

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

_____)	
J.C., Appellant)	
)	
and)	Docket No. 19-0219
)	Issued: July 26, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Keyport, NJ, Employer)	
_____)	

Appearances:
Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 7, 2018 appellant, through counsel, filed a timely appeal from a July 3, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

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.

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.³

ISSUE

The issue is whether appellant has met her burden of proof to establish a back condition causally related to the accepted August 9, 2013 employment incident.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 12, 2013 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2013 she injured her back bending over to lift a tray of mail at the employing establishment while in the performance of duty. She noted that she felt something move in her back.

On April 4, 2018 appellant, through counsel, requested reconsideration from OWCP's May 27, 2016 decision and submitted additional medical evidence.⁵ In a note dated May 10, 2017, Dr. Mark Filippone, a Board-certified physiatrist, opined that forward flexion motions in her employment duties had caused herniation and bulging of her lumbosacral discs as well as causing physical compression of the adjacent nerve roots. Specifically, he explained "[appellant's] work caused herniation and bulging of those lumbosacral discs causing histamine release from the borne out herniations as well as causing [a] physical compression of adjacent nerve roots as the result of repetitive overloading of the lumbar spine and blowing out and bulging of the lumbosacral discs consistent with her history, my physical presentation and subsequent anatomic [magnetic resonance imaging] (MRI) scans and my abnormal EMG [electromyograph] [and] NC[V] [nerve conduction velocity] studies, which I myself performed." Dr. Filippone noted that these diagnoses were the result of repetitive overloading of the lumbar spine.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the July 3, 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 evidence for the first time on appeal. *Id.*

⁴ Docket No. 16-1724 (issued April 20, 2017) (the Board affirmed a May 27, 2016 OWCP decision finding that appellant had not met her burden of proof to establish a traumatic injury causally related to the accepted August 9, 2013 employment incident); *Order Dismissing Appeal*, Docket No. 15-1059 (issued July 31, 2015) (by order the Board dismissed appellant's appeal in response to a request by counsel); Docket No. 14-1673 (issued November 14, 2014) (the Board found that appellant had not met her burden of proof to establish a traumatic injury as she had not provided a medical opinion based upon a proper background).

⁵ Appellant testified at an OWCP hearing on February 19, 2014, and explained, "I was going to lift up the tray of DPS, and I bent down, extending my arms out, and I felt something move in by back."

On March 22, 2018 Dr. Filippone opined that appellant's back was injured solely and directly as the result of her accepted August 9, 2013 employment incident. He described the employment incident relating that she bent over to lift a tray of mail from inside a mail cage. Dr. Filippone noted that this activity was similar to lifting a heavy object while it was inside a playpen. He opined that to lift in this way placed an enormous amount of stress on appellant's lower back which was required to move from a bent position to an erect position in order to lift the object over the barrier. Dr. Filippone reported that an intervertebral disc could move out of alignment with the spinal column when impacted by great stress. He noted appellant's report of movement in her lower back at the time of the incident and concluded that a shifting of the intervertebral disc occurred due to the traumatic stress of the incident while lifting at work. Dr. Filippone also opined that an annular tear at L3-4 was incidental to the back stress from lifting at work resulting in a break in the outer layer of the disc when it expanded beyond its normal composition. He noted that when the components of the spine move there is a danger that contact can be made with a nerve. Dr. Filippone reported that a compressed nerve could cause radiculitis and radicular pain with weakness of the extremities. He concluded that the exaggerated bending and lifting caused ligaments in the spine to expand beyond their normal length and that they become compromised resulting in a lumbar sprain. Dr. Filippone reviewed appellant's MRI scans, dated August 13, 2008 and October 22, 2013, and found that the disc herniation at L3-4 was the direct result of her accepted August 9, 2013 employment incident as this herniation was not present on prior studies. He further opined that the August 9, 2013 lifting incident exacerbated appellant's preexisting disc conditions at L4-5 and L5-S1.

By decision dated July 3, 2018, OWCP denied modification of its April 20, 2017 decision. It found that Dr. Filippone's May 10, 2017 report did not contain the necessary medical rationale to establish causal relationship between appellant's diagnosed condition and her accepted employment incident.

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,⁶ 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.⁷ 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.⁸

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

⁶ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

⁸ *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).

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, place, and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.⁹

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence sufficient to establish such causal relationship.¹⁰ Rationalized medical opinion evidence is 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 factors identified by the claimant.¹¹

ANALYSIS

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

In its April 20, 2017 decision, the Board reviewed all evidence submitted prior to OWCP's May 27, 2016 decision. The Board's review of the previously submitted medical evidence of record is *res judicata* absent any further review by OWCP under section 8128(a) and, therefore, the prior evidence need not be addressed again in this decision.¹²

Following the most recent Board decision, appellant requested reconsideration and submitted two reports from her attending physician, Dr. Filippone. In his May 10, 2017 report, Dr. Filippone opined that the forward flexion activities that she did in her work caused her diagnosed back condition. Specifically, he explained that “[appellant’s] work caused herniation and bulging of those lumbosacral discs causing histamine release from the borne out herniations as well as causing [a] physical compression of adjacent nerve roots as the result of repetitive overloading of the lumbar spine and blowing out and bulging of the lumbosacral discs consistent with her history, my physical presentation, and subsequent anatomic MRI [scan] studies and my abnormal electrophysiologic EMG/NCS studies, which I myself performed.”

In addition, on March 22, 2018 Dr. Filippone attributed appellant’s diagnosed back condition directly to her accepted August 9, 2013 employment incident and provided additional rationale. He opined that to lift a heavy object like a tray of mail while it was inside a container placed an enormous amount of stress on her lower back which was required to move from a bent position to an erect position in order to lift the object over the barrier.

⁹ *A.D.*, *supra* note 4; *T.H.*, 59 ECAB 388 (2008).

¹⁰ *T.H.*, Docket No. 18-1736 (issued March 13, 2019).

¹¹ *A.D.*, *supra* note 4; *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹² *N.M.*, Docket No. 18-1244 (issued March 4, 2019); *E.C.*, Docket No. 17-1765 (issued January 24, 2018); *E.L.*, Docket No. 16-0635 (issued November 7, 2016). *See A.T.*, Docket No. 16-0738 (issued May 19, 2016).

The Board finds that the medical rationale provided by Dr. Filippone is consistent with appellant's description of the mechanism of injury about which she testified at the hearing on February 19, 2014. At that hearing appellant explained, "I was going to lift up the tray of DPS, and I bent down, extending my arms out, and I felt something move in by back." The Board further finds that her testimony is consistent with her Form CA-1.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹³

The Board finds that while Dr. Filippone's May 10, 2017 and March 22, 2018 reports are insufficient to meet appellant's burden of proof, however, they raise an uncontroverted inference of causal relationship between her diagnosed condition and the accepted August 9, 2013 employment incident. Further, development of appellant's claim is therefore required.¹⁴

On remand, OWCP shall prepare a statement of accepted facts and refer appellant to an appropriate Board-certified specialist for a second opinion examination and an evaluation regarding whether she sustained a low back condition due to the accepted August 9, 2013 employment incident. Following any necessary further development, it shall issue a *de novo* decision.

CONCLUSION

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

¹³ See *B.B.*, Docket No. 18-1321 (issued April 5, 2019).

¹⁴ See *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: July 26, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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