United States Department of Labor
Employees' Compensation Appeals Board

M.F., Appellant	)	
and	)	**Docket No. 07-1477**
	)	**Issued: November 21, 2007**
SOCIAL SECURITY ADMINISTRATION,	)	
Thousand Oaks, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 8, 2007 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated May 18 and September 18, 2006 and February 2, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that her fibromyalgia and spinal subluxation conditions were causally related to her federal employment; and (2) whether the Office properly denied her requests for subpoenas.

FACTUAL HISTORY

On October 25, 2004 appellant, then a 50-year-old claims representative, filed a Form CA-2, occupational disease claim, alleging that factors of her federal employment aggravated her spinal condition. She first became aware of her condition on December 20, 2004 and of its relationship to her employment in December 2002. Appelant stopped work on September 29, 2004. She submitted a statement alleging that her condition was caused by

working outside her job classification. After appellant's returned from medical leave treatment for fibromyalgia, she was assigned tasks more physically demanding than provided in her job description. At her request, she was transferred from her usual Chatsworth, California work location to a worksite in Thousand Oaks, California, which was closer to her home. Appellant stated that, at Thousand Oaks, she was made to work at the front "numbers" counter where she had to dispense and collect numerous forms and open and close a heavy window which caused back pain. She stated that prolonged sitting and reaching also hurt her.

In a report dated April 7, 2004, Dr. Marcel A. Goldberg, Board-certified in family medicine, diagnosed fibromyalgia which would flare-up on occasion. He advised that a long commute could contribute to appellant's symptoms, particularly her back pain. By report dated June 22, 2004, Dr. Goldberg diagnosed irritable bowel syndrome and advised that the two conditions were chronic, that appellant would intermittently miss work and that she was totally disabled at that time. On an August 31, 2004 disability slip, Dr. C. Albert Reeves, M.D., advised that appellant could return to work on September 7, 2004. On September 8, 2004 Dr. Goldberg noted that appellant had not worked since July 2004 but had an increase in her fibromyalgia and irritable bowel syndrome symptoms. He advised that the conditions had been present for years and could vary from time to time and that it was impossible to predict when appellant could return to work. Dr. Goldberg recommended that she be transferred to an office near her home. He provided a disability slip stating that she should be off work until September 20, 2004. In a disability slip dated October 22, 2004, Dr. Stanley D. Jensen, a chiropractor, advised that appellant could return to work on November 24, 2004.

In a statement dated October 25, 2004, Jacalyn Levy, acting district manager in the Chatsworth office, noted that appellant had complained of back pain for several years. In June 2004 appellant was granted leave without pay (LWOP) under the Family Medical Leave Act. Upon her return to work on September 20, 2004, she was detailed to the Thousand Oaks office which was closer to her home. Ms. Levy stated that appellant only worked September 20, 21, 23, 24, 27 and 29, 2004 and then stopped. She attached a March 2, 2004 letter, in which the employing establishment advised appellant to seek leave counseling, a June 4, 2004 letter noted that appellant was on leave restriction, and letters dated August 27 and October 21, 2004 noted that appellant was working occasionally and otherwise was absent without leave. Ms. Levy also provided a job description with amendments for the claims representative position. The position was described as entailing the final authorization of claims and general application intake duties with the general public that required interviewing and conducting conferences to explain programs and elicit claims. It also required taking food stamp applications and performing cashier duties and was described as requiring mental rather than physical exertion and was mostly performed under common business office conditions but could include other temporary locations as designated by management.

On November 30, 2004 the Office informed appellant of the evidence needed to develop her claim. In an undated response, she described desk duties at Thousand Oaks where she passed documentation back and forth over a desk and through a window. This required bending forward at the waist four times per applicant, reaching above her head two times per applicant and twisting at the waist four times per applicant. Appellant stated that she served 50 people per day and had to open a heavy, sliding wooden window and that she was required to remain seated until break time. She performed these duties four days a week from December 2002 until

January 2003 and two to four times a month from January 2003 until July 2004, and then from September 20 to 28, 2004. Appellant first noticed pain and stiffness in her neck, shoulders, mid and lower back in December 2002. She also submitted an undated work capacity evaluation in which Dr. Jensen provided restrictions to her physical activity. On November 17, 2004 Dr. Jensen noted symptoms of constant moderate low back pain radiating to the right buttock and leg with a 70 percent limitation in range of motion. He diagnosed lumbar disc syndrome without myopathy and sciatica.

