United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant	)	
and	)	**Docket No. 19-1029**
	)	**Issued: October 22, 2020**
DEPARTMENT OF VETERANS AFFAIRS, JESSE BROWN MEDICAL CENTER, Chicago, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On April 10, 2019 appellant, through counsel, filed a timely appeal from a March 5, 2019 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.

[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 condition causally related to the accepted April 20, 2016 employment incident.

FACTUAL HISTORY

On June 3, 2016 appellant, then a 50-year-old sales clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 20, 2016 she slipped and fell on spilled grease on the kitchen floor while in the performance of duty. She noted that she was returning to her workstation after retrieving items from the cooler when her fall occurred. Appellant alleged that she injured her left leg, pelvic area, back, and neck. She stopped work on April 20, 2016.

In a July 5, 2016 development letter, OWCP advised appellant of the deficiencies of her claim. It requested additional factual and medical evidence from appellant. OWCP afforded her 30 days to respond.

In a note dated April 20, 2016, Dr. Katharine E. Secunda, a Board-certified internist, reported that appellant was carrying some supplies and slipped and fell on grease injuring her left side and back. She noted that appellant's cervical computerized tomography (CT) scan of April 20, 2016 (WHAT?) demonstrated a large disc protrusion at C4-5 and moderate degenerative central stenosis at C4-5. Dr. Secunda diagnosed a fall and released appellant to return to work on April 25, 2016.

On April 25, May 9, June 1, and July 13, 2016 Dr. Theresa Dabek, a family practitioner, opined that appellant was disabled from work. She completed an attending physician's report (Form CA-20) on July 12, 2016 and diagnosed cervical radiculopathy with low back muscle spasms. Dr. Dabek noted that appellant fell at work on April 20, 2016. On May 18, 2016 appellant's magnetic resonance imaging (MRI) scan of the cervical spine demonstrated small protrusions and spinal canal stenosis. She indicated by checking a box marked "no" that she did not believe that appellant's diagnosed condition was caused or aggravated by her employment.

By decision dated August 8, 2016, OWCP accepted that the April 20, 2016 employment incident occurred, as alleged, and that the medical evidence of record supported a diagnosis of cervical radiculopathy. However, it found that the medical evidence of record did not establish a causal relationship between her diagnosed condition and her accepted employment incident.

On September 6, 2016 appellant requested a review of the written record from an OWCP hearing representative and submitted additional medical evidence. In notes dated April 25, May 9, and 31, June 22, and August 15, 2016, Dr. Dabek noted appellant's history and reported that she was experiencing pain in her neck, back, and left shoulder. She diagnosed cervical radiculitis. Dr. Dabek released appellant to return to work with restrictions on May 31, 2016. On June 2, 2016 she noted that appellant's cervical radicular pain had increased following her fall at work.

In an August 30, 2016 report, Dr. Dabek noted that she first examined appellant on April 25, 2016 after she sought treatment at the emergency room. She noted that appellant reported low back pain and difficulty walking due to pain as well as tingling and pain in her upper

extremities. Dr. Dabek found that appellant was unable to work due to pain, muscle spasms, and difficulty walking as a result of her fall at work. She noted that appellant's MRI scan demonstrated degenerative changes and disc bulges in the cervical spine.

By decision dated January 3, 2017, OWCP's hearing representative affirmed the August 8, 2016 OWCP decision, finding that the medical evidence of record did not establish causal relationship between appellant's accepted employment incident on April 20, 2016 and her diagnosed conditions.

On February 25, 2017 appellant requested reconsideration of the January 3, 2017 decision and submitted additional medical evidence. She submitted notes from Elizabeth J. Williamson, a physical therapist, dated July 11 and August 17, 2016. On September 9, 2016 appellant underwent electromyogram (EMG) and nerve conduction velocity (NCV) studies, which were interpreted as normal in the upper extremities and indicative of mild S1 radiculopathy on the right and L7 radiculopathy on the left.

In August 30, October 27, and November 22, 2016 notes, Dr. Lenny Cohen, a Board-certified neurologist, examined appellant, noted her history of a fall at work on April 20, 2016 and diagnosed low back pain and neck pain. He referred appellant for a lumbar MRI scan on September 15, 2016, which demonstrated no significant disc bulge, spinal canal or foraminal stenosis.

