

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

M.G., Appellant)	
)	
and)	Docket No. 18-1310
)	Issued: April 16, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Anaheim, CA, Employer)	
)	

Appearances:
Kevin Card, for the appellant¹
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 June 18, 2018 appellant, through her representative, filed a timely appeal from a January 24, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).²

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 On the application for review (Form AB-1), appellant's representative timely requested an oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated March 1, 2019, the Board exercised its discretion and denied appellant's request finding that the appeal could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 18-1310 (issued March 1, 2019).

Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether appellant has met her burden of proof to establish a cervical condition causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On March 8, 2016 appellant, then a 57-year-old letter carrier, filed an occupational disease claim (Form CA-2) for a neck condition that she attributed to “years of repetitive motion at work.” She noted that she first became aware of her condition in May 2014, and related to factors of her federal employment on November 18, 2015.⁵ On the reverse side of the claim form, the employing establishment reported that appellant had not been at work.

In a statement dated November 18, 2015, appellant indicated that she worked for the employing establishment for the past 27½ years and had several bilateral upper extremity conditions that were accepted by OWCP. She related that she had experienced neck soreness while at work, but the pain in her arms overshadowed her neck discomfort until May 2014 when the neck pain became excruciating. Appellant reported that the duties of a letter carrier required repetitive use of her fingers, hands, wrists, arms, torso, shoulders, neck, and back for 8 to 10 hours a day.

In a September 25, 2014 report, Dr. Roy J. Caputo, a Board-certified orthopedic surgeon, provided examination findings, related appellant’s complaints of left shoulder pain, and diagnosed left shoulder impingement syndrome, left shoulder rotator cuff tear, and multilevel cervical degenerative disc disease -- “symptomatic nonindustrial.” He reported a May 14, 2011 date of injury. Because appellant was planning to undergo cervical fusion, Dr. Caputo deferred treatment of her left shoulder.

In a March 11, 2016 development letter, OWCP informed appellant that the evidence of record was insufficient to establish her claim.⁶ It advised her of the type of factual and medical

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the January 24, 2018 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was 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.*

⁵ The present claim was assigned OWCP File No. xxxxxx558. Under OWCP File No. xxxxxx313, appellant has an accepted occupational disease claim for right shoulder calcifying tendinitis, right shoulder sprain, right biceps tendon rupture, and bilateral lateral epicondylitis, which arose on or about August 18, 2007. Under File No. xxxxxx967, OWCP accepted left shoulder rotator cuff sprain, which arose on or about May 14, 2011.

⁶ OWCP referenced appellant’s prior upper extremity claims and noted that under File No. xxxxxx313 she had worked modified duties from 2008 onward and under File No. xxxxxx967 appellant had been off work entirely since June 2015.

evidence necessary to establish her claim and provided a questionnaire for completion. OWCP afforded appellant 30 days to respond.

In a March 24, 2016 response to the development letter, appellant listed the dates when she sought medical treatment for her neck, along with the names and addresses of her physicians. She also described the activities she performed outside of her federal employment.

A June 4, 2014 cervical spine magnetic resonance imaging (MRI) scan showed severe multilevel cervical spondylosis, a significant amount of soft tissue pannus formation around the dens, a widening of the pre-dental space with anterior subluxation of C1 in relation to C2, and mild basilar invagination. An October 28, 2014 cervical spine x-ray showed postoperative changes of removal of portions of the spinal process at C3 and C4. A December 18, 2015 cervical spine computerized tomography (CT) scan showed moderately severe degenerative changes and disc disease at C2-3, C3-4, C4-5, C5-6, and C6-7 and prominence of the atlantoaxial joint anteriorly. The report also noted that appellant was postlaminectomy from C2 through C6, with evidence of fixation hardware at C2-3. A December 18, 2015 cervical spine x-ray showed a 4 mm anterior subluxation of C2 and multilevel severe disc degeneration at C3-7.

In a narrative report dated January 8, 2016, Dr. Edward Mittleman, a family practitioner, related that appellant had worked as a letter carrier for the employing establishment for the past 27 years. He noted that appellant worked a combination of duties throughout her career. Dr. Mittleman described in detail appellant's letter carrier duties, including casing mail,⁷ pushing the loaded hamper to her long life vehicle (LLV), and loading her vehicle with the sorted mail. He also outlined the physical requirements of various delivery routes, including mounted delivery, dismount delivery, apartment delivery, Express Mail, and the "collection run." Dr. Mittleman noted that appellant worked 8 hours, and sometimes 10 hours per day.

Dr. Mittleman described appellant's medical history. He related that appellant started to experience cervical pain more consistently in May 2014 and later underwent cervical spine fusion surgery and laminectomy on October 18, 2014. Upon examination of appellant's cervical spine, Dr. Mittleman observed tenderness and muscle spasm on the right upon palpation of the bilateral posterior paravertebral cervical tissues and trapezii. He related range of motion findings of rotation to the left 60/80 and to the right of 30/80. Dr. Mittleman diagnosed cervical spondylosis, cervical degenerative disc disease, and status post cervical surgery.

