

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

S.S., Appellant)	
)	
and)	Docket No. 17-0332
)	Issued: June 26, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Bellmawr, NJ, Employer)	
)	

Appearances:
Thomas R. Uliase, 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 November 30, 2016 appellant, through counsel, filed a timely appeal from an August 3, 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 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 has met her burden of proof to establish that her right shoulder, cervical, and neurological conditions are causally related to an accepted August 18, 2015 employment incident.

FACTUAL HISTORY

On August 18, 2015 appellant, then a 51-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury to her neck that same day as a result of being rear-ended in an employment-related motor vehicle accident. She stopped work that day.

Appellant submitted a duty status report (Form CA-17) dated August 24, 2015 from an unknown provider diagnosing a right shoulder injury as a result of the claimed August 18, 2015 employment incident.

In a September 4, 2015 development letter, OWCP advised appellant of the deficiencies of her claim and afforded her 30 days to submit additional evidence and respond to its inquiries.

In response, appellant submitted hospital records dated August 24, 2015 in which Dr. Jason Hartis, an emergency medicine specialist, diagnosed acute cervical strain and back lipoma. Dr. Hartis noted that appellant had presented to the emergency room complaining of neck and right shoulder pain from a motor vehicle accident a week prior and presented with numbness and tingling in the right arm.

By decision dated October 8, 2015, OWCP denied appellant's claim because she had failed to establish fact of injury as she had failed to respond to the development letter with a response to the questions requested by OWCP.

On January 20, 2016 counsel requested reconsideration and submitted an electromyography and nerve conduction velocity (EMG/NCV) studies dated August 28, 2015 demonstrating acute right C6-7 radiculopathy. Appellant also submitted a November 11, 2015 report from a nurse practitioner diagnosing acute right C6-7 radiculopathy.

In an August 24, 2015 report, Dr. Garo Avetian, a Board-certified internist, diagnosed cervical sprain/strain and right shoulder sprain/strain. He noted that appellant was rear-ended on August 18, 2015 and since the injury she had been unable to perform most of her activities of daily living, work, and physical activities. Dr. Avetian opined that it was "within a medical probability" that appellant's injuries were causally related to the claimed employment incident. He noted that appellant was involved in a previous nonwork-related motor vehicle accident in 2009, which had resolved. On September 30, 2015 Dr. Avetian diagnosed thoracic sprain/strain and probable cervical radiculopathy and opined that "within a medical probability" appellant's injuries were a direct result of the claimed August 18, 2015 employment incident.

On September 30, 2015 Dr. Shiva Gopal, a Board-certified neurologist, diagnosed post-traumatic cervical strain/sprain with clinical radicular features bilaterally, post-traumatic lumbar strain/sprain, and post-traumatic cephalalgia. He opined that appellant clearly had upper extremity radiculopathy *versus* entrapment neuropathy. Dr. Gopal noted that appellant was suffering from

injuries sustained in a motor vehicle accident which occurred on August 18, 2015 while at work. Appellant saw her physician one week later due to severe pain in the neck and dizziness. Since the accident, she stated that she had been suffering from headaches occurring once weekly, located in the back of the head, and neck pain with radiation down both arms to the hands, right greater than left, with paresthesia. Appellant also complained of lower back pain.

In an October 28, 2015 report, Dr. Gopal found that appellant was still suffering from headaches occurring once weekly, neck pain with radiation, and lower back pain. He opined that appellant's significant neurological injuries, including radiculopathy, were causally related to her claimed August 18, 2015 motor vehicle accident. On March 21, 2016 Dr. Gopal found that appellant had headaches occurring two times per week, located in the back of the head and radiating frontal. Appellant also complained of significant visual worsening as well as development of cognitive issues over the past two months with trouble with forgetfulness. She suffered from significant neck pain with paresthesia of the right hand consistent with her EMG finding of a right C6-7 radiculopathy and non-localized ulnar neuropathy. Dr. Gopal noted that pain management had been discontinued secondary to cognitive issues as appellant reported progressive memory changes and difficulty with her attention and daily activities. He advised that appellant's headaches and cognitive dysfunction required a magnetic resonance imaging (MRI) scan of the brain, cognitive testing, and possibly a cortical brain mapping study.

On November 12, 2015 Dr. Alan Kwon, a Board-certified anesthesiologist and pain management specialist, diagnosed post-traumatic cervical strain/sprain, post-traumatic shoulder strain/sprain, post-traumatic cervical and peripheral neuropathy, post-traumatic cervicgia, and probable post-traumatic cervical facet syndrome. He noted that appellant was wearing a seat belt, but because it was a postal truck the seat belt was on the opposite side. Appellant was thrown forward and backwards in her seat when she was rear-ended. She did not suffer a loss of consciousness, but felt dizzy following the incident. Appellant did not seek immediate medical attention. A week later she was having significant pain and swelling over her right shoulder and neck and began to seek medical treatment. Dr. Kwon opined that appellant's conditions were a direct result of the claimed August 18, 2015 motor vehicle accident.

