

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

K.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Big Bear Lake, CA, Employer**

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**Docket No. 16-1181
Issued: July 26, 2017**

Appearances:

*Thomas S. Harkins, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 11, 2016 appellant, through counsel, filed a timely appeal from a December 1, 2015 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 the claim.

ISSUE

The issue is whether appellant establish an injury in the performance of duty due to the accepted July 23, 2014 employment incident.

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 6, 2014 appellant, then a 52-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she injured her lower back in the performance of duty on July 23, 2014. She previously filed a claim for an August 19, 2001 left hip injury, which OWCP denied (OWCP File No. xxxxxx894). With respect to her current lower back complaints, appellant indicated that it might be a recurrence of her 2001 left hip injury. She stopped work on July 23, 2014.

In an undated statement, appellant explained that on July 23, 2014 she was performing her normal duties, which included unloading packages to be delivered to another station. She emphasized that she had performed the same job for many years. Appellant explained that, while unloading a particular package, the contents inside shifted and it caused her to twist. She indicated that she felt a “popping” sensation in her lower back, which was concerning. Appellant explained that she “seemed to be ‘ok’ except for a very distinct ‘warming sensation’ in [her] back.” She further stated that because it was her last hand-truck load, she put the package in the back door, and sat back down in the Jeep. At that point, she experienced severe pain and could not breathe. Appellant indicated that she was “so scared.” When she returned to the office, she explained what had happened and requested assistance.

In an August 6, 2014 e-mail, Ruben A. Lemus, the officer in charge, confirmed that appellant texted him early in the morning on July 23, 2014 and informed him that she had injured her back after lifting a package. Mr. Lemus noted that appellant had a prior hip injury and frequently went home sick when her hip or back bothered her. He also provided a completed Form CA-16, authorization for examination and/or treatment, which was dated July 29, 2014.

In an August 6, 2014, attending physician’s report, Dr. Christopher H. Fagan, Board-certified in emergency medicine, advised that appellant related that she was lifting a box and hurt her lower back. He diagnosed back sprain. Dr. Fagan checked a box marked “yes” indicating that appellant’s condition was caused or aggravated by work activity. He explained that the injury was due to lifting box and body mechanics. Dr. Fagan indicated that appellant was totally disabled from July 24 through August 14, 2014.³ OWCP also received evidence from a physician assistant, as well as other documents from healthcare providers with illegible signatures.

In a letter dated August 13, 2014, OWCP advised appellant that additional medical evidence was needed. It afforded her at least 30 days to submit the requested medical evidence.

In an August 16, 2014 report, Dr. Fagan noted that appellant was seen for an ongoing problem. He related that she had a hip injury in 2013 and returned to work after a few weeks and was on chronic narcotics. Dr. Fagan explained that appellant came into his office on July 23, 2014 “after having a lifting injury at work and was subsequently taken off work for that problem.” He indicated that appellant believed that her hip condition was contributory to pulling her back out, and she filed an injury report with the employing establishment for the radiculopathy and back pain she was feeling. Dr. Fagan noted July 23, 2014 as the date of injury. He also noted that appellant had an ongoing history of hip pain that was treated with

³ On August 15, 2014, Dr. Fagan extended the period of disability until August 29, 2014.

analgesics and the lumbar spine x-rays from July 24, 2014 revealed scoliosis and diffuse degenerative joint disease. Dr. Fagan explained that he was trying to piece together the records, but appellant needed to see an orthopedist to evaluate the hip injury which had occurred in July 2013. Regarding her back pain, he noted that it “seems to be resolving somewhat” with appellant ambulating better and having improved straight leg raises. Dr. Fagan opined that it was his “understanding that this is a collaboration of both injuries.” He diagnosed left hip degenerative joint disease and lumbar spine disease. Dr. Fagan recommended an “orthopedic evaluation for the left hip concomitantly with the back sprain resolving somewhat.” He further noted that appellant remained on narcotic medication for the first injury and that her medication was adjusted for her ongoing symptoms.

Appellant also provided a July 24, 2014 lumbar spine x-ray report, which revealed scoliosis, diffuse degenerative disc changes with no significant interval change from x-rays taken on January 23, 2013.

By decision dated September 15, 2014, OWCP denied appellant’s traumatic injury claim. OWCP accepted that the July 23, 2014 lifting incident occurred as alleged, and that appellant had been diagnosed with back sprain, scoliosis, left hip degenerative joint disease, and lumbar spine disease. However, it denied the claim because the medical evidence of record did not establish a causal relationship between the accepted employment incident and the diagnosed condition(s).

