

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

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<b>A.S., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 20-0301</b>
	)	<b>Issued: October 26, 2020</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>TRANSPORTATION SECURITY AGENCY,</b>	)	
<b>JFK INTERNATIONAL AIRPORT,</b>	)	
<b>Jamaica, NY, Employer</b>	)	

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*Appearances:*  
Thomas R. Harkins, Esq., for the appellant<sup>1</sup>  
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 November 25, 2019 appellant, through counsel, filed a timely appeal from a June 6, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> 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 additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether appellant has met her burden of proof to establish lumbar conditions causally related to the accepted November 23, 2017 employment incident.

## **FACTUAL HISTORY**

On November 26, 2017 appellant, then a 47-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on November 23, 2017 she experienced back pain when a cart piled with suitcases tipped over and struck her in the back as she was scanning a bag from the oversize belt while in the performance of duty. She stopped work that day and returned on November 26, 2017.

In a November 27, 2017 post-injury evaluation form, Dr. Steven Zimmerman, Board-certified in emergency medicine, diagnosed work-related injury back pain. He held appellant off work until cleared by the emergency room staff.

A November 30, 2017 magnetic resonance imaging (MRI) scan of appellant's lumbar spine noted L4-5 broad-based posterior central subligamentous herniation with regional nerve root encroachment and mild bilateral neural foraminal narrowing. It also noted L3-S1 mild posterior disc bulges.

On December 1, 2017 Dr. Fernando Checo, a Board-certified orthopedic surgeon, diagnosed lumbar syndrome, lumbar radiculopathy, and lumbar spinal stenosis. In a narrative December 1, 2017 report, he noted the history of appellant's employment incident when a passenger's cart tipped and struck her back. Dr. Checo presented physical examination findings and provided an impression of lumbar radiculopathy, lumbar spinal stenosis, lumbar spondylosis and mechanical back pain. He opined that appellant was totally disabled from her position and was to refrain from any heavy lifting, bending, twisting, or strenuous activities. Dr. Checo referred her to physical therapy, which she started on December 13, 2017. He continued to opine that appellant was totally disabled from work in reports dated December 12 and 29, 2017.

In a January 26, 2018 development letter, OWCP advised appellant that, when her claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work. The claim was administratively approved to allow payment for limited medical expenses, but the merits of the claim had not been formally adjudicated. OWCP advised appellant of the deficiencies of her claim and instructed her as to the factual and medical evidence necessary to establish her claim. It requested that she provide a narrative medical report from her physician, which contained a detailed description of findings and diagnoses, explaining how the reported incident caused or aggravated her medical condition. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP received statements from appellant, additional physical therapy notes, a November 27, 2017 state workers' compensation claim form in which appellant indicated her back was jolted from the luggage which tipped/was pushed onto her, a February 15, 2018 letter from the employing establishment, claims for wage-loss compensation (Form CA-7), and February 14 and 18, 2018 requests for leave or approved absences.

In a November 30, 2017 report, Dr. David Rodriguez, a Board-certified family practitioner, indicated that on November 23, 2017 a cart full of luggage hit appellant and pushed her into the x-ray machine at work. An assessment of lower back work-related injury was provided.

In a January 26, 2018 prescription note, Dr. Checo diagnosed lumbar stenosis. He also provided a disability note dated February 9, 2018.

By decision dated March 13, 2018, OWCP denied the claim. It found that the evidence of record was insufficient to establish that the diagnosed medical conditions were causally related to the accepted November 23, 2017 employment incident.

Several reports from Dr. Checo dated February 9, April 20, June 15, and September 15, 2018 were submitted, along with disability notes. Dr. Checo noted that appellant had back pain after an injury at work. He presented examination findings, noting mechanical symptoms. Dr. Checo provided impressions of lumbar radiculopathy, lumbar spinal stenosis, lumbar spondylosis, and mechanical back pain.

In a February 27, 2018 report, Dr. Yohan Lee, a Board-certified physiatrist, reported that appellant was injured on November 23, 2017 when a luggage cart ran into her back, jerking her backwards and causing her to fall into an x-ray machine. No prior back issues were noted. Dr. Lee provided an impression of lumbar strain and lumbar disc herniation. He indicated that appellant was a candidate for an epidural steroid injection.

On March 8, 2019 appellant, through counsel, requested reconsideration. OWCP received copies of medical reports previously of record.

In an April 26, 2019 letter, the employing establishment indicated that video footage of the November 23, 2017 incident showed the incident and appellant at the time of the incident.

