

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

R.K., Appellant)	
)	
and)	Docket No. 17-0151
)	Issued: December 12, 2018
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Denver, Co, Employer)	
)	

Appearances:
Bernard Humbles, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 31, 2016 appellant, through her representative, filed a timely appeal from a July 15, 2016 merit decision and a September 13, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation

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 Appellant's representative filed a timely request for oral argument in this case. By order dated April 13, 2017, the Board exercised its discretion and denied appellant's request as oral argument would further delay issuance of a Board decision and not serve a useful purpose. *Order Denying Request for Oral Argument*, Docket No. 17-0151 (issued April 13, 2017).

Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.⁴

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a lumbar condition causally related to the accepted April 13, 2016 employment incident; and (2) whether OWCP properly denied appellant's request for a hearing.

FACTUAL HISTORY

On April 15, 2016 appellant, then a 46-year-old medical instrument technician, filed a traumatic injury claim (Form CA-1) alleging that on April 13, 2016 she was assisting a nurse with a very large patient in limited bathroom space. She explained that she leaned over the patient's large wheel chair to help with the patient's pants, and upon standing she felt a sharp pain in her low back at the midline level. Appellant also noted that pain radiated down to her left buttock and down her leg to the bottom of her foot.

In an April 13, 2016 report, Dr. Sandra Buseman, an attending physician Board-certified in sports medicine, physical medicine, and rehabilitation, recommended rest and a return to work on April 14, 2016 with restrictions. The restrictions included no pushing, pulling, lifting, or carrying greater than 10 pounds. Dr. Buseman also recommended that appellant have the ability to change positions as needed for comfort.

In an April 14, 2016 report, Dr. Tanya Michelle Kern, a Board-certified family practitioner, assessed lumbar radiculopathy. She recommended a medrol dose pack for a "likely disc herniation or annular tear." Dr. Kern opined that appellant's condition was "at least 50 percent likely to have been caused by exposure at work." She noted that appellant's job duties included that she had to help move patients. Dr. Kern indicated that appellant was asked to assist a coworker with a 200 pound woman, who needed help using the toilet. She related that appellant indicated that the bathroom was a small space in which she had to lean over the wheelchair to help hold the patient and in so doing injured the left side of her low back. Dr. Kern also indicated that appellant had immediate pain when she pulled up on the patient's pants and leaned over the wheelchair. She noted that appellant informed her that pain radiated down the back of her leg and into her foot. Additionally, Dr. Kern indicated that appellant had persistent pain in the left side of her low back with numbness in the middle of the bottom of her foot. She opined that "it feels exactly like the time that [appellant] had a disc herniation at L5 on the left side," which occurred due to a previous injury in 2003.

OWCP received several reports dated from April 20 to May 27, 2016 from Dr. Michael Shen, a Board-certified orthopedic surgeon. In his April 20, 2016 duty status report, Dr. Shen

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

indicated that appellant leaned over a large wheelchair while at work to assist a patient and she felt a sharp pain in the low back and midline, then down the right buttock and leg to the foot. He found clinical findings of lumbar strain and radiculopathy. Dr. Shen diagnosed low back pain and radiculopathy. He recommended light duty with restrictions on lifting and carrying of no more than 10 to 15 pounds continuously or intermittently.

In a separate report also dated April 20, 2016, Dr. Shen explained that appellant presented with pain and noted that her symptoms were acute, traumatic and began on April 14, 2016. He indicated that she had an acute strain and onset of her back and leg symptoms, and her pain was worse with prolonged sitting. Dr. Shen noted that appellant felt better when she could stand and even more so when she could walk or move around. He related that she had similar symptoms in the past which had resolved with conservative treatment. Dr. Shen examined appellant and diagnosed low back pain and radiculopathy in the lumbar region. He also indicated that she related that she had a history of degenerative disc disease and disc bulging at L5-S1. Dr. Shen opined that this helped to explain appellant's decreased disc height at L5-S1. He found that she was mechanically stable and neurologically intact. Dr. Shen recommended a magnetic resonance imaging (MRI) scan of the lumbar spine and conservative care.

Dr. Shen evaluated appellant on April 22, 2016 and diagnosed radiculopathy of the lumbar region. He noted that she continued to have pain in the right sacroiliac joint region and slightly distally in the glute.

In his April 25, 2016 report, Dr. Shen noted radiculopathy of the lumbar region and indicated that the patient reported occasional tingling in her feet and pain over the right sacroiliac joint extension in prone positions. He recommended continued light-duty work. Dr. Shen saw appellant on April 27 and May 3, 2016 and diagnosed radiculopathy of the lumbar region. He saw her again on May 4, 2016 and diagnosed low back pain along with radiculopathy of the lumbar region. Dr. Shen advised that appellant's back was improving with conservative treatment and recommended full-time work restrictions and moderate duty. He recommended continued physical therapy.

