United States Department of Labor
Employees' Compensation Appeals Board

M.L., Appellant	)	
and	)	**Docket No. 18-0582**
	)	**Issued: October 5, 2018**
DEPARTMENT OF ENERGY, HUMAN RESOURCES MANAGEMENT, Washington, DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 25, 2018 appellant, through counsel, filed a timely appeal from a November 30, 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 the 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 a cervical or lumbar injury causally related to the accepted July 6, 2015 employment incident.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 15, 2015 appellant, then a 52-year-old budget analyst, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury in the performance of duty at 4:00 p.m. on July 6, 2015. She reported that she was in the employing establishment parking garage and, as she opened her car door, her foot slid on water or oil, which caused her to jerk and fall into her car. Appellant indicated that the claimed injury resulted in low back and neck sprains.

Beginning on June 22, 2015 appellant's attending physician, Dr. Eric G. Dawson, an orthopedic surgeon, described the employment incident, noting that appellant had a slip and fall at the workplace. More specifically he recounted that, "[Appellant] actually slipped with a slight twist and grabbed the door handle of the car with the left hand. She had a sharp jolting motion with this."

By development letter dated July 28, 2015, OWCP requested that appellant submit additional evidence to support the claim for compensation. The evidence was to include a medical report noting the mechanism of injury, results on examination, diagnostic studies, and an opinion supported by medical explanation as to how the claimed incident caused an injury. OWCP afforded appellant 30 days to submit this additional evidence.

On August 18, 2015 Dr. Dawson again noted that appellant's injury was a slip and fall with a twisting at the moment of impact.

By decision dated August 27, 2015, OWCP denied appellant's claim. It accepted that the July 6, 2015 employment incident occurred as alleged. However, OWCP found that the medical evidence of record was insufficient to establish causal relationship between the accepted employment incident and a diagnosed condition.

On September 2, 2015 appellant requested a review of the written record by an OWCP hearing representative. Dr. Dawson completed a report on September 1, 2015 and again noted appellant's slip and fall with a slight twist.

By decision dated February 19, 2016, OWCP's hearing representative affirmed the August 27, 2015 OWCP decision, finding that the medical evidence of record failed to include

[3] Docket No. 16-1808 (issued February 21, 2017).

sufficient medical rationale to establish appellant's claim for cervicodorsal myofasciitis, lumbar sprain, mild C7 impingement, and rotator cuff impingement.

Appellant, through counsel, requested reconsideration on April 11, 2016. Counsel submitted a March 3, 2016 report from Dr. Dawson wherein he contended that his previous reports clearly explained the mechanism of injury in this case. Dr. Dawson wrote that "with [appellant] grabbing the door handle and then slipping, there was not only traction or pull, but also a twist. This is enough to stretch the nerve fibers, particularly termed C7, and present to clinical hands-on examination. Later, this was supported by [electromyogram (EMG)] and [nerve conduction velocity (NCV)] studies, so this is definitely the case. That is the mechanism." Dr. Dawson further asserted that "a review of the literature definitely will demonstrate and support this point." He contended that he did not base his opinion on appellant being asymptomatic before the injury. Dr. Dawson concluded that there was no doubt regarding his opinion in this case.

By decision dated July 8, 2016, OWCP reviewed the merits of the claim, but denied modification of its prior decision, finding that the medical evidence of record did not provide sufficient rationale to establish causal relationship. Appellant subsequently appealed to the Board.

In its February 21, 2017 decision,[4] the Board found that Dr. Dawson's reports supported causal relationship between the July 6, 2015 employment incident and appellant's cervical condition, and that they were sufficient to warrant further development.

