

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

S.K., Appellant)	
)	
and)	Docket No. 18-0836
)	Issued: February 1, 2019
U.S. POSTAL SERVICE, ELKINS POST OFFICE, Elkins Park, PA, Employer)	
)	

Appearances:
Paul J. Bartolomeo, Jr., Esq., for the appellant¹
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 March 13, 2018 appellant, through counsel, filed a timely appeal from a September 14, 2017 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 to consider the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish an injury causally related to the accepted February 21, 2012 employment incident.

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.*

FACTUAL HISTORY

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

On February 25, 2012 appellant, then a 52-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that, on February 21, 2012, she sustained a severe pinched nerve which affected her neck, right shoulder, and arm when she worked with a skid of circulars/advertisements while in the performance of duty.

By decision dated April 13, 2012, OWCP denied appellant's claim, finding that the medical evidence submitted was insufficient to establish that the diagnosed conditions were causally related to the accepted February 21, 2012 employment incident.

By letter dated April 18, 2012, appellant requested a telephonic hearing before an OWCP hearing representative. By decision dated September 26, 2012, OWCP's hearing representative affirmed the April 13, 2012 decision denying her claim.

On March 11, 2013 appellant, through counsel, appealed to the Board. By decision dated September 20, 2013, the Board affirmed OWCP's hearing representative's September 26, 2012 decision, finding that the medical evidence of record was insufficient to establish that she sustained neck, right shoulder, and arm conditions causally related to the accepted February 21, 2012 employment incident.⁴

Appellant, through counsel, subsequently requested reconsideration and submitted additional medical evidence. By decision dated June 13, 2014, OWCP denied modification, finding that the medical evidence of record was insufficient to establish causal relationship between the diagnosed conditions and the accepted February 21, 2012 employment incident.

On December 9, 2014 appellant, through counsel, appealed to the Board. By decision dated May 7, 2015, the Board affirmed OWCP's June 13, 2014 decision, finding that the evidence submitted was insufficient to establish causal relationship between the diagnosed conditions and the accepted February 21, 2012 employment incident.⁵

On May 6, 2016 appellant, through counsel, requested reconsideration and submitted additional evidence.

In a May 4, 2016 report, Dr. Norman B. Stempler, an osteopath specializing in orthopedic surgery, noted that appellant was first seen on January 30, 2013 for an employment injury. He reported that, on February 21, 2012, she sustained an injury while pulling multiple skids that were estimated to weigh over 200 pounds per skid. Physical examination findings included right upper extremity numbness and weakness, evidence of right grip weakness, and Spurling's maneuver.

³ Docket No. 13-0930 (issued September 13, 2013). Docket No. 15-0384 (issued May 7, 2015).

⁴ *Id.*

⁵ *Supra* note 3.

Dr. Stempler opined there was a direct relationship between appellant's current condition and symptoms and the accepted February 21, 2012 incident. He reported that appellant had no history of cervical or right upper extremity conditions prior to the accepted February 21, 2012 incident.

By decision dated August 4, 2016, OWCP denied modification. It found Dr. Stempler's report insufficient to establish appellant's claim as he failed to explain the mechanism whereby the accepted February 21, 2012 incident caused or aggravated the diagnosed conditions.

On January 23, 2017 appellant requested reconsideration and submitted a December 2, 2016 report from Dr. Randall Smith, a Board-certified orthopedic surgeon, and a January 17, 2017 report from Dr. Stempler.

In a December 2, 2016 report, Dr. Smith diagnosed C5-6 herniated disc, chronic pain, and adhesive capsulitis. He reviewed medical records and diagnostic studies, and provided a description of the accepted February 21, 2012 incident. Prior to the accepted February 21, 2012 incident, Dr. Smith reported that appellant had no musculoskeletal problems. However, following the incident, appellant developed neck, shoulder, right arm, lower back, and leg problems. Dr. Smith reported that appellant underwent surgery, but unfortunately she developed significant postoperative complications from her anterior cervical discectomy and had been totally disabled since the surgery. He concurred with Dr. Stempler in attributing appellant's cervical condition to the accepted February 21, 2012 employment incident. Dr. Smith explained that as a result of pulling the skid appellant had herniated her cervical disc as result of the increased pressure placed on her neck and shoulder. He noted that appellant appeared to have asymptomatic preexisting cervical degenerative changes. According to Dr. Smith the herniated disc aggravated her preexisting cervical degenerative condition resulting in radiculopathy, right shoulder pain, and myelopathy. In addition, he opined that appellant's right shoulder adhesive condition had also been caused by the employment incident. Dr. Smith explained that appellant was protective of her right shoulder, due to a prior injury, and neck strain from the injury led to shoulder pain. He related that adhesive capsulitis developed when the shoulder was held still as a method of protection. Dr. Smith further opined that the strain from the accepted February 21, 2012 work incident was the cause of the cervical disc herniation, shoulder pain, and resulting surgery.

Dr. Stempler, in the January 17, 2017 report, described how the February 21, 2012 accepted employment incident had occurred. He noted that in attempting to pull the heavy skid, her cervical spine and upper body strength and musculature were involved. Dr. Stempler opined that the accepted February 21, 2012 work incident caused appellant's C5-6 disc herniation and aggravated her preexisting degenerative disc disease.

