United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 18-1098**
	)	**Issued: April 22, 2019**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, FEDERAL DETENTION CENTER, Philadelphia, PA, Employer	)	

Appearances:
Aaron B. Aumiller, Esq., for the appellant[1]
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 April 30, 2018 appellant, through counsel, filed a timely appeal from a November 1, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from November 1, 2017, the date of OWCP's last decision was April 30, 2018. Since using May 4, 2018, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is April 30, 2018, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that acceptance of her claim should be expanded to include cervical and lumbar conditions causally related to the accepted September 15, 2015 employment injury; and (2) whether she has met her burden of proof to establish total disability for the period November 1 to 13, 2015 causally related to the accepted injury.

FACTUAL HISTORY

On September 21, 2015 appellant, then a 33-year-old senior officer specialist, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries to her mouth, left elbow, right little finger, and lower back on September 15, 2015 when escorting an inmate while in the performance of duty. She explained that the inmate became combative, hit her several times in the face and head, and pulled her hair. Appellant stopped work that day and returned to work on December 10, 2015 in a temporary alternative duty status.

In the attending physicians report section of a September 24, 2015 authorization for examination and/or treatment (Form CA-16), Dr. Uplekh S. Purewal, a Board-certified anesthesiologist, reported that on September 15, 2015 appellant was struck on the face by a prisoner, she was wrestled to the ground, and her neck was forcefully turned. He diagnosed cervical radiculopathy based on a positive compression test and positive facet arthropathy.

In a development letter dated September 25, 2015, OWCP advised appellant that the medical evidence of record was insufficient to establish that her claimed cervical and lumbar conditions were causally related to the alleged employment incident. Appellant was requested to submit rationalized medical evidence supporting causal relationship between her diagnosed conditions and the September 15, 2015 employment incident. OWCP afforded her 30 days to submit the necessary evidence.

Dr. Purewal noted in a September 30, 2015 report his examination findings for the cervical and lumbar spine as well as the upper and lower extremities. He opined that as a result of the September 15, 2015 employment injury, appellant developed aggravation and exacerbation of preexistent cervicalgia, aggravation and exacerbation of cervical facet syndrome, post-traumatic cervical radiculopathy, aggravation and exacerbation of preexistent lumbago, aggravation and

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that following the November 1, 2017 decision and attached to her appeal, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence that was in the case record before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

exacerbation of lumbar facet syndrome, clinical lumbar radiculopathy, post-traumatic muscle spasm, chronic pain syndrome due to trauma, and left elbow pain.

An October 5, 2015 x-ray report of appellant's left elbow indicated a normal radiographic appearance of the left elbow.

In an October 15, 2015 report, Dr. Purewal noted that appellant reported immediate pain in her left arm and left elbow at the time of the September 15, 2015 employment incident. He also noted that her complaints of neck pain, numbness in fingers, midback (thoracic spine) pain, and lower back pain all began without major events. Dr. Purewal noted examination findings and again noted his prior assessments regarding appellant's diagnosed conditions.

By decision dated November 2, 2015, OWCP found that appellant had not met her burden of proof to establish that her diagnosed cervical and lumbar conditions were causally related to or had been aggravated by the accepted September 15, 2015 employment incident.

In November 3 and December 4 and 17, 2015 reports, Dr. Purewal continued to report that, as a result of the September 15, 2015 employment incident, appellant developed the previously diagnosed multiple cervical and lumbar conditions. He reported that she had impacted her head, face, and left arm during the incident and that she immediately started to experience pain in her left arm and left elbow. Dr. Purewal also reported, however, that appellant's neck, midback, and lower back pain began without major events.

In a November 3, 2015 employment capacity evaluation (Form OWCP-5c) Dr. Purewal indicated that appellant could perform light-duty work with restrictions. Following a November 16, 2015 functional capacity evaluation, he advised that she was able to perform light-duty work. On December 4 and 17, 2015 Dr. Purewal ordered magnetic resonance imaging (MRI) scans of the cervical spine, lumbar spine, and left elbow, as well as a electromyogram and nerve conduction velocity (EMG/NCV) study of the bilateral upper extremities due to continuing symptoms.

On December 2, 2015 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In January 29 and February 26, 2016 reports, Dr. R. Todd Rinnier, an osteopath and Board-certified anesthesiologist, reported appellant's complaints of pain and that the neck pain, midback (thoracic spine), and lower back pain began without major events. He noted that she had been treated with pain medications and rest since the September 15, 2015 injury and that additional testing had been requested. Dr. Rinnier indicated that after the employment-related injury on September 15, 2015, appellant developed aggravation and exacerbation of preexistent cervicalgia, aggravation and exacerbation of cervical facet syndrome, post-traumatic cervical radiculopathy, aggravation and exacerbation of preexistent lumbago, aggravation and exacerbation of lumbar facet syndrome, clinical lumbar radiculopathy, post-traumatic muscle spasm, chronic pain syndrome due to trauma, and left elbow pain.

