

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

K.V., Appellant)	
)	
and)	Docket No. 18-0947
)	Issued: March 4, 2019
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Wilmington, DE, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 6, 2018 appellant, through counsel, filed a timely appeal from an October 27, 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.

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 to establish cervical conditions causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

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

On November 15, 2014 appellant, then a 44-year-old machine operator/delivery bar code sorter clerk, filed an occupational disease claim (Form CA-2) alleging that, on November 15, 2014, she first realized that her claimed neck strain was due to her federal employment duties. In a supplemental statement dated November 15, 2014, she related feeling neck pain on October 15, 2014 while processing outgoing mail which included many trays with large envelopes. Appellant related feeling neck pain immediately after throwing heavy trays, as well as after twisting her neck to clear jams in a machine. She stopped work on November 15, 2014.

By decision dated January 22, 2015, OWCP denied appellant's claim. It found that the evidence submitted was insufficient to establish that the claimed medical condition was causally related to her employment duties which included handling flat-sized mail and heavy trays.

In a February 9, 2015 report, Dr. Scott M. Fried, a treating Board-certified osteopath specializing in orthopedic surgery, noted appellant's employment duties, her medical history, and her recitation that on November 15, 2014 she dealt with a lot of jams in a machine which required turning her neck and head and stretching her arm to yank the mail free of the jam. While performing this work appellant felt acute pain and tightness in her right neck, plexus, and upper trapezius and her left side was also symptomatic. An examination of the cervical spine revealed tenderness in the left C2-7 cervical paravertebral musculature, the occipital region, left trapezius muscle, and left superior medial scapular border; left cervical and trapezius muscle spasms; positive Phalen's and Tinel's tests; and synovitis. Dr. Fried diagnosed bilateral median neuropathy, left radial neuropathy, right ulnar neuropathy, left brachial plexopathy/cervical radiculopathy with long thoracic neuritis and grade 2 scapular winging; and carpal tunnel median neuropathy, which he attributed to appellant's work activities. He also diagnosed C4-5, C5-6, and C6-7 disc bulges, pain syndrome, and left side posterior occipital neuralgia with cervical plexus symptoms. Dr. Fried recommended electromyography (EMG)/nerve conduction velocity studies be performed to assist in evaluating appellant's nerve complaints.

On April 13, 2015 appellant, through counsel, requested reconsideration.

In reports dated February 26 and March 2, 2015, Dr. Fried diagnosed: bilateral upper extremity sympathetically mediated pain syndrome; C4-5, C5-6, and C6-7 disc bulges with radiculopathy; posterior occipital neuralgia with cervical plexus symptoms; bilateral median neuropathy; left radial neuropathy; right ulnar neuropathy; left brachial plexopathy/cervical

³ Docket No. 16-0349 (issued November 25, 2016).

radiculopathy with long thoracic neuritis and grade 2 scapular winging; and bilateral carpal tunnel median neuropathy, which were all due to appellant's work activities. In his February 26, 2015 report, he noted physical examination findings of negative Tinel's sign, bilateral negative Phalen's test, limited cervical spine range of movement and spasm. Dr. Fried also noted that appellant had been out of work since her November 14, 2014 work injury, she remained symptomatic and was unable to perform her usual job duties.

By decision dated June 1, 2015, OWCP denied the claim, finding that the evidence then of record was insufficient to establish the factual element of appellant's claim. It noted that she had been asked to provide a statement explaining the basis for her claim and to complete the attached questionnaire. However no statement or completed questionnaire had been submitted. Thus, OWCP found appellant failed to establish the factual part of her claim.

In a letter dated and received by OWCP on July 7, 2015, counsel requested reconsideration.

On August 14, 2015 OWCP received a letter from the employing establishment providing information regarding appellant's duties as a sweeper. The position required a team of two mail processors working to set up and dispatch mail. As a sweeper, appellant's duties required her to load several trays of mail into the feed table. If a tray was too heavy to lift, the sweeper could move smaller amounts of mail until the tray could be lifted safely. It acknowledged that there were 200 stackers and that sweepers were required to work continuously, but denied that frequent turning of the neck was required.

In an August 27, 2015 report, Dr. Fried again noted appellant's extensive diagnoses. He related that her physical examination revealed positive Phalen's test for median nerve distribution dysesthesias, limited cervical range of motion, tenderness over the bilateral elbows and forearms, positive bilateral median nerve Tinel's sign, positive left elbow radial nerve Tinel's sign, and positive Roos and Hunter's tests. Dr. Fried explained that appellant's positive Roos and Hunter's tests were indicative of brachial plexus inflammation and scarring at the thoracic outlet level.

On September 21, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Robert A. Smith, a Board-certified orthopedic surgeon, to determine whether appellant sustained a diagnosed medical condition causally related to the identified employment factors.

