United States Department of Labor
Employees' Compensation Appeals Board

T.L., Appellant	)	
and	)	**Docket No. 18-1187**
	)	**Issued: March 10, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Melville, NY, Employer	)	

Appearances:
Stephen Larkin, for the appellant[1]
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 May 19, 2018 appellant, through her representative, filed a timely appeal from a February 13, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 appellant submitted additional evidence on appeal. 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 evidence for the first time on appeal. *Id*.

ISSUE

The issue is whether appellant has met her burden of proof to establish cervical and lumbar conditions causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On March 3, 2016 appellant then a 59-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she aggravated her neck and back conditions due to factors of her federal employment including lifting magazines. She first became aware of her condition and realized it was causally related to her employment on November 11, 2015. Appellant did not stop work, but continued in a limited-duty assignment related to a separate work-related injury.

Appellant was treated by Dr. Edward Firouztale, an osteopath Board-certified in neurology, on November 11, 2015, for intermittent radiating back pain. She reported having difficulty lifting heavy magazines at work. Dr. Firouztale noted diagnostic testing which included a magnetic resonance imaging (MRI) scan of the lumbar spine, dated January 3, 2009, that revealed minimal disc bulging at L2-3 and a small degenerative disc bulge and annular tear at L4-5 as well as a cervical spine MRI scan, dated December 20, 2011, that revealed interval progression from the prior study of cervical spondylosis most notably at C5-6, C6-7, impingement upon left C7 nerve root, central stenosis, and straightening of the cervical lordosis. Findings on examination revealed back and neck pain. Dr. Firouztale diagnosed radiculopathy of the lumbar region and spinal stenosis. He recommended further examination with a spine specialist, pain management, an electromyogram (EMG), and a reduction in appellant's work schedule to three days a week limited duty. A duty status report (Form CA-17) from Dr. Firouztale dated November 12, 2015 noted a diagnosis of cervical and lumbar radiculopathy and returned appellant to work on November 12, 2015 for three days per week of limited duty.

A March 2, 2016 Form CA-17 from a nurse practitioner noted a diagnosis of cervical and lumbar radiation and returned appellant to work three days per week with restrictions.

In an April 6, 2016 claim development letter, OWCP requested that appellant submit additional factual and medical information in support of her claim and provided a questionnaire to substantiate the factual elements of her claim. It also requested that she clarify whether she was claiming an occupational disease or a traumatic injury. OWCP afforded appellant 30 days to submit the requested information.

In a statement dated May 10, 2016, appellant indicated that in 1994 she sustained a cervical and lumbar injury when she slipped on ice while delivering mail, OWCP File No. xxxxxx716.[4] She reported that her back and neck conditions worsened and Dr. Firouztale reduced her work hours on November 11, 2015. Appellant indicated that her ongoing work duties aggravated her preexisting condition over a period of time. She noted that on October 17, 2011 her work

[4] OWCP assigned OWCP File No. xxxxxx716 and accepted the claim for cervical strain, lumbosacral strain, and lumbosacral neuritis/radiculitis. On October 17, 2013 appellant filed a traumatic injury claim alleging that on July 25, 2009 she had exacerbated her cervical and lumbar conditions while performing work outside of her restrictions. OWCP assigned File No. xxxxxx021 and denied the claim.

assignment involved "rips and tears" in which she lifted and carried buckets half filled with magazines, flats, catalogues, and newspapers weighing 10 to 15 pounds. Appellant indicated that repetitively lifting and carrying the buckets aggravated her back and created sciatica. She reported performing these duties five days per week until her physician reduced her work schedule to three days per week on November 11, 2015.

By decision dated June 10, 2016, OWCP denied appellant's claim finding that she had not established that her claimed medical condition was causally related to the established work-related events.

On June 20, 2016 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on February 16, 2017.

In a Form CA-17 dated October 5, 2016, Dr. Firouztale diagnosed cervical and lumbar radiculopathy. He returned appellant to work three days per week with restrictions.

On February 13, 2017 Dr. Deborah Eisen, Board-certified in family medicine, noted that appellant had previously been injured in 1994 when she fell on ice at work and sustained lumbar and cervical sprains. She reviewed appellant's prior diagnostic testing and performed a physical examination. Dr. Eisen opined that her job duties of lifting and carrying approximately 700 magazines and catalogues out of buckets for eight hours per day, five days per week would result in lumbar radiculopathy. She explained that lifting and carrying heavy packages put pressure across the discs causing them to bulge or herniate. Dr. Eisen noted that when a disc bulges or herniates, as noted on the MRI scan of November 19, 2015, it presses on spinal nerves creating stenosis at L4-5, and symptoms of pain, weakness, numbness, and radiculopathy. She opined that the cervical spine musculature was overworked and in a weakened state due to appellant's prior conditions and became strained. Dr. Eisen further opined, within a reasonable degree of medical certainty, that appellant's conditions were causally related to her employment duties, noting that lifting and carrying heavy packages caused bulging lumbar discs leading to stenosis of the nerves, L4-5 lumbar radiculopathy, and cervical spine sprain.

In letters dated March 17 and 27, 2017, the employing establishment indicated that appellant was restricted from lifting more than 15 pounds and her duties required lifting less than this amount. It indicated that the buckets weighed three pounds "when empty" and her estimate of lifting 700 magazines was a "very high estimate." The employing establishment also noted that she could ask for assistance for heavier job duties.

