

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

P.T., Appellant)	
)	
and)	Docket No. 17-0374
)	Issued: April 19, 2018
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS HEALTH ADMINISTRATION,)	
Brockton, MA, Employer)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 December 9, 2016 appellant, through counsel, filed a timely appeal from the October 21, 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 the claim.

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.*

ISSUE

The issue is whether appellant has established that her lumbar condition is causally related to the accepted September 15, 2014 employment incident.

FACTUAL HISTORY

On September 17, 2014 appellant, then a 52-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on September 15, 2014 she pulled a muscle in her middle back while closing windows in a treatment room, which had been left open all weekend. She stated that “the room was cold and the windows were really hard to shut.” Appellant stopped work on September 19, 2014.

A September 23, 2014 physical therapy note was submitted.

In an October 1, 2014 development letter, OWCP advised appellant of the deficiencies in her claim and provided her the opportunity to provide additional factual and medical evidence needed to establish her claim. This included a narrative medical report from her physician, which contained a detailed description of findings and diagnoses and the physician’s opinion, supported by a medical explanation as to how the reported work incident caused or aggravated a medical condition. Appellant was also provided a questionnaire to complete regarding the circumstances of her alleged injury. She was afforded 30 days to submit the requested information.

Appellant submitted a portion of the questionnaire, signed on October 6, 2014 in which she related that there were no witnesses to her employment incident. She also listed dates that she had worked following the alleged injury.

In a September 18, 2014 prescription note, Dr. Aaron F. Mann, a Board-certified internist, diagnosed back pain, acute/chronic and prescribed physical therapy. Physical therapy reports dated September 23 through October 24, 2014 were also received.

By decision dated November 4, 2014, OWCP accepted that the alleged incident occurred, but denied the claim as fact of injury (medical) was not established.

On November 17, 2014 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. A telephonic hearing was held on June 1, 2015. At the hearing, appellant stated that she stopped work on September 19, 2014 and returned to full-time full-duty work on May 20, 2015. Counsel noted that appellant underwent back surgery on February 20, 2015 and that coverage was sought for the conditions of extruded herniated disc, extruded fragments at L4-5, and a compressed nerve at L5.

Medical notes from Dr. Mann were received. In a September 18, 2014 report, Dr. Mann reported that appellant “hurt back at work a bit ago. Pulled window shut at work, now is worse again. Mid back. Runs down to full L leg.” An assessment of thoracic back pain was provided. In a September 21, 2014 note, Dr. Mann provided the x-ray results for the spine and pelvis and indicated that T11 was the area where appellant had pain. He indicated that there were congenital changes at T11 and minimal multilevel degenerative endplate changes. On September 23, 2014 Dr. Mann took appellant off work due to what he termed as a severe back issue. On October 1,

2014 he continued appellant off work. In an October 15, 2014 report, Dr. Mann indicated that appellant hurt her back while closing a window at work. He noted that she had initial imaging and physical therapy with no improvement. Dr. Mann ordered a magnetic resonance imaging (MRI) scan and indicated that appellant was to see a spine specialist on October 30, 2014. He noted that her return to work date depended on the MRI scan results and recommendations of the spine specialist. Dr. Mann also completed an October 15, 2014 work capacity evaluation (Form OWCP-5c). In an October 24, 2014 report, he reported that the MRI scan of her thoracic spine showed significant disc herniation at T8-T9. Dr. Mann opined that appellant could not work until she saw the spine specialist.

Physical therapy notes from October 23 to November 18, 2014 were submitted. OWCP also received an October 20, 2014 MRI scan of the thoracic spine, and a February 20, 2015 discography lumbar spine.

On February 20, 2015 Dr. Jay Zampini, a Board-certified orthopedic surgeon, performed a left laminectomy and discectomy at L4-L5. The preoperative and postoperative diagnoses were degenerative disc disease with herniated disc, radiculitis, L4-L5, left. Dr. Zampini noted that appellant, a nurse, experienced severe acute back pain as well as left radicular pain in the L5 distribution after attempting to free a stuck window. A lumbar spine MRI scan revealed a herniated disc at L4-L5 with irritation of the nerve roots at L4-L5. Dr. Zampini indicated that as appellant failed to achieve significant, sustained relief with nonoperative modalities, decompression of the lumbar spine at L4-L5 was offered.

OWCP also received a July 24, 2015 statement from appellant.³

By decision dated August 4, 2015, an OWCP hearing representative modified the prior decision to reflect that a medical diagnosis was of record. However, he affirmed the denial of the claim as the medical evidence of record was insufficient to establish causal relationship between the established work incident and the lumbar condition for which appellant underwent surgical treatment on February 20, 2015.

