

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

A.G., Appellant)	
)	
and)	Docket No. 20-0454
)	Issued: October 29, 2020
U.S. POSTAL SERVICE, WINFIELD POST OFFICE, Winfield, MO, Employer)	
)	

Appearances:
Stephanie Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 27, 2019 appellant, through counsel, filed a timely appeal from a July 11, 2019 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 January 17, 2018 employment incident.

FACTUAL HISTORY

On September 17, 2018 appellant, then a 45-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 17, 2018 she injured her back and experienced shooting pain down her left leg to her left foot and on the left side of her back as a result of loading mail trays and heavy parcels into her vehicle while in the performance of duty. She stopped work on January 18, 2018 and returned to work on January 22, 2018. In a witness statement on the claim form, C.S., a coworker, indicated that appellant called her crying about having severe back pain that ran down her leg. On the reverse side of the claim form appellant's postmaster indicated that she was injured in the performance of duty, but that she had not informed him about the injury on the date of injury.

In a November 29, 2018 letter, the employing establishment controverted appellant's claim, contending that she had waited until November 2018 to file an injury report for an injury that allegedly occurred "on January 18, 2018." It further contended that any current knee, leg, or back pain could potentially be related to her private activities and not job related.

OWCP, in a December 12, 2018 development letter, informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion regarding the facts and circumstances of the injury. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information including comments from a knowledgeable supervisor, the identification and job title of C.S., and an explanation of appellant's work activities. It afforded both parties 30 days to submit the necessary evidence.

On January 4, 2019 appellant responded to OWCP's development questionnaire. She recounted that on the date of injury she was loading her vehicle with trays of mail and parcels in the employing establishment's parking lot. Appellant experienced low back pain, but she delivered mail until she stopped due to intensified pain in her back that ran down to her leg and toes. She left work and sought medical treatment. Appellant indicated that she had never been hurt on the job. She noted that C.S. was a clerk at the employing establishment.

In physician progress notes dated April 2 and 12, 2018, Dr. Wendy L. Meyr-Cherry, an attending Board-certified family practitioner, indicated that appellant noted a history that she experienced pain down her left leg which she thought was related to lifting packages, turning, and twisting full time at work. She provided findings on examination and diagnosed acute left-sided low back pain with left-sided sciatica.

Daily notes from physical therapists dated April 10 through May 10, 2018 addressed treatment of appellant's lumbar conditions.

In medical reports dated May 17, 25 and 30, and June 15 and 20, 2018, Dr. Thomas J. Malbrough, a Board-certified physiatrist, noted a history of injury that appellant had an onset of lower back pain beginning in late February or early March 2018. Six to eight weeks later she reported the onset of worsening pain in her lower back and left lower extremity. Appellant indicated that her pain occurred right after she had carried, lifted, and delivered heavy packages at work. Dr. Malbrough discussed examination findings and provided assessments of acute left-sided low back pain with left-sided sciatica, other intervertebral disc displacement, lumbar region, spinal stenosis of the lumbar region without neurogenic claudication at L4-5 and L5-S1, and degenerative disc disease at L4-5 and L5-S1.

In a May 22, 2018 lumbar spine magnetic resonance imaging (MRI) scan report, Dr. Vikram A. Rao, a Board-certified diagnostic radiologist, provided impressions of multilevel degenerative disc disease and facet arthropathy, diffuse disc bulge at L4-5 with left foraminal annular fissure, including disc material that abutted the L5 nerve roots in the subarticular zone bilaterally; and degenerative disc disease at L5-S1 with central/left paracentral disc protrusion, disc material that abutted the left S1 nerve root, and a nerve root that was not compressed.

On August 6, 2018 Dr. Vilaas S. Shetty, a Board-certified diagnostic radiologist and neuroradiologist, reported that an x-ray of the lumbar spine was normal and no abnormal translational motion was identified in flexion or extension.

In an August 27, 2018 report, Dr. Jeffrey L. Thomasson, a Board-certified diagnostic radiologist and neuroradiologist, examined appellant and provided an assessment of left lumbar radiculopathy. In a progress note of even date, he indicated that she was status post lumbar myelogram and that a post-myelogram computerized tomography (CT) scan was to follow.

An August 27, 2018 lumbar CT scan report by Dr. Lukasz J. Curylo, a Board-certified orthopedic surgeon, provided assessments of left L5-S1 disc herniation, smaller left L4-5 disc herniation, and that appellant was recovering well status following a myelogram. In an operative report dated September 21, 2018, Dr. Curylo performed a lumbar discectomy to treat appellant's diagnosed left side L5-S1 lumbar disc herniation with intractable radiculopathy.

In reports dated August 30, 2018, Dr. Timothy G. Morgan, a Board-certified diagnostic radiologist and neuroradiologist, examined appellant and provided an assessment of postural headaches following a recent lumbar myelogram. In an August 31, 2018 report, he noted that he had performed a fluoroscopically-guided epidural blood patch for her postural headaches.

A September 11, 2018 chest x-ray report by Dr. David M. Niebruegge, a Board-certified diagnostic radiologist and neuroradiologist, noted an impression of no acute radiographic abnormality.

By decision dated January 22, 2019, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that an employment incident occurred, as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP thereafter received medical evidence previously submitted by appellant. It also received a September 21, 2018 lumbar spine x-ray report by Dr. Debra D. Rosenthal, a Board-

certified diagnostic and nuclear radiologist, who provided an impression of satisfactory intraoperative image.

