

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

S.R., Appellant)	
)	
and)	Docket No. 21-0574
)	Issued: August 10, 2022
U.S. POSTAL SERVICE, BAY STATION, Brooklyn, NY, Employer)	
)	

<i>Appearances:</i> Russell Uliase, Esq., for the appellant ¹ Office of Solicitor, for the Director	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On March 2, 2021 appellant, through counsel, filed a timely appeal from a September 3, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider 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 The Board notes that following the September 3, 2020 decision, OWCP received additional evidence. 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.*

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to expand the acceptance of her claim to include additional conditions as causally related to her accepted December 19, 2019 employment injury.

FACTUAL HISTORY

On January 14, 2020 appellant, then a 56-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 19, 2019 she injured her left leg and the left side of her lower back when she tripped while in the performance of duty. She explained that she tried to catch herself, heard a pop, and then felt pain in her left leg radiating into her back. Appellant stopped work on that date.

In December 23, 2019 form reports, Dr. Arkadiy Shusterman, an osteopath specializing in internal medicine, noted that appellant had tripped over a broken sidewalk. He diagnosed lumbar disc displacement and myalgia. Dr. Shusterman indicated by checking a box marked "Yes," indicating that she had preexisting conditions and that her diagnosed conditions were caused or aggravated by her employment activity. He found appellant was totally disabled from work.

In a February 7, 2020 development letter, OWCP requested additional factual and medical evidence in support of the claim and provided a questionnaire for appellant's completion. It afforded her 30 days to respond.

On February 18, 2020 appellant completed the development questionnaire, explaining that on the date of her alleged injury, she was returning to the employing establishment from her route and tripped over a broken sidewalk. She also provided additional medical evidence, including a December 20, 2019 left hip x-ray, which demonstrated mild arthritic changes and probable bone island in the intertrochanteric region.

In notes dated December 27, 2019 and January 20 and March 2, 2020, Dr. Shusterman found that appellant was status post a December 19, 2019 job-related accident with diagnoses of thoracic myofasciitis, lower back syndrome, lumbosacral myofasciitis, possible lumbosacral disc displacement, and left hip internal derangement.

By decision dated March 11, 2020, OWCP accepted that the December 19, 2019 employment incident occurred as alleged. However, it denied the claim, finding that appellant had not submitted medical evidence containing a medical diagnosis causally related to the accepted incident. OWCP, thus, found that the requirements had not been met to establish an injury as defined by FECA.

OWCP received additional medical evidence. On January 23, 2020 appellant underwent a lumbar spine magnetic resonance imaging (MRI) scan, which demonstrated disc bulge at L2-3, and disc herniations at L3-4, L4-5, and L5-S1. It also demonstrated grade 1 anterior subluxation of L4 onto L5 due to severe facet hypertrophic changes.

On February 6, 2020 appellant underwent a left hip MRI scan, which demonstrated mild osteoarthritic changes and increased signals at the attachment of the semimembranosus and biceps

femoris tendon to the left ischial tuberosity consistent with musculotendinous sprains/strains and/or partial tears.

On February 20, 2020 Dr. Aleksander Khalmov, an osteopath, noted appellant's history of injury on December 19, 2019 and reviewed her diagnostic studies. He diagnosed herniated lumbar disc.

In a February 25, 2020 report, Dr. Igor E. Cohen, a Board-certified neurologist, described appellant's December 19, 2019 employment incident and diagnosed thoracic spine pain, lower back syndrome, lumbosacral nerve root injuries, disc bulges at L2-3 and disc herniations at L3-4, L4-5, and L5-S1, cervical myofasciitis, and left hip derangement.

On March 18 and April 13, 2020 Dr. Shusterman reviewed his prior notes and opined that appellant's left hip and lower back conditions were directly related to her December 19, 2019 employment incident. He described the employment incident noting that she tripped over a broken sidewalk and forcibly twisted her left hip and back to avoid falling, resulting in a popping sensation. Dr. Shusterman diagnosed left hip sprain/strain, thoracic sprain/strain, and lumbar spine sprain/strain as directly and causally related to the accepted employment incident. He also reviewed the MRI scans of the left hip, which demonstrated musculotendinous sprain/strain, and of the lumbar spine, which demonstrated multiple disc bulges and disc herniations. Dr. Shusterman opined that based on the MRI scans, appellant also sustained traumatic left hip internal derangement and traumatic lumbar spine disc herniation due to the accepted December 19, 2019 employment incident.

In an April 30, 2020 note, Dr. Khalmov described the December 19, 2019 employment incident and found that appellant developed additional back symptoms including lower extremity weakness and radiating pain following her slip. He found diminished sensation in the L5 dermatome in the left lower extremity as well as weakness in the quadriceps and psoas muscles. Dr. Khalmov diagnosed herniated lumbar disc with radiculopathy and found that she was totally disabled.