By decision dated January 4, 2005, the Office denied the claim on the grounds that the medical evidence did not provide a firm diagnosis of her spinal problems. The Office noted that Dr. Jensen was not considered a physician because he did not diagnose a spinal subluxation as demonstrated by x-ray.[1]

On February 18, 2005, through her attorney, appellant requested reconsideration. In a December 23, 2004 report, Dr. Donald A. deGrange, Board-certified in orthopedic surgery, noted appellant's description of job activities and her complaint of low back pain with right lower extremity paresthesias and numbness and neck pain. Examination findings included mild to moderate cervical spine tenderness with restricted forward flexion, normal extension, lateral rotation and bending with full shoulder range of motion and no sensory deficits. Examination of the lumbar spine demonstrated diffuse tenderness from L1 through the sacrum and decreased lumbar range of motion. Hip and knee range of motion was normal with no motor or sensory deficits and straight leg raising, both sitting and supine, was normal. Dr. deGrange diagnosed chronic cervical and lumbar strains and opined that her condition was caused by her usual job duties of repetitive motion and cumulative trauma. He advised that appellant should not be assigned to the numbers desk because this precipitated her pain.

On August 25, 2005 the Office accepted that appellant sustained employment-related cervical and lumbar strains and vacated the January 4, 2005 decision.

On September 6, 2005 appellant filed a Form CA-7, claim for compensation, for the period commencing July 19, 2004. In a September 21, 2005 statement, Ms. Levy advised that appellant was on LWOP from July 19 to August 6, 2004, on annual leave from August 9 to 13, 2004 when she vacationed out of the country, on LWOP on August 16, 2004, absent without leave (AWOL) from August 16 to 30, 2004 and on LWOP August 31 to September 17, 2004. She again noted that appellant worked six days at Thousand Oaks in September 2004 and stopped work on September 29, 2004. Ms. Levy described appellant's normal job duties as light with no lifting and stated that the only accommodation appellant requested was that she be able to work closer to home. She advised that appellant had the option of sitting or standing at the numbers desk job.

By letter dated October 18, 2005, the Office informed appellant of the evidence needed to support her claim for compensation. The Office again informed appellant that Dr. Jensen was not a physician as defined by the Act.

[1] On January 19, 2005 appellant was removed from employment due to her unavailability for duty.

In an April 8, 2003 report, Dr. Shiu-Kwan Fok, a physiatrist, noted appellant's complaints of low back pain with tenderness on examination of the back. He advised that her physical findings were basically normal with some suggestion of early lumbar degenerative disc disease. Dr. Fok provided physical restrictions that she avoid leaning, bending or twisting in performing household chores. A patient ledger from Dr. Jensen's office dating from October 13, 2004 to February 3, 2006 showed that appellant underwent chiropractic treatment several times a week. Appellant also resubmitted Dr. Jensen's November 17, 2004 report, and Dr. Goldberg's June 16 and September 8, 2004 reports.

In a January 25, 2006 decision, the Office found that appellant was not entitled to wage-loss compensation beginning on July 19, 2004.[2] By letter dated March 28, 2006, the Office informed appellant that the claim was being developed regarding her diagnosed spinal subluxation and fibromyalgia. Appellant thereafter submitted a March 23, 2006 x-ray report from Dr. Jensen who diagnosed a subluxation at L5 and subluxations at C3 and C5. Reports from Dr. Goldberg dated September 23 to October 28, 2003 discussed a viral syndrome and a mole biopsy. He noted a history of irritable bowel syndrome and chronic low back pain with multiple somatic pain type complaints. In reports dated November 5, 2003 to January 28, 2004, Dr. Goldberg diagnosed fibromyalgia and irritable bowel syndrome. By report dated March 17, 2004, Dr. Paul M. Sanchez, a Board-certified gastroenterologist, advised that he suspected that appellant had irritable bowel syndrome. In an April 7, 2004 report, Dr. Goldberg advised that appellant's commute exacerbated her fibromyalgia and recommended that she be transferred to a location closer to her home. On October 7, 2004 appellant advised that the position she described at Thousand Oaks required twisting, reaching and grabbing. Dr. Goldberg diagnosed fibromyalgia syndrome, irritable bowel syndrome and work-related low back pain. In reports dated November 24, 2004 and January 5, 2005, Dr. Jensen advised that appellant was totally disabled. Dr. Cynthia K. Nortey, Board-certified in internal medicine and infectious diseases, submitted a June 21, 2005 report which noted a history of fibromyalgia and depression and advised that appellant's physical examination was unremarkable. On September 23, 2005 Dr. Oltita Tirzaman, a Board-certified internist, noted Pap smear findings of atypical cells of undetermined significance and diagnosed heavy menses and fibromyalgia. In reports dated December 21, 2005 and January 27, 2006, Dr. Gary T. Lieb, an internist, diagnosed fibromyalgia, irritable bowel syndrome and depression.

