

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

T.L., Appellant	)	
	)	
and	)	Docket No. 20-1116
	)	Issued: January 28, 2021
U.S. POSTAL SERVICE, POST OFFICE,	)	
Madison, AL, Employer	)	
	)	

*Appearances:*  
Lauren Shine, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 7, 2020 appellant, through counsel, filed a timely appeal from an April 22, 2020 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.

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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.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish a stroke causally related to the accepted December 7, 2015 employment incident.

## FACTUAL HISTORY

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

On January 4, 2016 appellant, then a 52-year-old sales services distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on December 7, 2015 she suffered a stroke while in the performance of duty due to stress caused by Postmaster R.G. She stated that on the date of injury she worked for 6 hours, took a 10-minute break, and then worked for an additional 5.5 hours prior to developing the blood clot on the left side of her brain which caused her stroke. Appellant has not returned to work.

On January 14, 2016 the employing establishment controverted appellant's claim. It disagreed with the factual allegations, noting that she was not in the performance of duty and the events "do not seem to be work related." An employing establishment representative, R.L., noted that no medical documentation had been submitted which supported appellant's claim.

In a development letter dated January 22, 2016, OWCP advised appellant of the factual and medical evidence necessary to establish her claim and attached a questionnaire for her completion. It afforded her 30 days to submit additional evidence and to respond to its inquiries.

In response, appellant submitted a hospital report dated December 7, 2015 indicating that she had been diagnosed with acute left frontal lobe cerebral vascular accident (CVA) and expressive aphasia.

A December 8, 2015 magnetic resonance imaging (MRI) scan of the brain revealed a small area of evolving left front lobe infarct.

In reports dated January 12 and 14, 2016, Dr. Amit Arora, a Board-certified neurologist, diagnosed left middle cerebral artery stroke with improving expressive aphasia. He released appellant to part-time, limited-duty work.

In a series of narrative statements, appellant made general allegations relating to her treatment by the employing establishment and more specifically R.G. She claimed that she had a stroke on December 7, 2015 due to stress caused by the actions of R.G. Appellant noted several events on the date of her work shift during which she had her stroke, as causative factors. She noted that: on that date she was provided only one break limited to 10 minutes; appellant had arrived at work at midnight and had a break at 6:00 a.m.; and that R.G. denied appellant a lunch, a break, or even time to get something to eat or drink. Appellant noted that, after being taken to

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<sup>3</sup> Docket No. 18-0100 (issued June 20, 2019).

the break room when falling ill, the paramedics were called, and she was in disbelief that nobody was sent to ride in the ambulance with her.

Appellant also made several allegations regarding the treatment she had received as an employee under R.G. in the period of time leading up to the date of her stroke, which coincided with the busy holiday season. She generally noted that her schedule was constantly changing, breaks were denied, she had been singled out in having her breaks denied, she was bullied, that he put his arm on her, and that her blood pressure rose when she was bullied.

Appellant submitted additional medical evidence dated September 9, 2013 through August 12, 2015 in support of her claim.

By decision dated April 12, 2016, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish an emotional condition arising from a compensable factor of employment.

Appellant subsequently submitted a series of medical reports from January 5, 2010 through March 28, 2016.

On April 28, 2016 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

On June 7, 2016 appellant submitted copies of text messages to support her claims against R.G.

By decision dated September 2, 2016, the hearing representative found that the case was not in posture for review and remanded the case for OWCP to make findings of fact as to whether the evidence submitted established that the alleged incidents had occurred and whether the incidents were compensable factors of employment.

Appellant submitted an August 25, 2016 progress report from Dr. Arora who indicated that appellant denied new stroke-like symptoms since her last office visit.

Appellant submitted additional narrative statements dated January 9, 2015 reiterating her allegations and documentation dated January 7 and 9, September 25, and October 16, 2015 related to her two Equal Employment Opportunity (EEO) complaints that she had filed.

In a witness statement dated September 29, 2016, K.T., a coworker, indicated that appellant came in at midnight the day of her stroke, December 7, 2015, when her usual time was 4:00 a.m. He stated that R.G. was having appellant come in "at all crazy hours" and that he did not give breaks or lunches on the day of her stroke. K.T. claimed that R.G. not only denied lunches or breaks, but he told employees that they would "have to earn them." He noted that at 6:00 a.m. a coworker, D.W., brought everyone something to eat. K.T. stated that he saw appellant standing over the trash can for maybe 10 minutes trying to eat a biscuit, but the supervisor kept "hurrying [appellant] up to get back to work."

In a statement dated October 4, 2016, R.G. indicated that the allegations made against him by appellant were totally false. He stated that she was not mandated by him to work 12 hours, no

one was denied a break at any time, and no one was mandated to work without having a break or lunch.

By decision dated January 5, 2017, OWCP denied appellant's claim, finding that the evidence of record failed to establish an emotional condition arising from a compensable factor of employment. It found that none of the alleged incidents were compensable factors of her federal employment.

On February 7, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

The hearing was held on July 12, 2017. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence. No additional evidence was received.

By decision dated September 26, 2017, OWCP's hearing representative affirmed the January 5, 2017 decision. On October 17, 2017 appellant, through counsel, appealed to the Board.

