United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
and	)	**Docket No. 18-0287**
	)	**Issued: October 11, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Miami, FL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of the Solicitor for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 27, 2017 appellant, through counsel, filed a timely appeal from a September 7, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider 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] The Board notes that, following the September 7, 2017 decision, OWCP received additional evidence. However, the Board's jurisdiction is limited to the evidence that was of record at the time OWCP issued its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. *See* 20 C.F.R. §§ 501.2(c)(1); *M.B.*, Docket No. 09-0176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that his claim should be expanded to include additional conditions as causally related to his accepted February 3, 2015 employment injury; and (2) whether appellant met his burden of proof to establish that his inpatient hospital stay from March 9 to 29, 2016 was medically necessary due to the accepted February 3, 2015 employment injury.

FACTUAL HISTORY

On February 4, 2015 appellant, then a 67-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on February 3, 2015, he sustained injuries to his right arm and shoulder when he pulled and engaged the emergency break in his postal vehicle. He continued to work with restrictions regarding the use of his right upper extremity. OWCP accepted the claim for a right shoulder and upper arm acromioclavicular sprain on April 4, 2015.

In an attending physician's report (Form CA-20) dated March 18, 2015, Dr. Mitchell R. Pollak, a treating Board-certified orthopedic surgeon, diagnosed neck, shoulder, and elbow sprains. He noted an injury date of February 3, 2015 and checked a box marked "yes" to questions concerning the relationship between the diagnosed conditions and the February 3, 2015 employment injury date. OWCP also received progress notes dated March 18, 25, and 30, 2015 from Dr. Pollak detailing examination findings and treatment given for cervical, bilateral carpal tunnel, and right upper extremity conditions.

Appellant was evaluated by Dr. Peter A. Tomasello, a Board-certified orthopedic surgeon on August 25, 2015 for complaints of neck pain. In an August 25, 2015 report, Dr. Tomasello provided examination findings, reviewed diagnostic tests, and noted a history of the February 3, 2015 employment incident. He diagnosed severe right cervical radiculopathy with right hand interosseous wasting and weakness, severe multilevel degenerative disc disease, C2-3 anterolisthesis, C4-5 and C7 on T1 retrolisthesis, and multilevel arthritis.

In reports dated September 10 and October 22 and 29, 2015, Dr. Harold Gregory Bach, an examining Board-certified orthopedic surgeon, diagnosed cervical spinal stenosis, cervical radiculitis, spondylolisthesis, and cervical spondylosis without myelopathy. He noted that on February 3, 2015 appellant's right arm got caught in the emergency brake when he was exiting his vehicle. A treatment plan and recommendation for spinal surgery were discussed with appellant.

In reports dated November 4 and December 2, 2015, Kay-Ann Mullings, a physician assistant, reported seeing appellant for a follow-up visit for a February 3, 2015 employment injury. She provided examination findings and noted that medical clearance for the cervical surgery was pending. Diagnoses included cervical herniation, cervical radiculitis, cervical spondylolisthesis, cervical spinal canal stenosis, right rotator cuff injury, biceps tear, cubital tunnel syndrome, and right elbow lateral epicondylitis. Ms. Mullings recommended that appellant avoid activities which aggravated his condition.

In a January 14, 2016 report, Dr. Bach noted the injury date of February 3, 2015 and provided examination findings. Appellant continued to complain of right arm numbness, right hand and arm atrophy, and neck pain radiating into his bilateral upper extremities. Diagnoses

included cervical region spondylolisthesis, cervical joint spondylosis, cervical herniated disc, cervical radiculitis, and cervical spinal canal stenosis. Dr. Bach observed that as of January 15, 2016 appellant was disabled from work due to his spinal cord compromise and neurological degeneration.

Ms. Mullings, in reports dated January 21 and February 18, 2016, noted that appellant was seen for neck, right shoulder, and right elbow pain. Examination findings and diagnoses were unchanged from prior reports.

