

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

C.H., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
WILMINGTON VA MEDICAL CENTER,)
Wilmington, DE, Employer)

**Docket No. 20-1155
Issued: January 26, 2021**

Appearances:

*Thomas R. Uliase, Esq., for the appellant¹
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 May 14, 2020 appellant, through counsel, filed a timely appeal from a December 4, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

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.

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.

ISSUE

The issue is whether appellant has met her burden of proof to establish a back condition causally related to the accepted June 19, 2018 employment incident.

FACTUAL HISTORY

On June 20, 2018 appellant, then a 44-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on June 19, 2018 she injured her left scapula and left upper arm, as well as her upper and mid back when she caught her right foot in a call button cord while in the performance of duty. She stopped work on that date.

On June 20, 2018 the employing establishment provided appellant with an authorization for examination and/or treatment (Form CA-16).

In support of her claim, appellant submitted notes dated from June 25 through August 22, 2018 from Dr. Patricia A. Wendel, a chiropractor. Dr. Wendel initially reported that on June 19, 2018 appellant tripped and fell over a call button landing on the left side of her body and injuring her shoulder, hip, and buttocks. On physical examination she found positive foraminal compression in the neck, as well as spasms, tenderness, and trigger points in the lumbar spine. Dr. Wendel completed a duty status report (Form CA-17) on August 20, 2018 and diagnosed cervical and lumbar sprain, L3-4 disc, L4-5 disc, L5-S1 disc, and C5-6 disc protrusion and annular fissure.

Appellant also submitted a series of treatment notes from Dr. Irwin L. Lifrak, a Board-certified internist, beginning on June 25, 2018, which indicated that on June 19, 2018, while at work, she tripped and fell. Dr. Lifrak found intense muscle spasm and decreased range of motion in the cervical and lumbar spines, as well as both shoulders. He diagnosed muscle strain and sprain and possible disc injury. Dr. Lifrak repeated this diagnosis on July 5 and 9, 2018. On July 9, 2018 he also completed a Form CA-17 and indicated that appellant was experiencing pain and decreased mobility. In an undated attending physician's report (Form CA-20) Dr. Lifrak diagnosed muscle strain/sprain. He examined appellant on August 2, 2018 and diagnosed muscle strain and sprain. On August 20, 2018 Dr. Lifrak repeated his diagnoses and found that appellant was totally disabled.

In an August 30, 2018 development letter, OWCP noted that, when appellant's claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work and that, therefore, payment of a limited amount of medical expenses was administratively approved without formally considering the merits of her claim. It reopened the claim for consideration and requested additional factual and medical evidence from appellant. OWCP provided appellant with a questionnaire for her completion and afforded her 30 days to respond.

² 5 U.S.C. § 8101 *et seq.*

On September 14, 2018 appellant responded to the development questionnaire and described the employment injury. She asserted that a call bell cord became wrapped around her right foot and she was “propelled in the air” landing on the floor on her left side and back. Appellant indicated that two coworkers helped her to a chair. She immediately experienced numbness, tingling, and stiffness in her neck, back, and left shoulder.

Appellant provided a September 7, 2018 witness statement from S.P., a coworker, who reported that appellant tripped over a call button cord, fell, and hit the floor. S.P. noted that she helped appellant from the floor to a chair as she was having difficulties getting up. Appellant also provided a September 12, 2018 witness statement from B.B., a coworker, who indicated that she helped appellant from the floor to a chair after appellant tripped and fell onto her left side and twisted onto her back.

On June 21, 2018 Dr. Gabriele Blumberg, a Board-certified internist, reported that appellant fell at work on June 19, 2018 injuring her neck and left shoulder. She diagnosed pain in the low back, left shoulder, and neck.

On June 26, 2018 appellant underwent a lumbar magnetic resonance imaging (MRI) scan, which demonstrated retrolisthesis and disc protrusion with mild bilateral foraminal stenosis at L3-4, hypertrophy of the facet joints and disc protrusion with mild bilateral foraminal stenosis at L4-5, and left posterolateral disc protrusion with annular fissure and mild left foraminal stenosis at L5-S1. A cervical MRI scan of even date demonstrated disc protrusion at C5-6.

Appellant provided additional notes from Dr. Wendel dated August 24 through September 17, 2018. In a narrative report dated September 5, 2018, Dr. Wendel noted appellant’s history of injury on June 19, 2018 when her foot became tangled in a call button cord causing her to fall. She reported that, in order to avoid hitting her head, appellant twisted her body and landed on her left hip, side, and shoulder. Dr. Wendel reviewed appellant’s MRI scans and diagnosed protruding discs at L3-4, L4-5, L5-S1, and C5-6. She further diagnosed L5-S1 annular fissure and mild left acromioclavicular (AC) joint edema and degeneration. Dr. Wendel found that appellant’s MRI scan demonstrated subluxations of L3, L4, L5, and C5. She opined that the June 19, 2018 fall directly caused appellant’s injuries and that the description of the fall and mechanism of injury directly correlated with the left posterior disc lateralization. Dr. Wendel further noted that appellant had no previous back conditions.

On August 20 and 31, 2018 Dr. Lifrak again diagnosed muscle strain/sprain rule out disc injury.

In a September 28, 2018 report, Dr. John Rowlands, a Board-certified internist, described appellant’s history of injury on June 19, 2018 as tripping and falling onto her back and left side. He diagnosed muscle spasm of the back, low back pain, and lumbar radiculopathy.

By decision dated October 4, 2018, OWCP denied appellant’s traumatic injury claim, finding that she had not submitted medical evidence sufficient to establish a causal relationship between her accepted employment incident and the diagnosed medical conditions.

