

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

E.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
MURRAY BRANCH, Cincinnati, OH, Employer**

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**Docket No. 17-0902
Issued: March 9, 2018**

Appearances:
Kevin L. Card, 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 March 20, 2017 appellant, through her representative, filed a timely appeal from a December 22, 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.³

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.*

³ Appellant timely requested oral argument pursuant to section 501.5(b) of Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated August 10, 2017, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 17-0902 (issued August 10, 2017).

ISSUE

The issue is whether appellant met her burden of proof to establish a neck condition causally related to the accepted September 28, 2013 employment incident.

On appeal appellant's representative contends that appellant had submitted all the necessary medical documentation for acceptance of her claim.

FACTUAL HISTORY

On November 12, 2013 appellant, then a 54-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 28, 2013 she sustained a neck/spine injury at C5 and C6 due to her employment duties. She advised that her pain increased through the day as she delivered her mail route. Appellant stopped work on the date of injury.

On the claim form and by letter dated November 19, 2013, the employing establishment controverted the claim. It noted that appellant did not report her claimed injury on the day of the accident and this prevented it from investigating the matter on that day. The employing establishment also asserted that she complained about neck pain prior to the date in question.

OWCP, in a November 22, 2013 development letter, advised appellant of the deficiencies in her claim. She was afforded 30 days to respond to its development questionnaire. On December 3, 2013 appellant responded and related that on September 28, 2013 she developed increased sharp pain in the left side of her neck and through her left shoulder while walking and delivering mail on her route. Later that evening appellant mentioned her pain to another carrier. She treated her pain at home with heat, but sought medical treatment on September 29, 2013 from a massage therapist in her physician's office. This treatment provided only minor relief. On September 30, 2013 appellant noted being evaluated by a Dr. Moloney,⁴ who advised her not to return to work until her condition was resolved with treatment. She explained the delay in filing her claim, noting that she thought she possibly had a soft tissue or muscle strain that would resolve with physical therapy, anti-inflammatory medication, and time. Appellant was referred to a neurosurgeon, who performed a magnetic resonance imaging (MRI) scan which revealed a traumatic injury to her cervical spine.

OWCP received a December 18, 2013 medical report in which Douglas Montgomery, a physician assistant, examined appellant and provided an impression of cervical disc herniation at C5-6, left, and cervical degenerative disc disease (DDD) with foraminal stenosis C6-7. Mr. Montgomery referred her for a cervical epidural steroid injection at C5-6.

OWCP also received a December 18, 2013 report from Dr. Marybeth Brune, a Board-certified internist, who noted appellant's complaints of neck and left shoulder pain and headaches, and a history of her social and medical background. Dr. Brune described findings on examination and advised that she sustained a work injury on September 28, 2013. She noted that appellant had not worked since September 30, 2013.

⁴ The Board notes that the professional qualifications of Dr. Moloney are not contained in the case record.

In a December 18, 2013 disability certificate, Dr. Alfred Kahn, III, an attending Board-certified orthopedic surgeon, advised that appellant could not work until after she had an epidural steroid injection and a follow-up evaluation. On December 23, 2013 he provided, in an attending physician's report (Form CA-20), and a history of injury that on September 28, 2013 appellant developed symptoms after carrying a bag on her left shoulder as part of her work duties. Dr. Kahn noted findings and diagnosed cervical herniated nucleus pulposus (HNP), degeneration of cervical intervertebral disc, and cervical spinal stenosis. He indicated by checking a box marked "yes" that the diagnosed conditions were caused or aggravated by an employment activity. Dr. Kahn explained that appellant's symptoms developed with letter carrying. He advised that she became totally disabled on October 1, 2013 and estimated that she would be disabled through March 1, 2014. In a December 18, 2013 duty status report (Form CA-17), Dr. Kahn provided a history of injury that on September 28, 2013 appellant had increasing pain on the left side of her neck. He reiterated his prior diagnoses of cervical HNP and diagnosed cervical DDD. Dr. Kahn related that the diagnosed conditions were due to injury. He indicated that appellant was unable to perform her regular work duties and that she had not been advised to return to work.

By decision dated January 13, 2014, OWCP denied appellant's traumatic injury claim because the medical evidence of record did not contain a rationalized medical opinion to establish a causal relationship between her diagnosed cervical condition and the accepted September 28, 2013 employment-related incident.