By decision dated June 6, 2019, OWCP denied modification of its March 13, 2018 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> 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 of FECA,<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

<sup>7</sup> *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

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.<sup>8</sup> Fact of injury consists of 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.<sup>9</sup> The second component is whether the employment incident caused a personal injury.<sup>10</sup>

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence sufficient to establish such causal relationship.<sup>11</sup> 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.<sup>12</sup>

Rationalized medical opinion evidence is required to establish causal relationship. 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 incident.<sup>13</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish lumbar conditions causally related to the accepted November 23, 2017 employment incident.

Dr. Checo provided several reports dated from December 1, 2017 through September 15, 2018 in which he either noted the history of the accepted employment incident or reiterated appellant's complaint that her back pain started after an injury at work. He provided impressions of lumbar radiculopathy, lumbar spinal stenosis, lumbar spondylosis, and mechanical back pain and opined that she was disabled from her position. However, Dr. Checo did not offer an opinion on causal relationship. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.<sup>14</sup> Dr. Checo's reports are, therefore, insufficient to establish appellant's claim.

Dr. Zimmerman, in his November 27, 2017 report, diagnosed work-related back pain. Dr. Rodriguez, in his November 30, 2017 report, provided an assessment of lower back work-related injury. The Board has long held, however, that pain is a symptom, not a compensable medical diagnosis.<sup>15</sup> Moreover, a medical opinion must explain how the implicated employment

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<sup>8</sup> *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

<sup>9</sup> *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>10</sup> *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>11</sup> *K.V.*, Docket No. 18-0723 (issued November 9, 2018).

<sup>12</sup> *M.M.*, Docket No., 20-0019 (issued May 6, 2020); *I.J.*, 59 ECAB 408 (2008).

<sup>13</sup> *M.A.*, Docket No. 19-1551 (issued April 30, 2020); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

<sup>14</sup> *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>15</sup> *M.B.*, Docket No. 19-1816 (issued April 28, 2020); *M.H.*, Docket No. 19-0162 (issued July 3, 2019).

incident caused, contributed to, or aggravated the specific diagnosed conditions.<sup>16</sup> Lacking a compensable medical diagnosis and such an explanation, Dr. Zimmerman's and Dr. Rodriguez' opinions are insufficient to meet appellant's burden of proof.<sup>17</sup>

In his February 27, 2018 report, Dr. Lee noted the history of the November 23, 2017 employment incident and that appellant had no prior back issues. He provided an impression of lumbar strain and lumbar disc herniation. As noted above, 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.<sup>18</sup> This report is therefore insufficient to establish appellant's claim.

Appellant submitted reports from physical therapists. However the Board has held that physical therapists are not considered physicians as defined under FECA and thus these reports do not constitute competent medical evidence.<sup>19</sup>

Appellant also submitted a November 30, 2017 MRI scan report of her lumbar spine. The Board has held, however, that diagnostic studies, standing alone, lack probative value on the issue of causal relationship as they do not address whether the implicated employment incident caused the diagnosed conditions.<sup>20</sup> Accordingly, this diagnostic study is insufficient to establish appellant's claim.

As appellant has not submitted rationalized medical evidence explaining a causal relationship between her lumbar conditions and the accepted November 23, 2017 employment incident, the Board finds that she has not met her burden of proof to establish her traumatic injury claim.

On appeal appellant, through counsel, asserts that she submitted sufficient medical evidence to establish that her back conditions are causally related to the November 23, 2017 employment incident. As noted, the medical evidence does not contain a physician's reasoned opinion regarding the causal relationship between her claimed back conditions and the

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<sup>16</sup> *C.M.*, Docket No. 19-0360 (issued February 25, 2020).

<sup>17</sup> *Id.*

<sup>18</sup> *See supra* note 15.

<sup>19</sup> Section 8101(2) of FECA provides that medical opinions can only be given by a qualified physician. This section defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *H.K.*, Docket No. 19-0429 (issued September 18, 2019); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA.)

<sup>20</sup> *L.J.*, Docket No. 19-1343 (issued February 26, 2020); *J.S.*, Docket No. 18-0657 (issued February 26, 2020).

November 23, 2017 employment incident, and thus she has not met her burden of proof to establish her traumatic injury claim.<sup>21</sup>

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.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish lumbar conditions causally related to the accepted November 23, 2017 employment incident.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 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

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<sup>21</sup> See *D.B.*, Docket No. 19-0514 (issued January 27, 2020).