In a March 25, 2016 report, Dr. Rinnier diagnosed, as evidenced by his interpretation of the March 2, 2016 MRI scans, a C5-6 disc herniation, abutting the ventral margin of the spinal cord; a T11-12 disc herniation, disc extrusion, with indentation of the thecal sac; and L5-S1 disc

bulging, annular tear, impinging upon nerve root, with right neuroforaminal encroachment. He indicated that those conditions developed after the September 15, 2015 employment injury.

In an April 5, 2016 report, Dr. Rinnier reported that appellant was first evaluated by his practice in June 2012 for neck pain, midback (thoracic spine) pain, and lower back pain and that she had received lumbar epidural injections, bilateral sacroiliac joint injections, radiofrequency ablation of medial branch nerves, and interventional pain management treatments. On September 30, 2015 appellant was reevaluated for an employment-related injury. Dr. Rinnier noted that she had indicated that, due to her employment incident, her head, face, and left arm were impacted and that she immediately experienced pain in her left arm and left elbow. Appellant also reported that her neck, midback, and lower back pain had been aggravated and exacerbated by the employment-related injury. Dr. Rinnier noted examination findings and results of diagnostic testing of the left elbow and cervical and lumbar spine. He opined that appellant's disc herniation at C5-6 and disc herniation at T11-12, as evidenced by MRI scans, were permanent and attributable to the employment injury of September 15, 2015. Copies of the March 2, 2015 MRI scans of the cervical spine and lumbar spine were provided along with a June 5, 2012 MRI scan of the lumbar spine for comparison.

By decision dated April 21, 2016, an OWCP hearing representative reversed the November 2, 2015 decision and remanded the case to OWCP for acceptance of conditions of laceration, inside bottom of lip, left side; contusion, bottom of right eye orbit; and left elbow bruise. He noted that the evidence of record remained insufficient to accept cervical and thoracic conditions.

By decision dated April 29, 2016, OWCP accepted the claim for contusion of eyeball and orbital tissues, right eye; contusion of left elbow; and laceration with foreign body of lip, consistent with the hearing representative's decision. It, however, found that the medical evidence of record was insufficient to establish the acceptance of additional conditions, as the reports of Dr. Rinnier and Dr. Purewal did not provide medical rationale explaining causal relationship between the additional conditions and the accepted employment incident.

OWCP subsequently received an April 20, 2016 report, Ijeoma Menkiti, a certified nurse practitioner, related appellant's findings regarding appellant's current condition.

An April 20, 2016 EMG/NCV study of the upper extremities revealed left cervical radiculopathy at C6-7.

On May 11, 2016 OWCP received a May 5, 2016 claim for compensation (Form CA-7) in which appellant sought wage-loss compensation for intermittent periods of leave used for the period November 1 through 28, 2015 and leave without pay continuously from November 29 through December 12, 2015. A May 9, 2016 time analysis form (Form CA-7a) noted appellant sought disability compensation for the period November 1 through 13, 2015 and noted use of leave by appellant through December 9, 2015.

In a development letter dated May 16, 2016, OWCP noted that appellant's physicians had not explained how the accepted conditions had resulted in temporary total disability for the periods claimed. It further noted that the submissions from Dr. Rinnier and Dr. Purewal contained

insufficient medical rationale to accept the case for additional conditions. Appellant was informed of the type of medical evidence needed to establish her claim for compensation and afforded her 30 days to submit the necessary evidence.

By decision dated June 28, 2016, OWCP denied appellant's claim for disability compensation for the period November 1 through December 9, 2015. It found that the medical evidence of record was insufficient to establish that she was disabled as a result of her accepted employment-related medical conditions. OWCP further found that medical reports from Drs. Rinnier and Purewal were insufficient to establish that the additional conditions were causally related to the accepted injury.

On July 8, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. A telephonic hearing was held on February 8, 2017, during which counsel contended that appellant's herniated disc conditions should have been accepted.

In a December 2, 2016 report, Dr. Rinnier continued to opine that, after the September 15, 2015 employment injury, appellant developed cervical and lumbar conditions. In a February 7, 2017 report, he explained that she was first evaluated by his practice in June 2012 for neck, pain, midback (thoracic spine) pain, and lower back pain and noted her medical course. Dr. Rinnier indicated that appellant was reevaluated on September 30, 2015 following an employment-related injury. He opined that her disc herniation at C5-6 and disc herniation at T11-12, as evidenced by MRI scans, were, within a reasonable degree of medical certainty, permanent and attributable to the employment incident.

By decision dated March 13, 2017, an OWCP hearing representative modified the June 28, 2016 decision to reflect that the period of disability claimed was from November 1 through 13, 2015, but affirmed the denial of the claim as there was no medical evidence of record which established that appellant's claimed disability from November 1 through 13, 2015 was causally related to her accepted conditions. He further noted that the medical evidence of record failed to reflect sufficient medical evidence to support that disc herniations at C5-6 and T11-12 were causally related to the accepted September 15, 2015 employment incident and/or that appellant had experienced disability from November 1 through 13, 2015 causally related to the accepted September 15, 2015 employment incident.

On August 3, 2017 appellant, through counsel, requested reconsideration of the March 13, 2018 decision. Counsel referenced new evidence from Dr. Rinnier dated July 11, 2017 which he asserted established causal relationship for the cervical and thoracic conditions.

