

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

M.O., Appellant)	
)	
and)	Docket No. 18-0229
)	Issued: September 23, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Howell, NJ, Employer)	
)	

Appearances:
Appellant, pro se
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 13, 2017 appellant filed a timely appeal from a July 11, 2017 merit decision and an October 31, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish cervical and left upper extremity conditions causally related to the accepted April 11, 2017 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 17, 2017 appellant, then a 53-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on April 11, 2017 he experienced pain in his neck and left

¹ 5 U.S.C. § 8101 *et seq.*

shoulder after lifting a heavy package while in the performance of duty. He stopped work on April 12, 2017.

In an April 12, 2017 prescription note, Dr. Aurora Dela Rosa, a Board-certified physiatrist, indicated that she saw appellant that day for evaluation of left shoulder and upper back pain which started three to four days prior. She advised that he needed to be off work from April 12 through 18, 2017 in order to relieve his severe muscle strain and pain.

In a series of prescription notes dated April 17, 2017, Dr. Dela Rosa diagnosed cervical herniated nucleus pulposus (HNP) and left cervical radiculopathy. She referred appellant for cervical spine and shoulder x-rays, a cervical magnetic resonance imaging (MRI) scan, and an upper extremity electromyogram and nerve conduction velocity (EMG/NCV) study. Dr. Dela Rosa noted that he was a mail carrier who sustained injuries to his cervical spine and left upper extremity on April 12, 2017.

On April 21, 2017 the employing establishment executed an authorization for examination and/or treatment form (Form CA-16) authorizing appellant's medical treatment for sprain and strain of his left shoulder.

Appellant was treated by Dr. John Mak, a Board-certified anesthesiologist, on April 25, 2017 for injuries sustained at work on April 11, 2017. Dr. Mak noted appellant's history was significant for prior lumbar surgery at L4-5 in 2001. Appellant reported repetitively lifting heavy packages at work and experienced a significant exacerbation of pain in his neck and left shoulder region on April 11, 2017. He did not report the injury that day because he thought his condition would resolve, but his pain increased with left upper extremity paresthesia symptoms. Appellant noted previous treatment for cervical pain in 2015 and he underwent a cervical epidural steroid injection with total resolution of bilateral upper extremity radicular pain. He was asymptomatic until his work accident on April 11, 2017. Appellant continued to experience cervical pain radiating into his left upper extremity and down to the fingers of his left hand, which affected his work duties and activities of daily living. Dr. Mak noted findings on examination of pain with palpation over the superior spinous processes and over the left cervical paraspinal muscles, cervical trapezius and splenius capitus, and guarded range of motion with pain. He diagnosed cervical radicular pain and referred appellant for physical therapy.

Appellant underwent physical therapy on April 26, 2017 for cervical radiculopathy. He submitted a duty status report (Form CA-17) dated April 28, 2017 from a physical therapist who diagnosed cervical radiculopathy and noted that he could not work.

In a letter dated May 3, 2017, OWCP advised appellant that his claim was originally received as a simple, uncontroverted case which resulted in minimal or no time loss from work. It indicated that his claim was administratively handled to allow limited medical payments, but the merits of the claim had not been formally adjudicated. OWCP advised that, because appellant had not returned to work in a full-time capacity, his claim would be formally adjudicated. It requested that he submit additional factual and medical information including a comprehensive medical report from his treating physician regarding how specific work incidents contributed to his claimed left shoulder and neck injury. Appellant was afforded 30 days to respond.

An April 27, 2017 cervical MRI scan revealed left paracentral to left foraminal disc herniation at C5-6.

