

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

D.T., Appellant)	
)	
and)	Docket No. 19-0867
)	Issued: August 12, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Akron, OH, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

ORDER REMANDING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

On March 18, 2019 appellant, through counsel, filed an appeal from a February 5, 2019 decision of the Office of Workers' Compensation Programs (OWCP). The Board assigned Docket No. 19-0867.

On June 12, 2018 appellant, then a 49-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she developed neck, back, left arm/hand, and left leg injuries due to factors of her federal employment, including sitting for prolonged periods of time and constantly trying to stand up and walk. She noted that she first realized her claimed condition was caused or aggravated by her employment on December 11, 2014 and first realized its relation to her federal employment on July 30, 2017.² In an attached June 12, 2018 statement, appellant provided further details regarding her claimed employment factors. In a statement of even date, appellant's

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 OWCP assigned the claim OWCP File No. xxxxxx585.

supervisor indicated that appellant's December 11, 2014 work-related injury was the only work-related injury of which she was aware.³

In a June 18, 2018 development letter, OWCP requested that appellant submit additional factual and medical evidence. It afforded her 30 days to submit the requested evidence.

Appellant submitted medical records, including an April 17, 2018 x-ray of her left hip and pelvis which revealed mild degenerative changes at the lumbosacral facets and sacroiliac joints. In a May 9, 2018 report, Dr. George Markarian, a Board-certified neurosurgeon, noted that appellant complained of constant lower back pain radiating down her left thigh, hip, and left arm which started two weeks prior. Appellant reported that activities such as walking, bending, sitting, standing, and lifting exacerbated her pain. Dr. Markarian noted that appellant's medical history included the performance of an L5-S1 microdiscectomy on February 16, 2016. He noted that his physical examination revealed that appellant's left grip was weak. Dr. Markarian diagnosed lumbosacral intervertebral disc displacement and cervical radiculopathy, and he ordered a magnetic resonance imaging (MRI) scan.

On July 6, 2018 Dr. Markarian noted that appellant presented with extreme pain in her neck radiating down her left arm, which was associated with numbness, pricking sensation, and weakness. Appellant also complained of weakness in her left leg and increased lower back pain radiating into her left hip. Dr. Markarian noted that his physical examination revealed that appellant had antalgic gait and cervical spine rotation of motion of 45 degrees. He diagnosed herniated intervertebral disc at C5-6 and a herniated lumbar disc with radiculopathy. In a separate July 6, 2018 note, Dr. Markarian indicated that appellant had been diagnosed with an intervertebral herniated disc in her lower back and would need surgery. He related that she was unable to do any kind of work (light or strenuous) and should be excused until after her surgery, the date of which had yet to be determined.

In a July 6, 2018 duty status report (Form CA-17), Dr. Markarian indicated that appellant's date of injury was December 11, 2014, and that she suffered a lumbar spine injury due to prolonged sitting and lifting. His findings included a large herniated disc and he diagnosed a herniated disc. Dr. Markarian indicated that appellant was totally disabled from work.

By decision dated July 26, 2018, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish that the employment incident(s) occurred as alleged. It therefore found that appellant had not established the factual component of fact of injury.

On August 1, 2018 appellant requested reconsideration of the July 26, 2018 decision. She submitted a July 30, 2018 narrative statement in which she indicated that in 2016 she underwent lower back surgery for a 2014 workplace injury. Appellant noted that, when she returned to work in July 2017, she was feeling well and was provided with a modified work assignment where she

³ Under OWCP File No. xxxxxx868, OWCP previously accepted that on December 11, 2014 appellant sustained a traumatic low back injury. Appellant's claims have not been administratively combined.

was required to sit for eight hours per day, five days a week, with two 15-minute breaks and a half hour lunch break.

Appellant submitted a May 15, 2018 report from Dr. Regina Doman, Board-certified in family medicine, who indicated that appellant complained of stabbing and shooting pain in her back, left arm, left leg, and left torso. Dr. Doman noted that her physical examination revealed impaired motor functioning in appellant's left arm and leg. On June 4, 2018 she reviewed appellant's diagnostic testing, reported examination findings, and diagnosed cervical radiculopathy. Appellant also submitted a May 29, 2018 MRI scan of the cervical spine, May 29, 2018 electromyogram/nerve conduction velocity (EMG/NCV) report of the upper extremities, and July 5, 2018 MRI scan of the lumbar spine.

