United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 18-1434**
	)	**Issued: February 22, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Macclesfield, NC, Employer	)	

Appearances:
Alan J. Shapiro, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 18, 2018 appellant, through counsel, filed a timely appeal from a February 9, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 a back injury causally related to the accepted May 27, 2016 employment incident.

FACTUAL HISTORY

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

On June 2, 2016 appellant, then a 49-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that, on May 27, 2016, she developed right lower back pain, in the performance of duty that was diagnosed as a subluxation. She noted that the pain went down her right thigh to her calf area when she tried to turn to her left to move long mail trays that she was holding on her lap. Appellant stopped work on the date of injury.

In duty status reports (Form CA-17) dated June 22 and July 1, 2016, Dr. Chawki A. Lahoud, a Board-certified internist, noted May 27, 2016 as the date of injury, listed clinical findings, and diagnosed muscular contracture and degenerative joint disease due to injury. He also addressed appellant's light-duty work capacity.

By decision dated July 21, 2016, OWCP denied appellant's traumatic injury claim, finding that she had not submitted medical evidence from a physician containing a medical diagnosis in connection with the accepted May 27, 2016 employment-related incident. As such, fact of injury as defined under FECA had not been established.

A July 25, 2016 medical report by Dr. David Musante, a Board-certified orthopedic surgeon, provided examination findings and diagnosed degeneration of a lumbosacral intervertebral disc.

Appellant appealed to the Board on September 26, 2016. By decision dated February 15, 2017, the Board affirmed OWCP's July 21, 2016 decision, finding that appellant failed to submit rationalized probative medical evidence sufficient to establish a back injury causally related to the accepted May 27, 2016 employment incident.[4]

In a letter received by OWCP on June 28, 2017, appellant, through counsel, requested reconsideration. Appellant submitted a progress note dated May 31, 2017 from Chetan D. Kapat, a certified physician assistant, who diagnosed left shoulder pain likely from acromioclavicular joint arthritis with rotator cuff tendinitis.

Appellant also submitted a progress note dated June 19, 2017 from Dr. Aaron P. Leininger, a Board-certified family practitioner. Dr. Leininger related that appellant reported the history of injury as involving trouble she had with her right knee since she stepped in a hole last year. She

[3] Docket No. 16-1885 (issued February 15, 2017).

[4] *Id.*

also reported a locking feeling and that a bone was catching onto something. Appellant initially sought medical treatment in an emergency room and it was suggested that she had a meniscus injury. Dr. Leininger reported findings on physical and x-ray examination of the right knee. He diagnosed chronic right knee pain.

By decision dated July 19, 2017, OWCP modified its decision denying appellant's traumatic injury claim, finding that the medical evidence of record was sufficient to establish the medical component of fact of injury as qualified physicians provided lumbar diagnoses. However, it further found that the claim remained denied as the medical evidence of record was insufficient to establish causal relationship between appellant's diagnosed conditions and the accepted May 27, 2016 employment incident of turning to the left to move long mail trays she had been holding on her lap.

In a discharge summary dated July 20, 2017, Dr. Leininger examined appellant and advised that she had a complex tear of the medial meniscus and primary osteoarthritis of the right knee.

In an after visit summary report dated August 1, 2017, Dr. Richard J. Alioto, a Board-certified orthopedic surgeon, noted that appellant's right knee pain was likely from a posterior medial meniscal tear, cartilage defect on the lateral femoral and tibial condyle, and patellofemoral mal tracking. He noted her desire to undergo right knee surgery.

In office visit reports dated May 31, 2016 to August 11, 2017, Dr. James Carraher, a chiropractor, related a history of the May 27, 2016 employment incident and reported examination findings regarding appellant's pelvic, lumbar, and cervical regions. He diagnosed nonallopathic lesions of the thoracic and hip regions, sacroiliac joint somatic dysfunction, displacement of lumbar intervertebral disc without myelopathy (disorder), cervico-occipital neuralgia, myalgia, and contracture of muscle, multiple sites. Dr. Carraher initially advised that appellant's prognosis was guarded because she had not received sufficient treatment to determine a prognosis. Subsequently, he advised that her prognosis was fair because she was responding well to chiropractic therapy.

In office visit reports dated June 1 to 24, 2016, Dr. Collin Kurtz, a chiropractor, provided examination findings regarding appellant's lumbar, cervical, and thoracic spines. He initially advised that her prognosis was guarded, but subsequently advised that appellant's prognosis was fair because she was responding well to chiropractic therapy.

On November 16, 2017 appellant, through counsel, requested reconsideration of OWCP's July 19, 2017 decision. She submitted a letter dated November 5, 2017 in which Dr. Alioto noted that appellant reported a 2016 work injury for which he assisted in the care of her shoulder and knee. Dr. Alioto also noted that commencing in May 2017 she was treated by his physician assistant, Mr. Kapat, for left shoulder pain that began in 2015 and resulted from repeated use of her shoulder while delivering mail. He listed Mr. Kapat's left shoulder diagnosis and medical treatment administered. Dr. Alioto indicated that appellant was treated in June 2017 by his partner, Dr. Leininger, for a right knee injury sustained approximately one year prior to her evaluation when she stepped in a hole. He related that there was no description of how and when the injury occurred. Dr. Alioto noted Dr. Leininger's right knee diagnostic findings. Based on appellant's history and his own examination findings, he found that her right knee symptoms were related to

a form of medial meniscus and patellofemoral pathology. Dr. Alioto indicated that she underwent arthroscopy of the knee with partial medial meniscectomy and patellofemoral chondroplasty on September 13, 2017. Appellant was progressing well postsurgery and undergoing physical therapy. Dr. Alioto advised that the pathology discovered in her knee in the September 2017 surgery most certainly was the result of chronic changes that were present, but was also likely a mechanical-type injury such as what would occur when someone stepped in a hole and twisted a knee. He maintained that since there was brief documentation of appellant's injury, he could not corroborate that this was the same injury described during her course of employment as a postal carrier. Dr. Alioto indicated that her knee injury was the type that should recover in time though the preexisting status of those joints could certainly affect the long-term outcome.