On June 5, 2020 appellant, through counsel, requested reconsideration of the March 11, 2020 decision and submitted additional medical evidence. In May 17, June 14, and July 12, 2020 reports, Dr. Michael J. Katz, a Board-certified orthopedic surgeon, described her conditions prior to December 19, 2019 including left knee arthritis and lumbar spine conditions. He noted that appellant had a 1995 work injury to her back and ankle when she fell downstairs.⁴ Dr. Katz described her December 19, 2019 employment incident, reviewed her medical treatment, and evaluated her diagnostic studies. Following a physical examination, he diagnosed left hip sprain/strain and/or internal derangement, partial tear of the biceps femoris tendon of the left hip, thoracic strain with prior internal derangement, and lumbosacral derangement and opined that these diagnoses were causally related to the December 19, 2019 work incident. Dr. Katz further found that appellant's preexisting T11-12 disc protrusion was aggravated by the December 19, 2019 twisting incident. He determined that she sustained a new L4-5 disc herniation, a new subluxation of L4 on L5, and new impingements of the L4, L5, and S1 nerve roots, which were

⁴ OWCP assigned the present claim OWCP File No. xxxxxx742. Appellant has a previously accepted claim for back sprain, back contusion, and left ankle sprain causally related to a May 9, 1995 employment injury in OWCP File No. xxxxxx890. OWCP is attempting to reconstruct File No. xxxxxx890.

not present on the November 1, 2019 MRI scan. Dr. Katz attributed appellant's injuries to twisting her spine when she tried to catch herself from falling. He found that there was movement in her spine, which caused the L4-5 vertebra and discs to shift causing a herniation, subluxation, and impingement of the nerve roots. Dr. Katz found that the popping sound appellant reported at the time of injury was consistent with lumbar disc herniation and left hip biceps femoris tear due to her accepted employment injury.

On June 13, 2020 appellant underwent electromyogram and nerve conduction velocity (EMG/NCV) studies, which demonstrated L5 radiculopathy on the left.

On September 3, 2020 OWCP accepted the instant claim for left hip muscle, fascia, and tendon strain, left hip sprain, strain of the muscle and tendons of the back wall of the thorax, sprain of the ligaments of the thoracic spine, and sprain of the muscle, fascia, and tendons of the lower back and sprain of the ligaments of the lumbar spine.

By separate decision dated September 3, 2020, OWCP denied expansion of the acceptance of appellant's claim to include the additional conditions of lumbar disc bulge at L2-3, herniated discs at L3-4, L4-5, and L5-S1, cervical myofasciitis, left hip derangement, internal derangement of the thoracic region, lumbosacral derangement with radiculopathy, and lumbosacral myofasciitis, finding that the medical evidence of record did not provide medical rationale establishing these conditions as causally related to her accepted December 19, 2019 employment injury.

LEGAL PRECEDENT

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁵

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁶ A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.⁷ Additionally, the physician's opinion must be expressed in 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 employment injury.⁸

⁵ *A.D.*, Docket No. 21-0143 (issued November 15, 2021); *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

⁶ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

⁷ *F.A.*, Docket No. 20-1652 (issued May 21, 2021); *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁸ *Id.*

ANALYSIS

The Board finds that this case is not in posture for decision with regard to the expansion of the acceptance of the claim to include the additional conditions of left hip internal derangement, partial tear of the biceps femoris tendon of the left hip, thoracic strain with prior internal derangement, lumbosacral derangement, aggravation of preexisting T11-12 disc protrusion, L4-5 disc herniation, subluxation of L4 on L5, and impingements of the L4, L5, and S1 nerve roots.

In reports dated May 17, June 14, and July 12, 2020, Dr. Katz noted appellant's history of injury recounting that appellant had twisted her spine when she tried to catch herself from falling. He opined that the movement in her spine caused the L4-5 vertebra and discs to shift resulting in a herniation, subluxation, and impingement of the nerve roots. Dr. Katz further found that the popping sound appellant reported at the time of injury was consistent with lumbar disc herniation and left hip biceps femoris tear due to her accepted employment injury. He diagnosed left hip internal derangement, partial tear of the biceps femoris tendon of the left hip, thoracic strain with prior internal derangement, lumbosacral derangement, aggravation of preexisting T11-12 disc protrusion, L4-5 disc herniation, subluxation of L4 on L5, and impingements of the L4, L5, and S1 nerve roots.

In his March 18, and April 13, 2020 notes, Dr. Shusterman also supported that appellant's left hip and lower back conditions were directly related to her December 19, 2019 employment incident when she tripped over a broken sidewalk and forcibly twisted her left hip and back to avoid falling, resulting in a popping sensation. He found that based on the MRI scans, appellant sustained traumatic left hip internal derangement and unspecified traumatic lumbar spine disc herniation due to the accepted December 19, 2019 employment incident.

