United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 17-1359**
	)	**Issued: May 3, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Toms River, NJ, Employer	)	

Appearances:
Michael D. Overman, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 9, 2017 appellant, through counsel, filed a timely appeal from a March 9, 2017 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.[3]

[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.*

[3] The Board notes that, following the March 9, 2017 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 additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish that her cervical and right shoulder conditions are causally related to the accepted May 2, 2016 employment incident.

FACTUAL HISTORY

On May 3, 2016 appellant, then a 55-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 2, 2016 she injured her right shoulder while in the performance of duty. She stated that she went to lift a tray in her mail vehicle, she felt a sharp pain in her right shoulder. Afterwards, appellant was unable to move her right arm. She stopped work on May 3, 2016. The employing establishment controverted continuation of pay, noting "Pending medical findings [-]- preexisting??" No additional documentation accompanied appellant's May 3, 2016 Form CA-1.

In a May 11, 2016 development letter, OWCP advised appellant that it had not received any medical evidence in support of her FECA claim. It requested that she submit a narrative medical report from her physician, which included a diagnosis and an opinion on causal relationship that explained how the reported May 2, 2016 employment incident either caused or aggravated her medical condition. OWCP also asked appellant to respond to the employing establishment's allegation that her condition may be preexisting. It afforded her 30 days to submit the requested information.

OWCP subsequently received May 3, 2016 treatment records from an emergency department. The records revealed that appellant complained of right shoulder pain, which began the previous day "while moving trays on the mail truck." She developed pain in her right shoulder and felt a "pop." Appellant also reported that she went home that evening and applied a heating pad, without relief. A May 3, 2016 right shoulder x-ray revealed no fracture or dislocation, and no acute pathology. A nurse practitioner diagnosed work-related acute right shoulder pain and right shoulder repetitive strain injury. She excused appellant from work for two days.

In a May 17, 2016 report, Dr. David B. Dickerson, a Board-certified orthopedic surgeon, noted that on May 2, 2016 appellant was lifting trays of mail when she felt sudden right shoulder pain. He advised that she went to the emergency room the next day and had right shoulder x-rays, which were normal. Dr. Dickerson obtained x-rays of the cervical spine, which revealed C5 retrolisthesis and moderate narrowing at C5-6, with anterior degenerative endplate changes. He examined appellant and diagnosed cervical spondylosis with myelopathy and right shoulder pain. Dr. Dickerson recommended magnetic resonance imaging (MRI) scans of the right upper extremity and cervical spine, and advised that appellant not work pending the MRI scan results.

In a May 19, 2016 attending physician's report (Form CA-20), a nurse practitioner diagnosed rotator cuff injury and cervical radiculopathy, with a reported May 2, 2016 date of injury. The nurse practitioner also completed a duty status report (Form CA-17) excusing appellant from all work.

By decision dated June 14, 2016, OWCP accepted that the May 2, 2016 incident occurred as alleged and that a medical condition had been diagnosed. It also found that appellant was in the

performance of duty at the time of the May 2, 2016 incident. However, OWCP denied her traumatic injury claim, finding that the evidence of record was insufficient to establish causal relationship between the diagnosed conditions and the accepted May 2, 2016 employment incident

Appellant, through counsel, timely requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was conducted on October 13, 2016.

Evidence received since OWCP's June 14, 2016 decision included June 3, 2016 cervical and right upper extremity MRI scans. The right shoulder MRI scan revealed rotator cuff tendinopathy without evidence of tear and severe edema of the acromioclavicular (AC) joint, with associated small effusion. Appellant's cervical MRI scan showed degenerative disc disease, most pronounced at C5-6. There was also evidence of facet joint arthrosis, most pronounced at left C4-5 facet.