On May 5, 2017 Dr. Mak reexamined appellant who reported slight improvement in symptoms since his last visit. He noted an April 27, 2017 MRI scan revealed a left paracentral to left foraminal disc herniation at C5-6, which was a new finding compared to the previous 2014 MRI scan that revealed a mild right-sided disc bulge at C5-6. Dr. Mak noted findings on examination of pain with palpation over the superior spinous processes and over the left cervical paraspinal muscles, cervical trapezius and splenius capitus, with guarded range of motion. He diagnosed cervical radicular pain and herniated cervical nucleus pulposus. Dr. Mak opined that the left-sided herniated nucleus pulposus at C5-6 explained appellant's current left upper extremity radicular symptoms. He opined that appellant's current diagnoses were causally related to his work-related accident on April 11, 2017. Dr. Mak recommended a trial of cervical epidural steroid injections at C6-7. In a May 5, 2017 letter, he noted that appellant could potentially return to work on June 17, 2017. In a duty status report (Form CA-17) dated May 5, 2017, Dr. Mak found appellant to be disabled from work. In an attending physician's report (Form CA-20) dated May 5, 2017, he noted that appellant's pain started on April 11, 2017 after repeatedly lifting heavy packages while at work. Dr. Mak diagnosed left-sided cervical herniated nucleus pulposus and cervical radiculopathy. He checked a box marked "yes" indicating that appellant's condition was caused or aggravated by an employment activity, noting repetitive work and lifting heavy packages. Dr. Mak opined that appellant was to be kept out of work until reassessment following cervical epidural steroid injection. On June 2, 2017 he performed a cervical epidural steroid injection at C6-7 under fluoroscopic guidance and diagnosed cervical radiculopathy.

Appellant continued to attend physical therapy appointments from April 26 to May 17, 2017 for treatment of cervical radiculopathy.

By decision dated June 5, 2017, OWCP denied appellant's claim for compensation because the medical evidence of record was insufficient to establish that he sustained an injury or medical condition causally related to the accepted employment incident.

Following the decision, OWCP received additional physical therapy treatment notes for May 19, 2017.

Appellant was treated by Dr. Mak on June 13, 2017 for chronic cervical spine pain resulting from an injury at work on April 11, 2017. He reported moderate relief from a cervical epidural steroid injection at C6-7. Appellant noted prior lumbar surgery in 2001 at the L4-5 level. Dr. Mak noted findings on examination of pain with range of motion on extension and rotation. He diagnosed cervical radicular pain and herniated cervical nucleus pulposus. Dr. Mak opined that appellant's current diagnoses of left-sided herniated nucleus pulposus at C5-6 was causally related to his work-related accident on April 11, 2017. He noted that appellant did not have left-sided herniated nucleus pulposus in the prior MRI scan of the cervical spine in 2014. Dr. Mak noted appellant's repetitive heavy lifting required in his job resulted in the new C5-6 herniation associated with left upper extremity radicular symptoms. He recommended a repeat cervical epidural steroid injection at C6-7. Appellant submitted an unsigned authorization for examination and/or treatment (Form CA-16) dated June 16, 2017. The date of injury was listed as April 11, 2017 and noted that appellant experienced neck pain radiating into his left arm as a result of cervical herniated nucleus pulposus and cervical radiculopathy. In the attached attending

physician's report, Dr. Mak noted that appellant reported moving heavy packages while at work on April 11, 2017. He diagnosed cervical herniated nucleus pulposus at C5-6 by MRI scan and cervical radiculopathy. Dr. Mak further noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity. He noted that appellant was totally disabled from April 12 to June 4, 2017 and could resume regular duty on June 5, 2017.

By decision dated July 11, 2017, OWCP denied modification of the June 5, 2017 decision.

On an appeal request form dated July 15, 2017, appellant requested reconsideration. In an accompanying undated statement, he indicated that on April 11, 2017 he arrived at work in fine condition. Appellant reported lifting and moving several heavy packages and boxes from the back of his truck, holding them on his shoulders, and experiencing neck and arm pain. He initially thought his injury was minor; however, he was referred to a pain management physician.

Appellant submitted a report from Dr. Mak dated June 13, 2017 previously of record.

