

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

_____)
G.V., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Huntington Station, NY, Employer)
_____)

Docket No. 20-0055
Issued: April 21, 2020

Appearances:

Thomas S. Harkins, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On October 7, 2019 appellant, through counsel, filed a timely appeal from an April 16, 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.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 April 16, 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 expand the acceptance of his claim to include additional conditions causally related to the accepted September 8, 2017 employment injury.

FACTUAL HISTORY

On September 9, 2017 appellant, then a 63-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on September 8, 2017 he sustained injuries on his right side from his neck to his leg when he was rear-ended in a motor vehicle accident while in the performance of duty. He stopped work on that date.

Appellant was initially treated in the hospital emergency department on September 8, 2017. A hospital discharge instruction sheet indicated that he was diagnosed with a muscle strain.

In a September 22, 2017 development letter, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and also provided a questionnaire for his completion. OWCP afforded appellant 30 days to provide the necessary factual information and medical evidence.

Appellant subsequently submitted a September 8, 2017 state police accident report and a state application for no-fault motor vehicle benefits.

OWCP received a September 21, 2017 initial examination report by Dr. David Weissberg, a Board-certified orthopedic surgeon. Dr. Weissberg described that appellant was working as a mailman when he was rear-ended while parked in his vehicle. He related that appellant complained of right shoulder, neck, and back pain and was treated in the hospital emergency room. Upon examination of appellant's neck, Dr. Weissberg observed limited range of motion, tenderness, and spasms. His strength was noted as 5/5. Dr. Weissberg reported that examination of appellant's lumbar spine revealed limited flexion, extension, and rotation with pain. Right shoulder examination further revealed tenderness and positive impingement sign. Dr. Weissberg answered "yes" to a form question indicating that the incident described was the medical cause of the injury. He completed a work capacity evaluation (Form OWCP-5c), which indicated that appellant was not capable of working.

On September 22, 2017 appellant began physical therapy treatment and submitted treatment notes.

In an October 5, 2017 progress note, Dr. Weissberg recounted appellant's complaints of continued right shoulder, neck, and back pain after a motor vehicle accident at work. He provided examination findings and responded "yes" indicating that the described incident was the cause of appellant's injury. Dr. Weissberg completed a Form OWCP-5c, which indicated that appellant was not capable of working.

Appellant was also treated by Dr. Thomas J. Dowling, Jr., a Board-certified orthopedic surgeon, who indicated in an October 24, 2017 report that appellant complained of neck, back, and right-side symptoms due to a September 8, 2017 motor vehicle accident at work. Upon

examination of appellant's cervical spine, he observed paraspinal spasm and muscle tenderness. Dr. Dowling reported that thoracolumbar examination revealed paraspinal tenderness and painful range of motion. Neurological examination revealed full strength and no sensory deficits in the lower extremities. Dr. Dowling related that right shoulder examination demonstrated tenderness and full active range of motion. He diagnosed right cervical radiculopathy, right shoulder tendinitis, and discogenic back pain.

By decision dated October 26, 2017, OWCP denied appellant's claim. It accepted that the September 8, 2017 incident occurred as alleged and that conditions had been diagnosed, but it denied his claim finding that he had not established causal relationship between the accepted employment incident and the diagnosed conditions.

On November 7, 2017 appellant requested reconsideration.

Appellant subsequently submitted a September 11, 2017 report by Dr. Scott L. Gross, a Board-certified family physician, who described that on September 8, 2017 appellant was climbing back into his postal mail truck when the truck was rear-ended and he was thrown into the steering wheel. Dr. Gross recounted appellant's complaints of neck, right side of arm, and right leg pain. Upon examination of appellant's cervical spine, he observed pain on forward flexion, extension, and right-sided lateral flexion. Sensation was normal and strength was 5/5. Dr. Gross diagnosed cervical radiculopathy and neck pain. He completed a duty status report (Form CA-17), which indicated that appellant could not return to work.

In an October 2, 2017 progress note, Dr. Gross recounted that appellant still complained of discomfort after the employment incident. He conducted an examination and diagnosed cervical strain.

On October 25, 2017 appellant underwent diagnostic testing. A cervical spine magnetic resonance imaging (MRI) scan report showed disc desiccation with posterior disc margin preservation at C2-3, posterior disc osteophyte complex with moderate bilateral neural foraminal narrowing at C3-4, a small posterior left paracentral protrusion with mild right and moderate left neural foraminal narrowing at C4-5, and intervertebral disc height at C6-7. A lumbar spine MRI scan report revealed a small right intraforaminal/far lateral extrusion at L4-5 and small posterior midline extrusion with descending left S1 nerve root contact at L5-S1.