On January 6, 2016 OWCP received appellant's January 6, 2016 request for reconsideration.

In a November 30, 2015 questionnaire, Dr. Zampini noted that appellant was working at the hospital as a nurse and injured her back trying to close a stuck window. He diagnosed herniated disc at L4-5. Based on a reasonable medical probability, Dr. Zampini opined that the incident was the direct and proximate cause of the herniated disc, L4-5. He also noted that there may be other causes for the herniated disc, L4-5, but emphasized that one of the causes was clearly the work activity previously described.

By decision dated May 26, 2016, OWCP denied modification of its August 4, 2015 decision. It found that Dr. Zampini's November 30, 2015 opinion lacked a medical explanation

³ Appellant indicated that she had a prior claim for pulling a muscle in her back under OWCP File No. xxxxxx065. She stated that she was unaware the prior incident was a workers' compensation case and that she did not miss work or see her physician.

as to how the accepted employment incident of September 15, 2014 caused or aggravated the conditions found.

On September 28, 2016 OWCP received appellant's September 28, 2016 request for reconsideration. A November 13, 2014 MRI scan report of the lumbar spine indicated that appellant had a small posterior L3-4 intervertebral disc protrusion, a moderate L4-5 intervertebral disc protrusion, a partial sacralization of L5 vertebral body and multilevel facet arthropathy.

OWCP also received an August 31, 2015 narrative report wherein Dr. Zampini provided a postsurgical assessment of appellant's condition. Dr. Zampini concluded his narrative by relating that appellant reported from the onset of treatment that her symptoms were caused by the event at work. He noted that her history, physical examination, imaging studies, and response to surgery all confirmed that the herniated disc on which he operated was the cause of her pain, paresthesia, and disability from work.

By decision dated October 21, 2016, OWCP denied modification of its May 26, 2016 decision. It found that the additional evidence from Dr. Zampini failed to explain how the employment incident resulted in her diagnosed injury or how the current diagnosed condition related to her underlying lumbar condition.

LEGAL PRECEDENT

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 and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ 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.⁵

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 that the employee actually experienced the employment incident which is alleged to have occurred.⁶ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.⁷

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁶ *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

⁷ *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *see also P.W.*, Docket No. 10-2402 (issued August 5, 2011).

includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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.⁸

ANALYSIS

OWCP accepted that the September 15, 2014 employment incident occurred as alleged. The issue is whether appellant established that the incident caused or aggravated her back condition. The Board finds that she failed to submit sufficient medical evidence to support a lumbar condition causally related to the accepted employment incident.⁹

Appellant was initially treated by Dr. Mann. In a September 18, 2014 medical report, Dr. Mann diagnosed thoracic back pain, acute/chronic from pulling a window shut at work. This opinion is not well rationalized. Dr. Mann failed to provide a firm medical diagnosis other than pain. It is not possible to establish the cause of a medical condition if the physician has not provided a diagnosis, but only notes pain.¹⁰ The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis.¹¹ Thus, this report does not constitute probative medical evidence.

In a September 21, 2014 report, Dr. Mann reviewed spine and pelvis x-ray results and indicated that the T11 area was where appellant had pain. While he indicated that appellant's back had some congenital changes at T11 and that there were minimal multilevel degenerative endplate changes, he failed to offer any opinion regarding the cause of appellant's condition.¹² In an October 24, 2014 report, Dr. Mann reported that the MRI scan of her thoracic spine showed significant disc herniation at T8-T9 and opined that she was disabled until she saw the spine specialist. He also submitted reports regarding appellant's work status. However, he again failed to offer any opinion regarding the cause of appellant's condition or her disability.¹³ Accordingly, his reports are insufficient to establish appellant's claim.

Appellant was referred to Dr. Zampini, who then referred appellant to a pain clinic where she received injections. Because her pain was not relieved, Dr. Zampini performed surgery on February 20, 2015. The surgical condition diagnosed was degenerative disc disease with herniated

⁸ *Solomon Polen*, 51 ECAB 341 (2000).

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

¹⁰ *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. 07-0881 (issued August 1, 2007) (regarding spasm).