On February 4, 2014 appellant's representative requested reconsideration. In support of the request, Dr. Kahn provided a January 28, 2014 report noting that appellant was under his care for cervical disc herniation at C5-6, left, and cervical DDD with foraminal stenosis at C6-7. He advised that she had contacted him because OWCP required further information to establish causation. Dr. Kahn indicated that appellant had never been treated for cervical spine or shoulder symptoms before the claimed September 28, 2013 injury. He related that treatment records from his office indicated the immediate care she received after the date of injury and documented the effect of treatment and the reasoning for seeking care with his office. After reviewing the mechanics of appellant's job, the symptoms she had after her workday, and the immediate care she sought the day after her injury, Dr. Kahn believed that her left cervical disc herniation at C5-6 and, at the very least, her significant aggravation of DDD with foraminal stenosis at C6-7 were causally related to the claimed September 28, 2013 injury. He noted that an attached October 23, 2013 MRI scan report documented the diagnoses. Dr. Kahn further noted that he was awaiting approval for at least one epidural steroid injection for appellant's disc herniation at C5-6. He indicated that a follow-up visit was necessary to address possible anterior cervical decompression and fusion. Dr. Kahn opined that appellant would remain totally disabled until she received the epidural steroid and returned to his office for follow up.

In the October 23, 2013 cervical spine MRI scan report referenced by Dr. Kahn, Dr. Galen Chun, a radiologist, diagnosed moderate left paracentral C5-6 disc protrusion resulting in a mass effect on the left side of the spinal cord, mild central canal stenosis, and mild left foraminal narrowing. He also noted a mild diffuse disc bulge at C4-6.

By decision dated May 5, 2014, OWCP denied modification of its January 13, 2014 decision. It found that Dr. Kahn failed to provide a rationalized opinion explaining causal relationship.

On August 12, 2014 appellant requested reconsideration. In support of her request, she submitted a July 31, 2014 statement that contained a chronological history of her left shoulder and neck symptoms and medical treatment from September 28 to December 18, 2013. Appellant also submitted a May 29, 2014 letter from a massage therapist who treated appellant's neck pain.

In a July 10, 2014 report, Dr. Kahn disagreed with OWCP's denial of appellant's claim. He related that he had reviewed treatment records from other providers who treated her for the injury until she came under his care on December 18, 2013. Dr. Kahn opined that there was a causal relationship between appellant's injury and the accepted work incident because testing and treatment were pursued in a very timely manner status post injury, she was observed, and her symptoms and history she provided were consistently documented in her previous treatment and testing. He maintained that this left no doubt that she had a traumatic injury on September 28, 2013 for which she sought treatment within 24 hours. Dr. Kahn asserted that his opinion on causal relationship was documented throughout appellant's treatment history starting on the date after her injury. Appellant's description of injury involved carrying a very heavy mailbag, which rested on her extreme upper left shoulder and against her neck. Around lunchtime on September 28, 2013, and after she carried the bag for at least two and one-half hours without a break, she noted intensified pain, but continued her route thinking that rest after her workday would improve her symptoms. Dr. Kahn advised that this was a disc herniation manifesting itself through intensifying pain. He indicated that the heavy mailbag rested with some shifting against the C5-6 disc space and caused a herniation resulting in all later treatment. Dr. Kahn advised that the first response of the body in this type of injury was muscle tightening and pain production. He noted that the October 23, 2013 test results documented the diagnosis of disc herniation and confirmed why appellant's bursting and ongoing pain began and persisted on September 28, 2013. Dr. Kahn noted that while she had some disc degeneration in the cervical spine, it had never been treated and only became symptomatic subsequent to this well-defined injury. He maintained that, of course, stenosis was also a causal diagnosis due to the narrowing and inflammation caused by the well-described and documented history and mechanics of the injury. Dr. Kahn contended that, while he only saw appellant one time, he reviewed her entire history with previous treating physicians, which included these physicians' diagnoses, testing, and therapy. He asserted that all clearly pointed to the causal relationship of his diagnoses of disc herniation at C5-6 and cervical DDD with foraminal stenosis at C6-7.

In a November 4, 2014 decision, OWCP denied modification of its May 5, 2014 decision. It found that Dr. Kahn did not base his opinion relative to causal relationship on his own examination findings. OWCP also found that a massage therapist was not a physician under FECA.

OWCP received progress notes dated August 3 and December 15, 2014, and August 3, 2015 from Deborah A. Yauch, a respiratory therapist, and finalized by Dr. Kahn. Dr. Kahn indicated that Ms. Yauch was his scribe. He reported appellant's history and discussed findings. Dr. Kahn reiterated his prior diagnoses, noting that appellant received three epidural steroid injections without benefit. In an August 3, 2015 Form CA-20 report, he noted findings, restated

his diagnosis of C5-6 disc herniation, and indicated with a checkmark in a box marked “yes” that the diagnosed condition was caused or aggravated by the September 28, 2013 employment incident. Dr. Kahn restated his explanation that appellant’s symptoms developed while carrying a mailbag. He advised that she was totally disabled from October 1, 2013 to November 1, 2015.

