United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 22-0504**
	)	**Issued: February 9, 2023**
U.S. POSTAL SERVICE, MILWAUKEE PROCESSING & DISTRIBUTION CENTER, Milwaukee, WI, Employer	)	

Appearances:
Peter A. Stanford, Esq., for the appellant[1]
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
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On February 17, 2022 appellant, through counsel, filed a timely appeal from an October 27, 2021 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 has met her burden of proof to establish a cervical condition causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On March 13, 2020 appellant, then a 44-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained a herniated cervical disc due to factors of her federal employment. She noted that she first became aware of her condition and realized its relation to her federal employment on August 20, 2014. No evidence was submitted in support of appellant's claim.

In a development letter dated March 19, 2020, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence required and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence. No response was received.

By decision dated April 27, 2020, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the injury and/or event(s) had occurred, as alleged.

On August 21, 2020 Dr. James Cain, Jr., a Board-certified orthopedic surgeon, completed a medical questionnaire. He diagnosed herniated nucleus pulposus, degenerative cervical disc disease C5-C6 and C6-C7 levels, neck pain and cervical radiculitis, which he indicated was supported by magnetic resonance imaging (MRI) scan results, physical examination features and subjective complaints. Dr. Cain opined that appellant sustained an aggravation of preexisting degenerative disc disease at C5-C6 and C6-C7 levels due to repetitive, awkward lifting at work and that the March 26, 2019 two-level fusion was medically necessary to treat her complaints. He explained that cervical musculature was recruited during lifting activity and could serve to aggravate a cervical degenerative disc.

On October 16, 2020 appellant requested reconsideration.

By decision dated December 2, 2020, OWCP denied modification of its April 27, 2020 decision.

On February 26, 2021 appellant, through counsel, requested reconsideration. She provided a copy of the mail handler position description and a March 16, 2021 statement. In the March 16, 2021 statement, appellant described her job duties and the equipment used to perform her job duties. She alleged that she performed repetitive lifting and carrying up to 70 pounds and repetitive duties including walking and carrying mail and packages.

By decision dated May 3, 2021, OWCP modified its prior decision to find that appellant had established that the employment factors occurred as described. However, the claim remained denied as the medical evidence of record was insufficient to establish causal relationship between the diagnosed conditions and the accepted work factors.

On July 23, 2021 appellant, through counsel, requested reconsideration. She submitted a July 8, 2021 report wherein Corina Welch, a certified physician assistant, related that appellant was now two years out from a two-level anterior cervical discectomy and fusion. Appellant further related that she had sustained an injury in 2014 performing her regular work duties.

By decision dated July 29, 2021, OWCP denied modification of its May 3, 2021 decision.

On August 9 and 11, 2021 appellant requested reconsideration. No additional evidence was received.

By decision dated September 2, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

On September 8, 2021 appellant, through counsel, again requested reconsideration.

In an August 27, 2021 report, Dr. Lawrence Maciolek, a Board-certified orthopedic surgeon, provided the status of appellant's back condition two years' status post anterior cervical discectomy and fusion (ACDF) surgery from C5 to C7. He reported that appellant's condition was related to a work injury that occurred in 2014 at the employing establishment. Dr. Maciolek noted that appellant denied having experienced any pain or issues with her neck or left shoulder prior to her work injury. He noted that the injury occurred while she was performing her usual job duties, and that she experienced left neck and shoulder pain which persists to this day. Dr. Maciolek opined that the disk extrusions at C5-C6 and C6-C7 suggested an acute injury rather than a preexisting degenerative condition that led to appellant's surgery.

By decision dated October 27, 2021, OWCP denied modification of its July 29, 2021 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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 FECA, that the claim was timely filed within the applicable time

[3] *Id.*

limitation period of FECA,[4] 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 employment injury.[5] 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.[6]

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.[7]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[8] The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 the specific employment factors identified by the claimant.[9]

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship, therefore, involves aggravation, acceleration or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.[10]

ANALYSIS

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

In an August 4, 2020 medical questionnaire, Dr. Cain opined that appellant sustained an aggravation of preexisting degenerative disc disease at C5-C6 and C6-C7 levels due to repetitive, awkward lifting at work and that the March 26, 2019 two-level fusion was medically necessary to

[4] *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).

