United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 17-1627**
	)	**Issued: March 15, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Baker, LA, 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 July 24, 2017 appellant filed a timely appeal from a June 23, 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.

ISSUE

The issue is whether appellant has established a back condition causally related to her accepted January 15, 2013 employment incident.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On January 22, 2013 appellant, then a 49-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right-side lower back injury on January 15, 2013 while picking up a tray of mail. She stopped work on the same day.

In a narrative statement dated January 15, 2013, appellant alleged that on that day she was on her route when her supervisor arrived in a truck with additional mail. The supervisor opened the side door and appellant began picking up the tray of mail that included delivery point sequence (DPS) and flats, which weighed more than her 15-pound lifting restriction. Appellant asserted that as she was picking up the tray she began dropping it and she fell to the ground with the tray. She alleged that the supervisor began to help her get the mail off the ground when she felt a sharp pain in the right side of her low back.

By statement dated January 15, 2013, appellant's supervisor indicated that she took three trays of mail to appellant. She stated that she picked up a tray of cased letters and flats and placed it in appellant's vehicle. Then the supervisor took a second tray and attempted to hand it to appellant, asking if appellant could handle it. Appellant indicated "yes" and placed her hands on the tray, but the supervisor did not release the tray. According to the supervisor, appellant slowly let her end of the tray fall, but no mail fell out of the tray. She then took a step backward, but at no time did she indicate that she was in pain. The supervisor reported that later that day appellant asserted that she had a back injury and she sought medical treatment. Regarding work restrictions, she indicated that the tray was not in excess of the appellant's lifting restrictions of 15 pounds, and appellant was always told to split the mail if she even suspected a tray was too heavy for her to lift. The supervisor opined that appellant's claim for injury may be in retaliation for an investigation of appellant on the prior day regarding a gasoline station incident.

The evidence of record also included additional February 14, 2013 letters from the employing establishment's postmaster and appellant's supervisor, reiterating the supervisor's description of the incident.

By decision dated April 5, 2013, OWCP denied the claim for compensation. It found that appellant had not established that an employment incident occurred as alleged.

On April 29, 2013 appellant requested reconsideration of her claim. She submitted additional statements describing the employment incident.

By decision dated June 12, 2013, OWCP reviewed the case and denied modification. It found that appellant had not established the incident occurred as alleged.

[2] Docket No. 17-0057 (issued February 14, 2017); Docket No. 15-1781 (issued December 21, 2015).

The record indicates that on June 21, 2013 OWCP received a June 14, 2013 statement from the supervisor, reiterating her original statements and that the January 15, 2013 incident had not occurred as appellant alleged. Appellant submitted a letter to her congressional representative alleging that she had injured herself when lifting a tray of mail that was over her work restrictions. On June 28, 2013 OWCP received a witness statement of that date relating that appellant went to a medical clinic with her supervisor on January 15, 2013 and that appellant's supervisor did not state any points of disagreement concerning appellant's description of the injury at that time.

On July 22, 2013 appellant again requested reconsideration. By decision dated October 15, 2013, OWCP reviewed the merits of the claim, but denied modification. It found that the factual component of the claim had not been established.

Appellant again requested reconsideration on December 5, 2013. In a November 19, 2013 statement, she argued that she had established the factual and medical elements of her claim. Appellant discussed the medical evidence and argued that she had met her burden of proof. She also submitted a November 20, 2013 report from Dr. Roy Berkowitz, a Board-certified surgeon. Dr. Berkowitz provided a history that appellant was lifting a tray of mail, stumbled backward, and the mail fell to the ground. He reported that he examined her on March 26, 2013 and objective findings had been consistent with an injury on January 15, 2013. Dr. Berkowitz opined that appellant did sustain an injury as reported on January 15, 2013, based on his review of the medical history and his own examination. Appellant also submitted an April 11, 2014 report from Dr. Edward Chorette, an emergency medicine specialist. Dr. Chorette provided a history that she was lifting a heavy object at work and experienced severe low back pain. He provided results on examination and diagnosed a lumbar sprain.

