

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

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| G.J., Appellant |) | |
| |) | |
| and |) | Docket No. 19-1826 |
| |) | Issued: April 28, 2020 |
| U.S. POSTAL SERVICE, MANASOTA |) | |
| PROCESSING & DISTRIBUTION CENTER, |) | |
| Manasota, FL, Employer |) | |
| _____ |) | |

Appearances: *Case Submitted on the Record*
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On August 29, 2019 appellant filed a timely appeal from a July 10, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish that an injury occurred in the performance of duty, as alleged.

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.*

FACTUAL HISTORY

On December 18, 2018 appellant, then a 58-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she developed an occupational illness due to factors of her federal employment. In an accompanying narrative statement, she explained that on April 30, 2018 she lifted an overloaded tray of mail while on lifting restrictions. Appellant claimed that the lifting aggravated her right shoulder and right neck conditions. She indicated that she first became aware of her conditions on June 12, 2018 and first attributed it to factors of her federal employment on October 12, 2018. Appellant did not stop work.

In a December 21, 2018 letter, the employing establishment controverted appellant's claim. It noted that there was no medical diagnosis in connection with factors of appellant's federal employment. As such, the employing establishment alleged that appellant had not established the medical component of fact of injury and causal relationship.

In a January 3, 2019 development letter, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of medical evidence needed, including a medical diagnosis and a comprehensive narrative report from a qualified physician explaining how factors of her federal employment caused, contributed to, or aggravated her diagnosed medical condition. In a separate development letter of even date, OWCP notified the employing establishment of appellant's occupational disease claim. It requested comments from a knowledgeable supervisor and an explanation of appellant's work activities and accommodations. OWCP afforded both parties 30 days to submit the necessary evidence.

In a January 16, 2019 report, Dr. David Kalin, a specialist in family medicine, examined appellant and reviewed her medical records.³ He related that appellant sustained an injury on December 3, 2014 when she lifted a tray of mail weighing about 20 pounds overhead. Dr. Kalin noted that appellant felt pain localize in her right elbow. He indicated that appellant returned to full duty without restrictions where she had to lift tubs weighing between 35 to 40 pounds. Dr. Kalin noted that appellant could not tolerate this lifting and had to be placed on light-duty restrictions. He indicated that appellant developed pain along the right side of the neck and right shoulder for which she received a cortisone injection to the right elbow. Dr. Kalin related that appellant had been seeking medical evaluation and treatment since 2017 for pain in the right neck and shoulder. He further related that, since the December 3, 2014 incident, appellant had difficulty putting objects overhead and periodically dropped objects. Dr. Kalin referenced and quoted his May 17, 2018 report⁴ to opine that appellant's musculoskeletal condition was causally related to her December 3, 2014 work-related elbow injury which had morphed over time due to changes in the musculoskeletal integrity along the right side of the body contributing to a dextroscoliotic curve. He found that these changes along with bulged and protruded discs through the mid cervical spine affected appellant's range of motion in her neck and contributed to her right-sided neck and scapular pain. Dr. Kalin noted that appellant's repetitive lifting, twisting, and bending stressed the decompensated areas along the right side of her body and aggravated her underlying condition.

³ Dr. Kalin reported that he reviewed medical reports from multiple physicians dated April 18, 2012 through October 26, 2018. He also reviewed magnetic resonance imaging scans, x-rays, a thoracic outlet syndrome test, an upper extremity nerve conduction study, and physical therapy treatment notes. None of these underlying medical reports or diagnostic studies are part of the medical record.

⁴ This report is not part of the medical record.

He indicated that appellant sustained a separate and distinct traumatic injury in May 2015 while lifting heavy tubs. Dr. Kalin opined that this injury aggravated the preexisting degenerative cervical condition and manifested with multiple herniated cervical discs which caused appellant's right shoulder pain. He diagnosed chronic cervical musculoskeletal ligamentous strain with grade 1 retrolisthesis, central disc bulge narrowing, central disc protrusion, foraminal stenosis, degenerative disc disease, joint osteophytosis, and spinal stenosis.

In a January 16, 2019 request form, Dr. Kalin referred appellant for physical therapy treatment. In a visit form of even date, he confirmed that he saw appellant for a medical appointment and listed the date of injury as June 12, 2018.

By decision dated February 12, 2019, OWCP denied appellant's claim finding that the medical evidence of record did not contain a valid medical diagnosis causally related to the "related to the event on [April 3, 20]18." It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On February 21, 2019 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

The hearing was held on June 7, 2019. Appellant testified that she developed an occupational disease as a result of overhead lifting. She noted that in April 2018 while lifting multiple trays of mail, she first realized that her right shoulder and neck conditions were causally related to her federal employment. Appellant further testified that she saw Dr. Kalin in May 2018, but listed June 12, 2018 as the date she first became aware of her condition because that was the date when she first received a diagnosis from Dr. Kalin. She related that she was claiming carpal tunnel syndrome in addition to her diagnoses related to her right shoulder and neck. Appellant reported that she believed her conditions were caused by the repetitive motion of lifting her right shoulder above her head over time. She indicated that she did repetitive overhead lifting from September 1998 to 2009 and then again from 2012 to 2014. Appellant testified that she began overhead lifting again in May 2015 after recovering from a traumatic injury and had continued to do so since that time even though she had lifting restrictions. She noted that she had a bulging muscle on her right shoulder blade in June to July 2015. Appellant also related that she was in a motor vehicle accident in November 2016 and that a computerized tomography scan revealed a cervical herniated disc. She reported that she had started seeing a chiropractor in March 2019, but had not experienced any permanent relief.