On September 26, 2014 appellant requested a review of the written record. She explained that on July 23, 2014 she injured her back while performing her rural carrier duties and she saw her primary care physician on July 24, 2014.

In a February 4, 2015 letter, counsel informed OWCP that he wished to pursue reconsideration, and advised that appellant’s previous request for review of the written record was withdrawn.

In a September 9, 2014 report, Dr. Paul D. Burton, a Board-certified orthopedic surgeon, noted that appellant was referred to him for complaints of lower back and left hip pain. Appellant related that she hurt her back at work on July 23, 2014 as she was moving a box when her body twisted. Dr. Burton noted that x-rays were taken on July 24, 2014. He advised that appellant had pain rating 10 out of 10 and that it radiated from her groin to her foot and felt like needles and pins in her foot. Dr. Burton indicated that she was filing the paperwork for her workers’ compensation injury. He related that appellant believed her work activities aggravated her hip pain. Dr. Burton examined appellant and diagnosed left hip pain with osteoarthritis and a complement of developmental dysplasia of the hip (DDH). He also diagnosed low back pain with degenerative disc disease, scoliosis in the lumbar spine, and narcotic dependence with use of fentanyl patch. He advised that appellant was temporarily totally disabled.

In September 22, 2014 reports, Dr. Fagan noted that appellant saw Dr. Burton and he called him because there was some “discrepancy of perception. This lady hurt her hip almost a year ago” and her pain never resolved. Dr. Fagan advised that she subsequently hurt herself on duty at work when moving a box, but her job did create some increased pain symptoms in the hip. He explained that “at least a minimum one percent of her symptoms are caused from her job” and that it was his understanding that it was “indeed” work related. Dr. Fagan and Dr. Burton were in agreement that “at least one percent of her symptoms are caused by work,” which aggravated the pain and disability in her left hip. Dr. Fagan explained that the dilemma

was whether it was personal or work related. He opined that “indeed her back did get injured when she was lifting a box.” Dr. Fagan advised that the hip problem was related to getting in and out of the car doing her mail route. He also stated his belief that at least one percent of appellant’s pain was due to “the nature of her job.” Dr. Fagan noted that Dr. Burton agreed with his assessment that the job was somewhat contributory to her symptomatology, if not the nature of her chronic arthritis of her hip.

By decision dated December 1, 2015, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

A claimant seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.⁵

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether “fact of injury” has been established. Generally, 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 that allegedly occurred.⁶ The second component is whether the employment incident caused a personal injury. Causal relationship is a medical question that generally requires rationalized medical opinion evidence.⁷ An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.⁸

Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered “physician[s]” as defined under FECA.⁹ Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.¹⁰

⁴ *Supra* note 2.

⁵ 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁶ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ *See Robert G. Morris*, 48 ECAB 238 (1996) (a physician’s opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background). *Victor J. Woodhams*, 41 ECAB 345, 352 (1989) (additionally, the physician’s opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant’s specific employment factor(s)).

⁸ *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

⁹ 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

¹⁰ *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

ANALYSIS

OWCP accepted that the July 23, 2014 employment incident occurred as alleged, and that appellant had been diagnosed with lumbar and left hip conditions. However, it denied her traumatic injury claim because the medical evidence was insufficient to establish a causal relationship between the July 23, 2014 employment incident and appellant's diagnosed condition(s). The Board finds that OWCP properly determined that appellant failed to establish causal relationship.

In the August 6, 2014, attending physician's report, Dr. Fagan related that appellant was lifting a box and hurt her lower back. He checked a box marked "yes" to indicate that appellant's condition was caused or aggravated by work activity. However, this was insufficient to establish fact of injury. The Board has found that checking of a box "yes" in a form report, without additional explanation or rationale, is not sufficient to establish causal relationship.¹¹

