United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 19-0863**
	)	**Issued: November 4, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Albany, NY, Employer	)	

Appearances:
Alan J. Shapiro, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 15, 2019 appellant, through counsel, filed a timely appeal from a February 21, 2019 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 February 21, 2019 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 his burden of proof to establish conditions causally related to the accepted November 6, 2015 employment incident.

FACTUAL HISTORY

On November 16, 2015 appellant, then a 57-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that, on November 6, 2015, he sustained pain in his low back and right buttocks when repairing damaged mail while in the performance of duty. He stopped work on November 6, 2015.

OWCP received a November 19, 2015 note from Dr. Khyber Khan, a Board-certified family practitioner, who indicated that appellant was "[o]ut of work until further notice."

In a development letter dated December 9, 2015, OWCP informed appellant that he had not submitted sufficient factual or medical evidence to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

OWCP received a January 7, 2016 return to work notice (Form CA-3) advising that appellant returned to full-time work without restrictions on December 22, 2015.

By decision dated January 11, 2016, OWCP denied the claim, finding that appellant had not provided sufficient evidence to support the factual aspects of his claim. It noted that he did not respond to the development questionnaire or provide a detailed description regarding the alleged employment incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

A November 7, 2015 hospital discharge summary from Dr. Prajesh Ghimire, a Board-certified family practitioner, diagnosed back pain.

In a December 18, 2015 duty status report (Form CA-17), Dr. Khan diagnosed sciatica and a bulging lumbar disc. He indicated that appellant could return to work on December 21, 2015.

In a December 31, 2015 report, Dr. Richard Jackson, a neurologist, noted that he saw appellant for right leg pain. He diagnosed double crush syndrome of S1 radiculopathy and piriformis syndrome.

On January 12, 2016 OWCP received appellant's response to the development questionnaire. Appellant noted that he reported his injury on November 10, 2015, four days after the incident, because he had been in the hospital on medication. He explained that, while he was working the damaged mail on November 6, 2015, he picked up a full tray of damaged flats and turned to put them in a hamper. At that time, something "felt weird" in his lower back and his back hurt. Appellant explained that it was close to quitting time, there was no supervisor present, and he went home. He also noted that two individuals witnessed that he was in pain on November 6, 2015, and asked him about his injury. Additionally, appellant indicated that one of the individuals, D.U., helped him leave the building and walk to his car. He explained the

immediate effects of his injury included a sharp and severe pain in his lower back and right buttocks.

On June 8, 2016 appellant, through counsel, requested reconsideration. In support thereof, OWCP received diagnostic tests and hospital records from November 7 to 15, 2015, some of which were illegible. In a November 7, 2015 note, Dr. Christopher Barsotti, an emergency medicine specialist, noted that appellant presented with mild-to-moderate lower back pain which began the prior day. He explained that appellant worked at the employing establishment, engaged in moderate lifting of boxes, and his back pain worsened with movement. Dr. Barsotti found intractable pain secondary to sciatica and diagnosed acute sciatica.

In a November 7, 2015 note, Dr. Khan advised that appellant presented to the emergency room after having severe, right side lower back pain, which started the prior night. He indicated that appellant related that he was at work when he felt a sharp pinch in his right lower back area which radiated down his right leg. Dr. Khan diagnosed severe sciatica.

In a November 12, 2015 report, Dr. Jackson noted that appellant presented to the emergency room with severe right side lower back pain, which began the prior night. He indicated that appellant related that he was at work when he felt a sharp pain in his right buttock, which radiated down his right leg. Dr. Jackson assessed classic pain syndrome associate with S1 nerve root of gluteus maximus spasm and medial gastroc spasm. In a November 13, 2015 note, he indicated that appellant was hospitalized for low back pain.

A November 8, 2015 computerized tomography (CT) scan of appellant's lumbar spine, read by Dr. Leonides T. Fernando, a Board-certified radiologist, revealed a L2-3 right paracentral disc herniation, a suspected L4-5 central disc protrusion, L5-S1 degenerative disc disease, facet arthrosis, and slightly narrowed left neural foramen.

OWCP also received physical therapy notes dated November 15, 2015, and nurses' notes dated November 7 and 15, 2015. It also received statements from appellant's coworkers who observed that he was in pain after the incident.

