

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

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| L.L., Appellant |) | |
| |) | |
| and |) | Docket No. 21-0981 |
| |) | Issued: July 1, 2022 |
| DEPARTMENT OF THE ARMY, |) | |
| U.S. MILITARY ACADEMY, West Point, NY, |) | |
| Employer |) | |
| _____ |) | |

Appearances:
Paul Kalker, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 14, 2021 appellant, through counsel, filed a timely appeal from a May 18, 2021 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.³

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 an 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.*

³ The Board notes that, following the May 18, 2021 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.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that the acceptance of her claim should be expanded to include additional conditions as causally related to the accepted December 26, 2019 employment injury; and (2) whether appellant has met her burden of proof to establish disability from work for the period March 12 through 26, 2020, causally related to her accepted December 26, 2019 employment injury.

FACTUAL HISTORY

On January 2, 2020 appellant, then a 54-year-old dental hygienist, filed a traumatic injury claim (Form CA-1) alleging that, on December 26, 2019, she was reaching for her telephone when her chair rolled away and she fell, hitting her head and landing on her tailbone, while in the performance of duty. She stopped work on the date of the claimed injury.

OWCP received a December 26, 2019 incident report, signed by appellant, relating that she slipped and fell on her buttocks. Appellant indicated that she had pain in the right side of her neck, back, tailbone, and behind the right ear, along with a massive headache.

Appellant completed a form indicating that, on December 26, 2019, she slipped and fell at work, fractured her tail bone, and struck her head and neck on a rolling cart. She provided additional statements describing the incident and her injuries, noting that she had pain in her buttocks, her head and neck felt numb, she felt dizzy, and she had tunnel vision. Appellant also indicated that her right ear and left elbow were throbbing with pain. She provided witness statements from coworkers, J.S. and M.P., who confirmed the incident.

In an undated attending physician's report (Form CA-20), Dr. Kulbhushan D. Gulati, Board-certified in emergency medicine, related that, on December 26, 2019, appellant fell while at work and fractured the lower end of her sacrum. He diagnosed sacrum fracture and provided a prescription for a donut cushion. In a December 26, 2019 emergency room report, Dr. Gulati noted appellant's history of injury; reviewed x-rays taken that day of appellant's cervical spine, sacrum and coccyx; and diagnosed contusions of the neck, lower back, pelvis, and nondisplaced fracture of the sacrum.

In an after-visit summary dated December 29, 2019, Dr. Valerie Lehman, Board-certified in emergency medicine, related that appellant was seen for a head injury. She diagnosed concussion without loss of consciousness, initial encounter. In an emergency room note of even date, Dr. Lehman related that appellant was seen and treated in the emergency department on that date and could return to work on January 3, 2020.

A December 29, 2019 computerized tomography (CT) scan of the cervical spine read by Dr. Lawrence A. Cicchiello, a Board-certified diagnostic radiologist, revealed no evidence of fracture or malalignment in the cervical spine, reversal of the normal cervical lordosis, and mild degenerative disc disease from C4-5 to C6-7. Dr. Cicchiello also found that a December 29, 2019 CT scan of the brain revealed no evidence of an acute major vascular distribution infarction.

Dr. Arthur Tolis, an internist, provided a January 17, 2020 disability certificate indicating that appellant was under his care, and requested that she be excused from work until January 31, 2020.

OWCP received a January 24, 2020 hospital admission record from Dr. Alexander P. Cohen, Board-certified in emergency medicine, who noted that appellant had experienced persistent headaches and vomiting since her fall on December 26, 2019. Dr. Cohen also noted that she had a one-day history of intermittent facial and bilateral upper extremity numbness and tingling. He diagnosed headache, unspecified type.

A January 25, 2020 magnetic resonance imaging (MRI) scan of appellant's lumbar spine read by Dr. Lawrence Pan, a Board-certified diagnostic radiologist, revealed no acute findings or significant degenerative changes.

In a development letter dated February 26, 2020, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of evidence necessary and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a January 29, 2020 report, Dr. David A. Jaeger, Board-certified in neurology, noted appellant's history of injury and treatment. He noted appellant's complaints of neck stiffness, weak upper body, headache, numb right ear lobe, and impaired hearing in the right ear. Dr. Jaeger reviewed appellant's CT and MRI scans, examined appellant, and diagnosed cervicogenic headache, marked neck spasm, and headache. He also provided an assessment of paresthesia, gait abnormality, traumatic head injury, and hearing loss.