In an October 5, 2015 report, Dr. Smith noted appellant's medical history included bilateral carpal tunnel syndrome, right carpal tunnel surgery in 2009, a neck injury in 2009, and an upper extremity and neck injury in January 2015. Appellant's physical examination was negative for cervical spasm, atrophy, deformity or trigger points, and allodynia. Essentially, she had normal upper extremity range of motion, no signs of upper extremity instability or derangement, no scapular winging, negative Phalen's and Tinel's tests, and no evidence of thoracic outlet syndrome. Dr. Smith noted an April 2014 magnetic resonance imaging (MRI) scan showed a small C6-7 disc herniation, but it was not in the record OWCP provided for his review. He also noted that Dr. Fried conducted a number of diagnostic tests including ultrasounds and electrodiagnostic tests, but that these test results were not available for review. There was no mention of record regarding findings from these tests. Dr. Smith opined that there was no clinical or objective evidence of a diagnosis due to appellant's identified employment factors by aggravation, direct cause or precipitation. He reported appellant had a significant preexisting history of carpal tunnel and cervical injuries.

By decision dated October 5, 2015, OWCP granted modification of the prior decision as it found appellant had established the factual portion of her claim. However, it denied the claim as it found that the medical evidence submitted was insufficient to establish causal relationship between the diagnosed medical conditions and the accepted factors of her federal employment.

On December 18, 2015 appellant, through counsel, appealed to the Board. By decision dated November 25, 2016,⁴ the Board set aside the October 5, 2015 decision and remanded the case to OWCP for it to provide the reports of the MRI scans and EMG tests performed by Dr. Fried to Dr. Smith and to obtain from him a supplemental report.

On February 8, 2017 OWCP referred appellant for an updated second opinion evaluation with Dr. Smith to determine whether she sustained a diagnosed medical condition causally related to the accepted employment factors. It informed Dr. Smith that it was forwarding a complete copy of the medical record, including diagnostic tests not previously provided. Dr. Smith was asked to comment as to whether the diagnosed conditions were caused or aggravated by the accepted employment factors set forth in the statement of accepted facts.

In a March 17, 2017 report, Dr. Smith reviewed the additional diagnostic tests provided by OWCP and detailed medical treatment provided, appellant's complaints, results of diagnostic tests, and diagnoses found by Dr. Fried. He observed that appellant had a history of back and neck injuries from 2009. Dr. Smith described the incident occurring on November 15, 2014 when appellant was trying to pull thick parcels of mail out of a machine. He noted that the contemporaneous medical evidence when appellant filed her claim did not mention acute neurologic symptoms or findings. Dr. Smith also explained that when appellant sought treatment with Dr. Fried he offered numerous diagnoses of appellant's condition, however, his diagnostic test findings did not comport with his multiple diagnoses. He noted: appellant's current physical examination revealed no cervical spasm; no atrophy, deformity, or trigger points; no shoulder deformity, scapular winging, or atrophy; full shoulder joint range of motion with no signs of instability, impingement, or crepitation; negative Phalen's signs and mild positive Tinel's signs at the wrist; negative Tinel's signs at the elbows and over the cubital tunnels; and no muscle atrophy or upper extremity dystrophic signs. Dr. Smith noted that appellant had neck pain (cervicalgia) and back pain (lumbago), attributable to the November 15, 2014 employment incident, which had ceased as of December 12, 2014. On April 3, 2017 OWCP forwarded an April 4, 2014 MRI scan for review by Dr. Smith.

In an April 10, 2017 supplemental report, Dr. Smith reported that appellant attributed her neck, extremity, and back pain to her work activities. Based on his March 17, 2017 physical examination, he found no objective findings to support neurological or musculoskeletal injuries or conditions due to her employment duties or her employment duties on November 15, 2014. Dr. Smith attributed the findings from the April 2014 cervical MRI scan to age-related degenerative disease.

⁴ *Id.*

In a letter dated April 17, 2017, OWCP requested clarification of Dr. Smith's March 17, 2017 report and April 10, 2017 addendum report. It noted that under FECA pain is considered a symptom and not a diagnosis.

Dr. Smith, in an April 25, 2017 addendum, explained that he found no confirmation clinically for the diagnoses of neuropathy, cervical radiculopathy, long thoracic neuritis, or brachial plexopathy, and, thus found no causal relationship between these conditions and a November 15, 2014 work incident.

By decision dated May 16, 2017, OWCP denied appellant's claim, finding the medical evidence of record was insufficient to establish causal relationship between the diagnosed medical conditions and the accepted factors of her federal employment. It found the weight of the medical opinion evidence rested with Dr. Smith's opinion.

In a letter dated May 23, 2017 and received May 23, 2017, counsel requested an oral hearing before an OWCP hearing representative, which was held on August 17, 2017.