On April 14, 2006 appellant stated that in December 2002 she was assigned the numbers desk for several days in a row during the holidays and that the physical activities of this position caused a great deal of pain in her neck, back and hands, and that thereafter when she was assigned to the numbers desk, at the end of her shift she was barely able to walk, including on September 29, 2004. She stated that her fibromyalgia developed slowly as a general malaise. Appellant stated that working the numbers desk and the added stress of dealing with the

[2] Appellant did not request a hearing or reconsideration before the Office from this decision. The Board does not have jurisdiction to review this decision as its jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of this appeal on May 8, 2007. 5 U.S.C. § 501.2(c); *see Charles W. Downey*, 54 ECAB 421 (2003).

"unhappy public" exacerbated her condition. She submitted publications regarding fibromyalgia.[3]

By decision dated May 18, 2006, the Office denied appellant's claim for fibromyalgia and spinal subluxation finding that the medical evidence did not establish that these conditions were caused by her employment duties.

On June 15, 2006 she requested a telephonic hearing and submitted duplicate copies of medical evidence previously of record. In a June 14, 2006 report, Dr. Jensen stated that appellant expressed concern at attending a deposition with no representation and that the long drive and prolonged sitting was "counterproductive" to her spinal condition. In an undated letter received by the Office on September 1, 2006, appellant requested that Dr. Jensen and six coworkers be subpoenaed.[4]

By decision dated September 18, 2006, an Office hearing representative denied her requests for subpoenas, noting that written statements could be obtained from the witnesses.

At the telephonic hearing, held on November 9, 2006, appellant testified that she had filed a claim with the Merit Systems Protection Board. The hearing representative advised her of the medical evidence needed to support her claim. In a November 10, 2006 report, Dr. Jensen described appellant's report of the duties at the numbers desk and opined that she had a significant injury to her neck and back with constant, chronic pain and stiffness with limited range of motion and positive x-ray findings of subluxations that required chiropractic treatment two to three times a week. Appellant also submitted publications regarding stress and cardiac conditions.

By decision dated February 2, 2007, an Office hearing representative affirmed the May 18, 2006 decision.[5]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally

[3] Appellant submitted statements from several coworkers addressing her medical condition.

[4] On February 9, 2006 appellant filed a schedule award claim. By letter dated August 22, 2006, the Office informed her that a schedule award was not payable for the back and that, if she had an impairment of an extremity as a result of her accepted back injury, she should file a schedule award claim for that extremity and provide supporting medical evidence.

[5] The Board notes that the February 2, 2007 decision contains a typographic error in that it affirms a June 28, 2006 decision. The prior decision on this merit issue is dated May 18, 2006.

related to the employment injury. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[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) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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.[7]

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[8] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet her burden of proof to establish that the claimed fibromyalgia and spinal subluxations were caused by employment factors. The record does not contain adequate medical opinion on explaining how her diagnosed conditions were caused or contributed to by her employment factors.[11]

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[6] *Gary J. Watling*, 52 ECAB 357 (2001).

[7] *Solomon Polen*, 51 ECAB 341 (2000).

[8] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[9] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[10] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[11] *Leslie C. Moore, supra* note 9. The Board notes that excerpts from publications have little probative value in resolving medical questions unless a physician shows the applicability of the general medical principles discussed in the articles to the specific factual situation at issue in the case. The publications submitted by appellant are therefore not competent medical evidence. Furthermore, the statements submitted by appellant's husband and coworkers are not relevant to establish that her claimed fibromyalgia or spinal subluxations were caused by her employment.

