United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
and	)	**Docket No. 22-0667**
	)	**Issued: November 1, 2022**
U.S. POSTAL SERVICE, POST OFFICE, Ashville, PA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On March 30, 2022 appellant, through counsel, filed a timely appeal from a March 3, 2022 merit decision of the Office of Workers' Compensation Programs. 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.[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 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 March 3, 2022 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*.

ISSUE

The issue is whether appellant has met her burden of proof to establish a cervical or upper extremity condition causally related to the accepted November 29, 2019 employment incident.

FACTUAL HISTORY

On March 16, 2020 appellant, then a 54-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 29, 2019 she sustained neck pain when unloading a heavy parcel while in the performance of duty.

Appellant submitted an attending physician's report (Form CA-20) and duty status reports (Form CA-17) dated June 10 and 22, 2020, signed by a physician assistant. These forms noted the date of injury as November 29, 2019 and related diagnoses of cervical strain, right upper extremity radiculopathy.

A magnetic resonance imaging (MRI) scan of appellant's cervical spine obtained on June 19, 2020 demonstrated mild ligamentous hypertrophy at the C2-3 level; a small broad-based protrusion at the C3-4 level causing minimal anterior impression on the thecal sac; minimal posterior subluxation of C5 with respect to C6 with a small broad-based protrusion at the C5-6 level causing mild anterior impression on the thecal sac and with mild ligamentous hypertrophy posteriorly; a bulging annulus at the C6-7 level causing mild anterior impression on the thecal sac with mild ligamentous hypertrophy seen posteriorly; and slightly narrowed anterior posterior dimensions of the canal; foraminal encroachment in the cervical spine, moderate to marked on the left at C2-3 and marked on the right at the C5-6 level.

In a development letter dated June 30, 2020, OWCP informed appellant that she had submitted insufficient factual and medical evidence to establish her claim. It advised her of the type of evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In a report dated June 10, 2020, Dr. Dawn Repko, a Board-certified family practitioner, examined appellant for complaints of left arm and neck pain. Appellant told Dr. Repko that her condition was related to lifting a heavy box at work on November 29, 2019. On physical examination of the cervical spine, Dr. Repko noted decreased range of motion with tenderness and spasm. She noted that appellant's pain was out of proportion to findings and winced before she was touched. Dr. Repko stated that with distraction, appellant's left upper extremity strength and sensation seemed intact. She diagnosed radicular pain of the upper extremity and neck muscle strain. Dr. Repko noted that appellant had not sought medical attention from her office until February 27, 2020.

Appellant submitted a June 12, 2020 letter from Dr. Patrick Lenz, a Board-certified family practitioner, which indicated that she could return to work on June 29, 2020 without restrictions.

OWCP received progress notes from Dr. John Brouse, a chiropractor, from December 2, 2019 through July 16, 2020. Dr. Brouse offered a diagnosis of neck pain.

OWCP also received reports signed by Michael S. Reichert, a physician assistant, dated July 23, 2020, which noted an assessment of cervical pain and radiculopathy. Mr. Reichert also

interpreted x-rays taken of appellant's cervical spine on July 23, 2020 as revealing loss of cervical lordosis, with space narrowing at C5-6 and anterior osteophyte formation.

By decision dated August 12, 2020, OWCP denied appellant's traumatic injury claim. It found that she had submitted insufficient medical evidence to establish causal relationship between her diagnosed conditions and the accepted employment incident of November 29, 2019.

Appellant submitted a report by Maryann Lyons, a physician assistant dated August 3, 2020. Appellant's diagnoses were listed as cervical spinal stenosis and cervical spondylosis.

On August 21, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

An electromyogram/nerve conduction velocity (EMG/NCV) study obtained on August 28, 2020 demonstrated carpal tunnel syndrome, but failed to demonstrate any evidence of radiculopathy, plexopathy, or upper limb mononeuropathy that could be contributing to appellant's neck and shoulder pain.

Appellant submitted a report signed by Mr. Reichert dated September 3, 2020. This report related appellant's history of injury and noted that appellant developed acute onset of left-sided neck, shoulder and upper extremity pain. Mr. Reichert noted that a physician had reviewed appellant's cervical MRI scan and had found that it did not really point to the source of appellant's cervical radicular pattern, therefore, an EMG/NCV study was recommended.

In progress notes dated September 10, 2020, Dr. Christopher Aaron, an osteopath specializing in neurology, followed up with appellant for neck and left arm pain. He noted that appellant's neck pain had progressively worsened since November 2019. Dr. Aaron diagnosed radicular pain of the upper extremity and strain of the neck muscle.

In progress notes dated October 9, 2020, Dr. Repko followed up with appellant for continued cervical pain. She diagnosed neck muscle strain, radicular pain of the upper extremity, and acquired hyperthyroidism.

A functional capacity evaluation dated October 28, 2020, signed by a physical therapist, found that appellant's overall level of work capacity fell within the sedentary range.