In a May 4, 2016 report, Dr. Shen recommended a 25-pound lifting and carrying restriction. He saw appellant on May 6, 2016 and related that she had pain going side to side. Dr. Shen related that she indicated that she reported some burning and nerve sensation to the left leg, but had not increased the workload yet. He advised that appellant indicated that she reported that she was sitting in a chair and bent to the floor to pick up a dropped tube and warmth began down the left thigh and tingling in the foot. Dr. Shen saw her on May 13, 2016 and noted reports of aching in the right glute and proximal hamstring bilaterally. In a May 17, 2016 report, he repeated his diagnoses. Dr. Shen found that appellant continued to have an inflamed and unstable vertebra and disc in her low back. He noted that she had increased pain down the left leg and reported that she indicated that she was in a car ride "for 1.5 x 2 hours this weekend and felt increased stiffness and pain." In a May 18, 2016 report, Dr. Shen diagnosed radiculopathy, lumbar region and low back pain. He advised that appellant regressed in terms of back and leg pain despite conservative care. Dr. Shen recommended proceeding with a lumbar MRI scan. He recommended continued physical therapy.

In a May 20, 2016 report, Dr. Shen noted that appellant presented with increased mobility today, during exercise, ambulation, and changing positions. He advised that she reported pain in the right PSIS with certain movements. Dr. Shen also noted that appellant reported “feeling pretty good today,” and also reported some sciatic sensations down both legs. In a note of May 24 2016, he advised that she again reported that her back was “feeling pretty good,” but she did try jumping jacks that created increased pressure and pain in her back, and she was going back to lifting at work for 5 out of 12 hours.

A May 26, 2016 MRI scan of the lumbar spine, read by Dr. Trystain D. Johnson, a Board-certified diagnostic radiologist, revealed mild central canal stenosis at L4-5, no other canal stenosis, mild-to-moderate lower lumbar facet arthrosis with small bilateral L4-5 facet joint effusions, and with no significant foraminal narrowing associated.

In a May 27, 2016 report, Dr. Shen found that appellant had other spondylosis with radiculopathy of the lumbar region. He explained that she reported that her back hurt more for a few days after work duties had been increased, but after being sore for a few days she was feeling better. Dr. Shen indicated that appellant had pain in the central lumbar spine and the right sacroiliac region.

By development letter dated June 10, 2016, OWCP advised appellant of the deficiencies in her claim. It requested additional factual and medical evidence and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the requested information.

Dr. Shen continued to treat appellant and submitted treatment notes and duty status reports dated June 14, 17, 21, 22 and 24 and July 13, 2016. He repeated his diagnoses, which included spondylosis with radiculopathy. Dr. Shen indicated that appellant continued to be symptomatic following her accident at work. He advised that her symptoms occurred occasionally, and her problem was fluctuating. In a July 13, 2016 duty status report, Dr. Shen indicated that appellant was able to return to full-time work.

By decision dated July 15, 2016, OWCP denied appellant’s claim. It found that the medical evidence of record was insufficient to establish causal relationship between her diagnosed medical condition and the accepted April 13, 2016 employment incident. OWCP explained that the submitted medical reports identified a preexisting condition of the lumbar spine, to include herniated discs from 2003, degenerative disc disease, and a bulging disc at L5-S1. It noted that appellant’s physician had not provided an opinion as to whether the work incident on April 13, 2016 was the cause of her diagnosed medical condition.

On August 26, 2016 OWCP received appellant’s request for a telephonic hearing dated August 1, 2016. The request was postmarked August 18, 2016.

OWCP also received an August 2, 2016 report from Dr. Bennet Machanic, a Board-certified neurologist, who noted appellant’s history, examined her, and provided his findings and an opinion on causal relationship. Additionally, it received a copy of the first page of a July 13, 2016 report which appears to be from Dr. Shen and a copy of a previously submitted May 24, 2016 report from Dr. Shen.

By decision dated September 13, 2016, OWCP denied appellant's request for a hearing. It found that the request was untimely as it was not made within 30 days of the July 15, 2016 decision. OWCP exercised its discretion and determined that it would not grant a hearing because the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence not previously considered pertaining to appellant's claim for an injury causally related to her accepted April 13, 2016 employment incident.

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 timely filed within the applicable time limitation period of FECA,⁵ that an injury was sustained in the performance of duty as alleged,⁶ and that any disability or specific condition for which compensation is claimed are causally related to the employment injury.⁷ These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁸

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.⁹ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.¹⁰

Causal relationship is a medical issue and the evidence required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's opinion on the issue of whether there is 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, 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.¹¹

⁵ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *Michael E. Smith*, 50 ECAB 313 (1999).

