

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

L.J., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Chicago, IL, Employer)

Docket No. 17-1554
Issued: February 5, 2018

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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 10, 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 Act² (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 an aggravation of a preexisting back condition causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On February 16, 2016 appellant, then a 53-year-old nurse, filed an occupational disease claim (Form CA-2) alleging that she experienced shooting pain in her lower back and bilateral thighs and legs as a result of trying to keep patients from falling and positioning them in wheel chairs. She first became aware of her condition and realized its relations to factors of her federal employment on August 27, 2015. Appellant further explained that she did not file her claim within 30 days because she originally thought her current back injury was an aggravation of a previous injury.³ She stopped work on September 21, 2015.⁴

By development letter dated February 19, 2016, OWCP advised appellant that the evidence submitted was insufficient to establish an occupational disease claim. It requested that she respond to an attached questionnaire in order to substantiate the factual element of her claim and submit additional medical evidence to establish a diagnosed condition causally related to her employment. Appellant was afforded 30 days to submit the additional evidence.

In letters dated February 18 and 19, 2016, M.G., a human resource specialist for the employing establishment, controverted appellant's claim. She alleged that appellant had not met the elements necessary to establish her claim as she had not provided sufficient medical evidence to establish the medical condition claimed was causally related to the alleged injury. M.G., speculated that nonwork factors may possibly have caused appellant's condition. She related that appellant had a well-documented history of a work-related back sprain injury and had filed a recurrence claim, which had been denied on February 4, 2016.

Appellant was treated by Dr. Mark Sokolowski, a Board-certified orthopedic surgeon. In a February 29, 2016 report, Dr. Sokolowski related her complaints of lumbar pain radiating to her bilateral buttocks and lower extremities. He noted that he last treated appellant on February 17, 2016 for an accepted January 5, 2015 work injury. Dr. Sokolowski reported that on January 5, 2015 she developed back pain, which continued to worsen as she worked. Appellant related that on August 27, 2015 she was working in the psychiatric unit and noticed a confused patient with an unsteady gait. She guided the patient to a wheelchair and when she helped him to sit down she developed lower back pain, which progressively worsened over the coming days. Appellant noted that her symptoms persisted. Upon physical examination, Dr. Sokolowski reported concordant back pain with radiation to her bilateral buttocks and lower extremities with extension beyond neutral. Dr. Sokolowski related that a February 22, 2016 lumbar spine magnetic resonance imaging (MRI) scan report was significant for L2-3 spondylolisthesis, mild central stenosis, and bilateral neuroforaminal stenosis at L2-3, moderate central stenosis and

³ The record reveals that under OWCP File No. xxxxxx896 OWCP accepted appellant's claim for a lumbar sprain as a result of a January 5, 2015 employment injury.

⁴ Appellant returned to light duty on October 3, 2016.

moderate-to-severe neuroforaminal stenosis at L3-4, mild-to-moderate central stenosis, and moderate neuroforaminal stenosis at L4-5. He diagnosed new onset of lumbar radiculopathy and further exacerbation of lumbar pain, which had initially developed on January 5, 2015.

Dr. Sokolowski opined that “the injury of August 27, 2015 further exacerbated the symptoms [appellant] had already developed at work on January 5, 2015. Her pain and radiculopathy persist to this day.” He explained that appellant’s work injuries resulted in the development of lumbar pain secondary to a strain and also the new onset of lumbar radiculopathy. Dr. Sokolowski noted that her lumbar radiculopathy arose from exacerbation of her spinal stenosis from L2-5. He reported that appellant remained temporarily totally disabled. Dr. Sokolowski provided a February 29, 2016 appointment note, which noted a date of injury of August 27, 2015. He also completed an employing establishment work capacity evaluation form on February 29, 2016, which related that appellant was temporarily totally disabled.

In a February 29, 2016 attending physician’s report (Form CA-20), Dr. Sokolowski indicated a date of injury of August 27, 2015. He related a history of injury of lumbar injury due to preventing a patient fall and noted that appellant had an accepted work injury of January 5, 2015. Dr. Sokolowski reported examination findings of stenosis at L3-5 and spondylolisthesis at L2-3. He diagnosed lumbar radiculopathy. Dr. Sokolowski checked a box marked “yes” indicating that appellant’s condition was caused or aggravated by an employment activity. He explained that it was an aggravation of stenosis. Dr. Sokolowski indicated that appellant was totally disabled beginning September 17, 2015.

