

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

_____)	
J.S., Appellant)	
)	
and)	Docket No. 19-1356
)	Issued: January 8, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Hornell, NY, Employer)	
_____)	

Appearances:
Thomas S. Harkins, Esq., for the appellant¹
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
JANICE B. ASKIN, Judge

JURISDICTION

On June 4, 2019 appellant, through counsel, filed a timely appeal from a December 28, 2018 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.

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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a back condition causally related to the accepted March 28, 2015 employment incident.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On April 3, 2015 appellant, then a 46-year-old distribution window clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 28, 2015 she sustained a middle back strain when she attempted to open a stuck all-purpose container (APC) while in the performance of duty. She did not stop work.

OWCP subsequently received medical evidence, including reports dated April 17, May 20 and 28, July 10, and August 14, 2015 from Dr. Seth M. Zeidman, an attending Board-certified neurosurgeon. Dr. Zeidman diagnosed thoracic spondylosis without myelopathy, thoracic spine pain, and unspecified osteoporosis due to a March 28, 2015 employment incident. In addition, he addressed appellant's need for diagnostic testing and cervical surgery.

In an October 5, 2015 letter, OWCP advised appellant that additional factual and medical evidence was necessary to establish her claim. It noted that her claim initially appeared to be a minor injury that resulted in minimal or no lost time from work and that the claim was administratively handled to allow a limited amount of medical payments. However, appellant's claim was being reopened for consideration of the merits because she had filed a wage-loss claim. OWCP informed her of the type of factual and medical evidence needed to establish her claim and afforded her 30 days to submit the necessary evidence.

OWCP subsequently received medical evidence, including additional reports from Dr. Zeidman. In a March 9, 2015 report, Dr. Zeidman noted that appellant presented for evaluation after not being seen since 2009 and denied an injury or event that brought on the onset of her symptoms, but reported having worsening pain over the last several months. He related that he had performed appellant's L4-S1 laminectomy in 2008. Dr. Zeidman noted her cervical symptoms, discussed examination findings, and reviewed diagnostic test results. He diagnosed lumbar intervertebral disc degeneration, post-laminectomy lumbar syndrome, cervical spondylosis without myelopathy, cervicalgia, and thoracic spondylosis without myelopathy.

By decision dated December 10, 2015, OWCP accepted that the March 28, 2015 incident occurred as alleged, but denied appellant's traumatic injury claim finding that the medical evidence of record did not contain a rationalized medical opinion relating her diagnosed conditions to the accepted employment incident.

³ Docket No. 17-0987 (issued October 20, 2017).

On October 25, 2016 appellant, through counsel, requested reconsideration and submitted additional reports dated August 27 and November 19, 2015 and July 22, 2016 from Dr. Zeidman.

By decision dated January 9, 2017, OWCP denied modification of its December 10, 2015 decision, finding that the medical evidence submitted was insufficient to establish causal relationship.

Appellant, through counsel, appealed to the Board on April 4, 2017. By decision dated October 20, 2017, the Board affirmed the January 9, 2017 decision. The Board found that appellant had not submitted rationalized, probative medical evidence sufficient to establish a back injury causally related to the accepted March 28, 2015 employment incident.⁴

On October 8, 2018 appellant, through counsel, requested reconsideration. Counsel submitted an additional report from Dr. Zeidman dated September 6, 2018 and alleged that Dr. Zeidman's new report established that all of appellant's diagnosed conditions were causally related to the accepted employment incident.

In his September 6, 2018 report, Dr. Zeidman noted a history of the accepted March 28, 2015 employment incident, discussed findings on physical examination, and reviewed diagnostic test results including an April 24, 2015 magnetic resonance imaging (MRI) scan. He reiterated his prior assessments of cervical spondylosis and thoracic spine pain. Dr. Zeidman recommended diagnostic testing. He opined that there was a direct correlation between appellant's current condition and the March 28, 2015 work injury and noted that, although she had a vague history of cervical spine discomfort, her condition was directly related to the accepted employment incident. Dr. Zeidman further opined that she remained temporarily totally disabled from work.

