

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

R.M., Appellant)	
)	
and)	Docket No. 18-1621
)	Issued: August 23, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Chicago, IL, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 23, 2018 appellant filed a timely appeal from March 22 and July 18, 2018 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant has met her burden of proof to establish consequential lumbar and cervical conditions causally related to her accepted October 11, 2008 and November 8, 2011 employment injuries.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the July 18, 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.*

FACTUAL HISTORY

On October 14, 2008 appellant, then a 41-year-old part-time flex carrier, filed a notice of traumatic injury claim (Form CA-1) alleging that she sustained neck and back injuries when a truck backed into her postal vehicle on October 11, 2008 while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx712 and, by decision dated November 28, 2008, accepted the claim for lumbar and cervical sprains. Appellant stopped work intermittently and received wage-loss compensation on the supplemental rolls.

On November 10, 2011 appellant filed a second notice of traumatic injury (Form CA-1) alleging that her postal vehicle was rear ended while she was stopped at a traffic light and she sustained a cervical injury on November 8, 2011 while in the performance of duty. OWCP assigned that claim, OWCP File No. xxxxxx371, and by decision dated December 28, 2011, accepted it for cervical strain. Appellant stopped work intermittently and received wage-loss compensation on the supplemental rolls.

On June 27, 2017 OWCP received a May 10, 2017 medical report, wherein Dr. Jacob M. Morgenstern, a treating orthopedic surgeon, reported that appellant was evaluated for neck and lower back complaints. Dr. Morgenstern reported that on October 11, 2008 she was sitting in her delivery vehicle when another car backed into her vehicle. Appellant reported that, during the impact, her neck and whole body jerked forward violently and she experienced sharp pain to her neck and lower back. She was treated and x-rays were obtained and no fractures were found. Appellant was diagnosed with sprain of cervical spine and sprain of lumbar spine and was released back to work after 45 days of treatment. Dr. Morgenstern reported that, in November 2011, she was out delivering mail when her vehicle was rear ended by a drunk driver. This incident aggravated and intensified appellant's cervical condition. Dr. Morgenstern reported that a magnetic resonance imaging (MRI) scan of the cervical spine completed at that time revealed right paracentral disc herniation at C6-7 with impingement upon the cervical spine cord and mass effect upon thecal sac. Appellant recounted that she received treatment *via* physical therapy and injections and returned to work in a limited-duty capacity which entailed sitting at a desk and keying for long hours. She reported that this position caused a worsening of her conditions and increased symptoms to her lower back and cervical spine. Appellant reported ongoing constant paresthesia in the upper and lower extremities with pain upon sitting for long periods of time. Dr. Morgenstern further noted pain to the lower back with associated radicular symptoms, and signs of cervical radiculopathy symptoms which were aggravated with prolonged neck flexion and mechanical manipulation.

Dr. Morgenstern provided findings on physical examination and diagnosed lumbosacral radiculopathy, lumbosacral spondylosis, and cervical radiculopathy. He opined that appellant's diagnosed conditions were proximately and directly caused by both work-related motor vehicle accidents based on her medical history, objective diagnostic studies, and findings on physical examination. Dr. Morgenstern reported that the A.M.A., *Guides*³ discussed the significant correlation to radiculopathies of the back and neck to high impact trauma such as motor vehicle accidents. Further, he provided evidence by way of research which found that radiculopathies of the cervical spine and the lumbosacral spine were found to be significantly higher in those patients

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009).

involved in motor vehicle accidents. Dr. Morgenstern explained that, along with the additional strenuous repetitive work that appellant performed as a mail carrier, her condition was clearly work related. He opined that the mechanism of injury was the high impact trauma from the motor vehicle accident. Dr. Morgenstern explained that the spine was made up of several bony joints called vertebrae and in between these joints were the discs which act as a cushion to absorb shock. However, with forceful impact, the region experiences soft tissue injury and tendon, bone, muscle, and disc inflammation. Dr. Morgenstern reported that, at times, the soft inner nucleus of the disc herniates outward causing nerve impingement in the respective regions. This impingement then causes associated radicular symptoms, weakness, and significant pain. Dr. Morgenstern concluded with full medical certainty that appellant's conditions were caused by her employment-related injuries through proximate causation and the claim should be accepted for her true conditions. An April 12, 2017 electrodiagnostic study and May 9, 2017 duty status report (Form CA-17) were also provided.