OWCP received February 6, 2020 audiology notes, which related appellant's history of injury and a diagnosis of: tinnitus in the right ear, resolved; otalgia, right ear; and sensorineural hearing loss, bilateral.

In notes from February 5 to 22, 2020, Dr. Opeyemi Darmola, an ear, nose, and throat (ENT) specialist Board-certified in otolaryngology, diagnosed otalgia right ear; sensorineural hearing loss, bilateral; tinnitus, right ear; and disequilibrium. He responded "Yes" with regard to whether the conditions were caused by the employment incident. In a February 12, 2020 disability certificate, Dr. Darmola requested that appellant be excused from work.

OWCP received a March 2, 2020 certification of health provider from Dr. Jaeger who noted that appellant had a cervicogenic headache, paresthesias, gait abnormality, traumatic head injury, hearing loss of right ear, neck stiffness, upper body weakness, headache, and numbness of right ear lobe. He advised that she could not walk, had disequilibrium and tinnitus, and could not drive. Dr. Jaeger indicated that he had referred appellant to an ENT specialist as he "suspect[s] this to be a primary ontological injury leading to tinnitus and disequilibrium." He completed a March 2, 2020 duty status report (Form CA-17) and advised that appellant was unable to work. Dr. Jaeger saw appellant on March 6, 2020 and reiterated the above diagnoses. In a March 6, 2020 disability certificate, he noted that appellant was unable to work.

On March 6, 2020 OWCP received appellant's completed development questionnaire.

On March 23, 2020 appellant filed a claim for compensation (Form CA-7) claiming disability for the period March 12 through 26, 2020.

By decision dated April 7, 2020, OWCP denied appellant's claim as the medical evidence was insufficient to establish a causal relationship between the diagnosed condition and the December 26, 2019 accepted employment incident.

On February 18, 2021 counsel requested reconsideration.

OWCP received copies of the previously-submitted reports and diagnostic tests.

In progress notes dated April 27, 2020, Dr. Thomas Booker, a pain medicine specialist, noted that appellant had pain in her neck and head from spondylosis and headaches several times per week that interfered with her sleep and were debilitating.

Dr. Tolis saw appellant on April 28, 2020, for right ear pain and diagnosed otalgia, right ear.

OWCP also received physical therapy notes.

In a June 15, 2020 report, Dr. Jaeger diagnosed chronic post-traumatic headache, not intractable.

In a July 10, 2020 report, Dr. Bindu Pathrose, an osteopath specializing in physical medicine and rehabilitation, noted appellant's history of injury and treatment and related diagnosed cervicalgia, cervicocranial syndrome, myalgia, other site, muscle spasm, and headache. She responded "Yes" as to whether the work incident was the competent medical cause of the injury or illness, and as to whether appellant's complaints were consistent with the history of the injury/illness. In reports dated July 17 and August 5, 2020, Dr. Pathrose repeated her prior assessments.

In a July 24, 2020 report, Dr. Andrew Faskowitz, an osteopath Board-certified in hospice care and palliative medicine, diagnosed chronic post-traumatic headache; cervicogenic headache; cervical spondylosis without myelopathy; spinal stenosis, cervical region; cervicalgia; and spasmodic torticollis. In an August 13, 2020 report, he repeated his prior diagnoses and added low back pain, chronic pain syndrome, and muscle pain.

In a July 29, 2020 report, Dr. Booker noted that he saw appellant for follow up for neck and head pain from spondylosis, he had continuing headaches, and he recommended a cervical diagnostic medical branch block.

In an October 13, 2020 report, Dr. Tolis noted that appellant had chronic headaches and neck pain, and diagnosed cervicalgia and cervicogenic headache.

By decision dated May 18, 2021, OWCP vacated the April 7, 2020 decision, finding that that the evidence of record was sufficient to establish contusions of the lower back, tailbone, and right side of the neck.⁴ It denied expansion of the acceptance of the claim to include additional conditions as causally related to the accepted employment injury. OWCP also denied appellant's claim for disability from work for the period March 12 through 26, 2020, finding that the medical

⁴ By a separate decision also dated May 18, 2021, OWCP formally accepted appellant's claim for contusions of the lower back and pelvis and unspecified side of the neck.

evidence of record was insufficient to establish that the claimed disability was causally related to the accepted employment injury.