Under a section in his report noted as "Causation," Dr. Mittleman described that casing mail required appellant to "rotate her head from side-to-side as well as upward and downward, placing rotation, flexion, and extension forces upon the cervical spine." He related that appellant then loaded the full trays of mail, weighing 10 to 20 pounds, in her gurneys and pushed the gurneys to her LLV. Dr. Mittleman explained that pushing the gurneys required "greater force being transferred into the cervical tissues ... the forces are through the trapezii at the shoulder level that intertwined with the cervical tissues and connect with the nuchal ridge of the skull." He reported that unloading the mail and parcels from the gurneys required forward flexion of the cervical spine

⁷ Dr. Mittleman reported that since appellant became an "unassigned regular" in 2008 she no longer cased mail. He also explained that appellant's daily assignment and delivery route changed depending on the needs of management.

and then extension as she returned to an upright position. Dr. Mittleman noted that lifting the parcels, weighing up to 70 pounds, also placed significant forces into the cervical axial skeletal system and excessive contraction forces upon the cervical tissue. He further explained that when driving her LLV, appellant had to rotate her neck from side to side in order to observe traffic behind her and through the side-view mirrors, which can produce excessive cervical tissue stretching forces. Dr. Mittleman related that extracting mail from the LLV involved repetitive lifting of the arms, which can cause a repetitive stress injury of the neck.

Dr. Mittleman opined that it was the repetitive movement of the cervical spine that produced the development of degenerative changes in appellant's cervical axial skeletal system. He explained that with flexion, there is a discs disengagement of the facets, which then adds to irritation of these bony joints as well as changing the physiologic position of the cervical vertebrae and other tissues directly connected to the cervical axial skeletal system. Dr. Mittleman also reported that appellant had developed severe bilateral facet arthropathy in her cervical spine, which was secondary to the repetitive motions that were required in the activities that he described. He further explained: "with this movement, pressures are placed upon the intervertebral discs, which then protrude beyond their normal physiologic position. The combination of this protrusion and the development of degenerative changes (osteophytes) there becomes a narrowing of the canals within which the spinal nerves traverse. There then becomes pressure upon the nerves producing pain, numbness, and tingling. In addition, with the bulging of the discs ... there is pressure upon the nerves that are in the covering of the discs."

By decision dated July 28, 2016, OWCP denied appellant's occupational disease claim. It accepted her duties as a letter carrier and that a medical condition had been diagnosed, but denied her claim because the medical evidence of record failed to establish that her diagnosed cervical conditions were causally related to the accepted employment factors.

On January 5, 2017 appellant requested reconsideration and submitted additional medical evidence.

In a December 23, 2016 letter, Dr. Mittleman again described appellant's employment duties and their effect on her cervical spine. He explained that degeneration of the intervertebral discs narrow the space between the vertebrae and nerves, which is a process known as cervical degenerative disc disease. Dr. Mittleman related that once the intervertebral discs degenerate and wear down, the disc is not as effective in resisting motion of the spine, which is a condition termed "micromotion" instability and often caused neck pain and stiffness, which appellant had experienced. He reported that appellant's bending, lifting, twisting, and turning had adversely affected appellant's neck.

By decision dated January 19, 2017, OWCP denied modification of the July 28, 2016 decision.⁸

⁸ OWCP noted that Dr. Caputo had indicated in a September 25, 2014 report that appellant's cervical condition was "nonindustrial." It determined that Dr. Mittleman's opinion did not address the difference of medical opinions nor adequately explain how appellant's degenerative cervical condition resulted from appellant's employment.

On July 10, 2017 appellant requested reconsideration and submitted additional medical evidence.

In a letter dated June 28, 2017, Dr. Mittleman referenced various medical studies and research which found a correlation between high levels of repetitive movement of the shoulder, hand, and wrist and neck musculoskeletal disorders. He opined: “the repetitive stress activities that a city letter carrier performs on a daily basis for the [employing establishment] place significant forces upon the various tissues of their body.... This is consistent with the pathology that [appellant] has in her cervical spine.” Dr. Mittleman recommended that appellant’s claim be accepted for cervical degenerative disc disease and cervical spondylosis.

In a February 23, 2017 report, Dr. Caputo explained that his use of the phrase “symptomatic nonindustrial” in his previous report meant that appellant’s cervical spine surgery was being handled by her private insurance. He noted that the statement was not a reflection of his opinion regarding causation as he was not evaluating appellant to determine the cause of her neck injury. Dr. Caputo added that he had “no opinion” as to the causation of appellant’s cervical spine injury.

OWCP also received an October 28, 2014 operative report, which indicated that appellant underwent posterior cervical fusion of C1-2 and decompressive laminectomy at C3 through C7.