Appellant continued to receive medical treatment from Dr. Weissberg. In progress notes dated November 2, 2017 to January 8, 2018, Dr. Weissberg recounted appellant's complaints of continued right shoulder, neck, and back pain despite over the counter pain medicine and activity modification. Upon examination of appellant's neck, he observed tenderness, spasms, and limited flexion, extension, and rotation. Examination of appellant's back revealed limited range of motion and examination of his right shoulder demonstrated tenderness and positive impingement sign. Dr. Weissberg diagnosed lumbar intervertebral disc degeneration, lumbar spondylosis without myelopathy or radiculopathy, cervical disc disorder with radiculopathy, right shoulder rotator cuff strain, and left rotator cuff sprain. He responded "yes" to a question indicating that the described incident was the cause of appellant's injury.

Dr. Weissberg also completed CA-17 forms dated October 8 to November 2, 2017 and a November 30, 2017 attending physician's report (Form CA-20). He noted the September 8, 2017 date of injury and described that appellant was delivering mail and was rear ended. Dr. Weissberg

reported examination findings of cervical disc disorder with radiculopathy and diagnosed bilateral shoulder sprain. He checked a box marked “yes” indicating that appellant’s condition was causally related to the described employment activity. Dr. Weissberg explained “patient was rear ended now has cervical disorder and bilateral shoulder sprain.” He noted that appellant could not return to work.

By decision dated February 6, 2018, OWCP denied modification of the October 26, 2017 decision.

OWCP subsequently received progress notes by Dr. Weissberg dated February 5 to September 24, 2018. Dr. Weissberg recounted appellant’s complaints of continued low back, neck, and right shoulder pain and noted that appellant had not worked since the accident. Upon examination of appellant’s low back and neck, Dr. Weissberg observed tenderness, spasms, and limited flexion, extension, and rotation. Examination of appellant’s right shoulder revealed acromioclavicular joint tenderness and limited flexion and extension. Hawkins and Impingement signs were positive. Dr. Weissberg diagnosed lumbar intervertebral disc degeneration, lumbar spondylosis without myelopathy, cervical disc disorder with radiculopathy, right shoulder rotator cuff strain, and left shoulder rotator cuff strain. He continued to respond “yes” to a question indicating that the described incident was the cause of appellant’s injury. Dr. Weissberg completed CA-17 forms dated January 8 and February 5, 2018, which indicated that appellant could not work.

On January 27, 2019 appellant, through counsel, requested reconsideration.

Appellant submitted a May 25, 2018 statement by Dr. Bruce S. Baumgarten, a licensed psychologist. Dr. Baumgarten indicated that he had treated appellant since November 3, 2017 for an acute reaction to stress, which was the result of an automobile accident that occurred while at work. He also submitted a handwritten examination note dated September 8, 2017.

OWCP also received a May 31, 2018 work status note by Dr. Dowling who provided diagnoses of right cervical radiculopathy, discogenic low back pain, herniated nucleus pulposus at C3-4, C4-5, C5-6, L4-5, and L5-S1, lumbar back pain with radiculopathy affecting the right lower extremity, and right shoulder tendinitis. Dr. Dowling related that appellant was not working due to the aforementioned injury and diagnosis.

By decision dated April 16, 2019, OWCP set aside the February 6, 2018 decision in part and affirmed the decision in part. It determined that the medical evidence of record was sufficient to establish that the diagnosed conditions of right rotator cuff strain and left rotator cuff strain were causally related to the September 8, 2017 employment incident.⁴ OWCP also found, however, that the medical evidence of record failed to establish that the diagnosed lumbar, cervical, and emotional conditions were causally related to the September 8, 2017 employment injury.

⁴ By separate decision of even date, OWCP accepted appellant’s claim for right shoulder rotator cuff strain and left shoulder rotator cuff strain.

LEGAL PRECEDENT

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁵

The medical evidence required to establish causal relationship between a specific condition, as well as any attendant disability claimed, and the employment injury, is rationalized medical opinion evidence.⁶ 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.⁷ Additionally, the opinion of the physician 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 the specific employment factor(s) identified by the claimant.⁸

ANALYSIS

The Board finds that appellant has not met his burden of proof to expand the acceptance of his claim to include additional conditions causally related to the accepted September 8, 2017 employment injury.