On February 8, 2017 Dr. Dabek completed a report diagnosing degenerative disc disease of the neck with disc protrusion. She opined that any fall could cause more muscle spasms around the impacted area, which would lead to pain and gait disturbances. Dr. Dabek found that appellant's symptoms were aggravated by her fall at work and that she was unable to return to work until her physical therapy was approved.

By decision dated May 4, 2017, OWCP denied modification of the January 3, 2017 decision. It found that the medical evidence of record did not contain a sufficiently reasoned opinion explaining how the accepted April 20, 2016 fall caused or aggravated appellant's diagnosed back conditions.

On November 20, 2017 appellant, through counsel, requested reconsideration of the May 4, 2017 decision and submitted additional medical evidence.

In a November 8, 2017 report, Dr. Neil Allen, a Board-certified neurologist, noted reviewing appellant's medical records and history of an April 20, 2016 fall at work. He diagnosed cervical sprain/strain and aggravation of cervical disc disorder with radiculopathy and noted that appellant's fall was a rapid deceleration event similar to that of whiplash. Dr. Allen described the event as entailing a forward flexion of the cervical spine, followed by hyperextension as she fell. He opined that the rapid change in directional force, through the spine, results in injury to the fibrous ligaments, tendons, and discal structures of the spinal aggravating or accelerating the progression any underlying age-related changes. Dr. Allen also noted that appellant's diagnoses included strain/sprain of the lumbar spine as the blunt force trauma of hitting the ground resulted in the overstretching of the ligaments and musculature of the lumbar spine and her back injury.

By decision dated March 5, 2019, OWCP denied modification. It found that Dr. Allen did not provide objective findings in support of his diagnoses and did not indicate that he had examined appellant, but instead reviewed unspecified medical records such that it was unable to determine whether his report was based on an accurate factual background.

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,[3] 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.[4] 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.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.[6]

The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[7] The opinion of the physician must be based on a complete factual and medical background, 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.[8]

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

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

[5] *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).

[6] *Id.*

[7] *R.R.*, Docket No. 18-1093 (issued December 18, 2018); *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[8] *A.W.*, Docket No. 19-0327 (issued July 19, 2019); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 45 ECAB 345 (1989).

ANALYSIS

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

In support of her claim, appellant submitted a November 8, 2017 report from Dr. Allen who asserted that he had reviewed appellant's medical records and noted that she fell at work on April 20, 2016. Dr. Allen diagnosed cervical sprain/strain and aggravation of cervical disc disorder with radiculopathy as well as lumbar sprain/strain. He opined that appellant's fall was a rapid deceleration event similar to that of whiplash, which entailed forward flexion of the cervical spine, followed by hyperextension as she fell. Dr. Allen further opined that the rapid change in directional force, through the spine, results in injury to the fibrous ligaments, tendons, and discal structures of the spinal aggravating or accelerating the progression any underlying age-related changes. He also noted that the blunt force trauma of hitting the ground resulted in the overstretching of the ligaments and musculature of the lumbar spine and her back injury.

The Board finds that the November 8, 2017 report of Dr. Allen is sufficient to require further development of the medical evidence to see that justice is done.[9] Dr. Allen is a Board-certified physician who is qualified in his field of medicine to render rationalized opinions on the issue of causal relationship and he provided a comprehensive and convincing review of the medical record and case history. It is further found that he provided a pathophysiological explanation as to how the mechanism of the accepted employment incident was sufficient to cause the appellant's cervical disc disorder with radiculopathy and lumbar sprain/strain condition. The Board has long held that 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.[10] Following review of Dr. Allen's November 8, 2017 report, the Board finds that his medical opinion is 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.[11] OWCP has an obligation to see that justice is done.[12]

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 April 20, 2016 employment incident. If the physician opines that the diagnosed condition is not causally related to the employment incident, he or she must explain with rationale how or why

[9] *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).

[10] *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).

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

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

their opinion differs from that of appellant's selected physicians. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2019 merit decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: October 22, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

Alec J. Koromilas, Chief Judge, dissenting:

The majority opinion finds that, although the November 8, 2017 medical report of Dr. Neil Allen was insufficient to meet appellant's burden of proof to establish their claim, it was sufficient to require Office of Workers' Compensation Programs to further develop the medical evidence. I disagree.