On remand from the Board, on April 5, 2017, OWCP referred appellant, a statement of accepted facts (SOAF),[5] and a list of questions for a second opinion evaluation to Dr. D. Burke Haskins, a Board-certified orthopedic surgeon. Dr. Haskins completed a report on May 2, 2017 and noting reviewing the SOAF. He further reported appellant's description of her employment incident, noting that she related falling on a wet surface as she was opening her car door. Dr. Haskins noted that she did not strike anything, but felt as if she twisted. He performed a physical examination and described appellant's report of pain in the posterior cervical region as well as intermittent sensation of numbness involving the entire left side. Dr. Haskins noted moderate lumbar lordosis, and full range of motion (ROM) of the cervical spine. He reported that appellant's reflexes were brisk and sensation intact in upper and lower extremities. Dr. Haskins noted that her lumbar ROM was limited, but heal and toe standing, gait, and muscle testing was normal. He opined that appellant's cervical and lumbar complaints were preexisting and that there was no objective evidence or clinical studies to establish a change in her underlying conditions following the July 6, 2015 employment incident. Dr. Haskins diagnosed degenerative disease of the cervical and lumbar spine. However, he opined that these conditions preexisted the June 6, 2015 employment incident and were unrelated to appellant's employment. Dr. Haskins found that she could return to full-duty work for eight hours a day.

[4] *Id*.

[5] The SOAF described appellant's employment incident as listed on her Form CA-1, without mentioning any twisting motions.

By decision dated June 5, 2017, OWCP denied appellant's traumatic injury claim, finding that the weight of the medical evidence established that her current condition was not related to the accepted June 6, 2015 employment incident.

On June 14, 2017, appellant, through counsel, requested an oral hearing before an OWCP hearing representative and provided an additional report from Dr. Dawson dated July 6, 2017. Dr. Dawson disagreed with Dr. Haskins' findings and conclusions. He again described appellant's mechanism of injury as a slip with a twist grabbing the door handle with the left hand. Dr. Dawson opined that she had clinical examinations consistent with spasm to the musculature and sensory and motor nerve impingement at C7 on the left. He noted appellant's positive findings on EMG for C7 nerve impingement. Dr. Dawson found that she had continued symptoms due to her June 6, 2015 employment incident. He also noted appellant's historical strain/sprain of the lower back, found that this condition had resolved, and reported that she had no symptoms prior to the June 6, 2015 employment incident. Dr. Dawson challenged Dr. Haskins' failure to review her EMG and NCV studies and disagreed that the entirety of her cervical and lumbar conditions were preexisting. He opined that, while appellant likely had some moderate degenerative changes to her spine prior to June 6, 2015, she "had the mechanism of injury (please read etiology and causality) that is likely to injure soft tissues including to the neck and the back." On September 28, 2017 Dr. Dawson reported findings on physical examination including definite C7 partial soft touch, stamina weakness to the ipsilateral extension. He found that appellant had pathognomic of nerve impingement including fasciculations with extension over the C7 dermatome and partially over the C6 ipsilateral extremity loss of extension. Dr. Dawson opined that she had documented motor and nerve impingement.

On October 25, 2017 counsel and appellant appeared before an OWCP hearing representative for the oral hearing. OWCP's hearing representative read her statement from her Form CA-1 and asked that she affirm her initial statement that she approached her car, proceeded to open the door to get in and her foot slid either on water or oil which caused her to jerk and fall into her car was correct. Appellant responded "yes."

By decision dated November 30, 2017, OWCP's hearing representative found that Dr. Dawson's opinion was not based on a proper factual background as he found that appellant had twisted in connection with her June 6, 2015 employment incident. He further noted that the second opinion physician, Dr. Haskins, also relied on her statement that she twisted during the June 6, 2015 employment incident. OWCP's hearing representative found that appellant's testimony at the oral hearing negated her previous descriptions to physicians that the June 6, 2015 employment incident involved twisting. He accorded the weight of the medical evidence to Dr. Haskins.

LEGAL PRECEDENT

An employee seeking benefits under FECA[6] 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 filed within the applicable time

[6] *Supra* note 1.

limitation, that an injury was sustained 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

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. There are two components involved in establishing fact of injury. 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. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. An employee has not met his or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast serious doubt on an employee's statements in determining whether a *prima facie* case has been established. However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[8]

Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[9] Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[10] The opinion of the physician must be based on a complete factual and medical background, 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 incident identified by the claimant.[11]

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[12] This is called a referee examination and OWCP will

[7] *A.D.,* Docket No. 17-1855 (issued February 26, 2018); *Gary J. Watling,* 52 ECAB 357 (2001).