LEGAL PRECEDENT -- ISSUE 1

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

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include additional conditions as causally related to the accepted December 26, 2019 employment injury.

Appellant was initially seen by Dr. Gulati on December 26, 2019, and he noted appellant's history of a fall at work. In addition to the accepted conditions, he diagnosed a non-displaced sacrum fracture, based on x-ray evidence. Dr. Gulati, however, offered no medical opinion regarding the cause of the diagnosed sacrum fracture. The Board has held that medical evidence, which does not offer an opinion on causal relationship, is of no probative value to the issue of causal relationship.⁹ Therefore, Dr. Gulati's reports are insufficient to establish that appellant sustained a non-displaced fracture of the sacrum on December 26, 2019.

Appellant was then seen by Dr. Lehman on December 29, 2019. Dr. Lehman diagnosed concussion without loss of consciousness. However, she also did not provide an opinion regarding causal relationship.¹⁰ Dr. Lehman's reports were, therefore, insufficient to establish causal relationship.

⁵ *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.*

⁹ *D.B.*, Docket No. 19-0514 (issued January 27, 2020); *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁰ *Id.*

Likewise, in a January 24, 2020 hospital record, Dr. Cohen diagnosed headache, but offered no opinion regarding causal relationship. As previously noted, medical evidence which does not address causal relationship is insufficient to establish causal relationship between the diagnosed condition and the employment incident.¹¹

In reports dated January 29, March 2, and June 15, 2020, Dr. Jaeger noted appellant's complaints of traumatic head injury, cervicogenic headache, chronic post-traumatic headache, paresthesias, gait abnormality, neck stiffness, upper body weakness, hearing loss, and numbness of right ear lobe. He indicated that he referred appellant to an ENT specialist, as he "suspect[s] this to be a primary ontological injury leading to tinnitus and disequilibrium." The Board finds that Dr. Jaeger's reports are speculative in that he indicated that he "suspect[ed]" an ontological injury and failed to explain the causal relationship between his diagnoses and the work injury. The Board has long held that medical opinions that are speculative or equivocal in character have little probative value.¹² As such, the reports from Dr. Jaeger are insufficient to meet appellant's burden of proof.

In February 5 to 22, 2020 treatment notes, Dr. Darmola diagnosed otalgia right ear, sensorineural hearing loss bilateral, tinnitus right ear, and disequilibrium, and responded "Yes" indicating that the conditions were caused by the employment incident. In a July 10, 2020 report, Dr. Pathrose diagnosed cervicgia, cervicocranial syndrome, myalgia, muscle spasm, and headache, and responded "Yes" as to whether the work injury was the cause of appellant's conditions. The Board has held that a physician's opinion, which consists only of an affirmative response on a form, without further explanation or rationale, is of diminished probative value and is insufficient to establish a claim.¹³ The Board also has held that a medical opinion should reflect a correct history and offer a rationalized explanation by the physician of how the specific employment incident physiologically caused or aggravated the diagnosed conditions.¹⁴ The Board finds that the reports from Dr. Darmola and Dr. Pathrose failed to provide the required rationalized explanation and are insufficient to establish causal relationship.

In progress notes dated April 27, 2020, Dr. Booker noted that appellant had pain in her neck and head from spondylosis. Dr. Tolis saw appellant on April 28, 2020, for right ear pain and diagnosed right ear otalgia. He also diagnosed cervicgia and cervicogenic headache in an October 13, 2020 report. In a July 24, 2020 report, Dr. Faskowitz diagnosed chronic post-traumatic headache; cervicogenic headache; cervical spondylosis without myelopathy; spinal stenosis, cervical region; cervicgia; and spasmodic torticollis. In an August 13, 2020 report, he reiterated these diagnoses. The reports from Drs. Booker, Tolis, and Faskowitz offered no medical opinion regarding the cause of appellant's diagnosed conditions. As previously noted, medical

¹¹ *Id.*

¹² *See C.A.*, Docket No. 21-0601 (issued November 15, 2021); *J.P.*, Docket No. 19-0216 (issued December 13, 2019); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

¹³ *See A.C.*, Docket No. 21-0087 (issued November 9, 2021); *O.M.*, Docket No. 18-1055 (issued April 15, 2020); *Gary J. Watling*, 52 ECAB 278 (2001).

