United States Department of Labor
Employees' Compensation Appeals Board

E.I., Appellant	)	
and	)	**Docket No. 21-0634**
	)	**Issued: February 15, 2022**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Oakland Park, IL, Employer	)	

Appearances:
Stephanie Leet, Esq., for the appellant[1]
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 March 15, 2021 appellant, through counsel, filed a timely appeal from an October 26, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 of proof to establish that her diagnosed medical conditions were 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 of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 18, 2015 appellant, then a 53-year-old revenue officer, filed an occupational disease claim (Form CA-2) alleging that she sustained right hand arthritis due to her repetitive work duties including walking, bending, twisting, writing, typing documents, lifting bags with files, and sitting due to prolonged driving. She also noted that she was at work when she had a July 29, 2002 automobile accident and her "issues" did not arrive until after the accident. Appellant noted that she first became aware of her condition and realized its relation to her federal employment on April 27, 2015.

By development letter dated June 16, 2015, OWCP noted that no evidence had been submitted with her claim. It advised her of the type of factual and medical and factual evidence necessary to establish her claim and afforded her 30 days to submit additional evidence.

In response, OWCP received x-ray interpretations of appellant's right hand, hip, back, knee, foot, and shoulder, dated April 24, May 18, June 18, and July 3 and 8, 2015.

In a June 1, 2015 report, Dr. Estella Hernandez, a treating Board-certified family practitioner, related appellant's medical and employment histories and provided physical examination findings. She diagnosed right carpal tunnel syndrome and right hand osteoarthritis, which were noted as work related.

A June 30, 2015 electromyogram (EMG) report signed by Dr. Engin Yilmaz, a Board-certified psychiatrist and neurologist, reported evidence of lower extremity sensory motor axonal polyneuropathy and mild-to-moderate right L4, L5, and S1 and mild left S1 chronic radiculopathy.

In a July 13, 2015 narrative report, Dr. Hernandez provided examination findings. She noted that appellant related that she sustained brain injuries as the result of a work-related automobile accident. Dr. Hernandez indicated that appellant's work-related diagnoses included right shoulder pain and osteoarthritis, shoulder tendinitis, right knee pain and osteoarthritis, right hip pain and osteoarthritis, lumbar pain and radiculopathy, lower back osteoarthritis, right wrist carpal tunnel syndrome, right wrist osteoarthritis, right lower extremity injury, right lower extremity peroneal tendinitis, lower extremity varicose veins, right knee osteoarthritis, right plantar fasciitis, and right foot pain and osteoarthritis.

[3] Docket No. 18-0634 (issued January 23, 2019).

In a July 15, 2015 supplemental statement, appellant related that, as a result of her July 28, 2002 employment-related motor vehicle accident, she sustained brain injuries and several arthritic conditions of the shoulder, hand, back, hip, knee, leg, and foot. She further explained that these conditions affected her walking, bending, twisting, sleeping, writing, typing, carrying, lifting and sitting while driving.

By decision dated September 2, 2015, OWCP denied appellant's claim, finding that the evidence of record did not establish that appellant's diagnosed medical conditions were causally related to her accepted employment factors.

In a report dated September 24, 2015, Dr. Hernandez reiterated her opinion that appellant's diagnosed conditions had been caused by her automobile accident.

On September 29, 2015 appellant filed a request for a review of the written record. She also submitted a September 16, 2015 letter describing her work duties and the July 29, 2002 motor vehicle accident.

By decision dated February 9, 2016, an OWCP hearing representative affirmed the denial of appellant's occupational disease claim. On remand OWCP was instructed to administratively combine OWCP File No. xxxxxx702 with OWCP File No. xxxxxx466, the claim related to appellant's July 29, 2002 motor vehicle accident, as appellant appeared to be claiming a recurrence of disability under OWCP File No. xxxxxx466.

In a letter dated June 15, 2016, and received on June 21, 2016, appellant detailed the duties of her position and her medical condition. She asserted that, as a result of working the past 14 years as a revenue officer, she developed pain in her right knee, lower extremity, hip, shoulder, wrist, foot, and lower back.

In a letter dated August 2, 2016, OWCP informed appellant that OWCP File No. xxxxxx702 and OWCP File No. xxxxxx466 had been combined for administrative case management as instructed by the hearing representative. It advised that OWCP File No. xxxxxx466 was designated as the master file number.

On August 5, 2016[4] OWCP received additional medical evidence.

Progress notes covering the period March 31, 2004 to February 12, 2016 detailed examination findings. Appellant also submitted a magnetic resonance imaging (MRI) scan dated August 19, 2015 and a January 23, 2016 computerized tomography (CT) scan.