By decision dated December 28, 2018, OWCP denied modification of its prior decision denying appellant's traumatic injury claim. It found that Dr. Zeidman's September 6, 2018 report was insufficient to establish causal relationship between the diagnosed conditions, aggravation of her preexisting neck and thoracic conditions, and the accepted March 28, 2015 employment incident.

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 and 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

⁴ The Board further denied appellant's petition for reconsideration. *Order Denying Petition for Reconsideration*, Docket No. 17-0987 (issued August 21, 2018).

⁵ *Supra* note 2.

⁶ *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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 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.⁹ There are 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.¹⁰ The second component is whether the employment incident caused a personal injury.¹¹

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹² A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment incident must be based on a complete factual and medical background.¹³ 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 incident.¹⁴

In a 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.¹⁵

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a back condition causally related to the accepted March 28, 2015 employment incident.

⁷ *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *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).

⁹ *S.S.*, Docket No. 18-1488 (issued March 11, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

¹⁰ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹¹ *E.M.*, *id.*; *John J. Carlone*, 41 ECAB 354 (1989).

¹² *S.S.*, *supra* note 9; *Robert G. Morris*, 48 ECAB 238 (1996).

¹³ *C.F.*, Docket No. 18-0791 (issued February 26, 2019); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁴ *Id.*

¹⁵ *R.C.*, Docket No. 18-1146 (issued August 12, 2019); *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).

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's January 9, 2017 decision because the Board considered that evidence in its October 20, 2017 decision and found that it was insufficient to establish her claim. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁶

On reconsideration appellant submitted a September 6, 2018 report from her treating physician, Dr. Zeidman. Dr. Zeidman provided cervical and thoracic spine diagnoses and opined that appellant's conditions were directly caused by the accepted March 28, 2015 employment incident and that she remained temporarily totally disabled from work. He indicated that although she had a "vague" history of cervical spine discomfort, there was a causal relationship between her diagnosed conditions and the accepted work incident. While Dr. Zeidman identified the specific employment incident alleged by appellant, he did not provide a pathophysiological explanation as to how attempting to open a stuck APC either caused or contributed to appellant's diagnosed conditions and resultant disability or aggravated a preexisting cervical condition.¹⁷ The Board has consistently held that complete medical rationalization is particularly necessary when there are preexisting conditions involving the same body part,¹⁸ and has required medical rationale differentiating between the effects of the work-related injury and the preexisting condition in such cases.¹⁹ Thus, the Board finds that Dr. Zeidman's report is insufficient to meet appellant's burden of proof.

As appellant has not submitted rationalized medical evidence sufficient to establish an injury causally related to the accepted employment incident, the Board finds that she has not met her burden of proof.

On appeal counsel contends that the factual and medical evidence of record unequivocally establishes that appellant sustained cervical and thoracic spine injuries causally related to the March 28, 2015 employment incident. However, as discussed above, Dr. Zeidman's report is insufficient to meet appellant's burden of proof.

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 and 20 C.F.R. §§ 10.605 through 10.607.

¹⁶ See *B.R.*, Docket No. 17-0294 (issued May 11, 2018).

¹⁷ See *A.S.*, Docket No. 19-0915 (issued November 22, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁸ *A.S.*, *id.*; *K.R.*, Docket No. 18-1388 (issued January 9, 2019).

¹⁹ See, e.g., *A.S.*, *id.*; *A.J.*, Docket No. 18-1116 (issued January 23, 2019); *M.F.*, Docket No. 17-1973 (issued December 31, 2018); *J.B.*, Docket No. 17-1870 (issued April 11, 2018); *E.D.*, Docket No. 16-1854 (issued March 3, 2017); *P.O.*, Docket No. 14-1675 (issued December 3, 2015).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a back condition causally related to the accepted March 28, 2015 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the December 28, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 8, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board