On March 8, 2016 appellant responded to OWCP’s February 19, 2016 development questionnaire. She related that she worked as a nurse full time and was never provided light duty as recommended by her treating physician. Appellant explained that she had to work with heavy assignments due to staff shortages and that she was forced to bend beyond her capacity because patient beds were not ergonomically correct. She indicated that she also had to transport wheelchair patients, empty heavy laundry linen carts, and open heavy doors at the nurses’ stations. Appellant reported that during her eight-hour workday, she only got one 15-minute break every four hours.

Appellant stated that she started to work the night shift full time at the psychiatric unit. She indicated that her treating physician had released her to full-time, light-duty work from the middle of February 2016 and that she had given the restrictions to her nurse manager and to employing establishment workers’ compensation personnel. Appellant noted that OWCP initially denied her claim, so she stopped going to physical therapy and was denied light duty. She reported that she continued to take pain medication and tried to work very carefully in order to prevent any pain from occurring. Appellant alleged that the repetitive motions of lifting duties further aggravated and intensified her back pain. She described that on August 27, 2015 she had to support a patient, who was beyond her medical capacity, from falling and experienced pain in her back, lower extremities, and thighs. Appellant reviewed the medical treatment that she received for her back symptoms. She explained that the reason why she did not immediately file this claim was because she thought the shooting pain in her back and legs was from the previous January 5, 2015 injury. Appellant alleged that her previous injury was aggravated by her work.

OWCP denied appellant's claim by decision dated June 3, 2016. It accepted factors of her employment noting the repetitive duties as a nurse and found that she had been diagnosed with lumbar radiculopathy. OWCP denied appellant's claim, however, because the medical evidence submitted failed to establish that her diagnosed condition was causally related to the accepted employment factors.

On June 14, 2016 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. He resubmitted Dr. Sokolowski's February 29, 2016 report and appellant's March 8, 2016 statement.

Appellant submitted several medical reports by Dr. Bency Kurian, a Board-certified internist. In a September 14, 2015 disability note, Dr. Kurian related that appellant should be excused from work from September 9 to 20, 2015 and could return to work on September 21, 2015 with restrictions of no bending.

In an October 18, 2015 report, Dr. Kurian related that appellant had been her patient since May 2015 and had informed her that she was undergoing treatment for a January 2015 work-related back injury. She reported that lumbar spine x-ray examination reports showed levoscoliosis of the lumbar spine, left lateral subluxation of L2 on L3, retrolisthesis of L2 on L3, and marked disc degenerative changes with disc height loss at the lumbar region. Dr. Kurian indicated that she recently saw appellant in September 2015 for aggravation of her lumbar back pain with radiculopathy down both legs. Dr. Kurian explained that she had advised appellant to go onto light duty at work.

Appellant underwent a lumbar spine MRI scan by Dr. Amjad Safvi, a Board-certified diagnostic radiologist. In a February 22, 2016 report, Dr. Safvi noted left lateral spondylolisthesis of L2 over L3, resulting in mild scoliotic deformity, multilevel disc desiccation with significantly reduced disc height of L2-3, mild-to-moderate degenerative changes seen at L2-3 level, and multilevel disc bulges resulting in variable degrees of spinal canal and neural foramen stenosis.

On February 16, 2017 a telephone hearing was held before an OWCP hearing representative. Counsel was present. Appellant described that she worked as a registered nurse providing bed-side care for patients. She indicated that she had an initial injury on January 5, 2015, but continued to work. Appellant also described an August 27, 2015 employment incident where she had to work beyond the capacity provided by her treating physician. She explained that she took pain medication and was able to continue working, but when the pain did not subside she sought medical treatment. Appellant described the medical treatment that she received for her back symptoms and noted that she underwent lumbar laminectomy surgery on May 19, 2016. Counsel explained that appellant initially filed a recurrence claim of the accepted injury, but when it was denied, she filed the current occupational disease claim. He alleged that Dr. Sokolowski's report provided sufficient evidence to meet the burden of proof that appellant had a second injury on August 27, 2015, which aggravated her preexisting condition.

By decision dated May 3, 2017, an OWCP hearing representative affirmed the June 3, 2016 denial decision. She found that the medical evidence of record was insufficient to establish

a causal relationship between appellant's diagnosed back condition and her federal employment duties.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence⁶ including that he or she sustained an injury in the performance of duty, and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁷ In an occupational disease claim, appellant's burden requires submission of the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁸

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁹ The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.¹⁰

ANALYSIS

Appellant has alleged that she aggravated a preexisting back condition as a result of her employment duties. OWCP accepted her employment factors and a diagnosed back condition, but it denied her claim because the medical evidence of record failed to establish causal relationship between her medical condition and the accepted factors of her federal employment.

The Board finds that appellant has not met her burden of proof to establish that she aggravated her preexisting lumbar condition due to the accepted factors of her federal employment.

