

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

K.V., Appellant)	
)	
and)	Docket No. 21-0008
)	Issued: November 15, 2021
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Wilmington, DE, Employer)	
)	

Appearances:
Russell T. 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 2, 2020 appellant, through counsel, filed a timely appeal from a May 12, 2020 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 met her burden to establish cervical conditions causally related to the accepted factors of her federal employment

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The facts relevant to this appeal are set forth below.

On November 15, 2014 appellant, then a 44-year-old machine operator/delivery bar code sorter clerk, filed an occupational disease claim (Form CA-2) alleging that on that day, she first realized that her neck pain was due to factors of her federal employment. In a supplemental statement dated November 15, 2014, she related feeling neck pain on October 15, 2014 immediately after throwing heavy trays, as well as twisting her neck to clear jams in a machine. Appellant stopped work on November 15, 2014.

By decision dated January 22, 2015, OWCP denied appellant's claim. It found that the evidence submitted was insufficient to establish that the claimed medical condition was causally related to her employment duties, which included handling flat-sized mail and heavy trays.

In a February 9, 2015 report, Dr. Scott M. Fried, a treating Board-certified osteopath specializing in orthopedic surgery, noted appellant's employment duties, medical history, and her recitation that on November 15, 2014 she cleared jams in a machine, which required turning her neck and head and stretching her arm to yank the mail free of the jam. While performing this work appellant felt acute pain and tightness in her right neck, plexus, and upper trapezius and her left side was also symptomatic. Dr. Fried noted appellant's physical examination findings and diagnosed bilateral median neuropathy, left radial neuropathy, right ulnar neuropathy, left brachial plexopathy/cervical radiculopathy with long thoracic neuritis and grade 2 scapular winging; and carpal tunnel median neuropathy, which he attributed to her work activities. He also diagnosed disc bulge with C4-5, C5-6, and C6-7 disc bulge, pain syndrome, and left side posterior occipital neuralgia with cervical plexus symptoms. Dr. Fried recommended that appellant undergo electromyography (EMG)/nerve conduction velocity (NCV) studies.

On April 13, 2015 appellant, through counsel, requested reconsideration.

In reports dated February 26 and March 2, 2015, Dr. Fried again related appellant's diagnoses, which he opined were all due to her work activities. He noted that she had been out of work since her November 15, 2014 injury, that she remained symptomatic and was unable to perform her usual job duties.

By decision dated June 1, 2015, OWCP denied modification of its January 22, 2015 decision.

³ Docket No. 18-0947 (issued March 4, 2019); Docket No. 16-0349 (issued November 25, 2016).

On July 7, 2015 appellant, through counsel, requested reconsideration.

In an August 27, 2015 report, Dr. Fried again related appellant's extensive diagnoses. He noted her physical examination findings and explained that her positive Roos and Hunters tests were indicative of brachial plexus inflammation and scarring at the thoracic outlet level.

On September 21, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Robert A. Smith, a Board-certified orthopedic surgeon, to determine whether appellant sustained a diagnosed medical condition causally related to the identified employment factors.

In an October 2, 2015 report, Dr. Smith noted that appellant's medical history included bilateral carpal tunnel syndrome, right carpal tunnel surgery in 2009, a neck injury in 2009, and upper extremity and neck injury in January 2015. Appellant's physical examination was essentially negative. Dr. Smith noted an April 2014 magnetic resonance imaging (MRI) scan showed a small C6-7 disc herniation, but the scan was not in the record OWCP provided for his review. He also noted that Dr. Fried conducted a number of diagnostic tests including ultrasounds and electrodiagnostic tests, but that these test results were not available for review. Dr. Smith opined that there was no clinical or objective evidence of a diagnosis due to appellant's identified employment factors by aggravation, direct cause or precipitation. He reported that appellant had a significant preexisting history of carpal tunnel and cervical injuries.

By decision dated October 5, 2015, OWCP modified the prior decision, finding that appellant had established the factual portion of her claim. However, it denied the claim, finding that the medical evidence of record was insufficient to establish causal relationship between the diagnosed medical conditions and the accepted factors of her federal employment.