By decision dated October 27, 2017, an OWCP hearing representative affirmed the May 16, 2017 decision denying the claim. He found that Dr. Fried's diagnoses were based upon appellant's subjective complaints and that he had not provided a rationalized medical opinion causally relating the diagnosed conditions to appellant's employment duties. The hearing representative concluded that Dr. Smith's opinion constituted the weight of the medical evidence.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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.⁶ 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.⁷

OWCP's regulations define the term "occupational disease or illness" as a condition produced by the work environment over a period longer than a single workday or shift."⁸ 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

⁵ *Supra* note 2.

⁶ See *E.B.*, Docket No. 17-0164 (issued June 14, 2018); *Alvin V. Gadd*, 57 ECAB 172 (2005); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁷ See *P.S.*, Docket No. 17-0939 (issued June 15, 2018); *Ellen L. Noble*, 55 ECAB 530 (2004); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁸ 20 C.F.R. § 10.5(ee).

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 employment factors identified by the claimant.

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁹ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.¹⁰ Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).¹¹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish cervical conditions causally related to the accepted factors of her federal employment.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's October 5, 2015 decision because the Board considered that evidence in its November 25, 2016 decision and found that it was insufficient to establish her claim. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹²

Following the Board's remand, OWCP provided Dr. Smith with additional medical records and scheduled a follow up evaluation. In his March 17, 2017 supplemental report, Dr. Smith explained that while appellant had a history of back and neck injuries from 2009, contemporaneous medical evidence at the time appellant filed her occupational disease claim did not mention acute neurologic symptoms or findings, rather only subjective findings and pain complaints were recorded. He explained that his own physical examination of appellant found no objective findings supporting neurological or musculoskeletal injuries or conditions due to appellant's employment duties. Dr. Smith attributed the findings from the April 2014 cervical MRI scan to age-related degenerative disease. He also reviewed Dr. Fried's reports and noted that his multitude of diagnoses were not corroborated by objective findings.

The Board has reviewed the opinion of Dr. Smith and finds that it has reliability, probative value, and a convincing quality with respect to its conclusions regarding the issue presented on appeal.¹³ Dr. Smith's opinion is based on a proper factual and medical history and he thoroughly

⁹ *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

¹⁰ *J.J.*, Docket No. 09-0027 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹¹ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *id.*

¹² *See B.R.*, Docket No. 17-0294 (issued May 11, 2018).

¹³ *See R.W.*, Docket No. 12-0375 (issued October 28, 2013).

reviewed the factual and medical history by accurately summarizing the relevant medical evidence.¹⁴ Thus, his opinion is entitled to the weight of the medical evidence and establishes that appellant's cervical condition was not caused or aggravated by the accepted employment duties.¹⁵

Appellant submitted a series of reports from Dr. Fried in which he diagnosed: bilateral upper extremity sympathetically mediated pain syndrome; C4-5, C5-6, and C6-7 disc bulges with radiculopathy; posterior occipital neuralgia with cervical plexus symptoms; bilateral median neuropathy; left radial neuropathy; right ulnar neuropathy; left brachial plexopathy/cervical radiculopathy with long thoracic neuritis and grade 2 scapular winging; and bilateral carpal tunnel median neuropathy. Dr. Fried has not explained how these diagnoses correlated with objective findings. Dr. Fried noted appellant's description of her work duties and the November 15, 2014 incident, which he indicated required stretching her arm to yank mail from jams and turning her neck and head a lot while working with machine jams. He attributed the diagnosed conditions to her work activities and opined that she was disabled and unable to perform her usual job duties. Dr. Fried did not provide a rationalized medical explanation as to how appellant's daily employment duties physiologically caused her numerous diagnosed conditions. While he provided an affirmative opinion on causal relationship, his conclusory opinion, is insufficient to establish causal relationship.¹⁶ The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/disability was related to employment factors.¹⁷ Dr. Fried failed to provide an explanation pertaining to the mechanism of injury to establish that appellant's cervical conditions were work related. Without explaining how physiologically the movements involved in appellant's employment duties caused or contributed to the diagnosed conditions Dr. Fried's opinion on causal relationship is equivocal in nature and of limited probative value.¹⁸

The mere fact that work activities may produce symptoms revelatory of an underlying condition does not raise an inference of an employment relation.¹⁹ Such a relationship must be shown by rationalized medical evidence of causal relation based upon a specific and accurate history of employment conditions which are alleged to have caused or exacerbated a disabling condition.²⁰ As appellant has not submitted such rationalized medical evidence in this case, the Board finds that she has not met her burden of proof to establish her occupational disease claim.

¹⁴ See *Melvina Jackson*, 38 ECAB 443 (1987).

¹⁵ See *R.T.*, Docket No 17-2019 (issued August 24, 2018).

¹⁶ See *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁷ See *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

¹⁸ See *M.E.*, Docket No. 18-1135 (issued January 4, 2019).

¹⁹ See *M.B.*, Docket No. 17-1999 (issued November 13, 2018); *P.D.*, Docket No. 17-1885 (issued September 17, 2018).

²⁰ *Id.*

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 cervical conditions causally related to the accepted factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the October 27, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 4, 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