A February 18, 2016 duty status (Form CA-17) reported that on February 3, 2015 appellant injured his right arm from a defective hand break.[4] Diagnoses, which were attributed to the injury, included right arm injury and spinal cord compression.

On February 18, 2016 appellant was again seen by Ms. Mullings who submitted a report of her findings and diagnoses, which was unchanged from prior reports.

On March 21, 2016 OWCP received a January 26, 2016 report from Dr. Robert O. Schiftan, an examining physician specializing in neurology. Dr. Schiftan provided examination findings, reviewed diagnostic tests, and noted the injury history. He reported that appellant was injured at work on February 3, 2015 when his hand got caught in the emergency break when he attempted to exit his postal vehicle. Dr. Schiftan diagnosed multilevel cervical radiculopathy, bilateral carpal tunnel syndrome which was worse on the right, and severe right upper extremity weakness. He attributed the severe right upper extremity weakness to the accepted February 3, 2015 incident.

By letter dated May 27, 2016, counsel requested that OWCP expand appellant's claim to include the conditions of cervical herniated disc, cervical spinal canal stenosis, cervical joint spondylosis, cervical radiculitis, and cervical region spondylolisthesis based on Dr. Bach's report.

Appellant submitted attending physician's reports (Form CA-20) dated March 9, May 13, and June 6, 2016 from Dr. Ali Ghods Jourabchi, a physician specializing in neurosurgery, in support of appellant's request to expand his claim. On the March 9 and May 13, 2016 reports, Dr. Jourabchi diagnosed cervical myelopathy and checked a box marked "yes" to the question of whether this condition had been caused or aggravated by the accepted February 3, 2015 incident. On the June 6, 2016 form report he detailed the history of injury and diagnosed multilevel cervical herniated discs and myelopathy. Dr. Jourabchi checked a box marked "yes" indicating that the diagnosed conditions had been caused or aggravated by the work injury. He explained that appellant's getting his arm caught caused abnormal reflexes and motion.

Dr. Schiftan, in reports dated May 31, July 14, August 25, and September 22, 2016, provided a history of complaints and examination findings. He reported that appellant was seen for neck pain. Dr. Schiftan noted that appellant continued having neck pain following anterior cervical discectomy and fusion surgery, which had been performed on November 6, 2015. Diagnoses included cervical herniation and cervical radiculopathy.

[4] The signature is illegible.

On a July 14, 2016 Form CA-17, Dr. Schiftan indicated that appellant continued to be disabled from work. He reported that appellant injured his right arm and neck on February 3, 2015 and diagnosed right arm injury and spinal cord compression due to the injury.

Dr. Schiftan, in CA-17 forms dated August 25 and September 22, 2016 indicated that appellant was capable of working light duty as of August 31, 2016. He reported that appellant injured his right arm and neck on February 3, 2015 and diagnosed right arm injury and spinal cord compression due to the injury.

In a September 22, 2016 report, Dr. Schiftan provided a history of anterior cervical discectomy and fusion surgery, which had been performed on November 6, 2015, and cervical spinal fusion, which had been performed on March 9, 2016. During the March 9, 2016 surgery he noted that appellant suffered a pulmonary embolism. Dr. Schiftan provided examination findings and diagnoses of status post cervical surgery, cervical myelopathy with cervical radiculopathy, cervical radiculopathy, cervical herniation, cervical spinal stenosis, and unspecified cervical region kyphosis.

On October 17, 2016 OWCP received a request for authorization for postsurgery hospitalization and medical treatment for a cervical condition for the period March 9 to 29, 2016.

By development letter dated November 14, 2016, OWCP informed appellant that the evidence of record was insufficient for authorization of the requested medical treatment for a cervical condition. It noted that the diagnosed cervical myelopathy was not an accepted condition. OWCP advised appellant regarding the type of medical evidence required to establish his claim for an additional condition and afforded him 30 days to provide the requested information.