On December 18, 2015 appellant, through counsel, filed an appeal with the Board. By decision dated November 25, 2016,⁴ the Board set aside the October 5, 2015 decision and remanded the case to OWCP for it to provide the reports of the MRI scans and EMG tests performed by Dr. Fried to Dr. Smith, and to obtain a supplemental report from Dr. Smith.

On February 8, 2017 OWCP referred appellant for an updated second opinion evaluation with Dr. Smith.

In a March 17, 2017 report, Dr. Smith related appellant's prior medical treatment, diagnostic test findings, and Dr. Fried's multiple diagnoses. He observed that she had a history of back and neck injuries from 2009. Dr. Smith described the incident occurring on November 15, 2014 when appellant was trying to pull thick parcels of mail out of a machine. He noted that the contemporaneous medical evidence at the time she filed her claim did not mention acute neurologic symptoms or findings. Dr. Smith also explained that when appellant sought treatment with Dr. Fried he offered numerous diagnoses of her condition, however, his diagnostic test findings did not comport with his multiple diagnoses. He noted her current physical examination was essentially within normal limits. Dr. Smith noted that appellant had neck pain (cervicalgia) and back pain (lumbago) attributable to the November 15, 2014 employment incident, which had

⁴ Docket No. 16-0349 (issued November 25, 2016).

ceased as of December 12, 2014. On April 3, 2017 OWCP forwarded an April 4, 2014 MRI scan for review by Dr. Smith.

In an April 10, 2017 supplemental report, Dr. Smith reported that appellant attributed her neck, extremity, and back pain to her work activities. Based on his March 17, 2017 physical examination, he found no objective findings to support any neurological or musculoskeletal injuries or conditions due to her employment duties or her employment duties on November 15, 2014. Dr. Smith attributed the findings from the April 2014 cervical MRI scan to age-related degenerative disease.

In a letter dated April 17, 2017, OWCP requested clarification of Dr. Smith's March 17, 2017 report and his April 10, 2017 addendum report. It noted that under FECA pain was considered a symptom and not a diagnosis.

Dr. Smith, in an April 25, 2017 addendum, explained that he found no confirmation clinically for any of Dr. Fried's diagnoses, including neuropathy, cervical radiculopathy, long thoracic neuritis, or brachial plexopathy, and, thus found no causal relationship between these conditions and the November 15, 2014 work incident.

By decision dated May 16, 2017, OWCP denied appellant's claim, finding the medical evidence of record was insufficient to establish causal relationship between the diagnosed medical conditions and the accepted factors of her employment. It found the weight of the medical opinion evidence rested with Dr. Smith's opinion.

On May 23, 2017 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 17, 2017.

By decision dated October 25, 2017, an OWCP hearing representative affirmed the May 16, 2017 decision. The hearing representative found that Dr. Smith's opinion constituted the weight of the medical evidence.

On April 6, 2018 appellant, through counsel, filed an appeal with the Board. By decision dated March 4, 2019,⁵ the Board affirmed the October 25, 2017 decision of OWCP's hearing representative finding that appellant had not met her burden to establish cervical conditions causally related to the accepted factors of her federal employment.

On February 12, 2020 counsel requested reconsideration.

In a February 5, 2020 report, Dr. Fried noted appellant's traumatic injuries sustained in 2009, January 2014, and November 15, 2014. He indicated that her work duties included pulling uprights, bending, pulling, lifting and doing trays, handling hampers, pushing large containers and cages, place trays on the belt, which rotates every two hours, sweeps on a regular basis. Appellant's job duties required lifting up 70 pounds to pull jams and clear machines, repetitive reaching, pulling, grasping, pushing, overhead reaching, twisting, bending, and fine motor function in her arms, hands, and wrists. Dr. Fried noted his disagreement with Dr. Smith and related that

⁵ Docket No. 18-0947 (issued March 4, 2019).

