spine pain, cervical and thoracic spondylosis, and also assessed other cervical spondylosis with radiculopathy. He continued to indicate with a check box marked "yes" that appellant's conditions were causally related to the March 28, 2015 incident and that she was totally disabled. In an August 27, 2015 Family and Medical Leave Act (FMLA) medical certification report, he indicated that appellant's condition began on March 28, 2015 and that he began treating her on April 17, 2015. Dr. Zeidman advised that she was unable to perform her job duties commencing on August 14, 2015 due to signs and symptoms of cervical myelopathy that had progressed. He noted that appellant's treatment schedule was pending approval of surgery from the United States Department of Labor.

By letter dated October 20, 2016, received October 25, 2016, appellant, through counsel, requested reconsideration. She submitted an October 5, 2016 report from Dr. Zeidman. In this report, Dr. Zeidman noted a history of the accepted March 28, 2015 work incident and his own

treatment of appellant. He reviewed diagnostic test results. Dr. Zeidman advised that, since appellant's work injury, she had subjective complaints of neck and thoracic spine pain and associated radicular pain. Appellant had correlating physical examination findings of weakness and hyperreflexia and signs of myelopathy as outlined in his progress notes. Dr. Zeidman indicated that a cervical MRI scan revealed mild dural sac effacement due to broad-based disc osteophytic bulging at C5-6 and moderate to marked bilateral foraminal stenosis secondary to uncovertebral hypertrophy. He noted that, at C6-7, the MRI scan showed minimal dural sac effacement due to disc osteitic bulging and mild right foraminal stenosis secondary to uncovertebral hypertrophy. Dr. Zeidman opined within a reasonable degree of medical certainty that appellant's reported neck and thoracic pain were directly and causally related to her March 28, 2015 work injury.

In a January 9, 2017 decision, OWCP denied modification of its December 10, 2015 decision. It found that the medical evidence lacked a rationalized medical opinion connecting appellant's cervical and thoracic conditions to the accepted March 28, 2015 work incident.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[3] 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 from 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 causal relationship between the claimed condition and the

[3] *Id*.

[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).

identified factors.[9] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish causal relationship.[10]

## ***ANALYSIS***

The Board finds that appellant has not met her burden of proof to establish a traumatic injury caused or aggravated by the accepted March 28, 2015 employment incident. Appellant failed to submit sufficient medical evidence to establish a back condition causally related to the accepted employment incident.

Appellant submitted a series of reports from Dr. Zeidman. Dr. Zeidman's reports dated April 17, May 20 and 28, July 10, August 14, and November 19, 2015, and July 22, 2016 offered thoracic and cervical diagnoses which he attributed to the March 28, 2015 work incident and noted that appellant's complaints were consistent with her history of injury/illness and her history was consistent with his objective findings by checking boxes marked "yes." He added that appellant's cervical spine symptoms could manifest in her shoulder blades and go down into her arms. This does not provide the kind of probative, rationalized medical opinion appellant must submit to discharge her burden of proof.[11] Dr. Zeidman did not sufficiently explain how appellant would have thoracic and cervical injuries that resulted in her need to undergo ACDF surgery at C5-6 and C6-7 causing temporary total disability due to the March 28, 2015 accepted employment incident. Therefore, his reports are of limited probative value.

In his October 5, 2016 report, Dr. Zeidman provided a history of the March 28, 2015 incident and his treatment of appellant. He noted that since appellant's work injury, she complained of neck and thoracic spine pain and associated radicular pain which correlated with physical examination findings of weakness and hyperreflexia and signs of myelopathy. Dr. Zeidman reviewed cervical MRI scan results and opined that the reported neck and thoracic pain were directly and causally related to the March 28, 2015 work incident. Symptoms of pain, however, are not considered compensable diagnoses.[12] Moreover, Dr. Zeidman did not offer any medical opinion addressing whether the cervical conditions noted in the MRI scan report were caused or aggravated by the accepted work incident.[13] While his remaining reports dated March 9, May 7, and September 4, 2015 noted diagnoses, he did not opine whether appellant's conditions were caused or aggravated by the accepted employment incident.[14] Thus, the Board finds that Dr. Zeidman's reports are insufficient to meet appellant's burden of proof.

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

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

[11] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[12] *B.P.*, Docket No. 12-1345 (issued November 13, 2012); *C.F.*, Docket No. 08-1102 (issued October 2008).

[13] *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).

[14] *Id.*

The remaining medical evidence of record is also insufficient to establish causal relationship between appellant's injury and the March 28, 2015 employment incident. The MRI scan reports and ancillary reports from Dr. Schroeder, Dr. Storch, and Dr. Cohn and EMG/NCV studies from Dr. Ameduri failed to offer an opinion on whether appellant's conditions were caused or aggravated by the accepted work incident.[15] The Board finds, therefore, that these reports are of limited probative value.

As a chiropractor, Dr. Anderson's March 25 and April 2, 2015 reports are of no probative value because he did not diagnose a subluxation from x-ray, and, therefore, he is not considered a "physician" under FECA.[16]

The Board finds that appellant has failed to submit rationalized, probative medical evidence sufficient to establish a back injury causally related to the March 28, 2015 employment incident. Appellant therefore did not meet her burden of proof.

On appeal counsel contends that the factual and medical evidence of record establish that appellant sustained a compensable employment-related injury. For the reasons set forth above, the Board finds that the weight of the medical evidence fails to establish a back condition causally related to the accepted March 28, 2015 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 failed to meet her burden of proof to establish a back condition causally related to the March 28, 2015 employment incident.

[15] *Id.*

[16] *A.O.,* Docket No. 08-580 (issued January 28, 2009). Under section 8101(2) of FECA, the term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary. 5 U.S.C. § 8101(2); *see D.S.,* Docket No. 09-860 (issued November 2, 2009).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the January 9, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 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