

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

E.F. (*nee* G.), Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Anaheim, CA, Employer)
_____)

Docket No. 23-0620
Issued: February 21, 2024

Appearances:

Roxann M. Gonzalez, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 23, 2023 appellant, through her representative, filed a timely appeal from a November 16, 2022 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish a low back condition causally related to the accepted factors of her federal employment.

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.*

FACTUAL HISTORY

On August 10, 2020 appellant, then a 61-year-old retired city letter carrier, filed an occupational disease claim (Form CA-2) alleging that she developed a low back condition due to factors of her federal employment. She explained that her job duties included standing and picking up parcels, that she initially experienced back pain in March 2020, and that the pain became intolerable in April 2020. Appellant noted that she first became aware of her condition and realized its relation to her federal employment on April 10, 2020. The employing establishment advised that she was last exposed to the conditions alleged to have caused her condition on June 18, 2020.³

In a development letter dated August 11, 2020, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence. OWCP assigned this claim File No. xxxxxx227.

OWCP thereafter received various diagnostic studies, including an October 13, 2010 report of magnetic resonance imaging (MRI) scan of the cervical spine, which revealed disc desiccation and protrusions from C4 through C7; a December 28, 2010 report of an MRI scan of the lumbar spine, which revealed lumbar muscular spasm, mild spondylosis at L3 through S1, and disc protrusions at L3-L4, L4-L5, and L5-S1; and a February 7, 2012 report of MRI scan of the lumbar spine, which revealed lumbar disc desiccation from L3 through S1, disc protrusions and annular tears at L3-L4 and L4-L5, and a disc protrusion at L5-S1. The February 7, 2012 study further noted that a posterior disc protrusion at L4-L5 had progressed when compared to a prior study performed on July 6, 2011.

OWCP also received an April 22, 2020 report of MRI scan of the lumbar spine, which revealed facet arthropathy resulting in mild bilateral neuroforaminal stenosis at L2-L3; anterolisthesis, disc bulge, small annular fissure, and ligamentum flavum redundancy resulting in mild spinal canal stenosis at L3-L4; a disc bulge with neuroforaminal stenosis at L4-L5; and a disc protrusion at L5-S1. The report further noted that the appearance of the findings at L3-L4 had worsened when compared to a November 10, 2018 study.

A May 21, 2020 report of electromyogram and nerve conduction velocity (EMG/NCV) study revealed no evidence of peripheral neuropathy, some evidence of proximal root irritation at L3-L4 consistent with probability of L3-L4 subacute radiculopathy bilaterally, and no active radiculopathy at L5-S1.

In a June 26, 2020 narrative report, Dr. Edward Mittleman, a physiatrist, noted that appellant related a history of low back pain in 2010⁴ which worsened in March 2020 due to walking back and forth to assist customers. He indicated that she worked as a city carrier from 2002 to September 2015, was out of work from September 2015 through February 2017 due to a

³ In an August 10, 2020 statement, appellant indicated that she had retired.

⁴ Appellant previously filed an occupational disease claim for injuries to her neck, shoulders, and low back due to repetitive work. OWCP accepted the claim for bilateral shoulder strain, neck sprain, cervical disc displacement, and cervical intervertebral disc displacement without myelopathy under OWCP File No. xxxxxx370.

left knee injury,⁵ and then worked as a lobby assistant commencing March 2017 with no lifting greater than five pounds and no gripping, grasping, or fine manipulation with the right hand for more than three hours per day. Beginning November 7, 2018, Dr. Mittleman indicated that appellant's duties as a lobby assistant involved standing continuously for two hours at a time, for a total of seven hours per day, and walking back and forth across the employing establishment to retrieve parcels for customers weighing up to 30 pounds. Thereafter, he indicated that as of March 27, 2020, she stood and walked continuously for seven hours per day and carried items in excess of 20 pounds. Dr. Mittleman performed a physical examination, which revealed an antalgic gait, reduced range of motion of the lumbar spine, and tenderness with palpation of the bilateral paravertebral lumbar tissues and spasm. He reviewed diagnostic studies, diagnosed aggravation of lumbar facet arthrosis, lumbar sprain, and permanent aggravation of lumbar stenosis, and opined that it was "medically reasonable to infer a causal relationship between all of this pathology and her work activities." Dr. Mittleman explained that appellant's duties as a lobby assistant, including standing, walking, and carrying packages weighing up to 30 pounds resulted in stretching and tearing of the tissues of the lumbar spine as well as irritation to the structures of the lumbar spine.

In an August 26, 2020 response to OWCP's development questionnaire, appellant indicated that the job duties that she believed caused her back issues were standing, walking, sitting down, and carrying heavy mail and packages throughout the entire day. She related that she experienced prior back pain but that she did not receive treatment. Appellant advised that she had experienced back pain due to prior injuries at work but was unable to receive treatment for her back pain due to confusion about whether her back was an accepted condition.