An operative report dated May 10, 2017 further demonstrated that appellant underwent a second cervical surgery for cervical degenerative disc disease and kyphosis with postlaminectomy syndrome.

By decision dated September 27, 2017, OWCP denied modification of the January 19, 2017 decision.

On October 26, 2017 appellant requested reconsideration and submitted additional evidence.

In a letter dated October 19, 2017, Dr. Basimah Khulusi, Board-certified in physical medicine and rehabilitation, indicated that she reviewed OWCP’s September 27, 2017 decision and would address how appellant’s neck condition resulted from her job. She referenced that medical reports from 1998 showed that appellant tested positive for chronic degenerative joint disease/arthritis in her neck. Dr. Khulusi explained that the findings in the x-ray examination were not to be expected for a then 38-year-old individual. She related that medical studies had shown that activities similar to the ones performed by appellant at her job caused acceleration of degeneration of the neck. Dr. Khulusi opined that as appellant continued to do the same activities on the job, her condition deteriorated with time and became aggravated to the point where she required two cervical surgeries. She requested that appellant’s claim be accepted for acceleration of cervical spondylosis, permanent aggravation of cervical degenerative disc disease, status post cervical surgery, and status post second cervical surgery.

OWCP received various hospital records dated May 13, 1998, which noted a past medical history of chronic degenerative joint disease/arthritis in the neck. A May 14, 1998 cervical x-ray showed degenerative disc changes at C4-5 and C5-6 with encroachment upon the neural foramina bilaterally.

By decision dated January 24, 2018, OWCP denied modification of the September 27, 2017 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁹ 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 of FECA,¹⁰ 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.¹¹ 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.¹²

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.¹³

Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue.¹⁴ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.¹⁵ Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).¹⁶

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation,

⁹ *Supra* note 3.

¹⁰ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

¹¹ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

¹² *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).

¹³ *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹⁴ *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

¹⁵ *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

¹⁶ *Id.*

the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.¹⁷

ANALYSIS

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

Appellant submitted various reports and letters by Dr. Mittleman dated January 8, 2016 through June 28, 2017. In a January 8, 2016 narrative report, Dr. Mittleman reviewed appellant's history and related that appellant's employment duties required casing mail, placing trays of mail into a hamper, pushing the loaded hamper to her LLV, and loading her vehicle. He also described the physical duties required with various delivery routes, including mounted delivery, dismount delivery, apartment delivery, Express Mail, and the "collection run." Dr. Mittleman provided examination findings and diagnosed cervical spondylosis, cervical degenerative disc disease, and status post cervical surgery. He opined that the repetitive movement of appellant's cervical spine produced the degenerative changes in appellant's cervical spine. Dr. Mittleman further described the process of how each of appellant's employment duties placed significant external forces on appellant's cervical spine, which accelerated the degeneration of her spine.

Dr. Mittleman reasoned that with flexion, there was discs disengagement of the facets which added to irritation of these bony joints and changed the physiologic position of the cervical vertebrae and other tissues directly connected to the cervical skeletal systems. Regarding appellant's facet arthropathy in her cervical spine, he noted that pressures were placed upon the intervertebral discs which then protruded beyond their normal physiologic position and that this protrusion and degenerative changes became a narrowing of the canals within which the spinal nerves traverse. In subsequent letters, Dr. Mittleman continued to recommend that appellant's claim be accepted for cervical degenerative disc disease and cervical spondylosis as related to her employment. He addressed the deficiencies of his previous reports as outlined in OWCP's decisions and again described the effect of appellant's employment on her cervical spine.

Dr. Mittleman has unequivocally stated that appellant's degenerative cervical conditions were accelerated by appellant's employment duties as a letter carrier. His opinion is also supported by Dr. Khulusi who opined in an October 19, 2017 letter that appellant's employment caused an acceleration or aggravation of her cervical conditions. The Board finds that, although Dr. Mittleman and Dr. Khulusi's opinions were not sufficiently rationalized to meet appellant's burden of proof to establish her claim, they are sufficient to require further development of the case by OWCP.¹⁸

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

¹⁸ See *C.M.*, Docket No. 17-1977 (issued January 29, 2019); see also *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

It is well established that proceedings under FECA are not adversarial in nature, and while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁹ OWCP has an obligation to see that justice is done.²⁰

Therefore, the Board finds that the case shall be remanded to OWCP. On remand, OWCP shall prepare a statement of accepted facts concerning appellant's working conditions and refer the matter to an appropriate medical specialist, consistent with OWCP's procedures, to determine whether appellant's employment duties caused or aggravated her degenerative cervical conditions. Following this, and any other further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further action consistent with this decision.

Issued: April 16, 2019
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

¹⁹ See e.g., *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978); *William N. Saathoff*, 8 ECAB 769, 770-71; *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985).

²⁰ *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).