United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 17-1378**
	)	**Issued: December 17, 2018**
DEPARTMENT OF AGRICULTURE, Fort Morgan, CO, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 5, 2017 appellant, through counsel, filed a timely appeal from an April 17, 2017 merit 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]

ISSUE

The issue is whether appellant has met her burden of proof to establish a diagnosed medical condition causally related to the accepted February 24, 2017 employment incident.

[1] 5 U.S.C. § 8101 *et seq.*

[2] 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 addition evidence for the first time on appeal. *Id.*; *P.W.* Docket No. 12-1262 (issued December 5, 2012).

FACTUAL HISTORY

On March 2, 2017 appellant, then a 41-year-old food safety inspector, filed a traumatic injury claim (Form CA-1) alleging that, on February 24, 2017, she injured the right side of her back in the performance of duty. On the reverse side of the claim form, appellant's supervisor checked a box marked "yes" indicating that appellant was injured in the performance of duty. The employing establishment also asserted that appellant engaged in willful misconduct because she performed procedures that were not part of the required inspection procedures. It indicated that she was pulling and representing "entire viscera repetitively."

In a February 27, 2017 statement, which was submitted with her Form CA-1, appellant indicated that on February 24, 2017, while she was working, she reached for a meat product she was to inspect and felt a muscle pull on the right side of her back. She informed her supervisor that she pulled the muscle immediately following the incident.

OWCP also received a February 28, 2017 statement from a coworker, T.R., who confirmed that the inspectors had to reach across the table, lift product, or have company personnel retrieve product that was not present or visible when it should have been. T.R. indicated that product was on the wrong side of the table or out of reach at times causing the inspectors to have to reach for the product to perform proper inspections.

By development letter dated March 7, 2017, OWCP informed appellant of the type of evidence needed to establish her claim. It requested that she complete a questionnaire setting forth the factual basis of her claim. OWCP also noted that the medical portion of appellant's claim was reviewed and was found to be insufficient. It requested a narrative report from appellant's attending physician, including an explanation of how appellant's alleged February 24, 2017 employment incident caused or aggravated a medical condition. OWCP afforded her 30 days to submit such evidence.

The employing establishment, on March 7, 2017, completed an authorization for examination and treatment (Form CA-16) for purposes of treating appellant's muscle strain.

In a March 16, 2017 response to the development questionnaire, appellant noted that she had experienced a throbbing pain in her right mid-back and she immediately informed her supervisor. She denied that she had any prior similar conditions.

OWCP received February 28 and March 3, 7, 14, 16, and 30, 2017 reports from physician assistants and chiropractors. In a March 3, 2017 report, Dr. Josef Planansky, a chiropractor, described the incident as related by appellant and noted that she indicated that she was standing at her workstation where she inspected meat. Appellant advised that as a piece of meat came through on the belt, she had to reach over to pull it closer to her, which caused pain and discomfort in her back on the right side of her ribs. Dr. Planansky examined appellant and diagnosed pain of the thoracic spine, pleurodynia, and cramps and spasms.

In a March 9, 2017 report, Dr. Nathan Ginn, a chiropractor, noted that appellant's chief complaint was throbbing and intermittent right mid-back side pain. He examined her and diagnosed pain in the thoracic spine, pleurodynia, and cramps and spasms. In a March 14, 2017

report, Dr. Planansky examined appellant and indicated that she could return to work with mild restrictions. Dr. Ginn saw appellant on March 16 and 29, 2017, and diagnosed pain in the thoracic spine and cramps and spasms.

In a February 28, 2017 note, Siegfried Emme, a nurse practitioner, assessed a back muscle strain and recommended that appellant be placed on work restrictions with no reaching out with the right arm. OWCP also received February 28 and March 7, 2017 work restrictions and nurses reports.

By decision dated April 17, 2017, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish that a medical condition had been diagnosed in connection with the claimed injury and or events. It noted in its decision that medical evidence from a nurse, nurse practitioner, or physician assistant lacked probative value as those health care providers are not considered physicians under FECA. OWCP also noted that a chiropractor is only considered a physician if there is a diagnosed spinal subluxation and it is demonstrated by x-ray to exist.

LEGAL PRECEDENT

A claimant seeking benefits under FECA 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, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.[3]

To determine if an employee sustained a traumatic 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 that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[4] The second component is whether the employment incident caused a personal injury.[5] An employee may establish that an incident occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[6]

[3] 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

[4] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue. *Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s). *Id.*

[6] *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered physician[s]" as defined under FECA.[7] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[8]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a diagnosed medical condition causally related to the accepted February 24, 2017 employment incident.

The Board notes that OWCP received reports from nurses dating from February 28 to March 10, 2017. However, nurses are not considered physicians under FECA and are not competent to render a medical opinion.[9] Their reports are therefore of no probative value.

The record also contains treatment notes from physician assistants dating from February 28 to March 30, 2017. Under FECA the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by the applicable state law.[10] Consequently, the physician assistant's treatment notes have no probative value as the records provided cannot be considered medical evidence.

The record also contains reports from chiropractors. They included reports dated March 3 and 14, 2017, from Dr. Planansky and reports dated March 9, 16, and 29, 2017, from Dr. Ginn. Section 8101(2) of FECA[11] provides that the term physician, as used therein, 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.[12] Without a diagnosis of a subluxation from x-ray, a chiropractor is not a physician under FECA and his or her opinion on causal relationship does not constitute competent medical evidence.[13]

[7] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[8] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

[9] *Supra* note 12; *S.J.*, Docket No. 17-0783, n.2 (issued April 9, 2018) (nurse practitioners are not considered physicians under FECA).

[10] *See* 5 U.S.C. § 8101(2). *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

[11] 5 U.S.C. § 8101(2).

[12] *See* 20 C.F.R. § 10.311.

[13] *Jay K. Tomokiyo*, 51 ECAB 361, 367-68 (2000).

The Board thus finds that appellant has not met her burden of proof as there is no medical evidence of record to establish a diagnosed medical condition causally related to the accepted February 24, 2017 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 not met her burden of proof to establish a diagnosed medical condition causally related to the accepted February 24, 2017 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 17, 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