

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

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<b>J.K. (nee R), Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 23-0959</b>
	)	<b>Issued: February 14, 2024</b>
<b>U.S. POSTAL SERVICE, PITTSBURGH</b>	)	
<b>PERFORMANCE CLUSTER, Pittsburgh, PA,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On June 5, 2022 appellant, through counsel, filed a timely appeal from a June 21, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

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<sup>1</sup> 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.

<sup>2</sup> The Board notes that a January 26, 2023 nonmerit decision and a February 21, 2023 merit decision are also within the Board's jurisdiction. However, appellant, through counsel, has only sought appeal from the June 21, 2023 decision. Thus, the January 26 and February 21, 2023 decisions are not properly before the Board and will not be addressed in this decision. *See* 20 C.F.R. § 501.3.

Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>4</sup>

### **ISSUE**

The issue is whether appellant has established a medical condition causally related to the accepted March 15, 2021 employment incident.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>5</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 26, 2021 appellant, then a 59-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 15, 2021 she pulled her left upper leg and hip out of place when she tripped on a sidewalk after delivering a package and fell while in the performance of duty. On the reverse side of the claim form, appellant's supervisor acknowledged that appellant was injured in the performance of duty. Appellant did not stop work.

An April 29, 2021 report from Dr. Bert Hepner, an osteopath specializing in orthopedic surgery, related that appellant sustained a work injury on March 8, 2021 when she tripped on a broken sidewalk, fell on her side, and pulled something in her left hip. He diagnosed labral tear of hip joint, sprain of left hip, and lumbar and sacral osteoarthritis. Dr. Hepner advised that appellant could participate in stationary, sedentary duties pending further evaluation via a magnetic resonance imaging (MRI) scan.

In a development letter dated June 28, 2021, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary and provided her with a development questionnaire. OWCP afforded appellant 30 days to respond. Appellant submitted additional evidence.

By decision dated July 28, 2021, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish causal relationship between her diagnosed conditions and the accepted March 15, 2021 employment incident.

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that, following the June 21, 2023 decision, a appellant submitted 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.*

<sup>5</sup> Docket No. 22-0945 (issued December 16, 2022).

On August 9, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on December 20, 2021.

In progress notes dated April 7, 2021, Dr. Michael Ondich, an osteopath specializing in family medicine, related that appellant fell down steps and landed face first while delivering mail approximately a week prior. He examined appellant and diagnosed pelvic pain and sacral pain.

A September 20, 2021 report from Dr. Scott J. Szabo, a Board-certified orthopedic surgeon, related that on March 15, 2021 appellant was delivering a package when she tripped, fell, and landed on her right side. Appellant immediately noted numerous musculoskeletal complaints but was being seen only for evaluation of the right shoulder. She reported no prior right shoulder injury, symptoms, or treatment. Dr. Szabo diagnosed right shoulder rotator cuff tear, superior labrum anterior to posterior (SLAP) tear, biceps tenosynovitis, scapular dyskinesia, impingement syndrome, and acromioclavicular joint arthritis.

In an October 14, 2021 report, Dr. Dana C. Mears, a Board-certified orthopedist, diagnosed unilateral primary osteoarthritis of the left hip and trochanteric bursitis of the left hip.

An October 15, 2021 report from Dr. Szabo related appellant's history of injury and diagnosed right shoulder rotator cuff tendinopathy and scapular dyskinesia evolving adhesive capsulitis. He advised that she could return to work with restrictions, including no lifting over 10 pounds and no lifting above the waist for four weeks. In a work restriction note of even date, Dr. Szabo took appellant off work for four weeks and indicated that after that period she could return to work with a 10-pound lifting limit to waist height and no above-head lifting.

In a December 1, 2021 addendum to his April 7, 2021 progress notes, Dr. Ondich clarified that appellant did not fall down the steps, but rather tripped over the sidewalk while delivering a package.

A December 9, 2021 letter from Dr. Ondich related that appellant tripped and fell at work, landing on her right side. Appellant stated that her pain and discomfort began immediately after the fall and that she had no prior musculoskeletal injuries or issues with her shoulder or back. Dr. Ondich opined that appellant's musculoskeletal complaints and injury were a direct result of her fall at work. He diagnosed hip strain and sacrococcygeal disorders.