On December 23, 2016 OWCP received a copy of the March 9, 2016 surgical report by Dr. Jourabchi and a March 29, 2016 hospital discharge note. Dr. Jourabchi noted that on March 9, 2016 appellant underwent anterior C2-7 cervical discectomy and osteophytectomy for spinal cord and nerve roots decompression, C2-7 anterior interbody arthorodesis, C2-7 placement of intervertebral structural allograft, C2-7 placement of anterior cervical instrumentation, C2-T1 cervical laminectomy, C2-6 and T1-2 posterior cervical and thoracic lateral mass and pedicle, and C2-6 and T1-2 posterolateral cervical arthrodesis.

The hospital discharge summary noted that appellant was admitted on March 9, 2016 and discharged on March 29, 2016. The summary reported that he underwent posterior C7-T1 laminectomy, C2-7 anterior cervical discectomy and fusion, and C2-T2 posterior fusion. The primary diagnoses were cervical myelopathy with cervical radiculopathy and, status post cervical fusion with secondary diagnoses of supraventricular tachycardia and pulmonary embolism.

In a December 14, 2016 report, Dr. Jourabchi noted that appellant had been under his care for cervical issues. He observed that appellant had progressive arm and hand weakness which impacted his daily living activities.

By decision dated December 29, 2016, OWCP denied appellant's request for authorization for inpatient stay postsurgery for the period March 9 to 29, 2016.

By separate decision dated December 29, 2016, OWCP denied appellant's request to expand his claim to include the additional conditions of cervical spinal stenosis, cervical

spondylosis without myelopathy, spondylolisthesis, cervical radiculitis, bicep tendon tear, right elbow lateral epicondylitis, right elbow cubital tunnel syndrome, and carpal tunnel syndrome. It found that the evidence of record was insufficient to establish that the conditions were causally related to the accepted work injury.

In a letter dated January 5, 2017, and received on January 9, 2017, appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative regarding the decisions issued on December 29, 2016. A telephonic hearing was held on July 11, 2017.

Following appellant's request for a telephonic hearing, OWCP received additional medical evidence.

In a December 15, 2016 report, Dr. Schiftan noted that appellant was seen for complaints of neck and lower back pain. He reported that appellant suffered a pulmonary embolism during the March 9, 2016 cervical spinal fusion. Examination findings and treatment provided were detailed. Diagnoses included cervical radiculopathy, cervical spinal stenosis, cervical herniation, cervical myelopathy with cervical radiculopathy, cervical region unspecified-type kyphosis, and status post cervical spinal fusion.

On July 12, 2017 OWCP received an April 2, 2014 cervical magnetic resonance imaging scan, which revealed multilevel cervical degenerative changes with severe focal central spondylostenosis and chronic C7-T1 cord compression without evidence of cord edema, C7-T1 anterolisthesis, and no evidence of a fracture.

Dr. Bach, in reports dated July 26 and August 29, 2017, noted that appellant was seen for complaints of right arm and neck pain. He reported that appellant had a February 3, 2015 employment incident and he was status post the March 9, 2016 cervical surgery. Dr. Bach detailed physical examination findings and treatment provided. Diagnoses included right arm pain, cervical radiculitis, herniated cervical disc, and cervical spinal cord stenosis.

By decision dated September 7, 2017, an OWCP hearing representative affirmed the December 29, 2016 OWCP decisions. The hearing representative found that the evidence of record remained insufficient to support that the additional diagnoses of cervical spinal stenosis, cervical spondylosis without myelopathy, spondylolisthesis, cervical radiculitis, bicep tendon tear, lateral epicondylitis of the right elbow, cubital tunnel syndrome of the right elbow, and bilateral carpal tunnel syndrome were caused or aggravated by the accepted employment injury. As such, appellant's request for authorization of his post-surgery inpatient stay from March 9 to 29, 2016 remained denied as the procedure for which he was hospitalized was necessitated by conditions which were not work related.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim, including the fact that he or she is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation,

[5] *Supra* note 2.

that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[6]

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[7]

To establish causal relationship between the condition claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such causal relationship.[8] The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 claimant.[9] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden to proof to establish that his claim should be expanded to include cervical spinal stenosis, cervical spondylosis without myelopathy, spondylolisthesis, cervical radiculitis, bicep tendon tear, right elbow lateral epicondylitis, right elbow cubital tunnel syndrome, and carpal tunnel syndrome as causally related to his accepted February 3, 2015 employment injury.

