

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

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<b>T.H., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 18-1736</b>
	)	<b>Issued: March 13, 2019</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Channahon, IL, Employer</b>	)	
_____	)	

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*  
*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 September 17, 2018 appellant, through counsel, filed a timely appeal from an August 10, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish a back condition causally related to the accepted September 21, 2017 employment incident.

## FACTUAL HISTORY

On September 25, 2017 appellant, then a 41-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 21, 2017 she strained her lower back while on her route at work. She stopped work on September 26, 2017 and has not returned.

OWCP subsequently received a test form report dated September 26, 2017 from Dr. Rebecca C. Kuo, an attending Board-certified orthopedic surgeon, who provided appellant's diagnoses of other intervertebral disc displacement, lumbar region, low back pain, and radiculopathy, lumbar region. In a referral slip dated September 26, 2017, Dr. Kuo ordered physical therapy, three times a week for four weeks and again noted her diagnosis of intervertebral disc displacement, lumbar region.

In an October 11, 2017 statement, appellant described the September 21, 2017 incident when, around 2:00 p.m., she finished her route, which involved delivering mail and a great deal of packages, including a very heavy package. She tried to exit her mail truck, but was unable to do so and experienced excruciating pain in her lower back that went down to her leg.

Appellant submitted a lumbar spine magnetic resonance imaging (MRI) scan report dated September 25, 2017 from Dr. Biren M. Patel, a Board-certified diagnostic radiologist. Dr. Patel provided an impression of left posterolateral annular tears at L2-3 and L3-4 with small foraminal disc protrusions causing mild left foraminal stenosis.

In a September 26, 2017 letter, Dr. Kuo advised that appellant had been under her care and that appellant was unable to return to work until released. In an attending physician's report (Form CA-20) dated September 28, 2017 and a duty status report (Form CA-17) dated September 28, 2017, she noted the date of injury as September 20, 2017<sup>3</sup> and September 21, 2017, respectively. In the Form CA-20 report and Part B of an authorization for examination and/or treatment (Form CA-16), an attending physician's report dated September 28, 2017, Dr. Kuo responded "not applicable" when asked what history of the employment injury or disease did the employee give to her. In the Form CA-17 report, she related a history of injury that appellant was picking up boxes/packages which affected her lumbar region. In these reports, Dr. Kuo reiterated her diagnosis of intervertebral disc displacement, lumbar region and advised that appellant was totally disabled from work from September 21 to approximately December 14, 2017. In the Form CA-20 report, she did not respond to the question of whether the diagnosed condition was caused or aggravated by the described employment activity. In the Form CA-17 report, Dr. Kuo advised that the diagnosed condition was due to injury. In the Form CA-16 attending physician's report, she

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<sup>3</sup> Dr. Kuo inadvertently listed the date of injury as September 20, 2017 rather than September 21, 2017 in her September 28, 2017 Form CA-17 report and later submitted reports discussed *infra*, as she accurately described the incident, which was subsequently accepted as work related by OWCP.

checked a box marked “yes” indicating that appellant’s diagnosis of intervertebral disc displacement, lumbar region was caused or aggravated by the described employment activity.

OWCP, by development letter dated October 16, 2017, informed appellant that, initially, her claim was administratively handled to allow payment of a limited amount of medical expenses as it appeared to be for a minor injury that resulted in minimal or no lost time from work and continuation of pay was not controverted by the employing establishment. However, appellant’s claim was now being reopened for adjudication because she had not returned to work in a full-time capacity. OWCP requested that she respond to a questionnaire describing the immediate effects of her injury, history of any other injury, and medical treatment received, and the weight of the package involved in the employment incident. It also requested that appellant submit a medical report from her attending physician which included a diagnosis, history of the injury, examination findings, and a rationalized opinion explaining how the employment incident caused or aggravated her medical condition.

OWCP received additional medical evidence from Dr. Kuo. Dr. Kuo, in a partial report dated November 2, 2017, indicated that she examined appellant on October 12, 2017 and the examination was grossly unchanged from the last time. She advised that appellant had an annular tear and slight herniation at L3-4 for which she recommended an injection. In a referral slip dated November 2, 2017, Dr. Kuo ordered physical therapy, three times a week for four weeks and again noted her diagnosis of other intervertebral disc displacement, lumbar region. Subsequently, physical therapy notes were received.

OWCP also received a progress note dated October 31, 2017 from Trisha E. Durham, a certified family nurse practitioner, in which she assessed annular tear of the lumbar disc, lumbar disc herniation with radiculopathy, lumbar foraminal stenosis, low back pain, and myofascial pain.