The telephonic hearing before a representative of OWCP's Branch of Hearings and Review was held on November 12, 2020. OWCP continued to receive medical evidence.

In a report dated July 23, 2020, Dr. Gregory Bailey, an osteopath specializing in orthopedic surgery, examined appellant for complaints of neck and pain radiating down her left arm. Appellant told Dr. Bailey that her symptoms began when she tried to move a heavy package at work and felt something "pop and pull" in her neck after which she experienced severe neck pain and pain radiating down her left arm. Dr. Bailey diagnosed cervical pain and cervical radiculopathy. In a report dated September 3, 2020, he followed up with appellant for continued weakness in the left hand and pain in the neck and left arm. Dr. Bailey reviewed the August 28, 2020 EMG/NCV report, noting no evidence of cervical radiculopathy, plexopathy, or

mononeuropathy, with evidence of left carpal tunnel syndrome. He diagnosed numbness of the left hand.

In a letter dated October 25, 2020, Dr. Lenz noted that appellant had originally presented to his office on February 27, 2020 complaining of neck pain, bilateral upper extremity numbness, tingling pain, and heaviness. Appellant stated that she had suffered a work-related injury, but was unsure of the date, explaining that she had lifted a package at work and "felt something pull" in her neck. She later offered a date of injury of November 29, 2019. Dr. Lenz recounted appellant's history of treatment and results of physical examinations. He opined that it was difficult to say with a reasonable degree of medical certainty that her current symptoms were caused or aggravated by conditions of her employment.

By decision dated January 6, 2021, OWCP's hearing representative affirmed the August 12, 2020 decision of OWCP. She found that appellant had submitted insufficient medical evidence to establish causal relationship between the accepted November 29, 2019 work-related incident and her diagnoses.

In a report dated January 15, 2021, Dr. Repko noted that appellant followed up for continued cervical pain and migraine headache. She diagnosed migraine and neck muscle strain.

In progress notes dated February 11, 2021, Dr. Joseph Mitchell, an osteopath specializing in orthopedic surgery, diagnosed Raynaud's phenomenon without gangrene, a strain of the neck muscle, and radicular pain of the upper extremity. In a letter dated February 14, 2021, he opined that due to the persistence of appellant's signs and symptoms since a work-related injury on November 29, 2019, appellant's condition would not improve or resolve for the foreseeable future.

In a report dated April 5, 2021, Dr. James Burke, a Board-certified orthopedic surgeon, related that he had examined appellant for complaints of neck pain and left arm pain, numbness, and weakness. He noted that her symptoms began on November 29, 2019 after pulling a package at work. Dr. Burke diagnosed left shoulder pain, sprain of the ligaments and joints of the neck, cervical disc displacement, cervical stenosis, and cervical spondylosis.

In a report dated April 8, 2021, Dr. Cameron Murphy, a Board-certified family practitioner, examined appellant for left shoulder pain related to a work incident on November 29, 2019 when she lifted a 50-pound package at work from her vehicle. He diagnosed left shoulder pain, shoulder impingement, tendinitis of the left rotator cuff, and chronic shoulder bursitis.

In a report dated April 15, 2021, Dr. Nicholas Kinback, a pain medicine specialist, examined appellant for neck pain. He diagnosed cervical spondylosis without myelopathy, cervicalgia, cervical dystonia, and left rotator cuff disorder.

In a report dated June 17, 2021, Dr. Kinback related that appellant followed up for complaints of neck pain, left arm and shoulder pain, reduced motion, neck tightness, and right hand numbness. He diagnosed cervical spondylosis without myelopathy, cervicalgia, cervical dystonia, and left rotator cuff disorder. Dr. Kinback recommended a diagnostic cervical medial branch block at C3, C4, C5, and C6 under fluoroscopy.

Appellant underwent a diagnostic cervical medial branch nerve block with fluoroscopy on June 30, 2021 with Dr. Kinback.

In a report dated July 6, 2021, Dr. Kinback related that appellant was seen again for neck pain. He diagnosed cervical spondylosis without myelopathy, cervicalgia, cervical dystonia, and left rotator cuff disorder. Dr. Kinback recommended left C3-4, C4-5, and C5-6 cervical radiofrequency ablation.

Appellant underwent cervical radiofrequency ablation of the medical branch nerves with fluoroscopy on July 30, 2021, performed by Dr. Kinback. On August 12, 2021 she underwent chemo enervation for cervical dystonia with Dr. Kinback. On August 23, 2021 appellant underwent a shoulder joint injection performed by Dr. Kinback.

In a report dated August 30, 2021, Dr. Kinback related that appellant was seen again for complaints of neck pain. He reiterated his previous diagnoses.

In a November 1, 2021 narrative report, Dr. Kinback reviewed appellant's history of injury and treatment. He diagnosed cervical dystonia and chronic rotator cuff tendinopathy. Dr. Kinback noted that appellant's diagnoses were often coexisting and could exacerbate each other. He opined within a reasonable degree of medical certainty that she initially sustained a high-grade cervical strain and a partial rotator cuff tear related to her work injury.