On April 20, 2017 OWCP requested that Dr. Todd Fellars, an orthopedic surgeon serving as an OWCP district medical adviser (DMA), review the medical record and a statement of accepted facts and thereafter address whether there was causal relationship between the accepted February 21, 2012 employment incident and the diagnosed conditions.

In a May 5, 2017 report, Dr. Fellars reviewed the medical evidence and the SOAF and wrote "no" in response to the question of "[d]oes the medical evidence establish a cause and effect relationship between accepted work activities and the diagnoses offered." In narratively addressing the issue of causation, he concluded that the accepted February 21, 2012 employment incident was of sufficient force that her underlying degenerative condition had been aggravated

and caused the onset of her cervical radicular symptoms. Dr. Fellars attributed the diagnosed dysphagia and dysphonia, which appeared to have resolved.

By decision dated September 14, 2017, OWCP denied modification, finding that the weight of the evidence rested with the May 5, 2017 report of Dr. Fellars, the DMA.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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 limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific conditions for which compensation is claimed is causally related to the employment injury.⁷ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁸

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.⁹ First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged.¹⁰ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.¹¹

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.¹² Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is causal relationship between the employee's diagnosed condition and the compensable employment factors.¹³ 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

⁶ 5 U.S.C. § 8101 *et seq.*

⁷ *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁸ *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁹ *B.F.*, Docket No. 09-0060 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 7.

¹⁰ *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

¹¹ *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 7.

¹² *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

¹³ *J.J.*, Docket No. 09-0027 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹⁴

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's June 13, 2014 decision because the Board has already considered this evidence in its prior decisions. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.¹⁵

Following the Board's May 7, 2015 decision OWCP reviewed additional medical evidence. Dr. Stempler in a May 4, 2016 supplemental report related that, on February 21, 2012, appellant sustained an injury due to pulling multiple skids that were estimated to weight over 200 pounds per skid. In a January 17, 2017 report, he indicated that appellant's cervical spine and upper body musculature were involved in attempting to pull the heavy skid on February 21, 2012. Dr. Stempler concluded that this incident caused her C5-6 disc herniation and aggravated her preexisting degenerative disc disease.

Dr. Smith, in a December 2, 2016 report, reviewed medical evidence, the injury history, and provided examination findings. He noted that, prior to the accepted 21, 2012 incident, appellant had a preexisting cervical degenerative condition and had a prior right shoulder injury. Dr. Smith diagnosed C5-6 herniated disc, chronic pain, and adhesive capsulitis, which he attributed to the accepted February 21, 2012 incident. He opined that appellant's herniated disc was caused by the increased pressure placed on appellant's neck and shoulder from pulling the skid. Dr. Smith further concluded that her preexisting cervical degenerative condition had been aggravated by the increased pressure on her neck which caused the cervical disc herniation and subsequent radiculopathy, right shoulder pain and myelopathy. With respect to her shoulder condition, he opined that appellant's protectiveness of her shoulder from a prior injury and the joint pain caused by the neck injury caused her right shoulder adhesive capsulitis.

Based upon receipt of these new reports from Drs. Stempler and Smith, on April 20, 2017, OWCP requested that its DMA, Dr. Fellars, review the record and the SOAF and thereafter address causal relationship between appellant's accepted February 21, 2012 employment incident and the diagnosed conditions.

In the September 14, 2017 decision, OWCP found that Dr. Fellars' May 5, 2016 report constituted the weight of the medical evidence. The Board finds, however, that Dr. Fellars' report is internally inconsistent and, therefore, further development of the medical evidence is necessary to determine whether appellant's diagnosed conditions were caused or aggravated by the February 21, 2012 accepted employment incident.

¹⁴ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹⁵ *See C.C.*, Docket No. 18-0719 (issued November 9, 2018).

In his May 5, 2017 report, Dr. Fellars noted appellant's history of injury and treatment along with the SOAF. He wrote "no" in response to the question as "[d]oes the medical evidence establish a cause and effect relationship between accepted work activity and the diagnoses offered." However, while addressing the issue of causation, Dr. Fellars concluded that the force from the accepted February 21, 2012 incident was sufficient to have aggravated her underlying degenerative condition and was the cause her cervical radicular symptoms. Dr. Fellars did not offer rationale or an explanation for his conflicting opinions on the issue of causal relationship. Further, OWCP did not seek clarification of Dr. Fellars' opinion.

Once OWCP undertakes development of the record, it has the responsibility to obtain an evaluation which will resolve the issue involved in the case.¹⁶ Therefore, the Board finds that the case must be remanded for further development of the medical evidence and receipt of a reasoned opinion regarding whether appellant's diagnosed medical conditions are causally related to the accepted employment incident.

The case is remanded to OWCP to refer appellant to Dr. Fellers or an alternate district medical adviser for a rationalized medical opinion on whether the accepted February 21, 2012 employment incident caused or aggravated appellant's diagnosed conditions. Following such 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

¹⁶ See *C.N.*, Docket No. 17-1751 (issued May 3, 2018); *R.A.*, Docket No. 14-1918 (issued March 3, 2015); *Phillip L. Barnes*, 55 ECAB 426 (2004).

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 1, 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