In a December 13, 2021 report, Dr. Szabo described his physical examination findings and diagnosed right rotator cuff tear, impingement, scapular dyskinesia, adhesive capsulitis, and possible SLAP tear.

By decision dated March 7, 2022, OWCP's hearing representative affirmed the July 28, 2021 decision.

In an undated letter, Dr. Alan Reefer, a chiropractor, indicated that he treated appellant multiple times in 2019 for a neck condition. He noted that the next time he saw appellant was on March 17, 2021 when she presented with left lower back and hip pain, right neck and shoulder pain with subluxation complexes which she reported were related to the accepted March 15, 2021

employment incident. Dr. Reefer noted that radiographs of the lumbopelvic region were obtained, and he was continuing to treat appellant for these conditions.

On April 27, 2022 appellant, through counsel, requested reconsideration.

By decision dated May 9, 2022, OWCP denied modification of the March 7, 2022 decision.

On June 3, 2022 appellant, through counsel, appealed to the Board.

While the appeal was pending with the Board, OWCP received a June 15, 2021 report from Dr. Nathan Formaini, an osteopath specializing in orthopedic surgery, who related that appellant tripped on a broken sidewalk at work on March 15, 2021 and then reported right shoulder and left knee pain. Dr. Formaini's examination of the right shoulder demonstrated full passive and active range of motion (ROM) with pain at the extremes, cuff and biceps tenderness, and positive Hawkin's and Neer's impingement signs. He reviewed right shoulder x-rays taken that day, which revealed acromioclavicular joint arthrosis of the right shoulder with distal clavicle osteolysis, and left knee x-rays taken that day, which revealed tricompartment osteoarthritis of the left knee. Dr. Formaini diagnosed a right rotator cuff tear and left knee osteoarthritis. He opined that appellant had aggravated her preexisting left knee osteoarthritis.

Additionally, OWCP received an October 28, 2022 report, Dr. Marco A. Alcala, Jr., Board-certified in sports medicine and family medicine, related appellant's history of injury and treatment, noting that she fell at work on March 15, 2021 and landed on her left side. His examination of the back demonstrated severe tenderness to palpation at the lumbar midline and sacrum, abnormal ROM with extension and rotation to the right, and positive axial loading test on the right. Dr. Alcala reviewed lumbar spine x-rays taken that day, which revealed decreased disc space at L3-4, L4-5, and L5-S1, as well as mild-to-moderate degeneration at those levels. He diagnosed chronic bilateral low back pain without sciatica and ordered a lumbar spine MRI scan.

By decision dated December 16, 2022, the Board affirmed OWCP's March 7 and May 9, 2022 decisions.

On January 17, 2023 appellant, through counsel, requested reconsideration. By decision dated January 26, 2023, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

Appellant subsequently submitted a January 6, 2023 report from Dr. Alcala noting that her low-back pain started following a fall at work on March 15, 2021. Dr. Alcala examined appellant and diagnosed chronic bilateral low back pain without sciatica.

On February 13, 2023 appellant, through counsel, requested reconsideration. By decision dated February 21, 2023, OWCP denied modification of its January 26, 2023 decision.

In a March 23, 2023 report, Dr. Alcala reiterated appellant's history of falling at work and landing on her left side on March 15, 2021 and repeated his October 28, 2022 examination findings. He reviewed a December 7, 2022 lumbar spine MRI scan, which revealed multilevel spondylosis, a Tarlov cyst at S2, a moderate broad disc bulge at L2-3 with minimal abutment of the bilateral descending L3 nerve root in the bilateral subarticular recesses, mild spinal canal

stenosis and neuroforaminal stenosis at L2-3, small broad disc bulge at L3-4 with minimal abutment of the bilateral descending L4 nerve roots in the bilateral subarticular recesses, and mild-to-moderate bilateral neuroforaminal stenosis at L3-4. Dr. Alcalá diagnosed lumbar spine spondylosis and chronic bilateral low back pain without sciatica. He opined that appellant's work-related slip and fall caused her ongoing low back pain. Dr. Alcalá explained that falling and landing on the side of the hip or tailbone can aggravate previous degenerative changes in the lumbar spine and cause severe pain, including referred pain to the hip and the site of impact. He also noted that hip contusions are common with falls and that this was likely the cause of appellant's hip pain at the time of the injury. Dr. Alcalá added that the bulging discs and Tarlov cyst visualized in the MRI scan were indications of an injury, noting that the cyst can be increased in size due to the type of fall she sustained. He concluded that each of these opinions was made within a reasonable degree of medical certainty.