In a narrative letter dated January 24, 2016, Dr. J. Michael Morgenstern, an examining orthopedic surgeon, diagnosed unspecified leg peroneal tendinitis, plantar fasciitis disorder, peroneal tendinitis disorder, right pes plantus, knee osteoarthritis, carpal tunnel syndrome, right hip joint pain, lumbar radiculopathy, shoulder secondary osteoarthritis', shoulder tendinitis, right

[4] This evidence was located in the master file OWCP File No. xxxxxx466. Under that file OWCP accepted that appellant sustained a concussion, intracranial injury, adjustment disorder with depressed mood. It subsequently accepted aggravation of unilateral primary osteoarthritis of the right hip and knee, and aggravation of lumbar radiculopathy due to the accepted July 29, 2002 automobile accident.

shoulder lesion, concussion with loss of consciousness, and traumatic brain injury, right shoulder pain and osteoarthritis, shoulder tendinitis, right knee pain and osteoarthritis, right hip pain and osteoarthritis, lumbar pain and radiculopathy, lower back osteoarthritis, right wrist carpal tunnel syndrome, right wrist osteoarthritis, right lower extremity injury, right lower extremity peroneal tendinitis, lower extremity varicose veins, right knee osteoarthritis, right plantar fasciitis, and right foot pain and osteoarthritis. He provided examination findings and attributed the diagnosed conditions to appellant's 2002 motor vehicle accident. On August 12, 2016 appellant requested reconsideration.

By decision dated January 12, 2018, OWCP found that the evidence of record was insufficient to warrant merit review of the decision dated February 9, 2016 as the evidence submitted with the request for reconsideration was irrelevant or immaterial and, thus, had no bearing on the issue, or was inconsequential to the issue of causal relationship.

Appellant appealed to the Board and, by decision dated January 23, 2019,[5] the Board set aside the January 12, 2018 decision, finding that appellant's right to a review of the merits of the case by the Board was jeopardized by OWCP's delay in issuing its January 12, 2018 decision and did not comply with its procedures. The Board noted that OWCP issued its decision more than 518 days after appellant requested reconsideration. The Board remanded the case to OWCP for a merit review to be followed by the issuance of an appropriate decision.

By decision dated June 11, 2019, OWCP considered the merits of appellant's claim. It denied appellant's claim as the medical evidence failed to explain how the accepted employment factors caused or aggravated the diagnosed conditions.

On May 26, 2020 appellant, through counsel, requested reconsideration. In support of her request, she submitted a May 22, 2020 report from Dr. Morgenstern.

Dr. Morgenstern, in his May 22, 2020 report, noted appellant's history of injury and medical treatment, job duties, and provided physical examination findings. He reported the job duties of a revenue officer included excessive walking, bending, twisting, typing, driving for long periods, lifting case bags filled with files, interviewing and contacting taxpayers and/or representatives, investigating the collection of delinquent taxes, and securing delinquent tax returns. Physical examination findings of appellant's right shoulder demonstrated: positive empty can, Apley's scratch, and lift off tests; notable swelling of the right anterolateral shoulder; and limited right shoulder forward and internal rotation. Examination of appellant's right hip and back revealed no visible musculoskeletal deformities, lumbar region and right greater trochanteric pain on palpation, notable paraspinal muscles spasms with palpation. Antalgic gait, positive tripod signs, positive straight leg testing, pain with lumbar flexion and extension, and notable crepitation. An examination of appellant's right knee demonstrated: no swelling, edema, effusion, or gross bony deformities; mild discomfort on peripatella palpation; and negative Clarke's, McMurray's, Lachman's maneuver, posterior and anterior draw, and Varus and Valgus tests. Dr. Morgenstern's examination of appellant's right foot and ankle demonstrated notable bilateral varicose veins, discomfort on right foot palpation, negative Homan's sign, pain on palpation of the plantar fascia region, and negative anterior draw, Tinel's, Squeeze, and external and internal rotation stress tests,

[5] *Supra* note 3.

negative inversion and eversion maneuvers. He diagnosed right shoulder, foot, knee, hip, and lumbar osteoarthritis; right shoulder tendinitis; plantar fasciitis; peroneal tendinitis; right pes plantus; and lumbar radiculopathy, which he attributed to appellant's repetitive work duties. Objective testing demonstrated right shoulder acromioclavicular tendon calcifications, and limited active and passive range of motion. Dr. Morgenstern noted that the grinding, clicking, and popping with normal shoulder movement was abnormal for appellant's age. He explained that appellant's repetitive lifting, bending, reaching, typing, and driving for long periods resulted in right shoulder joint muscles and tendons repetitive strains, microscopic tearing, and arthritis. Dr. Morgenstern also noted the driving and typing for long hours required her arms to be outstretched placing abnormal stresses on her shoulders, elbows, and wrists ligament and muscles. The abnormal stress caused microscopic right shoulder tearing of her tendons, inflammation, and arthritis. In addition, strain caused by her constant reaching, lifting, pulling, pushing, and overhead stretching accelerated the wear and tear on her right shoulder joint space and tendons. Further, Dr. Morgenstern noted the repetitive walking, lifting, and twisting caused back and hip joint sacroiliac and iliolumbar joints strains resulting in lumbar radiculopathy and lumbar and right hip osteoarthritis. In support of this conclusion, he explained the repetitive sitting and lifting heavy items increased the pressure on the lumbar discs causing spinal nerve impingement and left lumbar disc injury. This additional lower lumbar vertebra stress caused multiple iliolumbar and sacroiliac ligament strains and lower disc fibers and joint capsule, which in turn caused a loss of structural integrity. Next, Dr. Morgenstern attributed appellant's right knee osteoarthritis to stress caused by repetitive walking, lifting, and twisting. He explained that these activities caused multiple ligament strains resulting in a loss of structural integrity. This loss of structural integrity led to the bones rubbing and coming together resulting in osteoarthritis. Dr. Morgenstern also attributed appellant's plantar fasciitis to her repetitive work duties. He explained that the strain and pressure due to excessive walking and weight bearing caused micro tearing in the fascia leading to plantar fasciitis. In concluding, Dr. Morgenstern opined that the diagnosed right shoulder, lumbar, rip hip, right knee, and right foot osteoarthritis, shoulder tendinitis, lumbar radiculopathy, and plantar fasciitis were all due to her repetitive work duties and not to the natural degenerative processes. He reiterated that the mechanism of injury was appellant's strenuous repetitive work duties, the length of exposure, and thinning of her joint spaces.