By decision dated October 22, 2018, OWCP modified its July 26, 2018 decision, finding that sufficient factual and medical evidence was provided to establish fact of injury. However, it denied appellant's claim, finding insufficient medical evidence to establish causal relationship between her diagnosed medical conditions and the accepted factors of her federal employment, which included sitting for extended periods at work.

On November 29, 2018 appellant requested reconsideration of the October 22, 2018 decision. She submitted a September 25, 2018 operative report from Dr. Markarian who indicated that she underwent a laminectomy of L4 and L5, decompression of L4, L5, and S1, and lumbar exploration. In an October 10, 2018 report, he noted that appellant complained of leg swelling, pain in the area of the recent surgical incision, and burning in her feet. Appellant reported that her initial surgery was due to a prior workplace injury. Dr. Markarian told her that, because the recent surgery involved the same disc, her current injury was a "flow through" of the original workplace injury.

In a November 15, 2018 report, Dr. Markarian explained that he conducted appellant's February 16, 2016 L5-S1 microdiscectomy for a disc herniation due to a December 11, 2014 work-related injury. He noted that, as her more recent injury was a reherniation of L5-S1 and an adjacent disc herniation of L4-5, he could opine that, to a reasonable degree of medical certainty, her more recent injury was a direct "flow through" result of her December 11, 2014 work-related injury.

By decision dated February 5, 2019, OWCP denied modification of its October 22, 2018 decision. It discussed Dr. Markarian's October 10 and November 15, 2018 reports and indicated that they did not establish appellant's claim.

The Board finds that the case is not in posture for decision. Pursuant to 20 C.F.R. § 501.2(c)(1), 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. Decisions on claims are based on the written record, which may include forms, reports, letters, and other evidence of various types such as photographs, videotapes or drawings.⁴ Evidence may not be incorporated by reference, nor may evidence from

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.5a (June 2011).

another claimant's case file be used.⁵ Evidence contained in another of the claimant's case files may be used, but a copy of that evidence should be placed into the case file being adjudicated.⁶ All evidence that forms the basis of a decision must be in that claimant's case record.⁷

In adjudicating the present claim, OWCP File No. xxxxxx585, OWCP referenced medical evidence related to appellant's prior claim in OWCP File No. xxxxxx868. For example, it evaluated an November 15, 2018 report from Dr. Markarian who explained that he carried out appellant's February 16, 2016 L5-S1 microdiscectomy for a disc herniation due to a December 11, 2014 work-related injury. Dr. Markarian noted that, as appellant's more recent injury was a reherniation of L5-S1 and an adjacent disc herniation of L4-5, he could opine that appellant's recent injury was a direct "flow through" result of her December 11, 2014 work-related injury. However, the current case record does not contain the February 16, 2016 surgical report or other documents related to appellant's December 11, 2014 injury which, in part, concerned the same body area as the present occupational disease claim. OWCP's procedures provide that cases should be administratively combined when correct adjudication of the issues depends on frequent cross-reference between files.⁸ However, OWCP has not combined the case records or incorporated the referenced evidence into the current case record. Because it neglected to include evidence that helped to form the basis for its determination regarding appellant's claimed conditions in the current case record, the Board is not in a position to make an informed decision regarding appellant's entitlement to FECA benefits.⁹ Therefore, the case shall be remanded to OWCP to administratively combined OWCP File Nos. xxxxxx585 and xxxxxx868. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision regarding appellant's occupational disease claim.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* See also *G.O.*, Docket No. 18-1483 (issued June 20, 2019).

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8c (February 2000).

⁹ See *L.H.*, Docket No. 17-1960 (issued August 16, 2018); *K.P.*, Docket No. 15-1945 (issued February 10, 2016); *M.C.*, Docket No. 15-1706 (issued October 22, 2015).

IT IS HEREBY ORDERED THAT the February 5, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further action consistent with this order of the Board.

Issued: August 12, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board