On September 10, 2015 appellant requested reconsideration of OWCP’s November 4, 2014 decision. She submitted a February 19, 2015 report in which Dr. Kahn authenticated and concurred with Mr. Montgomery’s December 18, 2013 findings.

Appellant also submitted a June 19, 2015 report from Dr. Martin Fritzhand, a Board-certified urologist. Dr. Fritzhand noted a history of the September 28, 2013 employment incident and reported findings which included diminished cervical spine range of motion and decreased muscle strength over the left biceps and deltoid. He noted that appellant had documented significant C5-6 disc herniation and DDD. Dr. Fritzhand advised that there was clear causality between the letter carrier job requirements she performed since October 1994 and the diagnosed cervical disc herniation. He noted appellant’s physical difficulties and maintained that it did not appear that she had reached maximum medical improvement (MMI). Dr. Fritzhand utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*⁵ (A.M.A., *Guides*) and *The Guides Newsletter* July/August 2009 edition to determine that appellant had nine percent permanent impairment of the left arm.

Dr. Brune, in an August 20, 2015 progress note, related that appellant complained about left neck pain radiating to her left arm, which started while she was delivering mail on September 28, 2013 and worsened through the day. Appellant also had a stiff neck that would not move. Dr. Brune noted appellant’s medical and family history. She reviewed the October 23, 2013 cervical MRI results and appellant’s systems. Dr. Brune discussed findings on physical examination and assessed a work-related injury and neck pain on the left side.

OWCP received Form CA-20 reports dated October 12, 2015 and March 29, May 4, and July 7, 2016 from Dr. Kahn who reiterated his prior diagnoses. Dr. Kahn again indicated with a checkmark in the box marked “yes” that the diagnosed conditions were caused or aggravated by the accepted September 28, 2013 work incident. He reiterated that appellant’s symptoms developed while carrying a mailbag. Dr. Kahn advised that she was totally disabled from October 1, 2013 to October 6, 2016.

Progress notes dated October 12, 2015 and July 6, 2016, signed by Ms. Yauch, and finalized by Dr. Khan, indicated that appellant presented with neck pain and again noted her history. Dr. Kahn provided examination findings and restated his diagnoses of cervical DDD and cervical disc herniation. In a May 2, 2016 Form CA-17 report, he noted findings and reiterated his diagnosis of HNP at C5-6 due to a September 28, 2013 injury. Dr. Kahn maintained that appellant was unable to perform her regular work duties and could not resume work. In a June 7, 2016 operative report, he described anterior cervical decompression and fusion at C5-C6, C6-C7 using VG2 allograft and Eagle Plus plating. The preoperative and

⁵ A.M.A., *Guides* (6th ed. 2009).

postoperative diagnoses were severe DDD with total disc collapse at C6-C7, lesser extent at C5-C6 with disc herniation at left paracentral C5-C6 and foraminal stenosis at C5-C7.

In an August 18, 2016 decision, OWCP denied modification of its November 4, 2014 decision.

On September 21, 2016 appellant, through her representative, requested reconsideration. She submitted an October 21, 2013 progress note in which Dr. Brune noted appellant's neck and left shoulder symptoms and medical and family history. Dr. Brune discussed findings on physical examination and assessed neck pain that was not responding to massage therapy or multiple chiropractor treatments. She ordered an MRI scan to rule out a herniated disc. Dr. Brune also assessed upper back pain on the left side and left arm numbness. In an undated addendum to her October 21, 2013 note, she reported findings from an October 22, 2013 cervical spine MRI scan.⁶

In an August 31, 2016 letter, Dr. Kahn indicated that he had reviewed Dr. Brune's October 21, 2013 report. He noted her findings and diagnoses and related that they were symptoms revelatory of his subsequent diagnoses of cervical disc herniation at C5/C6 and DDD and stenosis at C6/C7 made on December 18, 2013. Dr. Kahn maintained that the MRI scan results listed in Dr. Brune's addendum to her report were consistent with the type of injury appellant had on September 28, 2013. He opined that her October 21, 2013 report constituted contemporaneous medical evidence of the September 28, 2013 injuries. Based on his review of appellant's medical records and physical examination, Dr. Kahn reiterated his prior opinion that her disc herniation was caused by carrying a heavy mail satchel on September 28, 2013.

By decision dated December 22, 2016, OWCP denied modification of its August 18, 2016 decision.

LEGAL PRECEDENT

An employee 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 evidence⁷ 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.⁸

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.⁹ There are two components involved in establishing the fact of injury. First, the employee must

⁶ This appears to be a typographical error as the only cervical MRI scan of record is dated October 23, 2013.

