United States Department of Labor
Employees' Compensation Appeals Board

B.P., Appellant	)	
and	)	**Docket No. 17-1572**
	)	**Issued: April 12, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 12, 2017 appellant, through counsel, filed a timely appeal from a May 3, 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.

[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 met her burden of proof to establish a lumbar condition causally related to the accepted August 29, 2016 employment incident.

FACTUAL HISTORY

On August 30, 2016 appellant, then a 59-year-old sales and distribution associate, filed a traumatic injury claim (Form CA-1) alleging that, on August 29, 2016, she "sustained a left lower back strain caused by a wet floor." She notified her supervisor on August 30, 2016 and first sought medical treatment on August 31, 2016. Appellant stopped work on September 1, 2016 and did not return.

In an August 30, 2016 narrative statement, appellant reported that, on August 29, 2016, she was putting her parcels and mail up when she slipped on an overly wet floor and tried to grab a table counter to keep from falling. This caused her to experience pain shooting down her left leg and arm, as well as swelling in her lower back.

The employing establishment issued appellant a properly completed Form CA-16, authorization for examination, dated August 30, 2016, which indicated that appellant was authorized to seek medical treatment for a strain of the left leg, arm, and lower back. The form indicated that there was doubt as to whether the employee's condition was caused by an injury sustained in the performance of duty, or was otherwise related to the employment.

In an August 31, 2016 discharge summary, Dr. Gordon Spafford, a family physician, reported that appellant presented with complaints of back pain after an August 29, 2016 incident when she slipped on a wet floor, causing her to almost fall. Appellant reported straining her left arm, back, and left leg. Dr. Spafford diagnosed dorsalgia, unspecified back pain and he restricted appellant from work.

By development letter dated September 14, 2016, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised of the medical and factual evidence needed. She was afforded 30 days to submit the necessary evidence.

In August 31 and September 14, 2016 medical reports, Dr. Spafford described the August 29, 2016 employment injury when appellant slipped on a wet floor and tried to grab a counter to keep from falling, causing her to strain her left arm, back, and left leg. He noted primary complaints of pain in the back on the lower left side. Dr. Spafford further reported that her problem began on August "28," 2016. He diagnosed dorsalgia unspecified back pain. Dr. Spafford reported that appellant underwent a magnetic resonance imaging (MRI) scan of her back and epidural injection just one week prior. He also noted that she currently had a bulging disc at L3, L4, and C5. Dr. Spafford restricted her from work as the cause of her problem was currently unknown.

By decision dated October 19, 2016, OWCP denied appellant's claim, finding that the August 29, 2016 incident occurred as alleged, but that the evidence of record failed to provide a firm medical diagnosis which could be reasonably attributed to the accepted employment incident.

On November 9, 2016 appellant requested reconsideration. In an accompanying narrative statement, she reported that at the time of her claimed injury, she had just returned back to work from a prior lumbar flair up. Appellant had previously received an epidural injection and was doing great until she slipped at work. She noted submission of an August 10, 2016 MRI scan and reported that her current injury was actually a reinjury of her prior condition. Appellant further reported that the employing establishment placed wet floor signs in the facility following her injury.

In an August 10, 2016 diagnostic report, Dr. Donald Wagnon, a Board-certified diagnostic radiologist, reported that appellant presented for a lumbar spine MRI scan due to pain, stiffness, and swelling in her lower back and right leg. He reported findings of L2-3 broad-based disc bulge with mild degenerative disc disease, L3-4 broad-based disc bulge with mild degenerative disc disease, and L4-5 posterior central disc protrusion extending inferiorly superimposed on a broad-based disc bulge with facet hypotrophy. Dr. Wagnon further noted the left lateral recess was narrowed with impingement on the left L5 nerve root and moderate degenerative disc disease.

In a September 26, 2016 medical report, Dr. Rosemarie Morwessel, a Board-certified orthopedic surgeon, reported that appellant complained of back pain following an August 29, 2016 injury when she slipped on some water while carrying mail and grabbed a counter to keep from falling. She reported that appellant had prior issues with her lower back and underwent a lumbar spine MRI scan on August 10, 2016 which showed an L4-5 disc protrusion with left nerve root impingement. Dr. Morwessel noted that appellant underwent an epidural steroid injection on August 24, 2016 which provided her relief. She returned to work as a mail carrier on August 29, 2016 when this new injury occurred. Subsequently, appellant reported tingling in her left leg, pain when sitting, tingling down her right thigh, pins and needles along the lateral aspect of her left leg and foot, and tingling down her right leg to knee. Dr. Morwessel also noted a history of known degenerative disc disease of the cervical spine. She provided findings on physical examination and diagnosed acute left-sided low back pain, abdominal oblique muscle strain, and L4-5 disc protrusion with left radiculopathy and numbness. Dr. Morwessel recommended another epidural injection and restricted appellant from returning to work.