On April 10, 2023 appellant, through counsel, requested reconsideration.

In an April 28, 2023 statement, the employing establishment asserted that appellant had not established causal relationship and noted that her Form CA-1 did not mention any back injuries.

By decision dated June 21, 2023, OWCP denied modification of its February 21, 2023 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>6</sup> has the burden of proof to establish the essential elements of their 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,<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

To determine whether an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident at the time and

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<sup>6</sup> *Supra* note 3.

<sup>7</sup> *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).

<sup>8</sup> *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).

<sup>9</sup> *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).

place and in the manner alleged.<sup>10</sup> The second component is whether the employment incident caused an injury.<sup>11</sup>

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.<sup>12</sup> 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.<sup>13</sup>

### ANALYSIS

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

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata*, absent further review by OWCP under section 8128 of FECA. It is, therefore, unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's May 9, 2022 decision as the Board considered that evidence in its December 16, 2022 decision.<sup>14</sup>

In his March 23, 2023 report, Dr. Alcalá diagnosed lumbar spine spondylosis and chronic bilateral low back pain without sciatica and noted that appellant fell at work and landed on her left side on March 15, 2021. He opined that her work-related slip and fall caused her ongoing low back pain. Dr. Alcalá explained that falling and landing on the side of the hip or tailbone can aggravate previous degenerative changes in her lumbar spine and cause severe pain, including referred pain to the hip and the site of impact. He also noted that hip contusions are common with falls. Dr. Alcalá added that the bulging discs and Tarlov cyst visualized in the MRI scan were indications of an injury, noting that the cyst can be increased in size due to the type of fall she sustained.

The Board finds that Dr. Alcalá's March 23, 2023 report is sufficient to require further development of the medical evidence. While his report is not completely rationalized to meet appellant's burden of proof to establish her claim, it raises an uncontroverted inference between

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<sup>10</sup> *R.K.*, Docket No. 19-0904 (issued April 10, 2020); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>11</sup> *Y.D.*, Docket No. 19-1200 (issued April 6, 2020); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>12</sup> *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).

<sup>13</sup> *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).

<sup>14</sup> *A.C.*, Docket No. 20-1340 (issued November 1, 2022); *L.K.*, Docket No. 19-0313 (issued January 15, 2020); *A.L.*, Docket No. 19-0285 (issued September 24, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

her diagnosed medical conditions and the accepted employment incident and is, therefore, sufficient to require further development of her claim.<sup>15</sup>

The Board notes that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While it is appellant's burden of proof to establish the claim, OWCP shares responsibility in the development of the evidence.<sup>16</sup> It has an obligation to see that justice is done.<sup>17</sup>

The Board will, therefore, remand the case to OWCP for further development of the medical evidence. On remand, OWCP shall refer appellant, a statement of accepted facts, and the medical evidence of record to a specialist in the appropriate field of medicine. The referral physician shall provide a rationalized opinion on whether the diagnosed conditions are causally related to the accepted March 15, 2021 employment incident. If the physician opines that the diagnosed conditions are not causally related, they must explain with rationale how or why their opinion differs from that of Dr. Alcalá. Following this and any further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim.

### CONCLUSION

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

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<sup>15</sup> *D.V.*, Docket No. 21-0383 (issued October 4, 2021); *K.S.*, Docket No. 19-0506 (issued July 23, 2019); *H.T.*, Docket No. 18-0979 (issued February 4, 2019); *D.W.*, Docket No. 17-1884 (issued November 8, 2018); *John J. Carlone*, *supra* note 11.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 21, 2023 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 14, 2024  
Washington, DC

Alec J. Koromilas, 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