Dr. Paul T. Boulos, a Board-certified neurosurgeon, completed a report on September 27, 2018 and noted appellant's June 19, 2018 employment-related trip and fall. He diagnosed cervical disc disorder at C5-6 with myelopathy.

On October 4 and 23, 2018 Dr. Rowlands repeated appellant's history of injury and his diagnoses of muscle spasm of the back, low back pain, and lumbar radiculopathy. He completed an addendum report on December 20, 2018 and opined that appellant's diagnosed conditions were causally related to and/or aggravated by her injury at work on June 19, 2018. Dr. Rowlands explained that her fall likely exacerbated her lumbar foraminal stenosis and caused her radicular symptoms as she had no such symptoms prior to her fall. In a December 28, 2018 note, he included the additional diagnoses of spondylolisthesis, lumbar region, arthropathy, and intervertebral disc degeneration lumbar region.

In a January 17, 2019 report, Dr. Mark Eskander, a Board-certified orthopedic surgeon, described appellant's June 19, 2018 employment injury and reviewed appellant's lumbar and cervical MRI scans. He diagnosed cervicgia, cervical radiculopathy, low back pain, and lumbar radiculopathy. On April 24, 2019 Dr. Eskander included the diagnosis of lumbar spinal stenosis with neurogenic claudication and lumbar intervertebral disc displacement.

Appellant underwent electrodiagnostic studies including nerve conduction velocity and electromyogram (NCV/EMG) testing on April 29, 2019, which demonstrated mild chronic L5 radiculopathy bilaterally.

On June 21, 2019 Dr. Rowlands diagnosed lumbar radiculopathy. In a July 19, 2019 report, he repeated this diagnosis.

On July 29, 2019 appellant, through counsel, requested reconsideration of the October 4, 2018 decision. Counsel contended that Dr. Rowlands' December 20, 2018 addendum was sufficient to establish a causal relationship between appellant's diagnosed conditions and her June 19, 2018 employment injury.

In an August 20, 2019 note, Dr. Rowlands noted appellant's history of injury and diagnosed lumbar and cervical radiculopathy, cervicgia, low back pain, lumbar disc displacement, and lumbar spinal stenosis with neurogenic claudication.

On September 5, 2019 appellant, through counsel, again requested reconsideration of the October 4, 2018 decision and submitted additional evidence. In an August 23, 2019 report, Dr. Eskander described appellant's history of injury and appellant's report of low back pain with radiation into her legs bilaterally. He diagnosed cervical and lumbar spondylosis, stenosis at L4-5 and annular tear at L5-S1. Dr. Eskander opined that appellant's cervical and lumbar conditions were directly related to the accepted June 19, 2018 employment incident. He noted that tearing of the annulus in the cervical, thoracic, and lumbar spine was a well-described event that occurred in direct response to the traumatic injury. Dr. Eskander further opined that degenerative changes and post-traumatic arthritis were also well-known phenomena following a traumatic injury as the result of a number of molecular, cellular, and biomechanical processes that result in the release of inflammatory mediators in damaged tissue and joints, which was recognized as degenerative

disease. He concluded that it was reasonable to attribute appellant's current cervical and lumbar conditions to her work-related incident, which served to incite the initial inflammatory process.

By decision dated December 4, 2019, OWCP denied modification of its prior 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,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 if an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, 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.⁶ The second component is whether the employment incident caused a personal injury.⁷

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.⁸ 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 the specific employment factor(s) identified by the employee.⁹ The weight of the medical evidence

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 *T.M.*, Docket No. 19-0380 (issued June 26, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *S.A.*, Docket No. 18-0399 (issued October 16, 2018); *Robert G. Morris*, 48 ECAB 238 (1996).

⁹ *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.¹⁰

ANALYSIS

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

Appellant submitted an August 23, 2019 report from Dr. Eskander who opined that appellant's cervical and lumbar conditions were directly related to the June 19, 2018 employment incident. He explained that tearing of the annulus in the cervical, thoracic, and lumbar spine was a well-described event that occurred in direct response to traumatic injury and that degenerative changes and post-traumatic arthritis well-known phenomena following a traumatic injury as the result of a number of molecular, cellular, and biomechanical processes that result in the release of inflammatory mediators in damaged tissue and joints which was recognized as degenerative disease. Dr. Eskander concluded that appellant's current cervical and lumbar conditions resulted from her accepted work-related incident, which served to incite the initial inflammatory process.

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

The Board finds that, although the report from Dr. Eskander dated August 23, 2019 is insufficiently rationalized to meet appellant's burden of proof to establish her claim, this report is relevant evidence in support of her claim, as it explains a physiological process by which the accepted employment incident caused or aggravated her diagnosed back conditions. This 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. Eskander, he or she must explain with rationale how or why his or her opinion differs. After this and other such further development deemed necessary, OWCP shall issue a *de novo* decision.

¹⁰ *D.R.*, Docket No. 19-0954 (issued October 25, 2019); *James Mack*, 43 ECAB 321 (1991).

¹¹ *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 *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*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 280 (1978).

¹³ *A.G.*, Docket No. 20-0454 (issued October 29, 2020); *L.P.*, Docket No. 18-1252 (issued June 4, 2020).

CONCLUSION

The Board finds that this case is not in posture for decision.¹⁴

ORDER

IT IS HEREBY ORDERED THAT the December 4, 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: January 26, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁴ The Board notes that where an employing establishment properly executes a Form CA-16 authorizing medical treatment related to a claim for a work injury, the form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination/treatment regardless of the action taken on the claim. *See Tracy P. Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. See 20 C.F.R. § 10.300(c)