In support of her claim, appellant submitted a February 29, 2016 report and notes by Dr. Sokolowski. Dr. Sokolowski noted that appellant had an accepted January 5, 2015 work

⁵ *Supra* note 2.

⁶ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁷ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

⁹ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

¹⁰ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

injury, which continued to worsen as she worked. Upon physical examination, he reported concordant back pain with radiation to her bilateral buttocks and lower extremities. Dr. Sokolowski described the August 27, 2015 work incident and noted the findings of a February 22, 2016 lumbar spine MRI scan report. He diagnosed new onset of lumbar radiculopathy and further exacerbation of lumbar pain, which had initially developed on January 5, 2015. Dr. Sokolowski opined that the purported August 27, 2015 work injury further exacerbated appellant's back symptoms, which had already developed at work on January 5, 2015. He explained that her work injuries resulted in the development of lumbar pain secondary to a strain and also the new onset of lumbar radiculopathy. Dr. Sokolowski noted that appellant's lumbar radiculopathy arose from exacerbation of her spinal stenosis from L2-5.

The Board finds that Dr. Sokolowski accurately described appellant's history and provided findings on physical examination. Although Dr. Sokolowski provided an opinion on causal relationship, he did not provide any medical rationale or explanation as to how her current back condition was an exacerbation of her preexisting back injury. He did not provide an explanation, based on medical rationale, as to how appellant's employment duties would have physiologically aggravated or exacerbated her preexisting back injury.¹¹ Because Dr. Sokolowski has not provided such medical rationale to support his opinion on causal relationship, his report is insufficient to establish her claim.

In a February 29, 2016 attending physician's report (Form CA-20), Dr. Sokolowski indicated a date of injury of August 27, 2015 and diagnosed lumbar radiculopathy. He checked a box marked "yes" that the condition was caused or aggravated by the above-described employment activity. Dr. Sokolowski explained that the aggravation was of the stenosis condition. The Board finds that his Form CA-20 is also insufficient to establish appellant's occupational disease claim as he attributes her lumbar condition to an August 27, 2015 employment incident, and not to her accepted employment duties. The Board has found that medical opinion evidence should reflect a correct history and offer a medically sound explanation of how the specific employment incident or work factors, physiologically caused injury.¹² Furthermore, the Board has held that a checkmark or affirmative notation in response to a form question on causal relationship is insufficient, without medical rationale, to establish causal relationship.¹³

Appellant also submitted a September 14, 2015 disability note and an October 18, 2015 report by Dr. Kurian. Dr. Kurian related that appellant had been her patient since May 2015 for a January 2015 work-related back injury. She indicated that she recently began to treat appellant for aggravation of her lumbar back pain with radiculopathy down both legs. Dr. Kurian did not, however, provide an opinion on whether appellant's aggravation of her lumbar condition was causally related to her federal employment. The Board has held that medical evidence that does

¹¹ See *M.M.*, Docket No. 15-0607 (issued May 15, 2015); *M.W.*, Docket No. 14-1664 (issued December 5, 2014).

¹² See *L.R.*, Docket No. 16-0736 (issued September 2, 2016).

¹³ *K.T.*, Docket No. 15-1758 (issued May 24, 2016).

not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁴

Likewise, Dr. Safvi's February 22, 2016 lumbar MRI scan report also fails to establish causal relationship as it did not contain any opinion on the cause of appellant's lumbar condition. For this reason, this evidence is not sufficient to meet her burden of proof.¹⁵

On appeal, counsel alleges that the May 3, 2017 OWCP decision was contrary to fact and law. He has not, however, provided any evidence or additional argument to establish that OWCP improperly denied appellant's occupational disease claim.

Causal relationship is a medical question that must be established by probative medical opinion from a physician.¹⁶ The mere fact that work activities may produce symptoms from an underlying condition does not raise an inference of causal relation.¹⁷ Such a relationship must be shown by rationalized medical evidence based upon a specific and accurate history of employment conditions which are alleged to have caused or exacerbated a disabling condition.¹⁸

As appellant has not provided such rationalized medical evidence in this case, she has not met her burden of proof 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.

CONCLUSION

The Board finds that appellant has not met her burden of proof establish an aggravation of a preexisting back condition causally related to the accepted factors of her federal employment.

¹⁴ *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).

¹⁵ *See A.B.*, Docket No. 17-0301 (issued May 19, 2017).

¹⁶ *W.W.*, Docket No. 09-1619 (issued June 2010); *David Apgar*, 57 ECAB 137 (2005).

¹⁷ *See S.D.*, Docket No. 16-0999 (issued October 16, 2017).

¹⁸ *Patricia J. Bolleter*, 40 ECAB 373 (1988).

ORDER

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

Issued: February 5, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board