

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

_____)	
T.E., Appellant)	
)	
and)	Docket No. 18-1595
)	Issued: March 13, 2019
U.S. POSTAL SERVICE, POST OFFICE, NEW)	
YORK INTERNATIONAL SERVICE CENTER)	
Jamaica, NY, Employer)	
_____)	

Appearances:
Daniel M. Goodkin, 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 August 17, 2018 appellant, through counsel, filed a timely appeal from a July 10, 2018 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 of proof to establish that the acceptance of her claim should be expanded to include the additional conditions of post-traumatic headaches, dizziness, post-traumatic vestibulopathy, postconcussion syndrome, and cervical radiculopathy casually related to the accepted December 5, 2014 employment injury.

FACTUAL HISTORY

On December 5, 2014 appellant, then a 52-year-old postal police officer, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she was injured in a motor vehicle accident, while in the performance of duty, when a livery cab struck her postal vehicle. She alleged that she struck her left temple on the window frame of her vehicle.

Appellant provided a note from Dr. Lee Berk, an internist, dated December 5, 2014 diagnosing thoracic strain and concussion with no loss of consciousness. On December 5, 2014 she underwent a computerized tomography (CT) scan of her head which demonstrated no evidence of acute intracranial hemorrhage or displaced fracture.

In a December 15, 2014 development letter, OWCP requested additional factual and medical evidence in support of appellant's traumatic injury claim. It afforded her 30 days for a response.

On December 20 and 27, 2014 Dr. Afshan Khan, a Board-certified neurologist, diagnosed vertigo, postconcussion syndrome, headaches, and myofascial pain syndrome due to the December 5, 2014 motor vehicle accident. In a January 12, 2015 note, he also diagnosed post-traumatic vestibulopathy, cervical radiculopathy, and cervical myofascial pain syndrome.

By decision dated January 21, 2015, OWCP denied appellant's traumatic injury claim, finding that she had not established that the December 5, 2014 employment incident occurred as alleged. On February 10, 2015 appellant requested a review of the written record from an OWCP hearing representative.

On January 28, 2015 appellant provided a narrative description of the events of December 5, 2014. She noted that, along with a fellow police officer, she was returning to the employing establishment after responding to a burglar alarm. Appellant's fellow officer was driving the vehicle and she was in the front passenger seat. Another vehicle struck her vehicle causing it to spin out of control and hit a metal divider. Appellant's right temple hit the door panel molding between the passenger side window and the windshield. She did not lose consciousness, but experienced swelling and severe pain in her right temple. Appellant was transported to the hospital by ambulance. She also provided a copy of the accident report and an incident report.

On December 5, 2014 Dr. Zong W. Chen, a physician Board-certified in emergency medicine, examined appellant following the motor vehicle accident and diagnosed head contusion following right-side temple trauma without loss of consciousness.

On January 17, 2015 appellant underwent a cervical CT scan which demonstrated loss of lordosis, degenerative changes, and disc herniations at C2-3 and C4-5. She also underwent a brain magnetic resonance imaging (MRI) scan which demonstrated lacunar infarct or ischemic changes.

In a note dated February 9, 2015, Dr. Khan reported that appellant sustained injuries as a restrained front seat passenger. He described the motor vehicle accident and noted that she struck her right temple on the window frame as her body was jerked sideways. Dr. Khan diagnosed post-traumatic headaches and dizziness, post-traumatic vestibulopathy, post-concussion syndrome, cervical radiculopathy, and lacunar infarct.

By decision dated October 13, 2015, OWCP's hearing representative vacated OWCP's January 21, 2015 decision and accepted appellant's claim for head contusion. She also remanded the case for further development of the additional conditions diagnosed by Dr. Khan including referral of the medical records to an OWCP district medical adviser (DMA). On November 16, 2015 OWCP informed appellant that her traumatic injury claim had been accepted for head contusion.

On January 15, 2016 Dr. Jon Glass, a Board-certified neurologist and DMA, reviewed a statement of accepted facts (SOAF), the medical evidence, and OWCP's questions regarding appellant's additional diagnoses. He opined that none of the diagnoses provided by Dr. Khan were employment related as there was no medical evidence supporting these conditions after February 9, 2015 or as of November 16, 2015 when OWCP accepted her traumatic injury claim. Dr. Glass indicated that appellant's symptoms from a concussion should have resolved within six to eight weeks and cervical spine trauma should have resolved within three-to-four months.

By decision dated March 15, 2016, OWCP denied expansion of the acceptance of appellant's traumatic injury claim to encompass conditions other than head contusion.

On March 15, 2017 appellant, through counsel, requested reconsideration of the March 15, 2016 OWCP decision. She disagreed with the DMA's findings noting that he only addressed whether her diagnosed conditions should have resolved and not whether the conditions were causally related to the December 5, 2014 employment injury. Counsel contended that the DMA's reasoning was faulty and based solely on the finding that as there was no medical evidence after a certain date, appellant must not have ever had the additional conditions. He contended that a second opinion referral was appropriate. Appellant also provided additional medical evidence.

In his March 15, 2017 report, Dr. Khan opined that post-concussion syndrome did not always resolve within six-to-eight weeks. He noted that the medical literature supported that chronic postconcussion syndromes were possible. Dr. Khan found that appellant's symptoms had not resolved by February 9, 2015. Appellant continued to experience headaches through June 30, 2015, but was allowed to carry a firearm. Dr. Khan had released her to return to work on August 5, 2015.