On November 9, 2017 appellant responded to OWCP’s development questionnaire. She related that she was sore between the date of injury and the date she first received medical attention. Appellant’s condition progressively worsened and she sought treatment in the emergency room. She indicated that the package weighed approximately 68 pounds.

Appellant submitted complete reports dated November 2, 2017, completed by Shara DuPree<sup>4</sup> and Dr. Kuo, which indicated that appellant was examined on September 26 and October 12, 2017 for follow-up of her severe low back pain which began on September 20, 2017. She worked as a mail carrier and she had pain after lifting many heavy boxes. Findings on physical examination were reported. A lumbar spine MRI scan demonstrated a left neural foraminal annular tear and protrusion causing mild compression in the left neural foramen. The MRI scan also revealed mild bilateral facet arthropathy at L4-5 with some mild disc bulge causing mild neural foraminal stenosis. Dr. Kuo assessed left leg radiculopathy, likely L3 radiculopathy secondary to the foraminal herniation/annular tear at L3-4. She opined that, given the fact that the remaining disc actually looked fairly healthy, the annular tear was acute in nature and more likely than not the etiology of appellant’s symptoms. Dr. Kuo also opined that appellant’s symptoms were more likely than not related to her work-related activities. She recommended a left L3-4 epidural steroid injection and advised that, if everything failed, appellant may be a candidate for a left L3-4

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<sup>4</sup> The Board notes that Ms. Dupree’s professional qualifications are not contained in the case record.

discectomy. Dr. Kuo advised that appellant would remain off work. In a referral slip dated November 2, 2017, she again ordered physical therapy, three times a week for four weeks and diagnosed other intervertebral disc displacement, lumbar region.

On November 24, 2017 appellant filed a claim for compensation (Form CA-7) for leave used for the period November 6 to 24, 2017.

In support of her claim, appellant submitted a Form CA-17 report dated November 21, 2017 signed by Dr. Kuo who opined that appellant's diagnosed condition of intervertebral disc displacement, lumbar region was due to her September 21, 2017 injury and that she had been advised to not return to work.

By decision dated November 30, 2017, OWCP denied appellant's traumatic injury claim and claim for compensation, finding that the medical evidence of record was insufficient to establish that her diagnosed medical condition was causally related to the accepted September 21, 2017 employment incident. It determined that Dr. Kuo's opinion on causal relationship was equivocal.

OWCP thereafter received a November 6, 2017 progress note from Dr. Farooq A. Khan, Board-certified in anesthesiology and pain medicine. Dr. Khan examined appellant and diagnosed annular tear of the lumbar disc, lumbar disc herniation with radiculopathy, lumbar foraminal stenosis, low back pain, and myofascial pain. He performed a lumbar transforaminal steroid epidural injection.

On December 15, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative from the November 30, 2017 decision.

OWCP subsequently received an unsigned Form CA-17 report dated December 12, 2017. The report noted clinical findings of intervertebral disc degeneration and that the diagnosed condition was due to a September 20, 2017 injury. The report also noted that appellant had been advised to not return to work.

A Form CA-17 report dated January 2, 2018 with an illegible signature noted a history of injury that on September 20, 2017 appellant lifted boxes, twisted, and felt pain. The report provided clinical findings of intervertebral disc degeneration and indicated that the diagnosed condition was due to injury.

In an undated Form CA-17 report, Dr. Kuo noted that appellant had been examined on February 15, 2018. She reiterated her opinion that appellant's condition of intervertebral disc displacement was due to a September 21, 2017 injury. Dr. Kuo also reiterated that she had been advised to not return to work. In a February 15, 2018 report, she noted appellant's history of injury and physical examination and MRI scan test findings during her initial evaluation on September 26, 2017. Dr. Kuo referenced her prior opinion that appellant's left neural foraminal annular tear and protrusion causing mild compression of the left neural foramen was acute in nature and more likely than not the etiology of her symptoms. She maintained that given her symptoms started at work on September 20, 2017 she believed that her symptoms which returned at work were more likely than not the etiology of her symptoms. Given the fact that appellant had not sought assistance or care for back pain or had a history of back pain, Dr. Kuo did not believe that

she had a significant preexisting condition. She related that the only condition noted on the MRI scan was bilateral facet arthropathy at L4-5, which was not the level she questioned. Dr. Kuo further related that, even if the annular tear and herniation or disc bulge at L3-4 were preexisting, they would have been definitely aggravated by bending, twisting, and lifting at work. She indicated that appellant was being scheduled for surgery at L2-3 and L3-4, left-sided hemi laminectomies and partial facetectomy as she was not doing well despite attempted epidural steroid injections and physical therapy. Dr. Kuo concluded that it was more likely than not that the work-related injury on September 20, 2017 caused the MRI scan findings and appellant's symptoms leading to the need for surgery.