¹¹ *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

¹² *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹³ *Id.*

disc, radiculitis, L4-5, left. Dr. Zampini noted that appellant, a nurse, had experienced severe acute back pain as well as left radicular pain in the L5 distribution after attempting to free a stuck window. He also noted that a lumbar MRI scan study revealed a herniated disc at L4-L5 with irritation of the nerve roots at L4-L5. However, Dr. Zampini did not offer any medical opinion addressing whether the diagnosed degenerative disc disease with herniated disc, radiculitis, L4-5, left and prior disability from work were caused or aggravated by the accepted September 15, 2014 employment incident.¹⁴ He failed to address how the specific employment incident physiologically caused the conditions he diagnosed.¹⁵ Thus, Dr. Zampini's report is insufficient to establish appellant's claim.

Dr. Zampini's other reports are also of diminished probative value and insufficient to establish appellant's claim. In his August 31, 2015 report, he opined that, based on appellant's history, physical examination, imaging studies, and response to surgery, the herniated disc on which he operated was the cause of her pain and paresthesia and disability from work. However, Dr. Zampini did not provide any medical rationale explaining the basis of his conclusory opinion regarding the causal relationship.¹⁶ A mere conclusory opinion provided by a physician without the necessary rationale explaining how and why the incident or work factors were sufficient to result in the diagnosed medical condition is insufficient to meet a claimant's burden of proof to establish a claim.¹⁷ Therefore, this evidence is insufficient to meet appellant's burden of proof.

In his November 30, 2015 questionnaire, Dr. Zampini noted appellant's history of injury and diagnosed herniated disc L4-5. While he opined that the employment incident was the direct and proximate cause of the herniated disc, L4-5, he offered no medical explanation, other than noting that it was based on reasonable medical probability, for how the September 15, 2014 employment incident caused or aggravated the diagnosed herniated disc L4-5. Medical conclusions unsupported by rationale are of diminished probative value.¹⁸ Dr. Zampini also indicated that there may be other causes for appellant's herniated disc L4-5, which renders his opinion equivocal.¹⁹

The diagnostic testing of record is of diminished probative value and is insufficient to establish appellant's claim as none of the physicians provided an opinion on the cause of appellant's diagnosed conditions and the September 15, 2014 employment incident.²⁰

¹⁴ See cases cited *supra* note 12.

¹⁵ See *M.S.*, Docket No. 17-0105 (issued December 7, 2017).

¹⁶ See *T.M.*, Docket No. 08-0975 (issued February 6, 2009) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

¹⁷ *J.D.*, Docket No. 14-2061 (issued February 27, 2015).

¹⁸ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

¹⁹ *Philip J. Deroo*, 39 ECAB 1294 (1988).

²⁰ See *C.P.*, Docket No. 15-0600 (issued June 2, 2015).

Appellant also submitted copies of physical therapy notes. However, reports from physical therapist do not rise to the level of competent medical opinion evidence under FECA as physical therapists are not physicians under FECA.²¹

Accordingly, the Board finds that the medical evidence contained in this case record is without a well-rationalized medical opinion establishing that appellant's diagnosed lumbar conditions were causally related to the accepted September 15, 2014 employment incident. OWCP advised appellant that it was her responsibility to provide a comprehensive medical report explaining how the diagnosed medical condition was caused or aggravated by the accepted employment incident. Appellant failed to submit appropriate medical documentation in response to OWCP's request.²²

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference of causal relation.²³ An award of compensation may not be based on surmise, conjecture, speculation, or upon appellant's own belief that there was a causal relationship between his or her condition and his or her employment.²⁴ Causal relationship must be based on rationalized medical opinion evidence.²⁵ As appellant did not submit a rationalized medical opinion supporting that her back conditions were causally related to the accepted September 15, 2014 employment incident, she did not meet her burden of proof to establish an employment-related traumatic injury.

On appeal counsel contends that appellant had submitted relevant probative evidence which was not given proper consideration and weight. OWCP, however, did in fact gave proper consideration to all evidence appellant submitted. As previously noted, causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence, which was not submitted in this case.²⁶

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.

²¹ See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

²² See *D.B.*, Docket No. 16-1219 (issued November 8, 2016); see also *T.H.*, Docket No. 15-0772 (issued May 12, 2016).

²³ *L.D.*, Docket No. 09-1503 (issued April 15, 2010); *D.I.*, 59 ECAB 158 (2007); *Daniel O. Vasquez*, 57 ECAB 559 (2006).

²⁴ *Patricia J. Glenn*, 53 ECAB 159, 160 (2001).

²⁵ *M.E.*, Docket No. 14-1064 (issued September 29, 2014).

²⁶ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

CONCLUSION

The Board finds that appellant has not established that her lumbar condition is causally related to the accepted September 15, 2014 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 21, 2016 is affirmed.

Issued: April 19, 2018
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