As a standard proposition, the Board has long held that the weight of medical opinion is determined by the opportunity for thoroughness of examination, the accuracy, and completeness of the physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested, and the medical rationale expressed in support of stated conclusions.[1]

[1] *R.C.*, Docket No 14-1964 (issued January 22, 2015); *Anna C. Leanza*, 48 ECAB 115 (1996)

The Federal Employees' Compensation Act Procedural Manual also sets out parameters for the weighing of medical evidence.[2] It describes a comprehensive report as one which reflects that all testing and analysis necessary to support the physician's final conclusions were performed. OWCP's procedures provide that, in general, greater probative value is given to a medical opinion based on an actual examination. An opinion based on a cursory or incomplete examination will have less value compared to an opinion based on a more complete evaluation.[3]

The case at bar raises a novel constellation of facts where appellant's physician is providing a causal opinion without examining appellant. While arguably considered a treating physician, Dr. Allen never saw in person nor physically examined appellant. He premised his opinion solely on what he characterized as medical records that he had reviewed. Dr. Allen did not, attribute his understanding of the events and effects of the April 20, 2016 fall to any specific medical records or reports, and did not explain the factual basis for his description of the physiological processes of appellant's fall or his resulting diagnoses.

It is an important distinction that the medical report of Dr. Allen in this case is being used to remand the case for further development.[4] The majority finds that, although his opinion contains insufficient medical rationale to establish the claim, it is sufficient to remand for OWCP to further develop the claim. This is effectuated by the 30-year-old Board-created standard, which provides that "when there is sufficient evidence to establish that the incident occurred, as alleged, but the medical evidence was insufficiently developed to establish the component of fact of injury, evidence submitted by appellant, which contains a history of injury, an absence of any other noted trauma, and an opinion that the condition found was consistent with the original injury is sufficient, given the absence of any opposing medical evidence, to require further development of the record."[5] It could be characterized as a reduced subjective standard, which effectively shifts the burden of proof to OWCP. This case was previously denied by OWCP based on in-person physical examination(s), which were found to be insufficient under the same reduced standard.

Especially in this posture, I believe certain basic medical examination parameters must be met. Dr. Allen espoused an opinion on causal relationship without the benefit of direct physical examination or observations and based his findings on the second-hand opinion(s) of what we believe to be other physicians. This is the type of injury that lends itself to physical examination for the purposes of diagnosis and causation, where the physician is able to palpate the patient, question and receive a first-hand account of the injury, and compare same. This remains critical even when the only issue is causation. I do not agree that words of causation in the ordinary course alone can be separated from an examination of appellant by appellant's physician.

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.810.6(a)(4) (September 2010).

[3] *Id*.

[4] *R.H.*, Docket No. 17-1966 (issued March 6, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[5] *Id*.

Of course, there are occasions where a physical examination cannot be conducted, such as when appellant is deceased. In that situation, record reviews are required and the weight of medical reports in the first instance are weighed using the above-mentioned criteria, but those circumstances are rare and that is inapplicable in the present case.

One could argue that this type of situation is similar to the use by OWCP of a district medical adviser (DMA). The Board has found that the unique status of the DMA, which allows for an advisory medical opinion without a physical examination, can be of sufficient probative value in certain circumstances.[6] I believe that there is an important distinction between a DMA as described in *Jackson* and a treating physician such as Dr. Allen in this case. A treating physician and DMA do not share the same status. DMAs have a much more defined and narrow purpose. They are generally charged with the computations of schedule awards, the medical necessity of requested surgeries, and other such issues that do not require an in-person examination. As well, they operate under parameters that ensure appropriate review of the evidence, as they have the benefit of the complete OWCP record, as well as a statement of accepted facts created by OWCP, which they must follow for the purposes of history, knowledge, and analysis. In Dr. Allen's situation, there are no such safeguards.

If Dr. Allen had examined appellant, noted an in-person history, reviewed the entire record, and made his own conclusions, I would be inclined to perhaps be satisfied with his knowledge and understanding of the matter and agree with the majority that his opinion would be sufficient to remand for OWCP to further develop the medical evidence. However, the majority finding in my view, without the benefit of in-person examination, effectively shifts the burden of proof to OWCP to disprove the claim based on a medical report that is of questionable probative value.

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

[6] *Melvina Jackson*, 38 ECAB 443 (1987) (regarding the importance, when assessing medical evidence, of such factors as a physician's knowledge of the facts and medical history, and the care of analysis manifested and the medical rationale expressed in support of the physician's opinion).