By decision dated April 29, 2014, OWCP reviewed the merits of the claim, but denied modification. It reviewed appellant's arguments with respect to the evidence. OWCP then reviewed the reports of Dr. Berkowitz and Dr. Chorette. With regard to Dr. Berkowitz, it found that, while the report was not entirely sufficient to meet appellant's burden of proof to establish the claim, it raised an uncontroverted inference between the claimed injury or disability and her employment activities. OWCP asserted that Dr. Berkowitz did not provide an opinion as to whether there was a prior preexisting condition or whether the work activities caused or aggravated a preexisting condition on either a temporary or permanent basis. With regard to Dr. Chorette, it found that he did not provide an opinion as to whether there is a prior preexisting condition or whether the work activities caused or aggravated a preexisting condition on either a temporary or permanent basis.

On April 23, 2015 appellant again requested reconsideration. She argued that it appeared her claim had been denied based on the medical evidence. On May 12, 2015 appellant submitted a May 1, 2015 report from Dr. Jeffrey Andry, a Board-certified family practitioner. Dr. Andry indicated that she complained of right shoulder pain.

By decision dated July 22, 2015, OWCP reviewed the merits of the claim, but denied modification. It reviewed the factual and medical evidence submitted and found the factual component of the claim had not been established. However, OWCP also noted that while the medical report of Dr. Berkowitz was not completely rationalized, it was consistent in indicating

an injury or disability. Therefore, while the report was found to be not entirely sufficient to meet her burden of proof to establish the claim, it raised an uncontroverted inference between the claimed injury or disability and the employment incident.

On August 25, 2015 appellant, through her representative, filed a timely appeal to the Board from the July 22, 2015 decision.

By decision dated December 21, 2015, the Board found that OWCP had improperly analyzed the factual and medical evidence of record. The Board noted that OWCP had not made a finding to accept the supervisor's version of events based on the evidence of record, and that the evidence of record clearly indicated that an employment incident occurred on January 15, 2013. The Board further noted that OWCP had asserted that it did not accept the factual component of fact of injury, yet then reviewed some, but not all, of the medical evidence. The Board found that, as to the medical evidence reviewed, OWCP did not make proper findings. Furthermore, the Board took note of OWCP's finding that Dr. Berkowitz's November 20, 2013 report was sufficient to require further development as it raised an uncontroverted inference of causal relationship. The Board remanded the case to OWCP for a proper review of the evidence and findings on the issue presented.

By letter dated June 24, 2016, OWCP directed appellant to a second opinion examination by Dr. Christopher Cenac, Sr., a Board-certified orthopedic surgeon. It requested that Dr. Cenac respond to its inquiries, including answering what specific diagnoses, if any, he felt was caused, aggravated, participated, accelerated, and/or exacerbated by appellant's January 15, 2013 employment incident.

In a second opinion report dated July 18, 2016, Dr. Cenac concluded, "I find no evidence of residual causally related to the 1/15/2013 incident in this patient. Specifically, there is no evidence of an acute traumatic structural injury causally related to the 1/15/2013 incident in the cervical or lumbar spines and/or extremities. All diagnostic findings predate the incident in question."

By decision dated September 2, 2016, OWCP issued a decision denying appellant's claim finding that she had not established the factual component of fact of injury. It explained that it found the supervisor's version of events more credible and that appellant's statements of the events of January 15, 2013 contained discrepancies. OWCP noted that, as such, it was unnecessary to address the medical evidence.

On October 17, 2016 appellant filed an appeal to the Board from OWCP's September 2, 2016 decision.

On February 14, 2017 the Board issued an order remanding the case to OWCP. The Board found that OWCP had failed to make the necessary findings as directed in its decision dated December 21, 2015. The Board noted that the proper analysis would be to accept that the January 15, 2013 event occurred as described in the witness statement, and then to review the medical evidence. The Board determined that the only question of fact in this case was precisely how appellant had handled a tray of mail, and by finding that the supervisor's description of events was more credible, OWCP had also found that a January 15, 2013 incident had occurred.

The Board remanded the case for OWCP to properly make a finding that the incident had occurred and then to review the medical evidence to determine if an injury causally related to the January 15, 2013 incident was established.

By decision dated June 23, 2017, OWCP found that appellant had established fact of injury, but denied her claim as she had not submitted sufficient medical evidence to establish a causal relationship. It directly quoted Dr. Cenac's report in support of its finding that appellant had not submitted sufficient evidence to establish a causal relationship between her claimed injury and the incident of January 15, 2013. OWCP further determined that Dr. Berkowitz's medical report dated November 20, 2013 was of diminished value and insufficient to establish causal relationship, because the report used speculative language.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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 injury[4] 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 and 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]

The claimant has the burden of establishing by the weight of reliable, probative, and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.[7] An award of compensation may not be based on appellant's belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that

[3] *Supra* note 1.