In a September 29, 2016 letter entitled "challenge statement," S.S., appellant's supervisor, reported that appellant's first day back at work was on August 29, 2016 after being out due to problems with her back for which she used sick leave. Appellant was finishing her workday and reported that she returned to put her parcels and mail away when she slipped on the wet floor. She notified S.S. following the incident and reported that she grabbed the counter to keep from falling. S.S. noted that there were no witnesses to the incident and she had inspected the area and found that the floor was wet. She argued that appellant did not fall and was claiming she injured her back when she slipped on the floor. S.S. noted that appellant had problems with her back for some time and no longer had sick leave to use to request time off.

In an October 14, 2016 duty status report (Form CA-17), Dr. Morwessel provided appellant work restrictions, noting that she aggravated her old injury from the August 29, 2016 employment incident.

By decision dated February 16, 2017, OWCP affirmed the October 19, 2016 decision, as modified, finding that fact of injury had been established. However, the evidence of record failed

to establish that her diagnosed conditions were causally related to the accepted August 29, 2016 employment incident. The claim remained denied as causal relationship had not been established between the diagnosed conditions and the accepted employment incident.

On March 10, 2017 appellant requested reconsideration of the February 16, 2017 OWCP decision and submitted additional medical evidence.

In a November 21, 2016 medical report, Dr. Clinton Howard, a Board-certified orthopedic surgeon, reported that appellant presented for evaluation with significant back and left-sided leg pain. He noted a prior history of back and leg pain for which appellant had been treated *via* an epidural steroid injection with significant relief. Appellant reported subsequently falling at work at the employing establishment and complained of significant back and left-sided leg pain. Dr. Howard noted that evaluation of a past MRI scan revealed moderate level of degenerative changes. He diagnosed low back and left lower extremity radiculopathy that changed in nature status post fall. Dr. Howard further recommended a lumbar spine MRI scan to compare with her prior study.

In a November 29, 2016 diagnostic report, Dr. Howard reported that an MRI scan of the lumbar spine revealed left central/paracentral disc extrusion at L4-5 with the extruded fragment extending inferiorly into the left lateral recess, causing spinal stenosis with indentation upon the thecal sac and in very close proximity to the left L5 nerve root in the lateral recess; a very small central disc extrusion at L3-4 which did not cause spinal or foraminal stenosis; very slight disc bulging at L2-3 without evidence of spinal or foraminal stenosis; and degenerative disc disease with disc space narrowing at L2-3 through L4-5.

In a December 2, 2016 medical report, Dr. Howard reported that appellant presented for evaluation following her MRI scan which revealed L4-5 disc herniation on the left side that corresponded with her symptoms. He recommended a repeat epidural injection. In a December 21, 2016 medical report, Dr. Howard reported that appellant responded well to the epidural injection. In a January 13, 2017 medical report, he reported that appellant complained of left-sided leg pain. Dr. Howard noted that the epidural injection provided the last time did not give her significant relief. However, seven months prior, Dr. Thompson administered an epidural injection which almost completely mitigated her symptoms. He recommended another epidural injection prior to assessing surgical intervention.

In a February 8, 2017 medical report, Dr. Howard reported that appellant had 100 percent reduction in her pain status post lumbar epidural steroid injection at L4-5 left sided. He noted that the MRI scan showed left-sided paracentral disc extrusion at L4-5 which caused spinal stenosis with compression of the L5 nerve root. Dr. Howard recommended a laminectomy and microdiscectomy at L4-5.

In a March 6, 2017 attending physician's report (Form CA-20), Dr. Howard noted an August 29, 2016 date of injury and diagnosed displacement of lumbar disc and degeneration of lumbar disc. When asked if the condition was caused or aggravated by the employment activity, he responded "not applicable." Dr. Howard noted that appellant was undergoing surgery on March 8, 2017.

By letter dated March 29, 2017, OWCP provided Dr. Howard a series of questions pertaining to appellant's preexisting and current lumbar injury and requested that he provide a response within 30 days.