OWCP, by decision dated February 9, 2018, denied modification of its July 19, 2017 decision, finding that the medical evidence submitted was insufficient to establish causal relationship between a diagnosed medical condition and the accepted May 27, 2016 employment incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] 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 condition for which compensation is claimed is causally related to the employment injury. 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.[6]

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 and place, and in the manner alleged.[7] Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[8]

Rationalized medical opinion evidence is generally 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 incident identified by the claimant.[9] This medical opinion must include an accurate

[5] *Supra* note 2.

[6] *A.D.*, Docket No. 17-1855 (issued February 26, 2018); *Gary J. Watling*, 52 ECAB 357 (2001).

[7] *A.D., id.; T.H.*, 59 ECAB 388 (2008).

[8] *Id.*

[9] *A.D., supra* note 6; *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

history of the employee's employment injury and must explain how the condition is related to the incident. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[10]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a back injury causally related to the accepted May 27, 2016 employment incident.

OWCP accepted that the May 27, 2016 employment incident occurred as alleged. The issue is whether appellant established that the accepted incident caused a back condition. By decision dated February 15, 2017, the Board affirmed OWCP's denial of appellant's claim. Findings made in the prior Board decision are *res judicata* absent any further review by OWCP under section 8128 of FECA.[11] The Board will, therefore, not review the evidence addressed in the prior appeal.

The June 19, 2017 progress note and July 20, 2017 discharge summary of Dr. Leininger and August 1 and November 5, 2017 reports of Dr. Alioto related a history of injury as appellant stepping in a hole in 2016. Dr. Leininger diagnosed pain, a complex tear of the medial meniscus, and primary osteoarthritis of the right knee. Dr. Alioto initially diagnosed right knee pain that was likely from a posterior medial meniscal tear, cartilage defect on the lateral femoral and tibial condyle, and patellofemoral mal tracking. He subsequently found that appellant's symptoms were related to a form of medial meniscus and patellofemoral pathology for which she underwent arthroscopic surgery on September 13, 2017. Dr. Alioto attributed the pathology discovered in her right knee surgery to present chronic changes and stepping in a hole in 2016.

The Board finds that the progress note and reports of Dr. Leininger and Dr. Alioto are insufficient to establish appellant's claim for a May 27, 2016 employment injury. The subject of OWCP's decision presently before the Board, *i.e.*, OWCP's February 9, 2018 decision, is whether appellant established a traumatic injury causally related to the accepted May 27, 2016 employment incident which involved turning to the left to move long mail trays she had been holding on her lap. The matter of employment-related medical conditions sustained in 2016 due to stepping in a hole is not currently before the Board. A medical opinion should reflect a correct history and offer a medically sound explanation by the physician of how the accepted employment incident physiologically caused or aggravated the diagnosed conditions.[12] The reports of Dr. Leininger and Dr. Alioto are of no probative value on the relevant issue of the present case because neither

[10] *S.H.*, Docket No. 17-1660 (issued March 27, 2018); *James Mack*, 43 ECAB 321 (1991).

[11] *See E.L.*, 16-0635 (issue November 7, 2016); *R.L.*, Docket No. 15-1010 (issued July 21, 2015). *See also A.P.*, Docket No. 14-1228 (issued October 15, 2014).

[12] *See J.M.*, Docket No. 17-1002 (issued August 22, 2017).

physician provided an opinion that appellant sustained a diagnosed condition due to the accepted May 27, 2016 employment incident.[13]

The reports dating from May 31, 2016 to August 11, 2017 from appellant's chiropractors, Dr. Carraher and Dr. Kurtz, have no probative value on the issue of causal relationship. Chiropractors are not considered physicians as defined under FECA unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.[14] Neither Dr. Carraher nor Dr. Kurtz diagnosed subluxation based on the results of an x-ray. Therefore, their reports have no probative value.[15]

The May 31, 2017 progress note from Mr. Kapat, a certified physician assistant, is also of no probative value. The Board has held that medical reports signed solely by a physician assistant are of no probative value as a physician assistant is not considered a physician as defined under FECA and therefore is not competent to provide a medical opinion.[16]

The Board finds that appellant has not submitted rationalized, probative medical evidence sufficient to establish a back injury causally related to the May 27, 2016 employment incident. Appellant therefore has not met her burden of proof.

On appeal counsel contends that OWCP's February 9, 2018 decision finds conflict in the evidence when there is none. For the reasons explained above, the Board finds that the evidence of record is insufficient to meet appellant's 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 a back injury causally related to the accepted May 27, 2016 employment incident.

[13] *See F.A.*, Docket No. 17-0468 (issued June 15, 2018).

[14] *See* 5 U.S.C. § 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term physician 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 regulation by the secretary. *See M.B.*, Docket No. 17-1378 (issued December 17, 2018); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[15] *M.B., id.*; *P.T.*, Docket No. 17-1189 (issued December 27, 2017).

[16] *Supra* note 14 at § 8101(2). *See C.C.*, Docket No. 18-1099 (issued December 21, 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).

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 22, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board