

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

A.K., Appellant)	
)	
and)	Docket No. 20-0003
)	Issued: June 2, 2020
U.S. POSTAL SERVICE, BLOOMINGTON)	
POST OFFICE, Bloomington, IL, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 1, 2019 appellant filed a timely appeal from a June 3, 2019 merit decision and a September 5, 2019 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 over the merits of this case.²

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a lumbar condition causally related to the accepted factors of her federal employment; and (2) whether

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the September 5, 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.*

OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On April 9, 2019 appellant, then a 44-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that she developed a lumbar condition with radiculopathy due to factors of her federal employment including lifting, walking, sitting while driving, twisting, turning, and carry a mailbag, as well as delivering newspapers one day per week. She noted that she first became aware of her condition on November 1, 2018 and first realized its relationship to her federal employment on April 3, 2019. Appellant stopped work on April 8, 2019.

In a development letter dated April 18, 2019, OWCP requested that appellant submit additional evidence in support of her claim. It advised her of the type of factual and medical evidence needed to establish her claim and it provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In an April 22, 2019 narrative response to OWCP's questionnaire, appellant described her work duties, including sorting mail in the morning which involved standing, bending, stooping, twisting, kneeling, lifting, and reaching above the shoulder. She reported lifting tubs of mail, trays, newspaper bundles, and packages weighing up to 70 pounds and loading them into her mail hamper and then into her mail truck for delivery. Appellant's mail route required prolonged walking, ascending and descending stairs, and walking on uneven terrain while carrying a mailbag weighing up to 35 pounds. She indicated that, beginning in November 2018, she started to feel pain in the left side of her lower back, radiating into her left leg and foot and the more she continued to perform her work duties, the more her pain worsened. On April 3, 2019 while pushing her mail hamper, appellant felt excruciating back pain radiating into her left leg and sought medical treatment that day and subsequently reported to the emergency department the following day. On April 17, 2019 she had a magnetic resonance imaging (MRI) scan that revealed a herniated disc. Appellant indicated that she was referred to a neurosurgeon and held off from work.

Appellant was treated by Jessica Johann, a licensed practical nurse, on January 15, 2019 for left buttock pain, radiating into her left leg since November 2018 and right shoulder pain since October 2018. Ms. Johann noted that appellant worked as a mail carrier, which required prolonged walking and carrying her mailbag strap on her right shoulder.

In an unsigned emergency room note dated April 3, 2019, an unidentified care provider noted appellant's complaint of acute low back pain radiating into her left leg. A muscle relaxer was prescribed.

Dr. Susan Sheppard, a Board-certified family practitioner, evaluated appellant on April 15, 2019 and advised that appellant would be off work from April 8 to 13, 2019 and could return to regular-duty work on April 16, 2019. On April 17, 2019 she advised that appellant remained disabled from work and could return to full-duty work on April 18, 2019. On April 23, 2019 Dr. Sheppard reported treating appellant on January 15, February 14, and April 3, 5, and 15, 2019. She opined that the activities and requirements of appellant's job aggravated her condition and that appellant was totally disabled from work until evaluated by a neurosurgeon. In a duty status report

(Form CA-17) of even date, Dr. Sheppard described clinical findings and diagnosed lumbar disc herniation. She concluded that appellant was disabled from work. Dr. Sheppard treated appellant again on May 2, 2019 and noted that appellant underwent a lumbar spine MRI scan on April 17, 2019 which confirmed a lumbar disc herniation.³ She opined that the activities and requirements of appellant's job aggravated her condition. Dr. Sheppard concluded that appellant was temporarily totally disabled from work from April 8 to 13, 2019 and April 17 to May 4, 2019 and would continue to be temporarily totally disabled from work until evaluated by a neurosurgeon.

Appellant attended physical therapy treatment on April 15, 2019.

On May 10, 2019 Dr. Sheppard opined that the activities and requirements of appellant's job aggravated her condition, and appellant could only perform limited duty for two hours a day, five days a week until she was evaluated by a neurosurgeon. She noted that appellant was temporarily totally disabled from May 10 to 28, 2019. On May 30, 2019 Dr. Sheppard indicated that appellant was evaluated by a neurosurgeon and found to be temporarily totally disabled. In Form CA-17 reports dated May 10 and 30, 2019, she diagnosed lumbar disc herniation and indicated that appellant could resume work for two hours per day with restrictions.

By decision dated June 3, 2019, OWCP accepted the alleged employment factors, but denied appellant's claim finding that the medical evidence of record was insufficient to establish causal relationship between her diagnosed conditions and the accepted factors of her federal employment.

On June 11, 2019 appellant requested reconsideration and submitted additional medical evidence in support of her claim.

By decision dated September 5, 2019, OWCP denied appellant's June 6, 2019 reconsideration request finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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,⁴ 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

³ The lumbar spine MRI scan was submitted and revealed mild-degenerative disc disease at multiple levels with moderate sized left paracentral cranially extruded disc herniation at L5-S1 with smaller central and left lateral disc herniation at L4-5 level.

⁴ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

to the employment injury.⁵ 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.⁶

To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee 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 employment factors identified by the employee.⁷

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁸ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background.⁹ 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 factors.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a lumbar condition causally related to the accepted factors of her federal employment.