Dr. Khan, in a December 4, 2017 progress note, again reiterated his diagnoses of annular tear of the lumbar disc, lumbar disc herniation with radiculopathy, lumbar foraminal stenosis, low back pain, and myofascial pain. He performed another lumbar transforaminal steroid epidural injection.

In a February 28, 2018 operative report, Dr. Kuo performed lumbar spine surgery. By decision dated August 10, 2018, an OWCP hearing representative affirmed the November 30, 2017 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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, place, and in the manner alleged.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.<sup>8</sup>

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<sup>5</sup> *Supra* note 2.

<sup>6</sup> C.S., Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>7</sup> *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>8</sup> *John J. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

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.<sup>9</sup> 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.<sup>10</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a back condition causally related to the accepted September 21, 2017 employment incident.

Appellant submitted a series of reports from her attending physician, Dr. Kuo, in support of her claim.<sup>11</sup> In Form CA-17 reports dated September 28 and November 21, 2017 and an undated Form CA-17 report, Dr. Kuo diagnosed intervertebral disc displacement, lumbar region, and advised that the diagnosed condition was due to an injury on September 21, 2017. She also advised that appellant could not return to work. However, Dr. Kuo did not offer medical rationale explaining how the accepted employment incident caused the diagnosed condition and resultant disability.<sup>12</sup> She did not explain how the mechanism of injury would have physiologically caused the diagnosed condition.<sup>13</sup> Thus, Dr. Kuo's reports are insufficient to establish appellant's burden of proof.

Dr. Kuo, in a Form CA-16 attending physician's report dated September 28, 2017, again diagnosed intervertebral disc displacement, lumbar region. She checked a box marked "yes" indicating that the diagnosed condition was caused or aggravated by a described employment activity. Dr. Kuo removed appellant from work from September 21 through approximately December 14, 2017. The Board has held that a report that addresses causal relationship with a checkmark, without medical rationale explaining how the employment incident caused or aggravated the diagnosed condition, is of diminished probative value and insufficient to establish

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<sup>9</sup> *K.V.*, Docket No. 18-0723 (issued November 9, 2018).

<sup>10</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *supra* note 7.

<sup>11</sup> The Board notes that it appears that the employing establishment issued appellant a signed authorization for examination and/or treatment (Form CA-16) authorizing treatment with Dr. Kuo. The Board has held that where an employing establishment properly executes a CA-16 form, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, it creates a contractual obligation which does not involve the employee directly to pay the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. §§ 10.300, 10.304; *R.W.*, Docket No. 18-0894 (issued December 4, 2018).

<sup>12</sup> *See C.F.*, Docket No. 18-1156 (issued January 22, 2019); *T.M.*, Docket No. 08-0975 (issued February 6, 2009) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

<sup>13</sup> *See C.F.*, *id.*; *R.R.*, Docket No. 16-1901 (issued April 17, 2017).

causal relationship.<sup>14</sup> Dr. Kuo failed to describe the employment activity that caused or aggravated the diagnosed condition as she responded “not applicable” when asked what history of the employment injury or disease did appellant give to her. Moreover, she also failed to offer medical rationale explaining how appellant’s diagnosed lumbar condition and disability status were caused or aggravated by delivering mail and heavy packages on September 21, 2017. Thus, the Board finds that Dr. Kuo’s report is insufficient to establish appellant’s burden of proof.<sup>15</sup>

Dr. Kuo’s November 2, 2017 and February 15, 2018 reports diagnosed left leg radiculopathy and L3 radiculopathy secondary to a foraminal herniation/annular tear at L3-4. She opined that it was more likely than not that the September 21, 2017 employment incident, which involved bending, twisting, and lifting, caused the diagnosed conditions and the need to perform left-sided hemi laminectomies and a partial facetectomy at L2-3 and L3-4. The Board has held that medical opinions that are speculative or equivocal in character are of diminished probative value.<sup>16</sup> Further, while Dr. Kuo noted that appellant had no back pain or preexisting back condition prior to the accepted work injury, an opinion that a condition is causally related to an incident because the employee was asymptomatic before the injury is insufficient, without adequate rationale, to establish causal relationship.<sup>17</sup> For these reasons, the Board finds that her report is insufficient to meet appellant’s burden of proof.