his understanding of the nature of appellant's work injury was limited. He explained that appellant's description of neck pain radiating into her left upper extremity was a classic description of acute radiculopathy and acute neurologic symptoms. Physical examination findings were unchanged from Dr. Smith's prior reports. Dr. Smith reviewed and summarized medical reports including explaining how the diagnostic tests supported his diagnoses. Diagnoses included left median neuropathy, right median neuropathy, left radial neuropathy, right ulnar neuropathy, brachial plexopathy/cervical radiculopathy left with long thoracic neuritis and scapular winging grade 2, carpal tunnel medial neuropathy, bilateral upper extremities sympathetically mediated pain syndrome, C4-5, C5-6, and C6-7 disc bulge with radiculopathy, and posterior occipital neuralgia left side with cervical plexus symptoms. Dr. Fried opined that appellant sustained an acute and significant injury on November 15, 2014 resulting in substantial radiculopathies, greater on the left, and was the cause of her current disability. Additionally, appellant's November 15, 2014 employment injury aggravated her acute cervical radiculopathy and traumatic neuropathies. Dr. Fried concluded that appellant was totally disabled from her job as the repetitive work activities required of her date-of-injury position made her a danger to herself and coworkers.

By decision dated May 12, 2020, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁷ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁸

OWCP regulations define the term "occupational disease or illness" as a condition produced by the work environment over a period longer than a single workday or shift."⁹ To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (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.

⁶ *Supra* note 2.

⁷ *See E.B.*, Docket No. 17-0164 (issued June 14, 2018); *Alvin V. Gadd*, 57 ECAB 172 (2005); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁸ *See P.S.*, Docket No. 17-0939 (issued June 15, 2018); *Ellen L. Noble*, 55 ECAB 530 (2004); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁹ 20 C.F.R. § 10.5(ee).

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹⁰ A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors(s) must be based on a complete factual and medical background.¹¹ Additionally, the physician's opinion must be expressed terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).¹²

ANALYSIS

The Board finds that appellant has not met her burden to establish cervical conditions causally related to the accepted factors of her federal employment.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to OWCP's October 27, 2017 decision because the Board considered that evidence in its November 25, 2016 and March 4, 2019 decisions and found that it was insufficient to establish her claim. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹³

In support of her request for reconsideration, following the Board's March 4, 2019 decision, appellant submitted a February 5, 2020 report from Dr. Fried in which he again diagnosed: bilateral upper extremity sympathetically mediated pain syndrome; C4-5, C5-6, and C6-7 disc bulges with radiculopathy; posterior occipital neuralgia with cervical plexus symptoms; bilateral median neuropathy; left radial neuropathy; right ulnar neuropathy; left brachial plexopathy/cervical radiculopathy with long thoracic neuritis and grade 2 scapular winging; and bilateral carpal tunnel median neuropathy. He attributed the diagnosed conditions to her work activities and opined that she was disabled and unable to perform her usual job duties. While Dr. Fried provided an affirmative opinion on causal relationship, he did not offer medical rationale sufficient to explain how appellant's employment duties could have resulted in or contributed to her diagnosed condition. Without explaining how repetitive work duties caused or contributed to her injury, Dr. Fried's medical evidence is of limited probative value.¹⁴ As such, his opinion on causal relationship is of limited probative value and insufficient to establish appellant's claim.¹⁵

¹⁰ *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

¹¹ *J.J.*, Docket No. 09-0027 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹² *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *id.*

¹³ *See B.R.*, Docket No. 17-0294 (issued May 11, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹⁴ *See A.V.*, Docket No. 20-1138 (issued December 15, 2020); *A.P.*, Docket No. 19-0224 (issued July 11, 2019).

¹⁵ *R.D.*, Docket No. 19-1076 (issued July 2, 2020).

As appellant has not submitted rationalized medical evidence in this case, the Board finds that she has not met her burden of proof to establish her occupational disease claim.

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 to establish cervical conditions causally related to the accepted factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 15, 2021
Washington, DC

Alec J. Koromilas, 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