In a June 19, 2019 report, Dr. Kalin related that appellant's duties in May 2015 as a mail processing clerk included loading approximately 20-pound trays onto a belt, feeding them into machinery, and loading them into overhead containers. He also noted that appellant had an assignment as a flat sorter which required her to lift 30- to 35-pound tubs repetitively throughout her eight-hour shift. Dr. Kalin indicated that her work activities included turning, twisting, lifting, and occasionally lifting mail overhead. He reported that since May 2015 appellant had been on light duty and had been sorting mail, transferring it to trays weighing approximately 10 pounds, carrying the trays, and loading them into upright containers. Dr. Kalin related that this procedure was repeated for eight hours daily. He opined that appellant's repetitive work activities caused overstretched ligaments of the cervical spine compressing the spinal nerves, resulting in inflammation and irritation of the nerve root. Dr. Kalin found that this aggravated appellant's cervical spondylosis/arthritis. He also opined that appellant's twisting, turning, and lifting of 20-pound trays caused the muscles in her neck to strongly contract shortening their length to stabilize

the spine and prevent fracture and dislocation. Dr. Kalin noted that this caused microscopic tearing of the shortened muscles along the right side of the neck and the associated tendons and surrounding spinal ligaments. He found that this aggravated appellant's underlying cervical degenerative spondylosis resulting in even more impingement in the right shoulder. Dr. Kalin diagnosed chronic cervical musculoskeletal ligamentous strain with grade 1 retrolisthesis, central disc bulge narrowing, central disc protrusion, foraminal stenosis, degenerative disc disease, joint osteophytosis, and spinal stenosis.

By decision dated July 10, 2019, OWCP's hearing representative affirmed the February 12, 2019 decision. She found that the factual evidence of record was insufficient to establish an occupational disease claim as appellant had failed to identify specific employment factors that she believed caused her condition. The hearing representative also found that there were inconsistencies in the factual evidence as to cast serious doubt upon the validity of the claim.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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 period of FECA,⁶ 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.⁷ 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.⁸

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.⁹

An injury does not have to be confirmed by an eyewitness in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.¹⁰ Such circumstances as late notification of injury, lack of

⁵ *Supra* note 2.

⁶ *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ 20 C.F.R. § 10.115; *E.S.*, Docket No. 18-1580 (issued January 23, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁹ *See T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹⁰ *R.W.*, Docket No. 19-0339 (issued July 12, 2019); *Mary Jo Coppolino*, 43 ECAB 988 (1992).

confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she had established a *prima facie* claim for compensation. However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong and persuasive evidence.¹¹

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹² 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 claimant.¹³ Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.¹⁴

ANALYSIS

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

The evidence of record supports that appellant's work activities as a mail processing clerk required repetitive overhead lifting. In a December 18, 2018 narrative statement, appellant noted that on April 30, 2018 she lifted an overloaded tray of mail while on lifting restriction. She claimed that the lifting aggravated her right shoulder and right neck conditions. During the June 7, 2019 telephonic hearing, appellant clarified that she believed her conditions were caused by the repetitive motion of lifting her right shoulder above her head. She indicated that she performed repetitive overhead lifting from September 1998 to 2009 and then again from 2012 to 2014. Appellant testified that she began overhead lifting again in May 2015 after recovering from previous injuries and had continued to do so since that time even though she had work restrictions. She noted that she regularly performed repetitive overhead lifting and that she worked 5 days a week, 40 hours a week. Dr. Kalin's January 16 and June 19, 2019 reports also contained a description of appellant's job duties which were substantially similar to those that she testified to during the telephonic hearing. Additionally, in a January 3, 2019 development letter, OWCP requested information from the employing establishment regarding appellant's work activities and accommodations. The employing establishment did not respond. As such, the Board finds that the evidence is undisputed that appellant's work activities as a mail processing clerk included repetitive overhead lifting using her right shoulder.¹⁵

¹¹ *Id.*

¹² *J.F.*, Docket No. 18-0492 (issued January 16, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹³ *A.M.*, Docket No. 18-0562 (issued January 23, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

¹⁴ *E.W.*, *supra* note 6; *Gary L. Fowler*, 45 ECAB 365 (1994).

¹⁵ *T.A.*, Docket No. 19-1525 (issued March 4, 2020); *J.S.*, Docket No. 19-0381 (issued July 16, 2019).

Furthermore, the Board finds that there are no inconsistencies in the record to cast serious doubt on the validity of appellant's claim.¹⁶

As appellant has established factors of her federal employment, OWCP must base its decision on an analysis of the medical evidence. The case will therefore be remanded to OWCP to analyze and develop the medical evidence of record.¹⁷ After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision on the merits of this claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 10, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 28, 2020
Washington, DC

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

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

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

¹⁶ *K.F.*, Docket No. 18-0485 (issued February 18, 2020); *S.B.*, Docket No. 19-1499 (issued January 27, 2020).

¹⁷ *Supra* note 15.