⁷ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁸ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁹ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.¹⁰

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.¹¹ The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.¹² The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.¹³

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a traumatic injury was caused or aggravated by the accepted September 28, 2013 employment incident. Appellant failed to submit sufficient medical evidence to establish a neck condition causally related to the accepted employment incident.

Appellant submitted several medical records from Dr. Kahn. In reports dated December 18, 2013 to August 31, 2016, Dr. Kahn examined appellant, reviewed cervical spine MRI scan test results, diagnosed disc herniation at C5-6 and cervical DDD with foraminal stenosis at C6-7, and opined that the diagnosed conditions and her associated disability were caused by her work on September 28, 2013. He reasoned that carrying a heavy mailbag at work that rested with some shifting against the C5-6 disc space resulted in the disc herniation and the need for medical treatment. Dr. Kahn further reasoned that appellant had some disc degeneration in the cervical spine, but this condition had never been treated and it only became symptomatic after her well-defined injury on September 28, 2013. While Dr. Kahn offered an opinion on causal relationship, he did not sufficiently explain how the accepted work incident caused the diagnosed conditions and resultant disability.¹⁴ Further, the Board has held that the fact that a condition manifests itself or worsens during a period of employment¹⁵ or that work activities produce symptoms revelatory of an underlying condition does not raise an inference of causal relationship between a claimed condition and employment factors.¹⁶ Dr. Kahn's remaining disability certificate, progress notes, and reports addressed appellant's cervical conditions, June 7, 2016 cervical surgery, and resultant disability from work, but did not offer a medical

¹⁰ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

¹¹ *John J. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

¹² *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

¹³ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

¹⁴ *Willa M. Frazier*, 55 ECAB 379 (2004); *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954) (medical reports without adequate rationale on causal relationship are of diminished probative value and do not meet an employee's burden of proof).

¹⁵ *Robert G. Morris*, 48 ECAB 238-39 (1996); *William Nimitz, Jr.*, 30 ECAB 567 (1979).

¹⁶ *B.B.*, Docket No. 13-0256 (issued August 13, 2013); *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

opinion addressing whether the diagnosed conditions, surgery, and any resultant disability were causally related to the accepted work incident. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁷ For the stated reasons, the Board finds that evidence from Dr. Kahn is insufficient to establish appellant's claim.

While Dr. Brune opined in a December 18, 2013 report and an August 20, 2015 progress note that appellant sustained a work-related injury on September 28, 2013, she failed to provide medical rationale to support her opinion. Dr. Brune noted a history of the September 28, 2013 employment incident and indicated that appellant had not worked since September 30, 2013. She also reviewed the October 23, 2013 cervical MRI scan results, noted examination findings, and diagnosed left-sided neck pain. The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis.¹⁸ Moreover, Dr. Brune did not explain how appellant's condition and resultant disability were causally to the accepted work incident.¹⁹ Her remaining progress notes failed to offer an opinion addressing whether the diagnosed conditions were caused or aggravated by the accepted work incident.²⁰ For these reasons, the Board finds that Dr. Brune's report and progress notes are insufficient to establish causal relationship.

Dr. Fritzhand's June 19, 2015 report is also insufficient to establish the claim. Although he indicated that appellant's cervical disc herniation was employment related, he attributed her condition to job requirements going back to October 1994. Dr. Fritzhand did not specifically explain how work duties on September 28, 2013 caused or aggravated her present condition. Without medical rationale on this point, his opinion is of limited probative value on causal relationship.²¹

Dr. Chun's October 23, 2013 diagnostic test findings are also insufficient to establish causal relationship as he did not provide an opinion on the cause of appellant's diagnosed condition.²² Furthermore, the report from a massage therapist has no probative medical value as a licensed massage therapist is not considered a physician under FECA.²³

The Board finds that appellant has failed to submit rationalized, probative medical evidence sufficient to establish a neck condition causally related to the September 28, 2013 employment incident. Appellant therefore did not meet her burden of proof.

¹⁷ *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).

¹⁸ *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

¹⁹ *Supra* note 14.

²⁰ *Supra* note 17.

²¹ *See supra* note 14.

²² *Supra* note 17.

²³ 5 U.S.C. § 8101(2); *A.M.*, Docket No. 12-0616 (issued October 15, 2012).

On appeal appellant's representative contends that appellant had submitted all the necessary medical documentation for acceptance of her claim and the Board had the authority to make an award of benefits. For the reasons set forth above, the Board finds that the weight of the medical evidence does not establish that appellant sustained a neck condition causally related to the accepted September 28, 2013 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 failed to meet her burden of proof to establish a neck condition causally related to the accepted September 28, 2013 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 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