On December 13, 2017 appellant requested that the acceptance of her claims be expanded to include consequential pinched nerves of the back and neck as causally related to her two prior work-related motor vehicle accidents. She further requested that OWCP File Nos. xxxxxx712 and xxxxxx371 be administratively combined.

In a development letter dated January 16, 2018, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It indicated that Dr. Morgenstern did not state which motor vehicle accident caused her current diagnosed conditions. OWCP advised that appellant's physician should compare the diagnostic test results of appellant's cervical spine to determine if there was objective medical evidence to support that the second work-related motor vehicle accident caused a material change in the underlying condition. Appellant was advised of the medical and factual evidence needed. OWCP afforded her 30 days to submit the necessary evidence.

By letter dated January 17, 2018, OWCP notified appellant that OWCP File Nos. xxxxxx712 and xxxxxx371 were administratively combined, with the former assigned as the master file.

By letter dated February 5, 2018, appellant again requested that OWCP expand the acceptance of her claims to include the consequential conditions of lumbosacral radiculopathy, lumbosacral spondylosis, and cervical radiculopathy. She described her continued neck and back pain as a result of a pinched nerve which caused numbness in her arms and legs. Appellant argued that the November 8, 2011 motor vehicle accident aggravated her prior work-related motor vehicle accident which resulted in a back and neck injury. She further explained that the diagnostic testing submitted showed a change in her conditions following the second motor vehicle accident. Appellant described her employment duties as a city carrier which required arduous exertion and caused pain.

In support of her claim, appellant submitted November 28, 2009 and January 15, 2013 magnetic resonance imaging (MRI) scans of the cervical spine, a February 13, 2010 MRI scan of the thoracic spine and a January 15, 2013 MRI scan of the lumbar spine.

In a November 28, 2009 diagnostic report, Dr. Allison Griffiths, a Board-certified diagnostic radiologist, reported that an MRI scan of the cervical spine demonstrated moderately

advanced changes of spondylosis with varying degrees of disc bulge, prolapse, or herniation of C3-4 through C6-7.

In a January 15, 2013 diagnostic report, Dr. Lavanya Chekuri, a Board-certified diagnostic radiologist, reported that an MRI scan of the cervical spine revealed abnormal findings when compared to the November 28, 2009 study. She reported a large new central and right paracentral disc herniation at C6-7, with indentation upon the cervical spinal cord and severe mass effect upon thecal sac.

In a January 15, 2013 diagnostic report, Dr. Ritesh Darji, a Board-certified radiologist, reported that an MRI scan of the lumbar spine demonstrated minimal degenerative changes compared to the prior October 8, 2011 study, without evidence of a significant disc bulge, protrusion, or central/neural foraminal stenosis.

Appellant also submitted work restrictions and appointment notes documenting treatment in 2012 and 2013. In a September 10, 2012 report, Dr. Howard Robinson, Board-certified in physical medicine and rehabilitation, diagnosed lumbosacral spondylosis without myelopathy, cervical degenerative disc disease, cervicalgia, and lumbago with minimal bulging at right L3-4.

By decision dated March 22, 2018, OWCP denied expansion of appellant's claims to include a consequential injury.

On April 23, 2018 appellant requested reconsideration. In support of her request, she resubmitted medical reports previously of record. Appellant also submitted a May 2, 2018 medical report from Dr. Morgenstern and a May 15, 2018 report from Dr. Garth Edwards, a chiropractor.

