

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

D.A., Appellant)	
)	
and)	Docket No. 18-1726
)	Issued: April 2, 2019
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Kearny, NJ,)	
Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 13, 2018 appellant, through counsel, filed a timely appeal from a July 5, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this 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 that her right shoulder, right wrist/hand, and lumbar conditions are causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 16, 2011 appellant, then a 51-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained right shoulder, right wrist/hand, and lower back injuries due to performing her repetitive job duties.⁴ She indicated that she pushed mail trays on a roller up a conveyor belt, dislodged mail trays on the conveyor belt when they became stuck, sleeved mail trays with straps, and lifted and emptied mail bins when they were full. Appellant reported that she first became aware of her claimed conditions in June 2007 and first became aware of their relationship to her federal employment on August 10, 2011.⁵ She stopped work on August 10, 2011 and did not return.⁶

By decision dated November 15, 2011, OWCP denied appellant's claim, finding that she failed to submit evidence sufficient to establish that the claimed conditions were causally related to the accepted factors of her federal employment. By decisions dated March 30, 2012 and February 26, 2013, it denied modification of its denial of her claim for work-related occupational conditions.⁷

Appellant subsequently appealed to the Board and, by decision dated September 9, 2013,⁸ the Board affirmed OWCP's February 26, 2013 decision denying her claim for work-related occupational conditions. The Board found that she failed to submit a rationalized, probative medical opinion which related her alleged current right shoulder, right wrist/hand, and lower back conditions to federal employment factors.

³ Docket No. 17-0533 (issued August 7, 2017); Docket No. 13-1043 (issued September 9, 2013).

⁴ OWCP assigned appellant's claim OWCP File No. xxxxxx363.

⁵ Appellant reported that, approximately two months prior to filing her claim, she began working in a position which involved handling a greater volume of mail. In an accompanying statement, she described additional work duties including sweeping mail bins.

⁶ Appellant retired from the employing establishment on disability retirement commencing February 20, 2018. The case record reflects that OWCP previously accepted, under a separate file (OWCP File No. xxxxxx560), that she sustained a work-related lumbar sprain on March 8, 2010. This injury is not the subject of the present appeal.

⁷ In these decisions, OWCP found that the medical reports submitted by appellant did not contain adequate medical rationale to establish her claim for work-related occupational diseases, including medical reports of Dr. Jeffrey F. Augustin, an attending Board-certified orthopedic surgeon, and Dr. Shailendra Hajela, an attending Board-certified physical medicine and rehabilitation physician.

⁸ *Supra* note 3.

On January 17, 2014 appellant, through counsel, requested reconsideration of her claim. Counsel submitted an October 30, 2013 report from Dr. Augustin who indicated that a magnetic resonance imaging (MRI) scan of her lumbosacral spine disclosed bulging annuli at T12-L1, L3-4, and L5-S1 and moderate disc protrusion at L5-S1.⁹ He discussed appellant's work duties and noted, "Repeated bending and lifting has caused [appellant] to have not only lumbar strain, but a disc protrusion." Dr. Augustin opined that there was a direct correlation between the "heavy work" she performed and her "injuries of rotator cuff, lumbar strain, and disc protrusion."

By decision dated February 28, 2014, OWCP denied appellant's claim, finding that she failed to submit evidence sufficient to establish that the claimed conditions were causally related to factors of her federal employment.

On January 30, 2015 appellant, through counsel, requested reconsideration and submitted a December 23, 2014 report from Dr. Hajela who advised that her history of injury might predispose her to the premature development of lumbar spine osteoarthritis. Dr. Hajela diagnosed lumbar dysfunction, lumbar radicular pain, lumbar disc protrusion at L4-5, bulging annuli at T12-L1, L3-4, and L5-S1, and left hip bursitis. He noted that, based on appellant's history, complaints, examinations, test results, and lack of previous symptoms, it was his opinion, within a reasonable degree of medical probability, that the diagnosed conditions were directly and causally related to her repetitive work activities.

The findings of June 29, 2015 electromyogram (EMG) and nerve conduction velocity (NCV) testing of appellant's lower extremities showed reduced amplitude in the left and right tibial motor nerves and increased insertional activity associated with several nerve distributions which innervated the left anterior tibialis, left biceps femoris, and left paraspinal muscles. The findings of a July 9, 2015 MRI scan of her lower back showed degenerative disc changes between the T12 and S1 levels.

By decision dated August 15, 2016, OWCP denied modification of the February 28, 2014 decision, finding that appellant failed to submit a rationalized medical opinion establishing an occupational condition as alleged.

On September 26, 2016 appellant, through counsel, requested reconsideration. Counsel resubmitted a copy of the December 23, 2014 report of Dr. Hajela. By decision dated November 29, 2016, OWCP denied modification of its August 15, 2016 decision.

Appellant subsequently appealed to the Board and, by decision dated August 7, 2017,¹⁰ the Board affirmed OWCP's November 29, 2016 decision, finding that she failed to submit a rationalized, probative medical opinion relating her claimed right shoulder, right wrist/hand, and lower back conditions to factors of her federal employment.