Dr. Sheppard evaluated appellant on April 15, 2019 and advised that she would be off work from April 8 to 13, 2019. In a follow-up note dated April 17, 2019, she advised that appellant continued to be disabled from work and would return to full duty on April 18, 2019. On May 30, 2019 Dr. Sheppard indicated that appellant was evaluated by a neurosurgeon and found to be temporarily disabled from her mail carrier position. While she found appellant disabled for work, she did not provide a medical diagnosis or reference the accepted employment factors in support of her findings. The Board has held that medical reports which do not provide a firm diagnosis or

⁵ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *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).

⁷ *R.G.*, Docket No. 19-0233 (issued July 16, 2019). See also *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

⁹ *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

¹⁰ *Id.*; *Victor J. Woodhams*, *supra* note 7.

fail to render an opinion on causal relationship are of no probative value and are insufficient to establish the claim.¹¹ These reports are therefore insufficient to establish appellant's claim.

In her April 23, 2019 report, Dr. Sheppard noted the history of treatment and opined that the activities and requirements of appellant's job aggravated her condition. On May 2 and 10, 2019 she diagnosed lumbar disc herniation and again opined that the requirements of appellant's job aggravated her lumbar spine. However, Dr. Sheppard did not provide medical reasoning to explain how the accepted employment factors were sufficient to have caused or aggravated appellant's lumbar condition. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition was related to accepted employment factors.¹² These additional reports of Dr. Sheppard are also insufficient to establish appellant's claim.

In Form CA-17 reports dated April 23 to May 30, 2019, Dr. Sheppard described clinical findings and diagnosed a lumbar disc herniation with radiculopathy. While her reports contain diagnoses, they do not provide an opinion as to causal relationship. 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.¹³ These reports, therefore, are insufficient to establish appellant's claim.

Appellant submitted a medical report from a nurse, Ms. Johann.¹⁴ Certain healthcare providers such as physical therapists and licensed practical nurses are not considered physicians as defined under FECA.¹⁵ Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.¹⁶

In an unsigned emergency room note dated April 3, 2019, an unidentified care provider noted treatment of appellant. The Board has held that a medical note containing an illegible signature or which is unsigned has no probative value, as it is not established that the author is a physician.¹⁷ This report therefore is insufficient to establish the claim.

¹¹ *I.M.*, Docket No. 19-1038 (issued January 23, 2020); *V.U.*, Docket No. 19-0755 (issued November 25, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹² *G.R.*, Docket No. 19-0940 (issued December 20, 2019); *D.L.*, Docket No. 19-0900 (issued October 28, 2019); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017); *C.M.*, Docket No. 14-0088 (issued April 18, 2014).

¹³ See *L.B.*, *supra* note 11; *D.K.*, *supra* note 11.

¹⁴ *J.D.*, Docket No. 16-1752 (issued March 1, 2017) (where the Board found that, a nurse practitioner is not considered a physician under FECA, thus, her opinion is of no relevance to the issue of causal relationship).

¹⁵ 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

¹⁶ See *M.F.*, Docket No. 17-1973 (issued December 31, 2018); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

¹⁷ See *Z.G.*, 19-0967 (issued October 21, 2019); *D.D.*, 57 ECAB 734 (2006); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

Appellant also submitted a lumbar MRI scan. The Board has held that diagnostic studies, standing alone, lack probative value as they do not provide an opinion on causal relationship between accepted employment factors and a claimant's diagnosed conditions.¹⁸ This evidence is therefore insufficient to establish appellant's claim.

As appellant has not submitted rationalized medical evidence establishing that her injury is causally related to the accepted factors of her federal employment, the Board finds that she has not met her burden of proof to establish her claim.

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

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁹ Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).²⁰ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.²¹

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.²² OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding to be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.²³ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.²⁴

OWCP's procedures note and the Board has held that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence that on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated).

¹⁸ See *I.C.*, Docket No. 19-0804 (issued August 23, 2019).

¹⁹ 20 C.F.R. § 10.607(a).

²⁰ Federal (FECA) Procedure Manual, *supra* note 16 at Chapter 2.1602.4(b) (February 2016).

²¹ *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

²² 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019).

²³ *Id.* at § 10.607(a).

²⁴ *G.L.*, *supra* note 21.

Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.²⁵ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²⁶

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

The last merit decision of record was OWCP's June 3, 2019 decision. As appellant's reconsideration request was received on June 11, 2019 within one year of the June 3, 2019 decision, it was timely filed. Therefore, OWCP should have applied the standard applicable to a timely reconsideration request as set forth in 20 C.F.R. § 10.606(b)(3) rather than the more stringent clear evidence of error standard for an untimely request for reconsideration set forth in 20 C.F.R. § 10.607(a). Because it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case for review of the newly submitted evidence under the proper standard of review for a timely reconsideration request.²⁷

Thus, the Board finds that the case shall be remanded for proper adjudication and application of the appropriate standard of review, to be followed by an appropriate decision.²⁸

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a lumbar condition causally related to the accepted factors of her federal employment. The Board further finds that OWCP improperly denied her request for reconsideration of the merits of her claim.

²⁵ *Supra* note 20; *G.L.*, *id.*

²⁶ *M.P.*, Docket No. 19-0674 (issued December 16, 2019).

²⁷ *J.H.*, Docket No. 18-1367 (issued July 17, 2019); *E.S.*, Docket No. 17-0698 (issued July 14, 2017).

²⁸ *J.H.*, *id.*; *W.R.*, Docket No. 16-0098 (issued May 26, 2016).

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2019 decision of the Office of Workers' Compensation Programs is affirmed and the September 5, 2019 decision is set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 2, 2020
Washington, DC

Christopher J. Godfrey, Deputy 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