On September 29, 2020 OWCP prepared a statement of accepted facts (SOAF) which noted that appellant initially worked for the employing establishment as a city carrier and thereafter was placed in various modified-duty positions, which the SOAF indicated were made under the present claim. Beginning February 7, 2011, appellant was provided with a modified position lifting no more than 25 pounds and no use of a mail satchel on her shoulder. On July 12, 2011 her modified job was changed to include no more than four hours per day standing and walking, no lifting greater than 20 pounds, and no carrying a satchel. On December 4, 2012 appellant received a modified job offer with no lifting over 15 pounds. On February 23, 2017 she was given a sedentary job offer as a passport agent. On October 19, 2017 appellant changed positions, but her duties remained sedentary including light computer, light typing, light clicking of a mouse, and answering phones. On October 19, 2018 the job offer was modified to include no lifting/carrying over 10 pounds, standing no more than 15 minutes continuously, and walking no more than 10 minutes continuously. On March 26, 2020 appellant received a modified job offer as a lobby assistant with no lifting greater than five pounds, standing and walking intermittently for four hours, intermittent stooping, bending, and twisting for up to three hours, intermittent climbing for up to one hour, and intermittent simple grasping and manipulation for up to three hours. OWCP listed her concurrent medical conditions and numerous prior claims, which it had accepted for various conditions of the shoulders, cervical spine, left knee, and left upper extremity.

⁵ Appellant has previously accepted traumatic injury claims for a June 16, 2011 left knee strain under OWCP File No. xxxxxx659 and for a June 27, 2014 tear of the left medial meniscus, sprain of left medial collateral ligament (MCL), bilateral plantar fibromatosis, and fracture of the left patella under OWCP File No. xxxxxx150. Appellant's claims have not been administratively combined by OWCP.

On November 6, 2020 OWCP referred appellant, the SOAF, the medical evidence of record case, and a series of questions to Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, for a second opinion examination.

In a November 24, 2020 report, Dr. Einbund reviewed the SOAF and medical record. He provided physical examination findings and reviewed MRI scans of the lumbar spine dated from December 28, 2010 through April 22, 2020, as well as computerized tomography (CT) scans and the EMG/NCV study. Dr. Einbund diagnosed multilevel degenerative disc disease with associated disc bulges. He opined that appellant's conditions were not causally related to factors of her federal employment. Dr. Einbund noted that various diagnostic studies revealed degenerative changes and disc bulges since 2010, which were not accelerated or aggravated by her work duties. He explained that the physical demands of her work activities had decreased over the years after 2011, noting that in February 2017 she began working in a sedentary position as a passport agent. Dr. Einbund further noted that at the time appellant alleged a worsening of symptoms in March 2020, she worked as a lobby assistant in a mainly sedentary capacity, with no lifting or carrying over 5 pounds. He found that the various MRI scan studies since 2010 did not reveal any changes that would suggest an acceleration or aggravation, but, rather, were consistent with natural progression of degenerative disease. Dr. Einbund opined that appellant was capable of returning to work as a lobby assistant, but not as a city carrier.

By decision dated December 16, 2020, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish that her diagnosed low back conditions were causally related to the accepted factors of her federal employment. It found that the weight of the medical evidence rested with the second opinion report of Dr. Einbund.

On June 4, 2021 appellant requested reconsideration of OWCP's December 16, 2020 decision. In support thereof request, she submitted a May 7, 2021 narrative report by Dr. Mittleman, who noted that he disagreed with Dr. Einbund's opinions. Dr. Mittleman agreed that her lumbar spine changes were degenerative in nature and not directly caused by her work activities but reiterated his opinion that her work duties as a lobby assistant, including standing continuously for two hours at a time for a total of seven hours per day and walking back and forth to retrieve parcels for customers, caused an aggravation of her lumbar facet arthrosis. Appellant also submitted a November 15, 2019 job offer, accepted on November 18, 2019, for a modified city carrier position, which required intermittent lifting and carrying up to 10 pounds for 8 hours per day, intermittent standing and walking for 4 hours per day, intermittent bending/stooping/twisting for 3 hours per day, intermittent climbing for 1 hour per day, intermittent sitting and performing fine manipulation for 6 hours per day, and intermittent reaching above her shoulder.⁶

By decision dated August 25, 2021, OWCP denied modification of its December 16, 2020 decision.

On November 4, 2021 appellant requested reconsideration of the August 25, 2021 decision. In support of her request, she submitted a November 2, 2021 narrative report by Dr. Basimah Khulusi, a Board-certified physiatrist. Dr. Khulusi noted that appellant's MRI scan results between November 10, 2018 and April 22, 2020 revealed worsening at L3-L4 and L4-L5, which translated into objective findings at L3-L4 on the EMG/NCV. She diagnosed lumbar sprain, aggravation of lumbar facet arthrosis, and permanent aggravation of lumbar stenosis, caused by

⁶ The job offer indicated that it was made under OWCP File Nos. xxxxxx370, xxxxxx659, and xxxxxx831.

repetitive activities as a lobby director, including picking up parcels for customers weighing up to 10 pounds, handling parcels, and walking back and forth.