Dr. Reeves merely advised that appellant could return to work on September 7, 2004. While Dr. deGrange diagnosed work-related cervical and lumbar strains, these conditions were accepted by the Office, and he did not diagnose either fibromyalgia or spinal subluxations. Dr. Fok advised that appellant's physical findings were basically normal and Dr. Sanchez diagnosed possible irritable bowel syndrome. Dr. Nortey noted a history of fibromyalgia and found appellant's physical examination to be unremarkable. While Dr. Tirzaman and Dr. Lieb diagnosed fibromyalgia, the physicians did not provide any opinion as to the cause of the diagnosed condition. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[12] Dr. Goldberg submitted reports which diagnosed fibromyalgia which he advised was a chronic condition and that appellant's symptoms could vary. He recommended that she transfer to a work location closer to home, which was granted. However, Dr. Goldberg did not provide any opinion regarding the cause of the diagnosed fibromyalgia. His opinion is therefore insufficient to meet appellant's burden of proof to establish that this condition was causally related to factors of her federal employment.[13]

Dr. Jensen would be considered a physician under the Act as he diagnosed subluxation by x-ray.[14] While he described appellant's report of the duties of the numbers desk, he did not explain how these or any other employment duties caused appellant's spinal subluxation other than to say her low back pain was greater than normal with repetitive bending, stooping, lifting or prolonged sitting. The mere fact that a condition manifests itself during a period of employment or the claimant's belief that the condition was caused or aggravated by employment conditions is insufficient to establish a causal relationship.[15] Dr. Jensen did not provide a clear opinion that appellant's diagnosed spinal subluxations were due to work factors and did not exhibit a sufficient knowledge of her work duties or otherwise provide medical rationale explaining how appellant's back condition was caused by the six days of employment at the numbers desk in Thousand Oaks.[16] His opinion is therefore insufficient to establish that appellant's spinal subluxations were employment related.

The fact that work activities produced pain or discomfort revelatory of an underlying condition does not raise an inference of causal relationship,[17] and a diagnosis of "pain" does not constitute the basis for payment of compensation.[18] While the medical opinion of a physician

[12] *Willie M. Miller*, 53 ECAB 697 (2002).

[13] *Id.*

[14] Under section 8101(2) of the Act, the term "physician" 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 demonstrated by x-ray to exist, and subject to regulation by the Secretary. *Paul Foster*, 56 ECAB ___ (Docket No. 04-1943, issued December 21, 2004).

[15] *Charles E. Evans*, 48 ECAB 692 (1997).

[16] *See Vicky L. Hannis*, 48 ECAB 538 (1997).

[17] *Jimmie H. Duckett*, 52 ECAB 332 (2001).

[18] *Robert Broome*, 55 ECAB 339 (2004).

supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.[19] The medical opinions of record are not insufficient to establish that appellant has either employment-related fibromyalgia or spinal subluxations. Because she did not submit a reasoned medical opinion explaining that her fibromyalgia and spinal subluxations were caused by employment factors, she did not meet her burden of proof.[20]

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. The implementing Office regulations provide that subpoenas for documents will be issued only where the documents are relevant and cannot be obtained by any other means. The Office hearing representative retains discretion on whether to issue a subpoena.[21] A claimant may request a subpoena only as part of the hearings process, and no subpoena will be issued under any other part of the claims process. To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[22] Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts,[23] and in requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[24] The function of the Board on appeal is to determine whether there has been an abuse of discretion.[25]

ANALYSIS -- ISSUE 2

In this case, appellant requested subpoenas for the appearance of Dr. Jensen and six coworkers. The Board finds that the Office hearing representative did not abuse her discretion in denying appellant's subpoena requests. In requesting a subpoena, a claimant must explain why

[19] *Patricia J. Glenn*, 53 ECAB 159 (2001).

[20] *Id.*

[21] 20 C.F.R. § 10.619.

[22] *Id*. at 10.619(a)(1).

[23] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[24] 20 C.F.R. § 10.619(a)(2).

[25] *Gregorio E. Conde*, *supra* note 23.

the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[26] Here appellant merely requested the subpoenas and thus did not show why information could not be obtained other than through the subpoena process.[27] Thus, the Office hearing representative acted within her discretion in not issuing subpoenas as requested by appellant.[28]

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained employment-related fibromyalgia or spinal subluxation conditions. The Board further finds that the Office did not abuse its discretion in denying her subpoena requests.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 2, 2007 and September 18 and May 18, 2006 be affirmed.

Issued: November 21, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[26] *Claudio Vazquez*, 52 ECAB 496 (2001).

[27] *Janet L. Terry*, 53 ECAB 570 (2002).

[28] *Id.*