In his August 16, 2014 report, Dr. Fagan noted that appellant was seen for an ongoing problem. He also explained that she had injured her hip in 2013, went back to work after a few weeks, and was on chronic narcotics. Dr. Fagan indicated that he saw appellant on July 23, 2014 "after having a lifting injury at work and was subsequently taken off work for that problem." He also noted that the hip was contributory to her pulling her back out, and that appellant had filed a report with the employing establishment for the radiculopathy and back pain she was feeling due to the July 23, 2014 date of injury. Dr. Fagan advised that she had an ongoing history of hip pain as well as scoliosis and diffuse degenerative joint disease. He explained that he was trying to piece together the records, but appellant needed to see an orthopedist to evaluate the hip injury which occurred in July 2013. Regarding her back pain, Dr. Fagan noted that it "seems to be resolving somewhat" with appellant ambulating better and having improved straight leg raises. He opined that it was his "understanding that this is a collaboration of both injuries." Dr. Fagan diagnosed left hip degenerative joint disease and lumbar spine disease, and recommended an "orthopedic evaluation for the left hip concomitantly with the back sprain resolving somewhat." The Board finds that Dr. Fagan's report is equivocal and speculative as to a causal relationship between appellant's diagnosed conditions and her employment. The Board has held that speculative and equivocal medical opinions regarding causal relationship have little probative value.¹²

In Dr. Burton's September 9, 2014 report, he noted appellant's history of injury and treatment and that appellant believed her work activities had aggravated her prior hip condition. Dr. Burton examined appellant and diagnosed left hip pain with osteoarthritis and a complement of DDH of the hip, low back pain with degenerative disc disease, scoliosis in the lumbar spine, and narcotic dependence with use of fentanyl patch. However, he did not provide his own opinion on causal relationship.¹³ Dr. Burton did not provide medical reasoning, or rationale,

¹¹ *Calvin E. King*, 51 ECAB 394 (2000); *Linda Thompson*, 51 ECAB 694 (2000).

¹² *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

¹³ *See A.M.*, Docket No. 10-205 (issued October 5, 2010) (a physician's opinion must be independent from a claimant's belief regarding causal relationship).

explaining how appellant's work activities caused or aggravated a particular diagnosed condition.¹⁴

In September 22, 2014 reports, Dr. Fagan explained that appellant hurt her hip almost a year ago and her pain had never resolved. Furthermore, appellant subsequently hurt herself on duty at work when moving a box and opined that the "job did create some increased pain symptoms in the hip." Dr. Fagan indicated that "at least a minimum one percent of her symptoms are caused from her job" and that it was his understanding that it was "indeed" work related. He related that "her back did get injured when she was lifting a box." Dr. Fagan noted that her hip problem was related to "getting in and out of the car doing her mail route. I do believe that at least one percent of her pain is due to "the nature of her job." He noted that Dr. Burton agreed with his assessment that the job was somewhat contributory to her symptomatology, if not the nature of her chronic arthritis of her hip. The Board finds that Dr. Fagan did not explain his opinion. A physician's opinion on causal relationship between a claimant's disability and an employment injury is not conclusive simply because it is rendered by a physician. To be of probative value, the physician must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.¹⁵

Appellant also provided a July 24, 2014 lumbar spine x-ray report. However, this report is insufficient because the diagnostic physician did not provide an opinion on causal relationship.

OWCP also received evidence from a physician assistant as well as other documents from healthcare providers with illegible signatures. The Board has consistently held that physician assistants are not competent to render a medical opinion.¹⁶ These reports are entitled to no probative weight because a physician's assistant is not a "physician" as defined by section 8101(2).¹⁷

The Board notes, however, that the employing establishment issued a Form CA-16, authorization for medical treatment, on July 29, 2014. Where an employing establishment properly executes a Form CA-16, which authorizes medical treatment as a result an employee's claim for an employment-related injury, the Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim.¹⁸ The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP.¹⁹ In this case, it is unclear whether OWCP paid for the cost of appellant's examinations. On return of the case record, OWCP should further address the issue.

¹⁴ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

¹⁵ *T.M.*, Docket No. 08-975, (issued February 6, 2009).

¹⁶ See *Janet L. Terry*, 53 ECAB 570 (2002).

¹⁷ See *Allen C. Hundley*, 53 ECAB 551 (2002).

¹⁸ *A.B.*, Docket No. 15-1002 (issued August 14, 2015); *Tracey P. Spillane*, 54 ECAB 608 (2003).

¹⁹ 20 C.F.R. § 10.300(c).

On appeal counsel argued that appellant had met her burden of proof as the medical evidence was sufficiently rationalized. However, as found above, the medical evidence was insufficient to establish causal relationship.

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 failed to meet her burden of proof to establish an injury in the performance of duty due to the accepted July 23, 2014 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 26, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board