¹⁴ *T.G.*, Docket No. 21-0175 (issued June 23, 2021); *J.D.*, Docket No. 19-1953 (issued January 11, 2021); *see K.W.*, Docket No. 19-1906 (issued April 1, 2020).

evidence, which does not offer an opinion on causal relationship, is of no probative value to the issue of causal relationship.¹⁵ Therefore, these reports are insufficient to establish the claim.

Appellant submitted multiple reports from physical therapists dating from May 18, 2020. The Board has long held that certain healthcare providers such as physician assistants, nurse practitioners, and physical therapists are not considered qualified physicians as defined under FECA.¹⁶ Their medical findings, reports and/or opinions, unless cosigned by a qualified physician, will not suffice for purposes of establishing entitlement to FECA benefits.¹⁷ Consequently, the physical therapy notes are insufficient to meet her burden of proof.

Appellant also submitted multiple diagnostic testing reports. The Board, however, has held that diagnostic studies, standing alone, lack probative value, as they do not address whether the employment injury caused any of the diagnosed conditions.¹⁸

As appellant has not submitted rationalized medical evidence sufficient to establish that the acceptance of her claim should be expanded to include additional conditions as causally related to the accepted December 26, 2019 employment injury, she has not met her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA¹⁹ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.²⁰ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.²¹ Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical opinion

¹⁵ *Supra* note 9.

¹⁶ Section 8102(2) of FECA provides as follows: “physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law.” 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *see also E.W.*, Docket No. 20-0338 (issued October 9, 2020) (physical therapists are not considered physicians under FECA).

¹⁷ *Id.*; *K.A.*, Docket No. 18-0999 (issued October 4, 2019); *K.W.*, 59 ECAB 271, 279 (2007).

¹⁸ *J.P.*, *supra* note 12; *see also A.Z.*, Docket No. 21-1355 (issued May 19, 2022); *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

¹⁹ *Supra* note 2.

²⁰ *See M.T.*, Docket No. 21-0783 (issued December 27, 2021); *L.S.*, Docket No. 18-0264 (issued January 28, 2020); *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

²¹ *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

evidence.²² Findings on examination are generally needed to support a physician's opinion that an employee is disabled from work.²³

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.²⁴

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish disability from work for the period March 12 through 26, 2020, causally related to her accepted December 26, 2019 employment injury.

Dr. Jaeger provided March 2 and 6, 2020 reports advising that appellant was unable to work. In his March 2, 2020 report, Dr. Jaeger related that appellant had cervicogenic headache, paresthesias, gait abnormality, traumatic head injury, hearing loss of right ear, neck stiffness, upper body weakness, headache, and numbness of right ear lobe. He further advised that she could not walk, had disequilibrium and tinnitus, and could not drive. Dr. Jaeger indicated that he had referred appellant to an ENT specialist as he suspected that appellant had a primary ontological injury leading to tinnitus and disequilibrium. The Board finds that Dr. Jaeger's reports fail to establish disability from work for the period March 12 through 26, 2020, as none of the reports address appellant's disability from work during that period due to her accepted December 26, 2019 medical conditions. As previously noted, for each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.²⁵ As Dr. Jaeger did not address why appellant was disabled from work during the period March 12 through 26, 2020 due to her accepted medical conditions, his reports are of no probative value and are insufficient to establish disability during the period claimed.²⁶

As the medical evidence of record does not contain rationale to establish disability during the claimed period, the Board finds that appellant has not met her burden of proof.

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.

²² *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *V.H.*, Docket No. 18-1282 (issued April 2, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

²³ *C.S.*, Docket No. 20-1621 (issued June 28, 2021); *Dean E. Pierce*, 40 ECAB 1249 (1989).

²⁴ *See M.J.*, Docket No. 19-1287 (issued January 13, 2020); *C.S.*, Docket No. 17-1686 (issued February 5, 2019); *William A. Archer*, 55 ECAB 674 (2004).

²⁵ *T.W.*, *supra* note 21.

²⁶ *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

CONCLUSION

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include additional conditions as causally related to the accepted December 26, 2019 employment injury. The Board further finds that she has not met her burden of proof to establish disability from work for the period March 12 through 26, 2020, causally related to her accepted December 26, 2019 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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