In a November 19, 2015 report, Dr. Khan noted that appellant was admitted to the hospital on November 7, 2015, and discharged eight days later. He explained that appellant presented to the emergency room following significant lower back discomfort "after bending over at work to remove an item." Dr. Khan saw appellant on December 3, 2015, and diagnosed sciatica. He saw appellant again on December 18, 2015, and January 15, 2016 and diagnosed lumbago with sciatica and related that appellant "acquired this injury at work while lifting a mail tray."

By decision dated February 21, 2019, OWCP affirmed the January 11, 2016 OWCP decision, as modified. It found that appellant had established that the November 6, 2015 employment incident occurred in the performance of duty as alleged, and that a medical condition was diagnosed in connection with the employment injury. However, OWCP denied the claim, finding that the medical 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 of FECA,[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]

In order to determine whether a federal employee has sustained a traumatic injury in the performance of duty, OWCP must first determine whether fact of injury has been established.[8] 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.[9] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[10]

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.[11] 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 employee.[12]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish conditions causally related to the accepted November 6, 2015 employment incident.

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[4] *See supra* note 2.

[5] *See D.C.*, Docket No. 19-0363 (issued July 18, 2019); *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); *S.P.*, 59 ECAB 184 (2007).

[9] *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[10] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[11] *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[12] *M.K.*, Docket No 19-0428 (issued July 15, 2019*; see also Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

Dr. Khan provided December 18, 2015 and January 15, 2016 reports in which he noted that appellant "acquired this injury at work while lifting a mail tray." He diagnosed lumbago with sciatica. While Dr. Khan generally attributed the diagnosed conditions to the employment incident, the Board has held that a physician must provide a reasoned opinion as to whether the employment incident caused or contributed to appellant's diagnosed medical conditions.[13] He did not explain how the mechanism of the accepted incident would have physiologically caused the diagnosed condition.[14] Dr. Khan's December 18, 2015 and January 15, 2016 reports are therefore insufficient to establish the claim.

None of Dr. Khan's remaining medical reports of record offered an opinion regarding the cause of appellant's low back condition. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[15] As such these reports are insufficient to establish causal relationship.

In reports dated November 12 and 13, 2015, Dr. Jackson related that appellant was at work when he felt a sharp pain in his right buttock. He assessed classic pain syndrome with spasm and low back pain. The Board has held that "pain" and "spasm" are symptoms and not diagnoses.[16] As these reports do not diagnose an actual medical condition causing appellant's symptoms, they lack probative value and are insufficient to establish appellant's claim.

The November 7, 2015 reports from Drs. Ghimire and Barsotti, and the December 31, 2015 report from Dr. Jackson provided diagnoses, but did not offer a rationalized medical opinion regarding the cause of the diagnosed conditions and are therefore insufficient to establish appellant's claim.[17]

The Board notes that OWCP also received reports from nurses and physical therapists in support of appellant's claim. These reports, however, are of no probative value as nurses and physical therapists are not considered physicians as defined under FECA.[18]

Finally, appellant submitted diagnostic testing reports in support of his claim. The Board has held that diagnostic reports lack probative value as they do not provide an opinion on causal relationship between appellant's employment duties and a diagnosed condition.[19] As such, these reports are also insufficient to establish appellant's claim.

[13] *See D.C.*, Docket No. 19-0363 (issued July 18, 2019); *John W. Montoya*, 54 ECAB 306 (2003).

[14] *C.C.*, Docket No. 19-0059 (issued May 29, 2019).

[15] *R.Z.*, Docket No. 19-0408 (issued June 26 2019); *P.S.*, Docket No. 18-1222 (issued January 8, 2019).

[16] *V.B.*, Docket No. 19-0643 (issued September 6, 2019).

[17] *See supra* note 12.

[18] *See S.S.*, Docket No. 18-1356 (issued May 21, 2019); *David P. Sawchuk*, 57 ECAB 316, 320 n.6 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA). *See also M.M.*, Docket No. 16-1617 (issued January 24, 2017).

[19] *See S.G.*, Docket No. 17-1054 (issued September 14, 2017).

Therefore, as the medical evidence of record is insufficient to establish that appellant's conditions were causally related to the accepted November 6, 2015 employment incident, the Board finds that appellant has not met his burden of proof.

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 his burden of proof to establish conditions causally related to the accepted November 6, 2015 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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