In a October 31, 2017 decision, OWCP denied appellant's request for reconsideration as the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA² 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,³ 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.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

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.⁶ 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.⁷ The second component is whether the employment incident caused a personal injury.⁸

² *Id.*

³ *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁶ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

⁷ *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁸ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

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.⁹

Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue.¹⁰ A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.¹¹ 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).¹²

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.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish cervical and left upper extremity conditions causally related to the accepted April 11, 2017 employment incident.

Appellant submitted an April 25, 2017 report from Dr. Mak who treated him for injuries he claimed to have sustained at work on April 11, 2017. Dr. Mak noted appellant's history was significant for L4-5 lower back surgery in 2001 and cervical pain with epidural steroid injections in 2015. Appellant reported lifting heavy packages at work and experienced a significant exacerbation of pain and paresthesia in his left neck and shoulder region on April 11, 2017. He reported being asymptomatic until his work accident on April 11, 2017. Dr. Mak noted positive findings on examination and diagnosed cervical radicular pain. However, he merely repeated the history of injury as reported by appellant without providing his own opinion regarding whether appellant's condition was work related.¹⁴ Therefore, this report is insufficient to meet appellant's burden of proof.

Appellant was reexamined by Dr. Mak on May 5, 2017 following a cervical spine MRI scan performed on April 27, 2017 which revealed a left paracentral to left foraminal disc herniation

⁹ *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *L.T.*, *supra* note 7; *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

¹⁰ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

¹¹ *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹² *Id.*

¹³ *J.F.*, Docket No. 19-0456 (issued July 12, 2019); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

¹⁴ See *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

at C5-6. He noted that this was a new finding compared to the previous MRI scan from 2014 which revealed a mild right-sided disc bulge at C5-6. Dr. Mak diagnosed cervical radicular pain and herniated cervical nucleus pulposus and opined that appellant's current diagnoses were causally related to his work-related accident on April 11, 2017. He related appellant's current cervical radicular pain and herniated cervical nucleus pulposus to the employment injury, however, his only rationale for doing so was that appellant had no left-sided herniated nucleus pulposus or radicular symptoms prior to the employment injury. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury is insufficient, without supporting rationale, to support a causal relationship.¹⁵

Appellant submitted attending physician's reports (Form CA-20) dated May 5 and June 16, 2017 from Dr. Mak who diagnosed left-sided cervical herniated nucleus pulposus and cervical radiculopathy. He checked a box marked "yes" indicating that appellant's condition was caused or aggravated by an employment activity, noting repetitive work, and lifting heavy packages. The Board has held that when a physician's opinion on causal relationship consists of checking "yes" to a form question, without adequate explanation or rationale, that opinion is of diminished probative value and is insufficient to establish a claim.¹⁶ Dr. Mak did not explain why or how lifting heavy packages on April 11, 2017 caused or contributed to appellant's diagnosed medical condition.

Appellant was treated by Dr. Mak on June 13, 2017 for chronic cervical spine pain resulting from an injury at work on April 11, 2017. He reported moderate relief from a cervical epidural steroid injection at C6-7 on June 2, 2017. Appellant noted prior lumbar surgery in 2001 at L4-5 level. Dr. Mak diagnosed cervical radicular pain and herniated cervical nucleus pulposus. He opined that appellant's current diagnoses of left-sided herniated nucleus pulposus at C5-6 was causally related to his work-related accident on April 11, 2017. Dr. Mak noted the repetitive heavy lifting required in appellant's job resulted in new C5-6 herniation associated with left upper extremity radicular symptoms. The Board finds that, although Dr. Mak supported causal relationship, he did not provide medical rationale explaining the basis of his conclusory opinion regarding the causal relationship between appellant's left-sided herniated nucleus pulposus at C5-6 condition and the April 11, 2017 work incident.¹⁷ Dr. Mak did not explain the process by which repetitive heavy lifting would have caused the diagnosed conditions and why the conditions would not have been the result of preexisting conditions. As the opinion of appellant's physician regarding causal relationship was conclusory and unexplained, it was insufficient to meet appellant's burden of proof. This report is thus insufficient to establish appellant's claim.¹⁸

¹⁵ *Kimper Lee*, 45 ECAB 565 (1994).