⁸ *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁹ *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ *Id.*

¹¹ *I.J.*, 59 ECAB 408 (2008).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a lumbar condition causally related to the accepted April 13, 2016 employment incident. The Board finds that the medical evidence of record contains no reasoned explanation of how the accepted employment incident on April 13, 2016 caused or aggravated her claimed back conditions.¹² Such a reasoned opinion is especially important as appellant has well-documented preexisting conditions of the lumbar spine.¹³

OWCP received an April 13, 2016 report from Dr. Buseman, who recommended a return to work with restrictions. However, Dr. Buseman merely provided work restrictions and did not offer an opinion on causal relationship. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁴

In an April 14, 2016 report, Dr. Kern assessed lumbar radiculopathy and opined that appellant's condition was "at least 50 percent likely to have been caused by exposure at work." She described appellant's job duties, which included that appellant had to help move patients -- specifically assisting a coworker with a 200-pound patient on the date of incident. Dr. Kern indicated that appellant experienced immediate pain when she pulled up on the large patient's pants and leaned over the wheelchair. She noted that appellant had pain that radiated down the back of her leg and into her foot as well as persistent pain in the left side of her low back with numbness in the middle of the bottom of her foot. Dr. Kern opined that "it feels exactly like the time that [appellant] had a disc herniation at L5 on the left side." She noted that appellant recovered from her prior injury in 2003 with conservative treatment. The Board notes that while Dr. Kern opined that appellant's condition was "at least 50[-]percent likely to have been caused by exposure at work," other than noting appellant's complaints, she did not provide a causation finding with medical rationale explaining how the April 13, 2016 work incident caused or aggravated the diagnosed conditions.¹⁵ Such rationale is particularly important given appellant's history of preexisting disc herniation at L5 on the left side.¹⁶

OWCP also received several reports from Dr. Shen for the period April 20 to July 13, 2016. Dr. Shen diagnosed low back pain and radiculopathy in the lumbar region along with spondylosis with radiculopathy. While he generally noted that, the lumbar condition was due to a work incident, he failed to provide medical reasoning as to how and why the accepted employment incident would result in a lumbar spine condition. Without explaining how, physiologically, the movements involved in the accepted employment incident caused or contributed to the diagnosed

¹² 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).

¹³ See *P.H.*, Docket No. 16-0654 (issued July 21, 2016); *S.R.*, Docket No. 16-0657 (issued July 13, 2016); *R.E.*, Docket No. 14-0868 (issued September 24, 2014).

¹⁴ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁵ See *K.W.*, Docket No. 10-0098 (issued September 10, 2010).

¹⁶ *Supra* note 13.

condition, Dr. Shen's opinion on causal relationship is of limited probative value.¹⁷ Furthermore, no opinion was provided on causal relationship. A medical opinion should reflect a correct history and offer a medically sound explanation by the physician of how the specific employment incident physiologically caused or aggravated the diagnosed conditions.¹⁸ As the reports of Dr. Shen are deficient in these regards, his reports are of no probative value as he did not offer an opinion on causal relationship.¹⁹

OWCP received a May 26, 2016 MRI scan of the lumbar spine read by Dr. Johnson, which noted spinal abnormalities. However, the Board has held that diagnostic studies lack probative value as they do not address whether the employment incident caused any of the diagnosed conditions.²⁰

Thus, the Board finds that the evidence of record is insufficient to meet appellant's burden of proof. On appeal, appellant argues that she was injured in the performance of duty and submitted the requisite medical evidence. However, as found above, the medical evidence of record was insufficiently rationalized to establish her claim.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before a hearing representative, states: Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his or her claim before a representative of the Secretary.²¹ A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.²² The Branch of Hearings and Review, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and must exercise this discretionary authority in deciding whether to grant a hearing.²³ The Board has held that it must

¹⁷ See *L.B.*, Docket No. 17-1600 (issued March 9, 2018).

¹⁸ See *J.M.*, Docket No. 17-1002 (issued August 22, 2017).

¹⁹ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

²⁰ See *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

²¹ 5 U.S.C. § 8124(b)(1).

²² 20 C.F.R. § 10.615.

²³ *D.M.*, Docket No. 08-1814 (issued January 16, 2009).

exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).²⁴

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for a hearing.

A request for a hearing must be made within 30 days after the date of the issuance of a final OWCP decision. Appellant's request for oral hearing was postmarked on August 16, 2016. As the request was submitted more than 30 days following issuance of the July 15, 2016 decision, the Board finds that it was untimely filed.

OWCP also has the discretionary power to grant an oral hearing even if the claimant is not entitled to a review as a matter of right. The Board finds that OWCP, in its September 13, 2016 decision, properly exercised its discretion by indicating that it had considered the matter and had denied appellant's request for oral hearing as her claim could be equally well addressed through a reconsideration application. The Board has held that as the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.²⁵ In the present case, the evidence of record does not indicate that OWCP acted unreasonably in denying appellant's request in connection with its denial of appellant's request for an oral hearing which could be found to be an abuse of discretion.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a lumbar condition causally related to the accepted April 13, 2016 employment incident. Furthermore, the Board finds that OWCP properly denied her request for a hearing.

²⁴ See *R.T.*, Docket No. 08-0408 (issued December 16, 2008).

²⁵ See *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the September 13 and July 15, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 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