On April 13, 2017 appellant submitted an opinion and award dated November 30, 2015 relating to a grievance she had filed against the employing establishment. The opinion found that her limited-duty position, in relation to her prior accepted claim, had been improperly abolished and she had therefore worked in an improper position.

By decision dated May 1, 2017, an OWCP hearing representative affirmed the June 10, 2016 decision. She found that appellant's employment duties involved repairing damaged magazines/catalogs, handling an average of several hundred magazines a day, working three days a week since November 11, 2015, and lifting which did not exceed 15 pounds. The hearing representative further found that Dr. Eisen's report was of diminished probative value as she based her opinion on an inaccurate and incomplete history of injury because her opinion was

based upon appellant lifting about 700 magazines each night and lifting buckets weighing approximately 10 pounds per bucket.

On November 21, 2017 appellant, through her representative, requested reconsideration. In support of the request, she submitted a report from Dr. Eisen dated November 17, 2017, who opined within a reasonable degree of medical certainty that appellant's conditions, as described, were causally related to her employment duties. Dr. Eisen opined that lifting and carrying 10-pound buckets and lifting approximately 700 magazines per shift would cause bulging of the lumbar discs leading to stenosis of the nerves, L4-5 lumbar radiculopathy, and cervical spine sprain of the musculature.

By decision dated February 13, 2018, OWCP denied modification of the May 1, 2017 decision.

LEGAL PRECEDENT

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,[5] 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.[6] 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.[7]

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.[8]

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

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

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

[7] *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).

[8] *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).

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

complete factual and medical background.[10] 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.[11]

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.[12]

ANALYSIS

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

OWCP accepted that appellant's employment duties involved repairing damaged magazines/catalogs, handling an average of several hundred magazines per day, working three days per week since November 11, 2015, and lifting which did not exceed 15 pounds.

In support of her claim, appellant has submitted medical reports from Dr. Eisen who provided affirmative opinions on the issue of causal relationship. In her February 13, 2017 report, Dr. Eisen acknowledged appellant's preexisting, work-related lumbar and cervical spine conditions. She opined that appellant's job duties of lifting and carrying approximately 700 magazines and catalogues out of buckets for eight hours per day, five days per week would result in lumbar radiculopathy, explaining that lifting and carrying heavy packages put pressure across the discs causing them to bulge or herniate. Dr. Eisen further explained that when a disc bulges or herniates it presses on spinal nerves creating stenosis and symptoms of pain, weakness, numbness, and radiculopathy. As it relates to the preexisting conditions, she opined that the cervical spine musculature was overworked and in a weakened state due to appellant's prior conditions and became strained. Dr. Eisen concluded that appellant's cervical and lumbar conditions were causally related to her employment duties, specifically noting that lifting and carrying heavy packages caused bulging lumbar discs leading to stenosis of the nerves, L4-5 lumbar radiculopathy, and cervical spine sprain.

In her November 17, 2017 report, Dr. Eisen reiterated her prior causation opinion and rationale and explained how the employment factors, as set forth by the hearing representative, were sufficient to have resulted in appellant's current cervical and lumbar spine conditions.

The Board finds that the reports of Dr. Eisen, when read together, are sufficient to require further development of the medical evidence to see that justice is done.[13] Dr. Eisen is a Board-

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

[11] *Id.*; *Victor J. Woodhams*, *supra* note 8.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013). *See R.D.*, Docket No. 18-1551 (issued March 1, 2019).

[13] *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

certified physician who is qualified to render an opinion on the issue of causal relationship and she provided a comprehensive and convincing review of the medical record and case history. The Board further finds that she provided a pathophysiological explanation as to how the accepted employment factors were sufficient to cause the currently diagnosed conditions. The Board has long held that it is unnecessary that the evidence of record in a case be so conclusive as to suggest causal connection beyond all possible doubt. Rather, the evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound, and logical.[14] Following review of Dr. Eisen's reports, it is found that her medical opinion is well rationalized and logical and is therefore sufficient to require further development of appellant's claim.

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[15] OWCP has an obligation to see that justice is done.[16]

On remand OWCP shall refer appellant to an appropriate specialist, along with the case record and a statement of accepted facts. Its referral physician shall provide a well-rationalized opinion as to whether appellant's diagnosed conditions are causally related to the accepted factors of her federal employment. If the physician opines that the current conditions are not causally related to appellant's employment duties, he or she must explain with rationale how or why the opinion differs from that of Dr. Eisen. After such further development of the case record as OWCP deems necessary, it shall issue a *de novo* decision.[17]

CONCLUSION

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

[14] *W.M.*, Docket No. 17-1244 (issued November 7, 2017); *E.M.*, Docket No. 11-1106 (issued December 28, 2011); *Kenneth J. Deerman*, 34 ECAB 641, 645 (1983) and cases cited therein.

[15] *See also A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

[16] *See B.C.*, Docket No. 15-1853 (issued January 19, 2016).

[17] The Board notes that appellant's prior claims, OWCP File Nos. xxxxxx716 and xxxxxx021, have not been administratively combined with the current case. Upon return of the case record, OWCP shall administratively combine appellant's current claim with her prior claims as they relate to the same cervical and lumbar spine conditions.

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2018 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: March 10, 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