In a June 28, 2016 follow-up report, Dr. Dickerson diagnosed cervical spondylosis with myelopathy and right shoulder bursitis. He noted that the June 3, 2016 right shoulder MRI scan showed bursitis "plausibly related to lifting trays on date of incident exacerbating underlying cervical stenosis." Dr. Dickerson stated "[w]ith a reasonable degree of medical certainty, there is a causal relationship between [appellant] lifting the heavy trays with her right arm and the exacerbation of [her] underlying cervical radiculopathy[,] as well as causing the bursitis of the right shoulder." He administered right shoulder steroid injection on July 7, 2016.

On July 11, 2016 Dr. Bruce R. Rosenblum, a Board-certified neurosurgeon, initially evaluated appellant for complaints of neck pain radiating to her right shoulder, arm, elbow, and hand. Appellant also reported hand numbness, bilaterally. Dr. Rosenblum noted a May 2, 2016 history of a work-related injury when she was carrying heavy trays of mail and felt a sharp pain in her right shoulder. Appellant had been out of work since the incident. She also reported no prior problems relative to her neck. Dr. Rosenblum also noted that she recently had a shoulder injection, which provided no relief. Additionally, he noted that her cervical MRI scan revealed C5-6 disc herniation. Dr. Rosenblum provided physical examination findings and diagnosed cervical radiculopathy. He indicated that appellant's cervical radiculopathy, and the need for treatment, was directly related to her May 2, 2016 injury. Dr. Rosenblum recommended C5-6 anterior cervical discectomy instrumentation and fusion (ACDIF).

An August 30, 2016 cervical MRI scan revealed C4-5 anterolisthesis, C5-6 retrolisthesis, multilevel disc bulges and degenerative disc disease, primarily at C5-6.

Dr. Rosenblum saw appellant for a follow-up examination on August 30, 2016. He discussed treatment options and provided information regarding the recommended surgery ACDIF, which he performed on September 1, 2016. Appellant's postoperative diagnoses were cervical radiculopathy with C4-5 and C5-6 herniated discs, and grade 1 C4-5 anteriolisthesis. After surgery she remained hospitalized through September 4, 2016.

In a September 13, 2016 follow-up report, Dr. Rosenblum noted that cervical x-rays showed very good alignment. Appellant reported soreness and stiffness in the back of her neck and a few episodes of numbness in her hands, but her radiculopathy had largely resolved.

In a September 14, 2016 narrative report, Dr. Rosenblum noted that he initially evaluated appellant on July 11, 2016, at which time she reported a May 2, 2016 work-related injury "lifting

heavy trays of mail." Appellant reported experiencing a sharp pain in her right shoulder and an inability to move her arm without pain. Dr. Rosenblum also noted that she had been off work since the incident. He reviewed appellant's June 3, 2016 cervical MRI scan, and also noted that she received a July 7, 2016 right shoulder injection without relief. Dr. Rosenblum provided a chronology of the treatment he provided her, including the September 1, 2016 C4-5 and C5-6 cervical discectomy with instrumentation and fusion. He also described the results of his most recent September 13, 2016 follow-up examination. Dr. Rosenblum noted that he had advised appellant to remain off work pending further evaluation.

With regard to causal relationship, Dr. Rosenblum stated "within a reasonable degree of medical certainty … [that appellant] suffered with a post[-]traumatic cervical radiculopathy as a result of her work-related injury…." He further stated that appellant's post-traumatic cervical radiculopathy was caused by a permanent aggravation of preexisting cervical degenerative disc disease at C4-5 and C5-6. Dr. Rosenblum explained that it was well known that the sort of physical activity that she engaged in "utilizing her upper extremities for repetitive motion" is exactly the sort of physical exertion which can aggravate and force preexisting degenerative asymptomatic cervical spine disease to manifest as a clinical syndrome, as was the case with her cervical radiculopathy. He described appellant's current cervical condition as a "manifestation of her previously asymptomatic cervical discogenic disease due to the aggravation by her work-related activity…." Dr. Rosenblum further noted that she had been totally disabled from the date of injury to the present time, and that she had yet to reach maximum medical improvement. He noted that appellant's prognosis was guarded, and he identified additional necessary treatment, including postsurgical physical therapy.