On June 5, 2018 appellant, through counsel, requested reconsideration of her claim.

⁹ The record includes the findings of December 4, 2009 MRI scan testing of the lumbosacral spine, which contains an impression of bulging annuli at T12-L1, L3-4, and L5-S1 and moderate disc protrusion at L4-5 (rather than at L5-S1 as reported by Dr. Augustin).

¹⁰ *Supra* note 3.

Appellant submitted an April 18, 2018 MRI scan of her lumbar spine which showed diffuse annular bulges with facet hypertrophy and ligament thickening at L2-3, mild disc bulging with facet hypertrophy and ligament thickening at L3-4, annular bulge with a small central sub ligamentous midline disc protrusion at L4-5 (larger than bulge at L3-4), and diffuse annular bulge with bulky facet hypertrophy at L5-S1.

The April 30, 2018 findings of EMG/NCV testing of appellant's lower extremities revealed unremarkable results with respect to the bilateral peroneal motor, tibial motor, superficial peroneal sensory, and sural sensory nerves.¹¹

In a May 3, 2018 report, Melissa Gallagher, an attending physician assistant, indicated that appellant presented complaining of back pain, which she reported had been present since she suffered a back injury at work in 2011. She detailed the findings of her physical examination and diagnosed hip bursitis, lumbar dysfunction, lumbar radiculopathy, and facet joint arthropathy.

By decision dated July 5, 2018, OWCP denied appellant's claim, finding that she did not establish work-related occupational conditions of her right shoulder, right wrist/hand, and lower back.

LEGAL PRECEDENT

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,¹² 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.¹³ 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.¹⁴ To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (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.¹⁵ The medical evidence required to establish causal relationship generally is rationalized medical

¹¹ Appellant also submitted a copy of previously submitted June 29, 2015 EMG/NCV testing results.

¹² *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

¹³ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

¹⁴ *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).

¹⁵ *C.D., id.*; *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

opinion evidence.¹⁶ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established employment factors.¹⁷

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that her right shoulder, right wrist/hand, and lumbar conditions are causally related to factors of her federal employment.

As noted, the Board previously affirmed OWCP's February 26, 2013 and November 29, 2016 decisions. OWCP's latest decision, and the subject of the current appeal, was issued on July 5, 2018. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁸ Therefore, the current analysis will focus on the relevant medical evidence received since OWCP's November 29, 2016 merit decision, which is the evidence that was not before the Board when it last reviewed appellant's claim on August 7, 2017.

Appellant submitted a May 3, 2018 report from Ms. Gallagher, an attending physician assistant, who indicated that appellant presented complaining of back pain which she reported had been present since she suffered a back injury at work in 2011. Ms. Gallagher diagnosed hip bursitis, lumbar dysfunction, lumbar radiculopathy, and facet joint arthropathy. This report does not constitute competent medical evidence because a physician assistant is not considered a "physician" as defined under FECA.¹⁹ As such, this evidence is insufficient to meet appellant's burden of proof.

Appellant also submitted an April 18, 2018 MRI scan of her lumbar spine which showed degenerative disc disease changes, including disc bulges, at L2-3, L3-4, L4-5, and L5-S1. The April 30, 2018 findings of EMG/NCV testing of her lower extremities revealed unremarkable results with respect to the bilateral peroneal motor, tibial motor, superficial peroneal sensory, and sural sensory nerves. The Board notes, however, that these diagnostic testing reports would have no probative value with respect to appellant's claim for work-related occupational conditions because the reports do not contain an opinion on the cause of the medical conditions described therein. The Board has held that reports of diagnostic testing lack probative value as they do not provide an

¹⁶ *F.S.*, Docket No. 15-1052 (issued July 17, 2015); *Tomas Martinez*, 54 ECAB 623 (2003).

¹⁷ *P.K.*, Docket No. 08-2551 (issued June 2, 2009); *John W. Montoya*, 54 ECAB 306 (2003).

¹⁸ *See B.R.*, Docket No. 17-0294 (issued May 11, 2018).

¹⁹ *See M.M.*, Docket No. 17-1641 (issued February 15, 2018); *K.J.*, Docket No. 16-1805 (issued February 23, 2018); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law).

opinion on causal relationship between the accepted employment factors and a diagnosed condition.²⁰

As appellant has not submitted any rationalized medical evidence establishing that her right shoulder, right wrist/hand, and lumbar conditions are causally related to accepted factors of her federal employment, she has failed to meet her burden of proof.

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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that her right shoulder, right wrist/hand, and lumbar conditions are causally related to factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the July 5, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2019
Washington, DC

Christopher J. Godfrey, 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

²⁰ *R.G.*, Docket No. 18-1045 (issued February 1, 2019). Appellant also submitted a copy of previously submitted June 29, 2015 EMG/NCV testing results, which the Board has previously found to be insufficient to establish her claim.