In the May 2, 2018 report, Dr. Morgenstern repeated the assertions and findings from his May 10, 2017 report. He provided findings on physical examination and diagnosed lumbosacral radiculopathy, lumbosacral spondylosis, and cervical radiculopathy. Dr. Morgenstern opined that appellant's conditions were proximately and directly caused by the work-related motor vehicle accident and that the claim should be accepted for these additional conditions. He emphasized that, following the November 2011 motor vehicle accident, a cervical spine MRI scan revealed right paracentral disc herniation at C6-7 with impingement upon the cervical spine cord and mass effect upon thecal sac. Dr. Morgenstern discussed the mechanism of injury pertaining to appellant's work-related motor vehicle accidents and argued that sprains and strains were temporary and typically last six to eight weeks. However, research had shown that, when the patient presents with ongoing symptomology, the provider is to consider other differential diagnoses. Dr. Morgenstern reported that, in appellant's claim, she presented with ongoing symptoms without a new external causation. He noted that this was documented as she had findings of neuropathies and multi-disc issues since the time of her initial injuries. Dr. Morgenstern further reported that appellant had not complained, or had any documented history of preexisting back or neck radiculitis prior to the work injuries, providing support that these conditions arose from the original employment-related injuries.

In the May 15, 2018 report, Dr. Edwards reported that he had been treating appellant since March 23, 2011 for neck and back pain following a work-related motor vehicle accident. He noted that her claim was accepted for neck and back sprain based on the October 12, 2011 diagnostic studies obtained, noting that he was in agreement with the work-related diagnosis after her vehicle

was hit by another vehicle. Dr. Edwards reported that appellant received treatment from that date to the present under his care. He noted findings of joint pain and tenderness with reduced range of motion to the cervical and lumbar spine, as well as extreme tissue swelling and inflammation which heightened her pain. Dr. Edwards' treatments included manual manipulation to maintain alignment of the lumbar spine, as well as ultrasound with interferential to reduce inflammation, muscle spasms, and eliminate scar tissue formation while also increasing range of motion. He reported that these treatments helped decrease appellant's symptoms and improve her motions.

By decision dated July 18, 2018, OWCP denied modification of the March 22, 2018 decision finding that the medical evidence of record was insufficient to establish that appellant's consequential lumbosacral radiculopathy, lumbosacral spondylosis, and cervical radiculopathy were causally related to her accepted employment injuries.

LEGAL PRECEDENT

It is an accepted principle of workers' compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent, intervening cause attributable to the employee's own intentional conduct.⁴ The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.⁵ With respect to consequential injuries, the Board has held that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation, to arise out of and in the course of employment, and is compensable.⁶

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is an opinion of reasonable medical certainty supported by sound medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.⁷

⁴ See *C.R.*, Docket No. 18-1285 (issued February 12, 2019); *D.L.*, Docket No. 18-0629 (issued November 16, 2018); *Albert F. Ranieri*, 55 ECAB 598 (2004); *Clement Jay After Buffalo*, 45 ECAB 707 (1994); *John R. Knox*, 42 ECAB 193 (1990).

⁵ *D.L., id.*; *S.M.*, 58 ECAB 166 (2006); *Debra L. Dillworth*, 57 ECAB 516 (2006); A. Larson, *The Law of Workers' Compensation* § 10.01 (2005); *Carlos A. Marrero*, 50 ECAB 117 (1998).

⁶ *R.V.*, Docket No. 18-0552 (issued November 5, 2018); *L.S.*, Docket No. 08-1270 (issued July 2, 2009); *Kathy A. Kelley*, 55 ECAB 206 (2004).

⁷ *J.B.*, Docket No. 14-1474 (issued March 13, 2015).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish consequential lumbar and cervical conditions causally related to her accepted October 11, 2008 and November 8, 2011 employment injuries.⁸

In reports dated May 10, 2017 and May 2, 2018, Dr. Morgenstern provided firm medical diagnoses of lumbosacral radiculopathy, lumbosacral spondylosis, and cervical radiculopathy, he however failed to provide a fully-rationalized opinion on the cause of appellant's injury, but rather cited general studies and research in support of his arguments.⁹ He reported that the mechanism of injury was due to the high impact trauma related to the motor vehicle accident. Dr. Morgenstern explained that discs located in the vertebrae of the spine act as a cushion to absorb shock however with forceful impact, the region experiences soft tissue injury and tendon, bone, muscle and disc inflammation