In a January 26, 2016 report, Dr. Schiftan diagnosed multilevel cervical radiculopathy, severe right upper extremity weakness, and bilateral carpal tunnel syndrome. He opined that appellant's severe right upper extremity weakness had been caused by the accepted February 3, 2015 accident. Dr. Schiftan, in duty status reports dated July 14, August 25, and September 22, 2016, diagnosed right arm injury and spinal cord compression, which he attributed to the accepted February 3, 2015 work injury. Without explaining how, physiologically, the employment incident caused or contributed to the diagnosed conditions, the medical evidence of record is of limited probative value.[11]

The remaining reports from Dr. Schiftan are of limited probative value with regard to claim expansion as they do not specifically address the cause of the diagnosed conditions. Medical evidence that does not offer any opinion regarding the cause of an employee's condition are of

[6] *C.W.*, Docket No. 17-1636 (issued April 25, 2018); *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[7] *See V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[8] *See M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

[9] *See John W. Montoya*, 54 ECAB 306 (2003).

[10] *See H.H.*, Docket No. 16-0897 (issued September 21, 2016); *James Mack*, 43 ECAB 321 (1991).

[11] *See E.R.*, Docket No. 18-0391 (issued August 24, 2018).

diminished probative value on the issue of causal relationship.[12] Thus, these reports are insufficient to meet appellant's burden of proof regarding the expansion of his claim.

Dr. Jourabchi, in attending physician reports dated March 9, May 13, and June 6, 2016, diagnosed various conditions including cervical myelopathy multilevel cervical herniated discs, and myelopathy. He checked a box marked "yes" indicating that the condition(s) was caused or aggravated by the injury date noted on these forms. In a March 18, 2015 form report, Dr. Pollak diagnosed neck, shoulder, and elbow sprains and checked a box marked "yes" to the question of whether the condition was employment related. The Board has held that a report that addresses causal relationship with a checkmark, without medical rationale explaining how the employment incident caused the alleged injury, is of diminished probative value and insufficient to establish causal relationship.[13] For the reasons set forth above, the reports from Dr. Jourabchi and Dr. Pollak are insufficient to support appellant's request for expansion of his claim.

The remaining medical evidence from Dr. Bach, Dr. Pollak, Dr. Jourabchi, and Dr. Tomasello is insufficient to establish appellant's claim as they offered no opinion regarding the cause of the diagnosed conditions. As noted above, the Board has held that medical evidence offering no opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[14] Thus, these reports are insufficient to support appellant's request for expansion of his claim.

Appellant also submitted reports from Ms. Mullings, a physician assistant. Physician assistants, however, are not considered physicians as defined by section 8101(2) of FECA.[15] Consequently, these reports have no probative value.

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence.[16] Appellant failed to provide rationalized medical evidence sufficient to establish that the conditions of cervical spinal stenosis, cervical spondylosis without myelopathy, spondylolisthesis, cervical radiculitis, bicep tendon tear, right elbow lateral epicondylitis, right elbow cubital tunnel syndrome, and carpal tunnel syndrome were causally related to his accepted February 3, 2015 employment injury. Accordingly, the Board finds that he has not met his burden of proof to establish expansion of the acceptance of his claim.[17]

[12] *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Conard Hightower*, 54 ECAB 796 (2003).