Dr. Kuo’s remaining reports are also insufficient to meet appellant’s burden of proof. Within these additional reports, she again diagnosed lumbar conditions and addressed appellant’s medical treatment. However, Dr. Kuo failed to provide an opinion concluding that the accepted September 21, 2017 employment incident caused or aggravated appellant’s diagnosed back conditions and medical treatment. Thus, these reports are of no probative value on the issue of causal relationship.<sup>18</sup>

Dr. Patel’s September 25, 2017 diagnostic test report addressed appellant’s lumbar conditions, but failed to offer a medical opinion addressing whether the diagnosed conditions were caused or aggravated by the September 21, 2017 employment incident. The Board has held that reports of diagnostic tests lack probative value as they do not provide an opinion on causal relationship between appellant’s employment incident and a diagnosed condition.<sup>19</sup>

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<sup>14</sup> See *S.G.*, Docket No. 18-0209 (issued October 4, 2018); *R.A.*, Docket No. 17-1472 (issued December 6, 2017); *Sedi L. Graham*, 57 ECAB 494 (2006); *Deborah L. Beatty*, 54 ECAB 340 (2003).

<sup>15</sup> *M.C.*, Docket No. 18-0361 (issued August 15, 2018).

<sup>16</sup> See *D.R.*, Docket No. 17-0971 (issued October 5, 2017); *D.D.*, 57 ECAB 734, 738 (2006); *Kathy A. Kelley*, 55 ECAB 206 (2004).

<sup>17</sup> See *F.H.*, Docket No. 18-1238 (issued January 18, 2019); *J.R.*, Docket No. 18-0206 (issued October 15, 2018).

<sup>18</sup> See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018) (medical evidence which does not offer an opinion regarding the cause of an employee’s condition is of no probative value on the issue of causal relationship).

<sup>19</sup> See *C.F.*, *supra* note 13; *S.G.*, Docket No. 17-1054 (issued September 14, 2017).

Similarly, Dr. Khan's November 6, 2017 progress note also fails to establish appellant's claim as he diagnosed annular tear of the lumbar disc, lumbar disc herniation with radiculopathy, lumbar foraminal stenosis, low back pain, and myofascial pain, but did not opine as to the causal relationship of the diagnosed conditions and the September 21, 2017 employment incident.<sup>20</sup>

The October 31, 2017 progress note signed by Ms. Durham, a certified family nurse practitioner, and November 7 and 10, 2017 daily notes and progress note signed by appellant's physical therapists have no probative medical value. Neither a nurse practitioner nor a physical therapist is considered a "physician" as defined under FECA.<sup>21</sup> As such, this evidence is also insufficient to meet appellant's burden of proof.

The record contains an unsigned Form CA-17 report dated December 12, 2017 and Form CA-17 report dated January 2, 2018 with an illegible signature diagnosed intervertebral disc degeneration due to a September 20, 2017 injury. The Board has held that unsigned reports and reports that bear illegible signatures cannot be considered probative medical evidence because they lack proper identification.<sup>22</sup> Thus, these reports are of no probative value.

The fact that a condition manifests itself during a period of employment is insufficient to establish causal relationship.<sup>23</sup> Temporal relationship alone will not suffice. Entitlement to FECA benefits may not be based on surmise, conjecture, speculation, or on the employee's own belief of a causal relationship.<sup>24</sup> The Board finds that the record lacks rationalized medical evidence establishing causal relationship between the September 21, 2017 employment incident and her diagnosed lumbar conditions.<sup>25</sup> Thus, appellant has not met her burden of proof.<sup>26</sup>

On appeal, counsel contends that OWCP's August 10, 2018 decision is contrary to fact and law. For the foregoing reasons, the Board finds that the medical evidence of record is insufficient to establish that appellant sustained a back condition causally related to the accepted September 21, 2017 employment incident.

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<sup>20</sup> See *supra* note 18.

<sup>21</sup> 5 U.S.C. § 8101(2) provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. See 5 U.S.C. § 8102(2); *M.M.*, Docket No. 16-1617 (issued January 24, 2017); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants and physical therapists are not competent to render a medical opinion under FECA). See also *Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

<sup>22</sup> See *D.S.*, Docket No. 18-0280 (issued June 12, 2018); *R.M.*, 59 ECAB 690 (2008); *D.D.*, 57 ECAB 734 (2006); *Richard J. Charot*, 43 ECAB 357 (1991).

<sup>23</sup> *Daniel O. Vasquez*, 57 ECAB 559 (2006).

<sup>24</sup> *D.D.*, *supra* note 22.

<sup>25</sup> See *J.S.*, Docket No. 17-0507 (issued August 11, 2017).

<sup>26</sup> *K.L.*, Docket No. 18-1029 (issued January 9, 2019).

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 condition causally related to the accepted September 21, 2017 employment incident.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

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