¹⁶ *Sedi L. Graham*, 57 ECAB 494 (2006); *D.D.*, 57 ECAB 734 (2006).

¹⁷ *See 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). The Board notes that the present claim involves only the claim for an August 4, 2014 injury.

¹⁸ *J.M.*, 58 ECAB 478 (2007) (Medical rationale was particularly necessary given that appellant injured his wrist while lifting luggage in private employment. As the opinion of appellant's physician regarding causal relationship was conclusory and unexplained, it was insufficient to meet appellant's burden of proof).

Appellant was treated by Dr. Dela Rosa on April 12 and 17, 2017, who diagnosed cervical HNP and cervical radiculopathy. Although she noted that appellant was a mail carrier who was injured on April 12, 2017, Dr. Dela Rosa did not explain how appellant's duties on April 12, 2017 either caused or contributed to his cervical and left upper extremity conditions. 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.¹⁹ These reports, therefore, are insufficient to establish appellant's claim.

The record also contains physical therapy notes. The Board has held that notes signed by a physical therapist are not considered medical evidence as physical therapists are not considered physicians under FECA.²⁰ Thus, these treatment records are of no probative medical value in establishing appellant's claim.

The remainder of the medical evidence including MRI scans of the cervical spine, a duty status report (Form CA-17) dated May 5, 2017, and a June 2, 2017, procedure note are of no probative value as they fail to provide a physician's opinion on a causal relationship between appellant's work incident and his diagnosed cervical condition.²¹ For this reason, this evidence is insufficient to meet his burden of proof.

On appeal appellant asserts that his claim was improperly denied and that the submitted medical evidence was sufficient. He further contended that he was pain free prior to the April 11, 2017 incident. As explained above, the medical evidence of record is insufficient to establish a diagnosed medical condition causally related to the accepted work incident.

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.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,²² OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

¹⁹ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

²⁰ See *David P. Sawchuk*, 57 ECAB 316, 320n.11 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a “physician” as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

²¹ *Supra* note 19.

²² 5 U.S.C. § 8128(a).

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”²³

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.²⁴

ANALYSIS -- ISSUE 2

OWCP denied appellant’s claim because he failed to submit sufficient medical evidence establishing that he sustained an injury or medical condition causally related to the accepted work incident. Thereafter, it denied appellant’s reconsideration request, without conducting a merit review.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He submitted an undated statement and indicated that on April 11, 2017 he arrived at work in fine condition and reported lifting and moving several heavy packages and boxes and sustained a herniated disc. Appellant initially thought his injury was minor; however, he was referred to a pain management physician. This statement does not show a legal error by OWCP nor does it provide a new and relevant legal argument. The underlying issue in this case is whether the medical evidence demonstrated a causal relationship between appellant’s claimed cervical and left upper extremity conditions and the April 11, 2017 employment incident. As such, the relevant issue must be addressed by medical evidence.²⁵ However, appellant did not submit any new and relevant medical evidence in support of his claim.

Appellant submitted a report from Dr. Mak dated June 13, 2017. However, this evidence is duplicative of evidence previously submitted and considered by OWCP in its earlier decision dated July 11, 2017. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.²⁶ Therefore, these reports are insufficient to require OWCP to reopen the claim for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or

²³ 20 C.F.R. § 10.606(b)(3).

²⁴ *Id.* at § 10.608(b).

²⁵ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

²⁶ *See Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish cervical and left upper extremity conditions causally related to the accepted April 11, 2017 employment incident. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).²⁷

ORDER

IT IS HEREBY ORDERED THAT the October 31 and July 11, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 23, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

²⁷ The record contains a Form CA-16 signed by an employing establishment official. When the employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination/treatment regardless of the action taken on the claim. *C.W.*, Docket No. 17-1293 (issued February 12, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c).