In a November 20, 2015 report, Dr. Gerald Vernon, a Board-certified family practitioner, diagnosed cervical sprain/strain, cervical disc syndrome with radiculopathy, entrapment neuropathy of the right hand and wrist, bilateral shoulder sprain, right greater than left, ruling out right rotator cuff tear, thoracic sprain/strain, and myofascial pain syndrome. He noted that appellant was involved in a motor vehicle accident on October 18, 2015.³

By decision dated April 4, 2016, OWCP denied the claim finding that the factual evidence was sufficient to establish fact of injury, but the medical evidence submitted was insufficient to establish a causal relationship between appellant's diagnosed conditions and the accepted August 18, 2015 employment incident.

On May 11, 2016 counsel requested reconsideration and submitted a June 23, 2016 MRI scan of the cervical spine which revealed mild degenerative changes at C5-6 and C6-7.

³ The Board notes that August 18, 2015 is the alleged date of the accepted employment incident.

In an April 25, 2016 report, Dr. Gopal reviewed the factual and medical history of the claim and reiterated his diagnoses. He noted that appellant's past medical history included the presence of a lipoma to the right shoulder which was said to have increased in size since her trauma. Dr. Gopal opined that appellant's conditions were causally related to the accepted August 18, 2015 employment incident explaining that an acceleration-deceleration injury causes rapid forward and backward shifting of the head, neck, and body. He further opined that this "whiplash"-type injury directly caused appellant's neck injury resulting in cervical radiculopathy. Dr. Gopal explained that there could also be shearing of brain tissues from these types of injuries, which would be a clear cause of appellant's dizziness, visual changes, and cognitive deficits.

By decision dated August 3, 2016, OWCP denied modification of its prior decision.

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 timely filed within the applicable time limitation period of FECA, that an injury⁴ was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁵

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. A fact of injury determination is based on two elements. 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. 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. An employee may establish that the employment incident occurred, as alleged, but fail to show that his or her condition relates to the employment incident.⁶

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. 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.⁷

⁴ OWCP regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

⁵ See *T.H.*, 59 ECAB 388 (2008).

⁶ *Id.*

⁷ *Id.*

ANALYSIS

The Board finds that this case is not in posture for a decision.

In support of her claim appellant submitted medical evidence, including three reports from Dr. Gopal. The Board finds that the medical opinions of Dr. Gopal are sufficient to require further development of the medical evidence as it relates to whether appellant's diagnosed conditions are causally related to the accepted employment incident.

In his reports, Dr. Gopal diagnosed post-traumatic cervical strain/sprain with clinical radicular features bilaterally, post-traumatic lumbar strain/sprain, post-traumatic cephalalgia, upper extremity radiculopathy, neck pain with paresthesia of the right hand consistent with her EMG finding of a right C6-7 radiculopathy, and non-localized ulnar neuropathy. He noted that appellant's past medical history included the presence of a lipoma to the right shoulder which was said to have increased in size since the accepted employment-related August 18, 2015 motor vehicle accident. On March 21, 2016 Dr. Gopal found that appellant had headaches occurring two times per week, significant visual worsening, and development of cognitive issues. He noted that pain management had been discontinued secondary to cognitive issues as appellant reported progressive memory changes and difficulty with her attention and daily activities. In an April 25, 2016 report, Dr. Gopal opined that appellant's conditions were causally related to the August 18, 2015 employment incident explaining that an acceleration-deceleration injury causes rapid forward and backward shifting of the head, neck, and body and that this "whiplash"-type injury directly caused appellant's neck injury resulting in cervical radiculopathy. Dr. Gopal further explained that there could also be shearing of brain tissues from these types of injuries, which would be a clear cause of appellant's dizziness, visual changes, and cognitive deficits. The Board finds that when read together Dr. Gopal has provided sufficient medical rationale explaining the mechanism of how being rear-ended in a motor vehicle accident at work on August 18, 2015 caused appellant's conditions due to an acceleration-deceleration injury caused by the rapid forward and backward shifting of the head, neck, and body. The Board does not find Dr. Gopal's explanation of "shearing of brain tissues" sufficient to explain a basis for appellant's dizziness, visual changes, and cognitive deficits as his reasoning as to this mechanism is both speculative and equivocal in nature. The Board has long held that medical opinions that are speculative or equivocal in character have little probative value.⁸

Accordingly, the Board finds that Dr. Gopal provided an affirmative opinion on causal relationship which properly identifies the mechanism of injury, findings upon examination, and explained how the motor vehicle accident caused appellant's diagnosed conditions. The Board finds that Dr. Gopal's opinion, while not sufficiently rationalized to meet appellant's burden of proof, is sufficient, given the absence of any opposing medical evidence, to require further development of the record.⁹ It is well established that proceedings under FECA are not adversarial in nature, and while appellant has the burden of proof to establish entitlement to compensation,

⁸ *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

⁹ See *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *A.F.*, Docket No. 15-1687 (issued June 9, 2016). See also *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

OWCP shares responsibility in the development of the evidence.¹⁰ OWCP has an obligation to see that justice is done.¹¹

The case will be remanded to OWCP for further action consistent with this decision. On remand, after such further development of the case record as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the August 3, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: June 26, 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

¹⁰ See, e.g., *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978); *William N. Saathoff*, 8 ECAB 769, 770 71; *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985).

¹¹ *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).