Dr. Rosenblum also provided follow-up treatment reports dated October 18 and 25, 2016. Appellant was to begin physical therapy in mid-October 2016, and her surgical wound was noted to be mostly closed as of October 25, 2016.

By decision dated December 2, 2016, OWCP's hearing representative affirmed the June 14, 2016 decision. She found that the reports from Dr. Rosenblum and Dr. Dickerson did not adequately explain how the May 2, 2016 employment incident either caused or contributed to appellant's diagnosed conditions, particularly in light of the preexisting cervical spine pathology.

On December 16, 2016 appellant, through counsel, requested reconsideration. In support of the request, counsel submitted a December 3, 2016 addendum report from Dr. Rosenblum. Dr. Rosenblum noted that he had seen appellant in follow-up on September 26, October 18 and 25, and November 8, 2016 and most recently on November 29, 2016. He briefly described her progress, and noted that when last seen she felt that physical therapy was helpful. Dr. Rosenblum also noted that appellant continued to complain of neck pain radiating into her right shoulder. A recent right shoulder injection reportedly did not significantly alleviate her symptoms. Dr. Rosenblum also noted that appellant had a well-healed wound and her cervical spine x-rays showed routine postoperative changes. Regarding causal relationship, he indicated that his September 14, 2016 opinion had not since changed. Dr. Rosenblum explained that she had preexisting degenerative disc disease at C4-5 and C5-6, "but the work-related activities which she was carrying out on [May 2, 2016] including lifting and carrying up to 70 pounds as well as bending, stooping, twisting, and reaching above her shoulders" were exactly the sort of physical activities that would exacerbate preexisting degenerative disc disease and cause it to become

symptomatic "by virtue of compression of the existing nerve roots" with resultant post-traumatic cervical radiculopathy.

OWCP also received additional follow-up progress reports from Dr. Rosenblum dated September 26 and November 29, 2016, and January 10, 2017. In his latest January 10, 2017 report, Dr. Rosenblum noted that appellant felt well and could return to work full duty on January 18, 2017.

By decision dated March 9, 2017, OWCP denied modification of the December 2, 2016 decision, finding that the evidence of record was insufficient to establish causal relationship.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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,[5] 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.[6] 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.[7]

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.[8] Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[9] The second component is whether the employment incident caused a personal injury.[10] An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[11]

[4] *Supra* note 2.

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

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

[7] *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).

[8] *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[9] *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[10] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[11] *D.D.*, Docket No. 18-0648 (issued October 15, 2018); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[12] 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.[13] 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).[14]

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.[15]

ANALYSIS

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

Dr. Rosenblum was aware of appellant's underlying, preexisting cervical condition. He was also aware of the May 2, 2016 employment-related lifting incident. Dr. Rosenblum found that appellant's current cervical and right upper extremity condition were either caused or exacerbated by her federal employment. He explained that she had preexisting degenerative disc disease at C4-5 and C5-6, "but the work-related activities which [appellant] was carrying out on [May 2, 2016] including lifting and carrying up to 70 pounds as well as bending, stooping, twisting, and reaching above her shoulders" were exactly the sort of physical activities that would exacerbate preexisting degenerative disc disease and cause it to become symptomatic "by virtue of compression of the existing nerve roots" with resultant post-traumatic cervical radiculopathy. Although Dr. Rosenblum various reports are insufficient to discharge appellant's burden of proving that her current cervical and/or right upper extremity conditions are causally related to the accepted May 2, 2016 employment incident, his opinions are sufficient to require further development of the case record by OWCP.[16]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.[17]

On remand, OWCP should refer appellant to an appropriate specialist, along with the case record and a statement of accepted facts. OWCP's referral physician should provide an evaluation and a rationalized medical opinion on whether appellant's cervical and/or right upper extremity

[12] *T.H.*, *supra* note 8 at 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

[13] *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

[14] *Id.*; *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

[16] *See John J. Carlone*, *supra* note 10; *Horace Langhorne*, 29 ECAB 820 (1978).

[17] *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

conditions were caused or aggravated by the accepted May 2, 2016 employment incident. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: May 3, 2019
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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