In the accompanying July 11, 2017 report, Dr. Rinnier reiterated the history of the injury, noted appellant's prior history of cervical and lumbar conditions, presented physical examination findings, and diagnosed post-traumatic cervicalgia, post-traumatic cervical facet syndrome, disc herniation at C5-6 from MRI scans, post-traumatic cervical radiculopathy, cervical radiculopathy at C6-7 from EMG study, disc herniation at T11-12 from MRI scan, aggravation and exacerbation of preexisting lumbago, lumbar facet syndrome and lumbar radiculopathy, post-traumatic muscle spasm, chronic pain syndrome due to trauma, and left elbow pain. He reiterated that these conditions developed after the September 15, 2015 employment injury. Dr. Rinnier explained that the altercation with the inmate was described as an impact to the head and face and had resulted

in accepted conditions to the head and face. He advised that an impact to those areas, if strong enough, can flex or extend the neck in a way that can herniate an intervertebral disc (also known as a whiplash injury). Dr. Rinnier explained that a herniation causes arm pain (radiculopathy) as the disc presses on the nerves coming out of the spine. He concluded that appellant's injuries were proximally caused by the employment-related injury. Dr. Rinnier opined that appellant's disc herniation at C5-6 from MRI scans, disc herniation at T11-12 from MRI scans, and cervical radiculopathy at C6-7 from EMG study were permanent and causally related to the September 15, 2105 employment injury for the reasons explained in his report.

By decision dated November 1, 2017, OWCP denied modification of its March 13, 2017 decision finding that the evidence of record was insufficient to establish causal relationship between the accepted employment injury and her multiple diagnosed cervical and lumbar conditions as well as her alleged disability for the period November 1 to 13, 2015.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,[5] that an injury 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.[6] 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. The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[8]

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence sufficient to establish such causal relationship.[9] Rationalized medical opinion

[5] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *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).

[9] *K.V.*, Docket No. 18-0723 (issued November 9, 2018).

evidence is required to establish causal relationship. 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 factors identified by the claimant.[10]

ANALYSIS -- ISSUE 1

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

In a report dated July 11, 2017, Dr. Rinnier reiterated the history of appellant's traumatic injury, noted her preexisting history of cervical and lumbar conditions, presented physical examination findings, and diagnosed post-traumatic cervicalgia, post-traumatic cervical facet syndrome, a disc herniation at C5-6 from MRI scans, post-traumatic cervical radiculopathy, cervical radiculopathy at C6-7 from EMG study, disc herniation at T11-12 from MRI scan, aggravation and exacerbation of preexisting lumbago, lumbar facet syndrome and lumbar radiculopathy, post-traumatic muscle spasm, chronic pain syndrome due to trauma, and left elbow pain. He reiterated that these conditions developed after the September 15, 2015 employment injury.

Dr. Rinnier noted that appellant's altercation with the inmate was an impact incident to her head and face sufficient to result in a lip laceration, a contusion of the right eye orbit, and a left elbow bruise. He explained that an impact to her head and neck areas, if strong enough, can flex or extend the neck in a way that can herniate an intervertebral disc (also known as a whiplash injury). Dr. Rinnier explained that such an injury then causes arm pain (radiculopathy) as the disc presses on the nerves coming out of the spine. He concluded that appellant's injuries were proximally caused by the employment-related injury. Dr. Rinnier opined that her disc herniation at C5-6 from MRI scans, disc herniation at T11-12 from MRI scans, and cervical radiculopathy at C6-7 from EMG study were permanent and causally related to the September 15, 2105 employment injury.

The Board finds that while Dr. Rinnier's opinion regarding causal relationship lacks sufficient medical rationale to meet appellant's burden of proof to establish her claim, it was based upon an accurate medical history and provided medical rationale explaining how the forces of impact in the accepted employment injury could result in or have aggravated the diagnosed cervical and lumbar conditions. As such, the opinion of Dr. Rinnier is sufficient to require OWCP to further develop the medical evidence in this claim.[11]

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.[12] While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that

[10] *I.J.*, 59 ECAB 408 (2008).

[11] *See R.H.*, Docket No. 17-1966 (issued March 6, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[12] *See A.M.*, Docket No. 18-0630 (issued December 10, 2018); *Vanessa Young*, 56 ECAB 575 (2004).

justice is done.[13] Thus, the Board will remand the case to OWCP for further development of the medical evidence to obtain a rationalized medical opinion as to whether the accepted employment incident of September 15, 2015 was sufficient to have caused or aggravated cervical and lumbar conditions. As appellant reported that her preexisting neck, midback, and lower back pain had been aggravated and exacerbated by the employment-related injury, on remand, OWCP should prepare a statement of accepted facts which includes the accepted conditions of the case as well as appellant's preexisting medical conditions and then obtain a second opinion examination on the issue of causal relationship. After such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.[14]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 1, 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: April 22, 2019
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

[13] *M.B.*, Docket No. 17-0536 (issued June 22, 2017); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[14] Given the disposition of Issue 1, Issue 2 is moot.