By decision dated October 26, 2020, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA[6] has the burden of proof to establish the essential elements of his 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

[6] *Supra* note 2.

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]

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 identified employment factors.[9]

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 causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.[11] 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 specific employment factor(s).[12]

ANALYSIS

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

Appellant submitted a May 22, 2020 report in which Dr. Morgenstern opined that her employment duties caused right shoulder, lumbar, rip hip, right knee, and right foot osteoarthritis, shoulder tendinitis, lumbar radiculopathy, and plantar fasciitis. Dr. Morgenstern indicated that it was uncontroverted that appellant performed her revenue officer for over 18 years, which required her to excessive walking, driving, bending, twisting, typing, lifting case bags filled with files, and driving for long periods in a repetitive fashion. He attributed the right shoulder conditions to repetitive lifting, bending, reaching, typing, and driving which he found contributed to strains and microscopic tearing resulting in tendon tearing, inflammation, and arthritis. Dr. Morgenstem explained the repetitive sitting and lifting heavy items increased the pressure on the lumbar discs causing spinal nerve impingement and left lumbar disc injury causing multiple iliolumbar and

[7] *M.R.*, Docket No. 19-1954 (issued March 1, 2021); *E.S.*, Docket 18-1580 (issued January 23, 2020); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[8] *M.R., id.*; *E.S., id.; S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[9] *E.S.*, *supra* note 7; *R.G.*, Docket No. 19-0233 (issued July 16, 2019). *See also Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[10] *W.M.*, Docket No. 14-1853 (issued May 13, 2020); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

[11] *E.S.*, *supra* note 7; *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

[12] *Id.*; *Victor J. Woodhams*, *supra* note 9.

sacroiliac ligament strains and lower disc fibers and joint capsule, which in turn led to a loss of structural integrity. He attributed appellant's right knee osteoarthritis to stress caused by repetitive walking, lifting, and twisting, which he explained caused multiple ligament strains resulting in a loss of structural integrity and bones rubbing and coming together resulting in osteoarthritis. Dr. Morgenstern also attributed appellant's plantar fasciitis to her repetitive work duties. Specifically, he explained the strain and pressure caused excessive walking and weight bearing contributed to micro tearing over the plantar fascia. Dr. Morgenstern advised the long-term mechanism of injury was due to the length of appellant's exposure to the repetitive strenuous nature of her work and thinning of joint spaces, which applied pressure and strain to the tendons, cartilage, ligaments, and meniscus of the lumbar and right shoulder, hip, knee, and foot areas.

The Board notes that Dr. Morgenstern offered an affirmative opinion regarding causal relationship and provided a physiological explanation as to how the accepted employment factors could cause or contribute to appellant's lumbar and right shoulder, hip, knee, and foot conditions. While the opinion of Dr. Morgenstern is insufficiently rationalized to meet appellant's burden of proof, the Board finds that it is sufficient to require further development of the record as to whether appellant's lumbar and right shoulder, hip, knee, and foot conditions are causally related to the accepted factors of her federal employment.[13]

It is well established that proceedings under FECA are not adversarial in nature, and that while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. OWCP has an obligation to see that justice is done.[14] The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.[15]

The case will therefore be remanded to OWCP for preparation of a statement of accepted facts, which includes a detailed summary of the accepted factors of appellant's employment, and the conditions accepted in the master file. OWCP shall thereafter refer appellant to a specialist in the appropriate field of medicine for an examination and opinion on the issue of whether appellant sustained a medical condition causally related to the accepted factors of her federal employment. If the physician opines that the diagnosed conditions are not causally related to the accepted employment factors, he or she must provide a rationalized explanation as to why their opinion differs from that articulated by Dr. Morgenstern. After this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[13] *K.M.*, Docket No. 20-1373 (issued July 27, 2021); *A.R.*., Docket No. 20-1425 (issued July 15, 2021); *G.M.*, Docket No. 19-0657 (issued September 13, 2019); *see also John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

[14] *V.P.*, Docket No. 20-0415 (issued July 30, 2020); *S.C.*, Docket No. 19-0920 (issued September 25, 2019); *E.P.*, Docket No. 20-0898 (issued February 21, 2017).

[15] 20 C.F.R. § 10.121.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 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: February 15, 2022
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