By decision dated April 12, 2017, OWCP denied modification of the March 15, 2016 OWCP decision.

In a report dated September 1, 2017, Dr. Morton Finkel, a Board-certified neurologist, noted appellant's history of injury on December 5, 2014 in a motor vehicle accident while at work.

He reported that the right side of her head hit the vehicle door. Dr. Finkel noted that appellant continued to experience headaches and that her MRI scan demonstrated a basal ganglia infarct. He diagnosed cerebral contusion.

On August 10 and September 12, 2017 Dr. Isaiah Pinckney, II, a family practitioner, examined appellant due to headache and neck pain. He noted her history of a motor vehicle accident during which she struck the right side of her head. Dr. Pinckney reviewed appellant's cervical CT scan and diagnosed bulging cervical disc, contusion of the head, and postconcussion syndrome. He opined that these conditions were causally related to her work accident. Dr. Pinckney concluded that appellant's accident was the competent producing cause of her injuries and the need for further treatment.

In a February 16, 2018 note, Dr. Finkel diagnosed cerebral contusion.

On April 12 2018 appellant, through counsel, requested reconsideration of OWCP's April 12, 2017 decision. She provided reports dated September 10, 2017 and April 20, 2018 from Dr. Finkel. Dr. Finkel described appellant's December 5, 2014 motor vehicle accident which resulted in her striking her head. He reviewed Dr. Kahn's reports and found that she had persistent headaches and dizziness for four months after her accepted injury. Dr. Finkel opined that the accident of December 5, 2014 was the competent producing cause of appellant's cerebral contusion and cerebral concussion, vertigo due to vestibulopathy, and cervical radiculopathy. He found that her conditions had not resolved by February 9, 2015. Dr. Finkel disagreed with the DMA that a concussion typically resolves within six-to-eight weeks and found that appellant had experienced headache and dizziness for several months.

By decision dated July 10, 2018, OWCP denied modification of the March 15, 2016 decision, finding that appellant had not submitted sufficient medical evidence to establish causal relationship between her December 5, 2014 employment injury and her diagnosed conditions of post-traumatic headaches, dizziness, post-traumatic vestibulopathy, post-concussion syndrome, and cervical radiculopathy.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including the fact that he or she 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.⁴ 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.⁵

³ *Id.*

⁴ *See F.H.*, Docket No. 18-1238 (issued January 18, 2019); *Tracey P. Spillane*, 54 ECAB 608 (2003).

⁵ *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).

When an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁶ 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 based on a complete factual and medical background, supporting such a causal relationship.⁷ The opinion of the physician must be based on a complete factual and medical background of the claimant, 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.⁸ 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.⁹

While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.¹⁰

ANALYSIS

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

On October 13, 2015 OWCP's hearing representative accepted appellant's claim for head contusion. She also remanded the case for OWCP to undertake development of the medical evidence regarding the additional conditions alleged by appellant as employment related. The hearing representative directed OWCP to refer the case record to a DMA for review. OWCP referred the medical evidence, a SOAF, and a list of questions to Dr. Glass, a Board-certified neurologist and DMA. On January 15, 2016 Dr. Glass opined that none of the diagnoses provided by Dr. Khan were employment related as there was no medical evidence supporting these conditions after February 9, 2015 or as of November 16, 2015. He indicated that appellant's symptoms from a concussion should have resolved within six-to-eight weeks and cervical spine trauma should have resolved within three-to-four months. Dr. Glass did not provide a coherent basis for his opinion that the additional claimed conditions were not causally related to her accepted employment injury. He indicates both that the diagnosed conditions were causally related to appellant's accepted employment injury as she was initially diagnosed with head and cervical injuries, but also that the additional diagnosed conditions were not causally related to her December 5, 2014 employment injury because these conditions had largely resolved by the time OWCP accepted her claim. This opinion did not clearly address whether the motor vehicle accident and resulting head injury had resulted in additional medical conditions such as post-

⁶ See *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁷ See *S.A.*, Docket No. 18-0399 (issued October 16, 2018).

⁸ See *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

⁹ *F.H.*, *supra* note 4.

¹⁰ *J.S.*, Docket No. 16-0777 (issued January 3, 2017); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

traumatic headaches, dizziness, post-traumatic vestibulopathy, post-concussion syndrome, and cervical radiculopathy at the time of or following the December 5, 2014 employment injury.

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹¹ While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.¹² When OWCP undertakes to develop the evidence it has an obligation to seek clarification from its physician upon receiving a report that did not adequately address the issues that OWCP sought to develop.¹³ As such, it should obtain a clear and rationalized supplemental opinion from Dr. Glass with regard to appellant's request for expansion of the acceptance of her claim to include additional employment-related conditions. Thus, the Board will remand the case to OWCP to obtain a supplemental report from the DMA, providing a rationalized medical opinion as to whether her additional conditions are causally related to the employment injury regardless of whether they are ongoing conditions or whether they have resolved. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision on whether appellant sustained additional conditions causally related to the December 5, 2014 employment injury.

CONCLUSION

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

¹¹ *J.S., id.; Vanessa Young*, 56 ECAB 575 (2004).

¹² *Supra* note 10.

¹³ *S.C.*, Docket No. 17-1587 (issued January 2, 2019); *E.B.*, Docket No. 17-0795 (issued January 18, 2018).

ORDER

IT IS HEREBY ORDERED THAT the July 10, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: March 13, 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