In an April 11, 2017 medical report, Dr. Howard reported that appellant underwent a microdiscectomy for L4-5 disc disease, but experienced continued neuropathic pain. He noted that OWCP had some questions with regard to appellant's baseline condition versus objective findings. Dr. Howard noted that appellant reported no symptoms prior to the August 29, 2016 employment incident. Subsequent to that incident she had symptoms and her MRI scan findings were indicative of L4-5 disc disease based on her "December" episode. Dr. Howard noted that, based on appellant's recollection, it was most likely due to the L4-5 disc and significant left-sided leg pain as he had no reason not to believe her. He further noted that she probably had some neuropathic disc injury.

By letter dated April 14, 2017, appellant reported that she underwent surgery on March 8, 2017 and was currently in postoperative status. She noted that Dr. Morwessel's report relied on the prior August 10, 2016 lumbar MRI scan study as she had not yet undergone the most recent MRI scan testing. Appellant reported that Dr. Howard evaluated her based on her most recent MRI scan findings following her work injury.

In an April 21, 2017 medical report, Dr. Howard reported that appellant showed improvement in her back and left-sided leg pain and hoped to release her to full duty in two weeks.

In an April 28, 2017 narrative statement, appellant described the circumstances surrounding her injury and treatment.

By decision dated May 3, 2017, OWCP denied modification of its February 16, 2017 decision, finding that the evidence of record failed to establish that appellant's diagnosed conditions were causally related to the accepted August 29, 2016 employment 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, 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 is 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,

[3] *Supra* note 2.

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

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

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.

To establish 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 supporting such 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]

ANALYSIS

OWCP accepted that the August 29, 2016 employment incident occurred as alleged and that fact of injury was established. The issue is whether the accepted incident caused appellant's diagnosed lumbar conditions.

The Board finds that appellant has not submitted sufficient medical evidence to support that her lumbar conditions were causally related to the August 29, 2016 employment incident.[9]

In medical reports dated August 31 and September 14, 2016, Dr. Spafford described the August 29, 2016 employment incident and diagnosed dorsalgia unspecified back pain. The Board notes that Dr. Spafford failed to provide a firm medical diagnosis as he only diagnosed low back pain. The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis.[10] Furthermore, Dr. Spafford reported that he did not know the cause of appellant's problems. Given the above deficiencies, these reports are insufficient to establish causal relationship.

In a September 26, 2016 medical report, Dr. Morwessel described the August 29, 2016 employment incident and diagnosed acute left-sided low back pain, abdominal oblique muscle strain, and L4-5 disc protrusion with left radiculopathy and numbness. She noted prior back issues as evinced by an August 10, 2016 lumbar spine MRI scan which showed L4-5 disc protrusion with

[6] *Supra* note 4.

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

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

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

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

left nerve root impingement. Dr. Morwessel noted that appellant's symptoms began following the August 29, 2016 incident because she had undergone an epidural steroid injection on August 24, 2016 which provided relief. The Board has held that an opinion that a condition is causally related because the employee was asymptomatic before the incident is insufficient, without adequate rationale, to establish causal relationship.[11] Dr. Morwessel failed to provide support for a work-related injury as she based her opinions on subjective complaints rather than objective findings. Her generalized statements do not establish causal relationship because they merely repeat appellant's allegations and are unsupported by adequate medical rationale explaining how the accepted employment incident of August 29, 2016 actually caused or aggravated the diagnosed conditions.[12] Dr. Morwessel failed to discuss why appellant's complaints were not caused by her preexisting disc herniation and degenerative conditions for which she was seeking treatment for at the time of the August 29, 2016 employment incident. Therefore, her report is of limited probative value and insufficient to meet appellant's burden of proof.[13]

The Board further finds that Dr. Howard's reports dated November 21, 2016 through April 21, 2017 are also insufficient to establish causal relationship. Dr. Howard described the August 29, 2016 employment incident and noted that the evaluation of a past MRI scan revealed moderate levels of degenerative changes. He reported that a new November 29, 2016 lumbar MRI scan revealed L4-5 disc herniation on the left side which corresponded with appellant's symptoms. The Board notes that Dr. Howard failed to compare the findings of the August 10 and November 29, 2016 MRI scan studies to determine if there were any changes following the August 29, 2016 employment incident. Dr. Howard's medical reports implied that appellant sustained a work-related L4-5 disc herniation because she exhibited no symptoms at the time of the August 29, 2016 employment incident. As previously noted, the Board has held that an opinion that a condition is causally related because the employee was asymptomatic before the incident is insufficient, without adequate rationale, to establish causal relationship.[14] Dr. Howard's statement that appellant's symptoms were a direct result of the incident is highly speculative as he is attributing symptoms to the employment incident, but not her diagnosed conditions.[15]

Dr. Howard's March 6, 2016 Form CA-20 also fails to provide support for causal relationship. He diagnosed displacement of lumbar disc and degeneration of lumbar disc, but indicated "not applicable" when asked if the condition was caused or aggravated by the employment activity. As such, this form fails to provide support for a work-related causal relationship.[16]

[11] *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

[12] *K.W.*, Docket No. 10-98 (issued September 10, 2010).