The Board finds that Dr. Morgenstern failed to provide a clear, rationalized opinion that appellant's current cervical and lumbar radiculopathies and lumbar spondylosis were natural progressions of the accepted cervical and lumbar sprains, so as to establish consequential injuries.¹⁰ Dr. Morgenstern opined that her accepted lumbar and cervical sprains were conditions which were temporary and typically last six to eight weeks, however, he considered differential diagnoses. The Board notes that the January 15, 2013 MRI scan of the cervical spine revealed abnormal findings when compared to the prior November 28, 2009 study, resulting in a large new central and right paracentral disc herniation at C6-7 with indentation upon the cervical spinal cord and severe mass effect upon thecal sac. While the January 15, 2013 cervical spine MRI scan provided evidence of additional diagnoses, Dr. Morgenstern failed to explain how these conditions were a consequence of the accepted lumbar and cervical strain conditions, which he related had resolved within weeks following the accepted injuries. The MRI scan changes alone are insufficient to establish a consequential employment-related injury without further explanation. Thus, the opinion of Dr. Morgenstern is insufficient to establish appellant's claim.¹¹

The remaining medical evidence of record is also insufficient to establish consequential injuries. The work notes documented that appellant had been seen for treatment, recommended work restrictions, or requested that she be excused from work, but did not provide findings and opinions regarding the cause of her condition.¹² Dr. Robinson's September 10, 2012 report provided additional diagnoses, but failed to state any opinion on the cause of her injuries. The

⁸ *F.L.*, Docket No. 17-1613 (issued August 15, 2018).

⁹ *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

¹⁰ *See Y.R.*, Docket No. 17-1187 (issued June 5, 2018).

¹¹ *P.G.*, Docket No. 18-1547 (issued January 28, 2019).

¹² *L.D.*, Docket No. 18-1468 (issued February 11, 2019).

Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value.¹³

Dr. Edwards' May 15, 2018 report failed to substantiate any additional diagnoses. Section 8101(2) of FECA¹⁴ provides that the term physician, as used therein, includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation, as demonstrated by x-ray to exist and subject to regulations by the Secretary.¹⁵ Because Dr. Edwards did not diagnose subluxation based upon x-ray evidence, he is not a qualified physician under FECA and his opinion does not constitute competent medical evidence.¹⁶ Thus, his report is insufficient to establish appellant's consequential injury claim.¹⁷

OWCP also received a number of diagnostic studies. However, the Board has explained that diagnostic studies lack probative value as they do not address whether the diagnosed conditions were consequential to the accepted conditions.¹⁸

The Board finds that the record lacks rationalized medical evidence establishing causal relationship of appellant's additional lumbar and cervical conditions, by either direct causation, aggravation, or as a consequence of the accepted employment injuries. Thus, appellant has not met her burden of proof.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's 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 consequential lumbar and cervical conditions causally related to the accepted October 11, 2008 and November 8, 2011 employment injuries.

¹³ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

¹⁴ 5 U.S.C. § 8101(2).

¹⁵ See 20 C.F.R. § 10.311; *R.H.*, Docket No. 18-1544 (issued March 4, 2019); *M.B.*, Docket No. 17-1378 (issued December 13, 2018).

¹⁶ *J.K.*, Docket No. 19-0095 (issued June 18, 2019); *R.P.*, Docket No. 18-0860 (issued December 4, 2018); *Jay K. Tomokiyo*, 51 ECAB 361, 367-68 (2000).

¹⁷ *M.M.*, Docket No. 18-1096 (issued December 14, 2018); *E.T.*, Docket No. 17-0265 (issued May 25, 2018).

¹⁸ *F.S.*, Docket No. 19-0205 (issued June 19, 2019).

ORDER

IT IS HEREBY ORDERED THAT the July 18 and March 22, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 23, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board