By decision date November 23, 2021, OWCP denied modification of its August 25, 2021 decision.

On November 9, 2022 appellant requested reconsideration of OWCP's November 23, 2021 decision. In support thereof, she submitted a November 8, 2022 narrative report of Dr. Khulusi, who noted that her job duties as a lobby assistant since March 2017, including being on her feet for seven hours per day, walking back and forth, and handling parcels and mail weighing up to 10 pounds repetitively, caused spraining, straining, and inflammation of the structures of her low back. She also explained that muscle contraction caused increased pressure in the intradiscal spaces, which led to crowding of the exiting nerve roots. Dr. Khulusi cited medical studies which noted a relationship between back disorders and heavy physical labor. She opined that appellant's "highly repetitive and forceful work for many years ... resulted in injury to the ligaments and the discs of her low back."

By decision dated November 16, 2022, OWCP denied modification of its November 23, 2021 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁷ 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,⁸ 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.⁹ 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.¹⁰

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (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 employment factors identified by the employee.¹¹

⁷ *Supra* note 2.

⁸ *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).

⁹ *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).

¹⁰ *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).

¹¹ *P.L.*, Docket No. 19-1750 (issued March 26, 2020); *R.G.*, Docket No. 19-0233 (issued July 16, 2019); *LM.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett, id.*

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹² The opinion of the physician must be based upon a complete factual and medical background, 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.¹³

In a case in which 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.¹⁴

ANALYSIS

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

The record reflects that OWCP provided information to Dr. Einbund through the preparation of a SOAF dated September 29, 2020, which described various modified-duty positions made available to appellant under the present claim. However, the record does not contain any of the modified duty offers listed in the SOAF. Moreover, in support of her June 4, 2021 request for reconsideration, appellant submitted a November 15, 2019 offer of limited duty, made under prior claims, that she accepted for a modified city carrier position. The September 29, 2020 SOAF does not mention the November 15, 2019 modified position, nor did Dr. Einbund reference it in his November 24, 2020 report. It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF,¹⁵ and its procedures require that all evidence on which the SOAF is based must be in the case record.¹⁶ Its procedures also dictate that when a DMA, second opinion specialist, or impartial medical examiner renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹⁷ As Dr. Einbund did not have a complete and accurate SOAF or evidentiary record as the framework in forming his opinion, his opinion is of diminished probative value.

¹² *I.J.*, Docket No. 19-1343 (issued February 26, 2020); *T.H.*, 59 ECAB 388 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

¹³ *D.C.*, Docket No. 19-1093 (issued June 25, 2020); *see L.B.*, Docket No. 18-0533 (issued August 27, 2018).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013). *See C.F.*, Docket No. 20-0222 (issued December 21, 2020).

¹⁵ *C.E.*, Docket No. 19-1923 (issued March 30, 2021); *B.K.*, Docket No. 19-0976 (issued December 15, 2020); *M.B.*, Docket No. 19-0525 (issued March 20, 2020); *J.N.*, Docket No. 19-0215 (issued July 15, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁶ *Supra* note 14 at Chapter 2.809.4(a)(1) (September 2009).

¹⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see also C.C.*, Docket No. 19-1948 (issued January 8, 2021); *N.W.*, Docket No. 16-1890 (issued June 5, 2017).

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹⁸ While appellant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source.¹⁹ Once OWCP undertakes development of the record, it must do a complete job in procuring the evidence that will resolve the relevant issues in the case.²⁰ Appellant alleged an injury to her lower back due to her job duties, and therefore, her job history with the employing establishment is a relevant issue. The Board finds that OWCP insufficiently developed the evidence regarding appellant's job history with the employing establishment, which was evidence necessary to resolve a relevant issue in the case. Therefore, the case must be remanded for further development of the claim.²¹

On remand, for a full and fair adjudication, OWCP shall administratively combine OWCP File Nos. xxxxxx227 and xxxxxx370. Further, OWCP shall then prepare an updated SOAF and refer the case record, together with the updated SOAF, to Dr. Einbund for a supplemental opinion on causal relationship.²² If Dr. Einbund is unavailable or unwilling to provide a supplemental opinion, OWCP shall refer appellant, together with the updated SOAF and a list of specific questions, to a second opinion physician in the appropriate field of medicine to resolve the issue of whether appellant sustained a low back condition causally related to the accepted factors of her federal employment.²³ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁸ *V.P.*, Docket No. 22-0706 (issued November 3, 2022); *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹⁹ *T.T.*, Docket No. 20-0383 (issued August 3, 2020).

²⁰ *V.P.*, *supra* note 18; *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

²¹ *See S.T.*, Docket No. 20-0588 (issued September 16, 2020).

²² *See M.N.*, Docket No. 17-1729 (issued June 22, 2018).

²³ *See F.K.*, Docket No. 19-1804 (issued April 27, 2020).

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2022 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 21, 2024
Washington, DC

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

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

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