[13] *See L.M.*, Docket No. 14-0973 (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).

[14] *Supra* note 11.

[15] *M.R.*, Docket No. 14-0011 (issued August 27, 2014).

[16] *S.R.*, Docket No. 12-1098 (issued September 19, 2012).

By letter dated March 29, 2017, OWCP requested that Dr. Howard answer a series of questions pertaining to appellant's preexisting and current lumbar spine injuries, with discussion of the August 10 and November 29, 2016 lumbar MRI scan findings. Dr. Howard's April 11, 2017 report failed to provide any clarification, only stating that appellant reported no symptoms prior to the August 29, 2017 employment incident and experienced symptoms following the incident. As previously noted, lack of symptoms at the time of the employment incident does not establish that the incident caused injury.[17]

The Board finds that Dr. Howard does not have an accurate history of the employment incident as the event alleged to have caused appellant's injury occurred in August 2016. Dr. Howard reported that her MRI scan findings were indicative of L4-5 based on her "December" episode. Medical opinion must include an accurate history of the employee's employment incident and must explain how the condition is related to the incident. 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.[18] Moreover, his statement on causation is vague and not sufficiently rationalized. Dr. Howard reported that, based on appellant's recollection, "it" was due to the L4-5 disc and significant left-sided leg pain as he had no reason not to believe her. It is unclear whether he was discussing causal relationship to the accepted employment incident, as he only noted that appellant's condition was due to the L4-5 and L4-5 disc. The Board notes that the record reflects a preexisting degenerative lumbar condition as evidenced by an August 10, 2016 MRI scan for which appellant was undergoing treatment at the time of her alleged traumatic injury. Dr. Howard did not address why appellant's complaints were not caused by her preexisting condition, nor did he discuss whether her a preexisting condition had progressed beyond what might be expected from its natural progression.[19] A well-rationalized opinion is particularly warranted when there is a history of preexisting condition.[20] As such, Dr. Howard's reports are of limited probative value and insufficient to meet appellant's burden of proof.[21]

The Board notes that the record reflects diagnostic findings from an August 10, 2016 lumbar MRI scan as well as a subsequent November 29, 2016 lumbar MRI scan. These diagnostic reports do not reflect any significant change to establish a worsening or aggravation of the preexisting condition on or after August 29, 2016. While these medical reports have some relevance to appellant's claim, they are of limited probative value in establishing causal relationship as they offered diagnostic findings with no opinion on the cause of appellant's condition.[22]

[17] *See supra* note 11.

[18] *See M.C.*, Docket No. 17-1579 (issued November 28, 2017).

[19] *R.E.*, Docket No. 14-868 (issued September 24, 2014).

[20] *See G.M.*, Docket No. 13-1367 (issued November 19, 2013).

[21] *John W. Montoya*, 54 ECAB 306 (2003).

[22] *R.C.*, Docket No. 15-0315 (issued May 4, 2015).

An award of compensation may not be based on surmise, conjecture, speculation, or on the employee's own belief of causal relation.[23] Appellant's honest belief that her accepted employment incident caused her lumbar condition, however sincerely held, does not constitute the medical evidence necessary to establish causal relationship.[24] In the instant case, the record lacks rationalized medical evidence establishing causal relationship between the August 29, 2016 employment incident and her diagnosed lumbar conditions. Thus, appellant has failed to meet her burden of proof.

The record contains a Form CA-16 dated August 30, 2016 and signed by the employing establishment. A properly executed CA-16 form can be the basis of a contractual agreement for payment of medical expense, even if the claim is not accepted.[25] Upon return of the case record, OWCP should address this issue.

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. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that her lumbar conditions are causally related to the accepted August 29, 2016 employment incident, as alleged.

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

[24] *See J.S.*, Docket No. 17-0967 (issued August 23, 2017).

[25] *See* 20 C.F.R. § 10.300; *Val D. Wynn*, 40 ECAB 666 (1989); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Authorizing Examination and Treatment*, Chapter 3.300.3(a)(3) (February 2012).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated May 3, 2017 is affirmed.

Issued: April 12, 2018
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board