On February 20, 2019 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on May 29, 2019. Following the hearing, counsel submitted a June 27, 2018 letter in which she cited Board precedent and asserted that appellant's uncontroverted statement of injury established that her injury occurred, as alleged. She further asserted that the accompanying reports from Dr. Curylo and Dr. Malbrough³ established a causal relation between appellant's January 17, 2018 claimed employment injury and her diagnosed conditions.

On June 28, 2019 OWCP received an October 11, 2018 predisciplinary interview statement, that resulted from appellant's failure to report an on-the-job injury, in which the postmaster noted that he was not disputing her statement that she was hurt on the job. He noted, however, that appellant did not report the claimed injury on the same date of its occurrence.

Dr. Curylo, in reports dated August 6 and September 4, 2018 and a follow-up note dated October 8, 2018, provided examination findings and reviewed diagnostic test results. He provided impressions of lumbago and sciatica secondary to L5-S1 disc herniation on the left with a S1 radiculopathy and mostly subjective sensory, and that appellant had failed physical therapy, anti-inflammatory medications, and epidural injections and slowly resolving symptoms after a lumbar microdiscectomy. Dr. Curylo indicated that, as of August 6, 2018, she also had five months of moderate-to-severe pain. He recommended a CT myelogram to define better the extent of disc herniation.

In a May 13, 2019 letter, Dr. Curylo noted that appellant reported to him that she had no preexistent back conditions and was never treated for back issues prior to the acute onset of symptoms at work. He indicated that if appellant had no preexistent lumbago/sciatica prior to the acute onset at work then it was more likely than not true that the act of lifting and transferring multiple heavy parcels caused her lumbar L5-S1 disc herniation. Dr. Curylo advised that this, in turn, caused compression of the left S1 nerve root resulting in sciatica/radiculopathy. He noted that he was not aware of any new injuries or intervening causes occurring after appellant's work-related onset of symptoms to aggravate or cause the L5-S1 disc herniation.

OWCP thereafter received a May 30, 2019 report by Dr. Fridley. Dr. Fridley noted a history that on January 18, 2018 appellant presented crying and bent over with pain in her left S1 joint. Appellant reported that her pain started on that day at work while working with parcels. Dr. Fridley provided an assessment of spinal subluxation of the left pelvis at L4 and L5.

By decision dated July 11, 2019, an OWCP hearing representative affirmed the denial of appellant's claim, with modification. The hearing representative found that, while appellant had established that the January 17, 2018 employment incident occurred, as alleged, the medical

³ The Board notes that counsel resubmitted Dr. Malbrough's May 17 and 25, 2018 reports along with her June 27, 2018 letter.

evidence of record was insufficient to establish that her diagnosed medical conditions were causally related to the accepted employment incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including 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,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 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 and place, and in the manner alleged. The second component is whether the employment incident caused a personal injury and causal relationship can only be established by medical evidence.⁸

The medical evidence required to establish a causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.⁹ The opinion of the physician must be based on a complete factual and medical background of the employee, 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 specific employment factors identified by the employee.¹⁰

⁴ *Supra* note 2.

⁵ *F.H.*, Docket No.18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

⁹ *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

¹⁰ *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

ANALYSIS

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

Appellant submitted a series of reports by Dr. Curylo. In a May 13, 2019 report, Dr. Curylo diagnosed left L5-S1 disc herniation and lumbar sciatica/radiculopathy. He opined that it was “more likely true than not true” that appellant’s diagnosed conditions were caused by lifting and transferring multiple heavy parcels since she did not have preexistent back conditions. Dr. Curylo explained that this in turn caused compression of the left S1 nerve root resulting in sciatica/radiculopathy. He noted that he was unaware of any new injuries or intervening causes occurring after her work-related onset of symptoms to aggravate or cause her diagnosed conditions.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.¹¹

Dr. Curylo is a Board-certified orthopedic surgeon who is qualified in his field of medicine to render rationalized opinions on the issue of causal relationship, and he provided a comprehensive understanding of the claimed mechanism of injury. The Board finds that, although his May 13, 2019 medical report is insufficiently rationalized to meet appellant’s burden of proof to establish her claim, it is relevant evidence in support of her claim, as it explains a physiological process by which the accepted employment incident could have caused or aggravated her diagnosed back conditions. Dr. Curylo’s May 13, 2019 medical report therefore raises an uncontroverted inference of a causal relationship between appellant’s claimed back conditions and the accepted employment incident. Further development of appellant’s claim is therefore required.¹²

On remand OWCP shall prepare a statement of accepted facts setting forth the accepted employment incident and refer appellant to a second opinion physician in the appropriate field of medicine for an examination and a rationalized medical opinion as to whether the accepted employment incident caused, contributed to, or aggravated the diagnosed back conditions.¹³ If the second opinion physician disagrees with the pathophysiological explanation provided by Dr. Curylo, he or she must provide a fully-rationalized explanation explaining why Dr. Curylo’s opinion is unsupported. After this and other such further development deemed necessary, OWCP shall issue a *de novo* decision.

¹¹ See *J.D.*, Docket No. 18-0279 (issued January 6, 2020); *K.P.*, Docket No. 18-0041 (issued May 24, 2019); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹² See *J.D.*, *id.*; *K.P.*, *id.*; *M.K.*, Docket No. 17-1140 (issued October 18, 2017); *G.C.*, Docket No. 16-0666 (issued March 17, 2017); *John J. Carlone*, *supra* note 8; *Horace Langhorne*, 29 ECAB 280 (1978).

¹³ See *L.P.*, Docket No. 18-1252 (issued June 4, 2020).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with decision of the Board.

Issued: October 29, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board