The Board finds that, while the reports of Dr. Katz and Dr. Shusterman are not fully rationalized, these reports are sufficient to require further development of the medical evidence. The physicians rendered an opinion on the issue of causal relationship, provided a pathophysiological explanation of the mechanism of the injury, and demonstrated a comprehensive understanding of the medical record and case history. The Board has long held that it is unnecessary that the evidence of record in a case be so conclusive as to suggest causal connection beyond all possible doubt. Rather, the evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound, and logical.⁹ Although the opinions of Drs. Katz and Shusterman are insufficiently rationalized to establish causal relationship, it is sufficient to require that OWCP further develop the medical evidence in the claim.¹⁰

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares

⁹ *A.D.*, *supra* note 5; *W.M.*, Docket No. 17-1244 (issued November 7, 2017); *E.M.*, Docket No. 11-1106 (issued December 28, 2011); *Kenneth J. Deerman*, 34 ECAB 641, 645 (1983) and cases cited therein.

¹⁰ *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

responsibility in the development of the evidence.¹¹ OWCP has an obligation to see that justice is done.¹²

On remand OWCP shall refer appellant, a statement of accepted facts, and the medical record to a specialist in the appropriate field of medicine for an evaluation and a well-rationalized opinion as to whether the diagnosed conditions, as found by Drs. Katz and Shusterman, are causally related to the accepted December 19, 2019 employment injury. If the physician opines that the additional diagnosed conditions are not causally related to the employment injury, he or she must explain, with rationale, how or why the opinion differs from that of appellant's physicians. Following this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision regarding the expansion of the acceptance of appellant's claim to include additional conditions.

The Board further finds that appellant has not met her burden of proof to expand acceptance of her claim to include the additional conditions of lumbar disc bulge at L2-3, herniated discs at L3-4, and L5-S1, cervical myofasciitis, lumbosacral myofasciitis, and radiculopathy.

In his February 25, 2020 report, Dr. Cohen described the December 19, 2019 employment incident and diagnosed the additional conditions of disc bulges at L2-3 and disc herniations at L3-4, L4-5, and L5-S1, and cervical myofasciitis.

Dr. Shusterman also completed notes dated December 27, 2019, January 20, and March 2, 2020, describing the December 19, 2019 job-related incident and diagnosing of thoracic myofasciitis, lower back syndrome, lumbosacral myofasciitis, and possible lumbosacral disc displacement.

In his February 20 and April 30, 2020 notes, Dr. Khalmov noted appellant's history of injury and diagnosed herniated disc with radiculopathy.

While Dr. Cohen, Dr. Khalmov, and Dr. Shusterman provided a description of the accepted employment incident, these physicians did not provide an attribution of appellant's diagnosed conditions to the accepted December 19, 2019 employment incident. 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.¹³ Thus, the Board finds that the reports of Drs. Cohen, and Khalmov, and the December 27, 2019, January 20, and March 2, 2020 notes of Dr. Shusterman¹⁴ are of no probative value on the issue of causal relationship and are

¹¹ See *id.* See also *A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

¹² See *B.C.*, Docket No. 15-1853 (issued January 19, 2016); *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *John J. Carlone*, 41 ECAB 354 (1989).

¹³ See *P.T.*, Docket No. 21-0110 (issued December 8, 2021); *J.M.*, Docket No. 19-1926 (issued March 19, 2021); *L.D.*, Docket No. 20-0894 (issued January 26, 2021).

¹⁴ The diagnosed conditions listed in Dr. Shusterman's March 18 and April 13, 2020 notes, including left hip sprain/strain, thoracic sprain/strain, and lumbar spine sprain/strain were accepted by OWCP.

insufficient to establish appellant's burden of proof to establish the additional conditions diagnosed therein.

The record contains MRI scans of the lumbar spine as well as EMG/NCV studies. However, diagnostic studies, standing alone, lack probative value on the issue of causal relationship as they do not address whether an employment incident caused the diagnosed conditions.¹⁵

As the medical evidence of record is insufficient to establish causal relationship between appellant's diagnosed conditions of disc bulges at L2-3 and disc herniations at L3-4, L4-5, and L5-S1, cervical myofasciitis, lumbosacral myofasciitis, and radiculopathy and the accepted employment injury, the Board finds that she has not met her burden of proof with regard to these additional conditions.

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 the case is not in posture for decision regarding the additional conditions of left hip internal derangement, partial tear of the biceps femoris tendon of the left hip, thoracic strain with prior internal derangement, lumbosacral derangement, aggravation of preexisting T11-12 disc protrusion, L4-5 disc herniation, subluxation of L4 on L5, and impingements of the L4, L5, and S1 nerve roots. The Board further finds that appellant has not met her burden of proof to establish the additional conditions of lumbar disc bulge at L2-3, herniated discs at L3-4, and L5-S1, cervical myofasciitis, lumbosacral myofasciitis, and radiculopathy as causally related to the accepted employment injury.

¹⁵ *P.T.*, *supra* note 13; *C.H.*, Docket No. 20-0228 (issued October 7, 2020); *E.G.*, Docket No. 17-1955 (issued September 10, 2018).

ORDER

IT IS HEREBY ORDERED THAT the September 3, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 10, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board