[8] *L.F.,* Docket No. 17-0689 (issued May 9, 2018).

[9] *A.D., supra* note 7; *T.H.,* 59 ECAB 388 (2008).

[10] *Supra* note 8.

[11] *A.D., supra* note 7; *I.J.,* 59 ECAB 408 (2008); *Victor J. Woodhams,* 41 ECAB 345 (1989).

[12] 5 U.S.C. § 8123(a); *S.T.,* Docket No. 08-1675 (issued May 4, 2009); *M.S.,* 58 ECAB 328 (2007).

select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[13]

ANALYSIS

The Board finds that this case is not in posture for decision as a conflict in medical evidence has been created between the opinions of appellant's attending physician and OWCP's second opinion physician, regarding causal relationship between appellant's diagnosed conditions and her accepted employment incident.

Appellant claimed that, as she opened her car on July 6, 2015, her foot slid on water or oil which caused her to jerk and fall into her car. She provided a consistent history of this incident to her attending physician, Dr. Dawson, and to the second opinion physician, Dr. Haskins, further explaining to both that she felt she twisted during her slip on June 6, 2015. During the October 25, 2017 oral hearing, OWCP's hearing representative read appellant's description of the July 6, 2015 employment incident from her Form CA-1 and asked her to certify that this statement was correct. Appellant answered "yes."

In his November 30, 2017 decision, OWCP's hearing representative found that the medical evidence of record was not based on a proper factual background, as appellant did not initially report twisting on her claim form and affirmed during the October 25, 2017 hearing that her initial description of the July 6, 2015 events was correct.

As noted above, to establish fact of injury the claimant must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.[14] The Board finds that appellant has established that the July 6, 2015 employment incident occurred, as alleged. Appellant reported the twisting mechanism of the claimed July 6, 2015 employment injury in a consistent manner to both her attending physician and the second opinion physician. Her affirmance of her initial statement during the oral hearing does not discount her additional description of twisting while slipping that she provided to both her attending physician and the second opinion physician. It is well established that proceedings under FECA are not adversarial in nature.[15] The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.[16] The hearing representative's attempt to discount appellant's medical evidence by manipulating appellant's description of her employment incident does not comport with the nonadversarial policy of FECA proceedings. The Board finds that there are no inconsistencies in the evidence which would cast serious doubt upon the validity of appellant's account of the July 6, 2015 work incident, and her account is not refuted by strong or persuasive evidence.[17] Consequentially, the Board finds that the reports of Dr. Dawson and

[13] 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

[14] *Supra* note 8; *Julie B. Hawkins*, 38 ECAB 393 (1987).

[15] *See R.A.*, Docket No. 14-1918 (issued March 3, 2015).

[16] 20 C.F.R. § 10.121.

[17] *Id.*

Dr. Haskins are based on accurate histories of injury which include twisting as part of the slipping event on July 6, 2015.

The Board previously found that Dr. Dawson's reports were sufficient to require further development of the medical evidence. In accordance with the Board's instructions, on remand OWCP undertook additional development of the medical evidence and referred appellant for a second opinion evaluation with Dr. Haskins. Dr. Haskins found that her July 6, 2015 employment incident had not resulted in any medical condition and that her diagnosed condition of degenerative disease of the cervical and lumbar spine preexisted the June 6, 2015 employment incident and were unrelated to her employment. Dr. Dawson submitted additional reports dated July 6 and September 28, 2017 disagreeing with Dr. Haskins' findings and conclusions and providing objective findings on physical examination.

The Board finds that there remains a conflict of medical opinion between Dr. Dawson, appellant's attending physician, and Dr. Haskins, an OWCP second opinion physician, on whether appellant's diagnosed cervical and lumbar conditions were caused or aggravated by her accepted July 6, 2015 employment incident. On remand, OWCP shall refer her to an appropriate Board-certified physician for an impartial medical examination to resolve the conflict.[18] After this and such other development as OWCP deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[18] *J.M.*, Docket No. 17-0079 (issued January 25, 2018).

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 5, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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