[5] *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).

[6] *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).

[7] *See T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[8] *J.F.*, Docket No. 18-0492 (issued January 16, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[9] *A.M.*, Docket No. 18-0562 (issued January 23, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *M.B.*, Docket No. 20-1275 (issued January 29, 2021); *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

treat her complaints. He explained that each musculature is recruited during lifting activity and can serve to aggravate a cervical degenerative disc. While Dr. Cain identified preexisting degenerative conditions in appellant's cervical spine that could worsen partially due to lifting activity, he did not distinguish the effects of the aggravation due to age or natural progression from the aggravation, if any, due to her federal employment. As noted above, in cases involving a preexisting condition, the Board has placed special emphasis on the need for a complete medical rationale with a physiological explanation that distinguishes the effects of the natural progression of the preexisting condition, any effects caused by aging or nonwork-related injuries, and the employment factors.[11] This report is, therefore, insufficient to establish causal relationship between appellant's cervical degenerative conditions and the accepted employment injury.[12]

Dr. Maciolek, in his August 27, 2021 report, opined that the disc extrusions at C5-C6 and C6-C7 suggested an acute injury rather than a preexisting degenerative condition that led to appellant's surgery. He reported that her condition was related to a work injury, noting that she was asymptomatic prior to the work injury. The Board finds that Dr. Maciolek's opinion that appellant's condition is work related is conclusory in nature and of diminished probative value. The Board has held that a report is conclusory and of limited probative value regarding causal relationship if it does not contain medical rationale.[13] Dr. Maciolek failed to note or provide a well-rationalized medical discussion of how the work factors appellant identified in her claim physiologically caused or aggravated appellant's diagnosed acute injury at C5-C6 and C6-C7 levels. Additionally, his opinion of an acute injury is in variance from Dr. Cain's report, which indicated that the diagnosed conditions of herniated nucleus pulposus, degenerative cervical disc disease C5-C6 and C6-C7 levels, neck pain and cervical radiculitis was supported by MRI scan findings.[14] Furthermore, while Dr. Maciolek noted that appellant was asymptomatic prior to the work injury, the Board has held that an opinion that a condition is causally related because the employee was asymptomatic before the injury is insufficient, without adequate rationale, to establish causal relationship.[15] For these reasons, Dr. Maciolek's report is insufficient to meet appellant's burden of proof.

Appellant also submitted a July 7, 2021 report from a certified physician's assistant. However, certain healthcare providers such as physician assistants, nurse practitioners, physical

[11] *Id.*; *see also S.H.*, Docket No. 19-0631 (issued September 5, 2019); *D.F.*, Docket No. 19-0067 (issued May 3, 2019).

[12] *See P.M.*, Docket No. 20-0114 (issued December 23, 2020).

[13] *See R.W.*, Docket No. 19-1733 (issued April 13, 2021); *D.W.*, Docket No. 18-1139 (issued May 21, 2019); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

[14] The Board notes that the record does not contain a copy of the MRI scan.

[15] *See J.I.*, Docket No. 20-1374 (issued March 3, 2021); *D.M.*, Docket No. 20-0266 (issued January 8, 2021); *H.A.*, Docket No. 18-1466 (issued August 23, 2019); *R.V.*, Docket No. 18-1037 (issued March 26, 2019).

therapists, and social workers are not considered "physician[s]" as defined under FECA.[16] Consequently, this report does not constitute competent medical evidence.[17]

As the record lacks rationalized medical evidence establishing causal relationship between appellant's diagnosed cervical conditions and the accepted August 20, 2014 employment factors, 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.

CONCLUSION

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

[16] Section 8101(2) of FECA provides that 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); *H.S.*, Docket No. 20-0939 (issued February 12, 2021); (*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).

[17] *H.S., id.*; *D.S.*, Docket No. 17-1566 (issued December 31, 2018).

ORDER

IT IS HEREBY ORDERED THAT the October 27, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 9, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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