On December 6, 2021 appellant, through counsel, requested reconsideration of OWCP's January 6, 2021 decision.

In a November 5, 2021 report, Dr. Stephanie Grilli, an osteopath specializing in orthopedic surgery, related that she had examined appellant for complaints of shoulder impingement. Appellant told Dr. Grilli that she experienced a work-related injury on November 29, 2019. Dr. Grilli noted that appellant had retired. She diagnosed left shoulder impingement and administered a left shoulder subacromial injection.

By decision dated March 3, 2022, OWCP denied modification of the January 6, 2021 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim, including 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 of FECA,[5] 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

[4] *Id*.

[5] *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

employment injury.[6] 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.[7]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. The first component is that the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.[8]

The medical evidence required to establish a causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.[9] 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 specific employment factors identified by the employee.[10]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a cervical or upper extremity condition causally related to the accepted November 29, 2019 employment incident.

Appellant submitted reports dated from June 10, 2020 through January 15, 2021 from Dr. Repko; a September 10, 2020 report from Dr. Aaron; June 12 and October 25, 2020 reports from Dr. Lenz; July 23 and September 3, 2020 reports from Dr. Bailey; a February 11, 2021 report from Dr. Mitchell; an April 5, 2021 report from Dr. Burke; an April 8, 2021 report from Dr. Murphy; reports dated from April 15 through August 30, 2021 from Dr. Kinback; and a November 5, 2021 report from Dr. Grilli. However, none of these reports contained an opinion regarding the cause of appellant's diagnosed conditions. 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

[6] *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

[9] *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

[10] *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

value on the issue of causal relationship.[11] As such, these reports are insufficient to establish her claim.

Appellant submitted a November 1, 2021 narrative report from Dr. Kinback. Dr. Kinback reviewed appellant's history of injury and medical treatment. He diagnosed cervical dystonia and chronic rotator cuff tendinopathy. Dr. Kinback noted that appellant's diagnoses were often coexisting and could exacerbate each other. He opined within a reasonable degree of medical certainty that she initially sustained a high-grade cervical strain and a partial rotator cuff tear related to her work injury. However, Dr. Kinback provided no rationale for his opinion on causation. The Board has held that conclusory opinions are insufficient to meet a claimant's burden of proof to establish a claim.[12] The Board has explained that a medical opinion should reflect a correct history and offer a medically-sound and rationalized explanation by the physician of how the specific employment incident physiologically caused or aggravated the diagnosed conditions.[13] As Dr. Kinback provided insufficient rationale supporting his opinion regarding causal relationship, the Board finds that his November 1, 2021 report is insufficient to establish causal relationship.

Appellant submitted diagnostic reports dated June 19 and August 28, 2020 and February 4 and 15, 2021. The Board has held that diagnostic test reports, standing alone, lack probative value as they do not provide an opinion on causal relationship between the employment incident and a diagnosed condition.[14]

Appellant also submitted reports signed by physician assistants and physical therapists in support of her claim. These reports, however, are of no probative value as physician assistants and physical therapists are not considered physicians as defined under FECA.[15]

Lastly, appellant submitted reports from Dr. Brouse, a chiropractor, containing a diagnosis of neck pain. The Board notes that section 8101(2) of FECA[16] provides that the term physician, as used therein, includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as

[11] *D.C.*, Docket No. 19-1093 (issued June 25, 2020); *see L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018); *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

[12] *J.O.*, Docket No. 19-0326 (issued July 16, 2019).

[13] *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).

[14] *T.H.*, Docket No. 18-1736 (issued March 13, 2019).

[15] Section 8101(2) (this subsection defines a physician as 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* 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 A.M.*, Docket No. 20-1575 (issued May 24, 2021) (physical therapists are not physicians as defined by FECA); *A.C.*, Docket No. 20-1510 (issued April 23, 2021) (physician assistants are not physicians as defined by FECA).

[16] 5 U.S.C. § 8101(2).

demonstrated by x-ray to exist and subject to regulation by the Secretary.[17] OWCP's implementing federal regulation at 20 C.F.R. § 10.5(bb) defines subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae, which must be demonstrated on x-ray. As Dr. Brouse did not diagnose a subluxation as demonstrated by x-ray, he is not considered a physician under FECA and his report does not constitute probative medical evidence.[18] Thus, these reports are insufficient to establish appellant's claim.

As appellant has not submitted rationalized medical evidence establishing that her diagnosed medical conditions were causally related to the accepted employment incident of November 29, 2019, the Board finds that she 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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a cervical or upper extremity condition causally related to the accepted November 29, 2019 employment incident.

[17] *Id.*; 20 C.F.R. § 10.311.

[18] *See T.H.*, Docket No. 17-0833 (issued September 7, 2017); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 1, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board