In support of his claim, appellant submitted a series of progress reports by Dr. Weissberg. In an initial September 21, 2017 report, Dr. Weissberg described the September 8, 2017 work-related motor vehicle accident and appellant's complaints of right shoulder, neck, and back pain. He provided examination findings. In subsequent progress notes dated October 5, 2017 to September 24, 2018, Dr. Weissberg diagnosed lumbar intervertebral disc degeneration, lumbar spondylosis without myelopathy, cervical disc disorder with radiculopathy, right shoulder rotator cuff strain, and left shoulder rotator cuff strain. He answered "yes" in response to a form question indicating that the described incident was the cause of appellant's injury, but provided no rationale in support of his opinion. The Board has held that answering "yes" in response to a form question without the necessary rationale explaining how the accepted employment injury could result in the diagnosed conditions is insufficient to meet appellant's burden of proof.⁹ These reports of Dr. Weissberg are, therefore, insufficient to establish expansion of the acceptance of his claim.¹⁰

⁵ *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

⁶ *T.C.*, Docket No. 19-1043 (issued November 8, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

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

⁸ *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁹ *K.B.*, Docket No. 19-0398 (issued December 18, 2019); *M.O.*, Docket No. 18-1056 (issued November 6, 2018); *Sedi L. Graham*, 57 ECAB 494 (2006).

¹⁰ *See L.D.*, Docket No. 19-0350 (issued October 22, 2019).

Dr. Weissberg also completed a November 30, 2017 Form CA-20. He related that on September 8, 2017 appellant was delivering mail when he was rear ended. Dr. Weissberg reported examination findings of cervical disc disorder with radiculopathy and diagnosed bilateral shoulder sprain. He checked a box marked “yes” indicating that appellant’s condition was causally related to the described employment activity. Dr. Weissberg noted “patient was rear ended now has cervical disorder and bilateral shoulder sprain.” As noted above, the Board has held that a checkmark or affirmative notation in response to a form question on causal relationship is insufficient, without medical rationale, to establish causal relationship.¹¹ While Dr. Weissberg provided additional explanation that appellant was rear ended and developed a cervical disorder, he did not provide sufficient medical rationale explaining the basis of his opinion.¹² This report is, therefore, also insufficient to establish appellant’s claim.

In an October 24, 2017 report, Dr. Dowling also described the September 8, 2017 employment injury and provided examination findings. He diagnosed right cervical radiculopathy, right shoulder tendinitis, and discogenic back pain. While Dr. Dowling discussed the accepted September 8, 2017 employment injury, he did not address the cause of appellant’s cervical or lumbar conditions. 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.¹³ Appellant was also treated by Dr. Gross and Dr. Baumgarten who likewise did not specifically address how appellant’s cervical conditions or stress disorder resulted from the accepted September 8, 2017 employment injury. Thus, these reports are insufficient to establish any additional conditions as employment related.¹⁴

The October 25, 2017 lumbar and cervical MRI scan reports also fail to establish appellant’s claim. The Board has held that diagnostic studies lack probative value on the issue of causal relationship as they do not address whether the employment incident caused any of the diagnosed conditions.¹⁵

On appeal counsel argues that appellant sustained all disabling injuries and conditions causally related to the September 8, 2017 employment injury. As found above, the evidence submitted did not provide medical rationale from a physician explaining the causal relationship between appellant’s additional conditions and the September 8, 2017 employment injury. Thus, the Board finds that appellant has not met his burden of proof with respect to his claim for expansion of the accepted conditions.¹⁶

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.

¹¹ *K.T.*, Docket No. 15-1758 (issued May 24, 2016).

¹² *See T.J.*, Docket No. 19-1339 (issued March 4, 2020).

¹³ *See B.P.*, Docket No. 19-0777 (issued October 8, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

¹⁴ *See Y.C.*, Docket No. 17-1938 (issued January 7, 2019).

¹⁵ *F.D.*, Docket No. 19-0932 (issued October 3, 2019); *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

¹⁶ *See S.J.*, Docket No. 19-0489 (issued January 13, 2020); *E.B.*, Docket No. 17-1497 (issued March 19, 2019).

CONCLUSION

The Board finds that appellant has not met his burden of proof to expand the acceptance of his claim to include additional conditions causally related to the accepted September 8, 2017 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 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