[13] *See R.A.*, Docket No. 17-1472 (issued December 6, 2017); *Sedi L. Graham*, 57 ECAB 494 (2006); *Deborah L. Beatty*, 54 ECAB 340 (2003).

[14] *Supra* note 12.

[15] *See V.J.*, Docket No. 17-0358 (issued July 24, 2018); *see also David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *Charley V.B. Harley*, 2 ECAB 208 (1949) (the Board held that medical opinion, in general, can only be given by a qualified physician). *See also* 5 U.S.C. § 8101(2).

[16] *See E.P.*, Docket No. 16-0153 (issued August 25, 2016); *D.I.*, 59 ECAB 158 (2007).

[17] *See E.P., id.*

On appeal, counsel argues that OWCP failed to give proper credit to the medical evidence appellant submitted. For the reasons set forth above, the Board finds that the medical evidence of record is insufficient to establish expansion of appellant's claim to include additional conditions.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty the services, appliances and supplies prescribed or recommended by a qualified physician that the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability, or aid in lessening the amount of any monthly compensation.[18] OWCP procedures provide that services which meet the statutory criteria of being likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation, including hospitalization, may be authorized.[19]

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[20]

In interpreting section 8103, the Board has recognized that OWCP has broad discretion in approving services provided under FECA.[21] The only limitation on OWCP's authority is that of reasonableness.[22] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[23] To be entitled to reimbursement of medical expenses, a claimant has the burden of proof to establish that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.[24]

[18] 5 U.S.C. § 8103(a); *see B.L.*, Docket No. 15-1452 (issued September 20, 2016); *L.D.*, 59 ECAB 648 (2008).

[19] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.5 (April 1993).

[20] *S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Joseph P. Hofmann*, 57 ECAB 456 (2006); *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

[21] *A.O.*, Docket No. 08-580 (issued January 28, 2009); *Joseph P. Hofmann, id.*

[22] *D.C.*, 58 ECAB 620 (2007); *Dr. Mira R. Adams*, 48 ECAB 504 (1997).

[23] *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

[24] *Supra* note 20.

ANALYSIS -- ISSUE 2

The Board finds that appellant has not established that his inpatient postsurgery hospitalization from March 9 to 29, 2016 was causally related to the accepted February 3, 2015 employment injury.

Appellant's claim was accepted for the conditions of right shoulder and upper arm acromioclavicular sprain.

Dr. Jourabchi diagnosed cervical myelopathy in a March 9, 2016 attending physician's report. In a March 9, 2016 surgical report, he reported that appellant underwent anterior C2-7 cervical discectomy and osteophytectomy for spinal cord and nerve roots decompression, C2-7 anterior interbody arthorodesis, C2-7 placement of intervertebral structural allograft, C2-7 placement of anterior cervical instrumentation, C2-T1 cervical laminectomy, C2-6 and T1-2 posterior cervical and thoracic lateral mass and pedicle, and C2-6 and T1-2 posterolateral cervical arthrodesis. Appellant must submit evidence that establishes that the requested medical procedure was necessitated by the accepted employment injury. In the preceding analysis, the Board explained why the medical evidence did not support that his claim should be expanded to include additional conditions including cervical myelopathy. As the requested surgery has not been established to be causally related to appellant's employment injury, OWCP did not abuse its discretion by denying his request for authorization of surgery and inpatient hospital stay from March 9 to 29, 2016. As the procedure performed during his hospitalization was not related to his accepted condition, his hospitalization was not likely to cure, give relief, reduce the degree or the period of any disability, or aid in lessening the amount of any monthly compensation.[25]

CONCLUSION

The Board finds that appellant has not established that the acceptance of his claim should be expanded to include additional conditions causally related to his accepted February 3, 2015 employment injury. The Board further finds that OWCP did not abuse its discretion in denying authorization for his inpatient hospital stay from March 9 to 29, 2016 as causally related to the accepted February 3, 2015 employment injury.

[25] *Supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 7, 2017 is affirmed.

Issued: October 11, 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