[4] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events of 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] *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *See Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

[7] *Roma A. Mortenson-Kindschi*, 57 ECAB 418, 428 n.37 (2006); *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[8]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[9] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is causal relationship between the employee's diagnosed condition and compensable employment factors.[10] 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.[11]

ANALYSIS

OWCP has issued a number of decisions denying this claim as appellant had not established that the alleged incident occurred as alleged. Based upon the Board's February 14, 2017 order, OWCP accepted that an incident occurred based upon the description of the incident provided by appellant's supervisor. It, however, denied the claim again on June 23, 2017 as the medical evidence of record did not establish causal relationship between appellant's back condition and the accepted employment incident.

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

By letter dated June 24, 2016, OWCP referred appellant for a second opinion examination by Dr. Christopher Cenac, Sr., a Board-certified orthopedic surgeon. It requested that Dr. Cenac respond to its inquiries, including answering what specific diagnoses, if any, he felt to have been caused, aggravated, participated, accelerated, and/or exacerbated by appellant's federal employment incident of January 15, 2013.

In a second opinion report dated July 18, 2016, in response to OWCP's inquiry regarding the cause of appellant's diagnosis, Dr. Cenac concluded, "I find no evidence of residual causally related to the 1/15/2013 incident in this patient. Specifically, there is no evidence of an acute traumatic structural injury causally related to the 1/15/2013 incident in the cervical or lumbar spines and/or extremities. All diagnostic findings predate the incident in question."

In its decision dated June 23, 2017, OWCP directly quoted Dr. Cenac's report in support of its finding that appellant had not submitted sufficient evidence to establish a causal relationship between her claimed injury and the incident of January 15, 2013. It further determined that Dr. Berkowitz's medical report dated November 20, 2013 was insufficient to

[8] *P.K.*, Docket No. 08-2551 (issued June 2, 2009); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[9] *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149, 155-56 (2006); *D'Wayne Avila*, 57 ECAB 642, 649 (2006).

[10] *J.J.*, Docket No. 09-0027 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379, 384 (2006).

[11] *I.J.*, 59 ECAB 408, 415 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

establish causal relationship because the report used speculative language, contradicting its earlier finding on April 29, 2014 that this same report was sufficient to raise an uncontroverted inference between the claimed injury and the incident of January 15, 2013.

The Board finds that Dr. Cenac did not sufficiently respond to OWCP's inquiries as to the causal relationship between the January 15, 2013 incident and appellant's claimed conditions. While he provided his review of appellant's symptoms as documented by x-ray, he did not provide sufficient medical rationale to support his opinion that all diagnoses and limitations are preexisting rather than causally related to her employment incident. Furthermore, he indicated that all diagnostic testing predated the work incident; however, his note reflects that he reviewed four studies that were performed after the January 15, 2013 incident. It is well established that proceedings under FECA are not adversarial in nature, and while the employee has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[12] Once OWCP undertook development of the evidence by referring appellant to a second opinion physician, it had an obligation to do a complete job and obtain a proper evaluation and report that would resolve the issue in this case.[13] Dr. Cenac did not render a report that was fully responsive to OWCP's inquiries and, as such, OWCP did not perform its obligation to obtain a proper evaluation and report that would resolve the issue in this case.

The Board will, therefore, set aside OWCP's June 23, 2017 decision and remand the case for review of the medical record and to obtain another report from a second opinion physician that is responsive to the issue of causal relationship. After such further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for compensation for traumatic injury.[14]

CONCLUSION

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

[12] *T.W.*, Docket No. 16-0176 (issued January 10, 2018); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[13] *Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

[14] The record reflects that a Form CA-16 was issued on February 15, 2013 by the employing establishment authorizing treatment by Dr. Karen Lynn Smith, a specialist in internal medicine. A properly completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *Tracy P. Spillane*, 54 ECAB 608 (2003). On return of the case record OWCP shall determine whether appellant is entitled to payment of medical expense pursuant to this Form CA-16 authorization.

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: March 15, 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