By decision dated June 20, 2019, the Board set aside OWCP's September 26, 2017 decision, finding that appellant had established the compensable work factor of overwork, especially on December 7, 2015, when she was instructed to arrive at work four hours early, then required to work six hours prior to a 10-minute break, and denied a break or even sufficient time to eat and drink. The Board noted that the compensable factor pertained to an occupational disease claim for an emotional condition.<sup>4</sup> The Board found that on remand OWCP should also consider whether appellant has met her burden of proof to establish a stroke causally related to a traumatic incident on December 7, 2015. The Board remanded the claim to review the medical record and conduct any further development deemed necessary, to be followed by issuance of a *de novo* decision.

On remand of the case, in a development letter dated August 7, 2019, OWCP advised appellant that as the Board found a compensable factor the additional medical evidence was needed to establish her claim for a December 7, 2015 traumatic injury causally related to the accepted employment factor of overwork. It afforded appellant 30 days to provide the requested evidence.

On September 6, 2019 OWCP received an undated letter from Dr. Arora, finding appellant totally disabled for work due to the December 2015 stroke. Dr. Arora had held appellant off work commencing August 25, 2016 because of her anxiety and aphasia caused by the stroke. He noted that she continued to have problems with her speech and anxiety as a result of the stroke.

On December 16, 2019 OWCP referred appellant, the medical record, and statement of accepted facts (SOAF) for a second opinion examination by Dr. Diane Counce, a Board-certified neurologist and neuroradiologist, regarding the causal relationship of the accepted employment factor of overwork and the December 7, 2015 stroke.

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<sup>4</sup> The Board notes that OWCP has not yet issued a final decision regarding an occupational disease claim for an emotional condition due to the compensable work factor of overwork.

Dr. Counce submitted a January 6, 2020 report in which she reviewed the SOAF and medical record and examined appellant. She noted that appellant could not go to the grocery store by herself and only rarely shopped unaided. Appellant participated in speech therapy and received psychiatric treatment for anxiety. Dr. Counce noted a history of migraine, hypertension, and a small patent foramen ovale (PFO). On examination, she noted decreased sensation in all extremities in a stocking-glove distribution, absent deep tendon reflexes at both ankles, and that appellant could not remember the word for windowsill. Dr. Counce diagnosed a cerebral infarction of unspecified mechanism, idiopathic peripheral neuropathy, expressive aphasia, anxiety and depression. She opined that she could not attribute appellant's "work issues as a cause of her stroke," and posited that the infarction could have been caused by the PFO or an undiagnosed cardiac arrhythmia. Dr. Counce opined that the idiopathic peripheral neuropathy was not related to the employment factors as described in the SOAF. She noted that medical literature did not support stress as a cause for embolic stroke, and that appellant's stroke had been felt to be embolic in nature.

By decision dated January 17, 2020, OWCP denied appellant's claim finding that the medical evidence submitted was insufficient to establish causal relationship between her diagnosed condition and the accepted December 7, 2015 employment incident.

On March 2, 2020 appellant, through counsel, requested reconsideration. He provided additional evidence.

In a February 16, 2020 report, Dr. S. Nixon Gillespie, a Board-certified family practitioner, noted his discussions with appellant over a period of years about "psychological problems dealing from stress at work," including inappropriate behavior by her supervisor. He opined that it was logical that this stress contributed to appellant's CVA. Dr. Gillespie explained that "stress did contribute to [appellant's] stroke as it contributed to her decreased ability to function due to the stressful environment that she describes."

By decision dated April 22, 2020, OWCP denied modification as Dr. Gillespie did not provide a firm opinion on causal relationship between the accepted employment factor of overwork and the December 7, 2015 employment incident.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> 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,<sup>6</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

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<sup>5</sup> *Supra* note 2.

<sup>6</sup> *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

employment injury.<sup>7</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>8</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (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 claimant.<sup>9</sup>

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.<sup>10</sup> 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.<sup>11</sup>

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>12</sup> This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>13</sup>

### ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's September 26, 2017 merit decision because

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<sup>7</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>8</sup> *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).

<sup>9</sup> *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

<sup>10</sup> *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>11</sup> *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>12</sup> 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

<sup>13</sup> 20 C.F.R. § 10.321.

the Board considered that evidence in its June 20, 2019 decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.<sup>14</sup>

Dr. Counce, OWCP's referral physician, concluded in her January 6, 2020 report that she could not attribute appellant's stroke to the accepted work factor and December 7, 2015 incident, because there were other possible contributing factors. Dr. Gillespie, in his February 16, 2020 report, opined that work stress had contributed to appellant's stroke as the stressful environment decreased appellant's ability to function. The Board therefore finds that there is an unresolved conflict of medical opinion between Dr. Gillespie, for appellant, and Dr. Counce, for the government, regarding whether the accepted employment factor of overwork on December 7, 2015 caused or contributed to appellant's stroke. OWCP's regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.<sup>15</sup> The Board will thus remand the case to OWCP for referral to an impartial medical examiner regarding whether the accepted employment factor of overwork and the December 7, 2015 employment incident caused the claimed stroke.<sup>16</sup> Following this and any such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

### CONCLUSION

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

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<sup>14</sup> *J.S.*, Docket No. 19-0022 (issued November 4, 2020); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020).

<sup>15</sup> 5 U.S.C. § 8123(a); *D.N.*, Docket No. 19-1344 (issued November 6, 2020); *K.C.*, Docket No. 19-0137 (issued May 29, 2020).

<sup>16</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 22, 2020 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: January 28, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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