United States Department of Labor
Employees' Compensation Appeals Board

L.P., Appellant	)	
	)	**Docket No. 19-1772**
and	)	**Issued: February 19, 2021**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Okmulgee, OK, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 21, 2019 appellant, through counsel, filed a timely appeal from an August 9, 2019 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 medical condition causally related to the accepted November 20, 2012 employment incident.

FACTUAL HISTORY

On November 20, 2012 appellant, then a 52-year-old sales and service distribution associate, file a traumatic injury claim (Form CA-1) alleging that she sustained an injury on that date when she sneezed hard and kicked her leg outward, causing a popping sensation in her back, while in the performance of duty.[3] She stopped work on the date of injury.

On November 20, 2012 the employing establishment executed an authorization for examination and/or treatment (Form CA-16).

In November 20, 2012 reports, Dr. Thomas Todd, a physician specializing in emergency medicine, noted appellant's history of multiple lumbar disc bulges with the onset of severe lumbar pain after a sneezing episode earlier that day. He diagnosed a lumbar sprain.

In a development letter dated November 29, 2012, OWCP informed appellant of the factual and medical deficiencies of her claim. It advised her of the type of evidence necessary to establish her claim and provided a questionnaire for her completion regarding the circumstances of the injury. OWCP afforded appellant 30 days to respond.

Appellant subsequently submitted a November 29, 2012 report by Dr. David R. Hicks, a Board-certified orthopedic surgeon. Dr. Hicks noted treating her for preexisting lumbar degenerative disc disease. He reported appellant's account of increased lumbar pain after sneezing on November 20, 2012. Dr. Hicks obtained lumbar x-rays demonstrating multilevel degenerative lumbar disc disease. He diagnosed a lumbar strain.

By decision dated January 3, 2013, under File No. xxxxxx420, OWCP denied appellant's claim finding that fact of injury had not been established.

On January 25, 2013 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on May 13, 2013. During the hearing, appellant contended that her November 20, 2012 sneezing episode aggravated her previous employment injuries of her lumbar spine. She submitted additional evidence.

A December 6, 2012 magnetic resonance imaging (MRI) scan showed multilevel degenerative disc disease with a right-sided disc bulge at L4-5 and a left-sided disc protrusion at L5-S1.

[3] Under File No. xxxxxx176, OWCP accepted that appellant sustained a lumbar sprain in the performance of duty on November 28, 2007 when she backed into an open safe door. Under File No. xxxxxx344 it accepted that on March 27, 2012 she sustained a traumatic lumbar sprain, the degeneration of a lumbar or lumbosacral disc, and sciatica when a scale tipped over as she removed a package. On August 7, 2018 OWCP administratively combined File Nos. xxxxxx176, xxxxxx344, and xxxxxx420, with xxxxxx420 serving as the master file.

In a December 27, 2012 report, Dr. Hicks noted the history of injury and diagnosed a lumbar strain. In a January 2, 2013 report, he opined that the accepted March 27, 2012 lumbar injury aggravated preexisting lumbar degenerative disc disease. Dr. Hicks returned appellant to modified-duty work for four hours a day.

In reports dated from February 4 to April 1, 2013, Dr. Jack E. Weaver, Board-certified in family practice, provided a history of the 2007 and March 27, 2012 injuries. He opined that the November 2012 sneezing incident worsened appellant's lumbar pain from the two accepted employment injuries and her preexisting disc bulges. Dr. Weaver restricted appellant from work beginning April 1, 2013.

By decision dated August 2, 2013, an OWCP hearing representative set aside OWCP's January 3, 2013 decision and remanded the case for a referral for a second opinion examination to be followed by the issuance of a *de novo* decision.

On November 5, 2013 OWCP obtained a second opinion report from Dr. Paul Maitino, a Board-certified orthopedic surgeon, who opined that the sneezing incident may have caused a lumbar spasm. Dr. Maitino noted in his report that the medical records provided by OWCP lacked reports that had been mentioned in the statement of accepted facts (SOAF).

By decision dated December 13, 2013, OWCP denied the claim finding that fact of injury had not been established.

On December 30, 2013 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. She submitted additional evidence in support of her request.

In a note dated October 25, 2013, Dr. Donald E. Adams, a Board-certified physiatrist specializing in pain management, noted that he administered an L4-5 transforaminal epidural injection on that date.

In a November 25, 2013 duty status report (Form CA-17), a provider whose signature is illegible restricted appellant from work.

By decision dated June 5, 2014, an OWCP hearing representative set aside OWCP's December 13, 2013 decision and remanded the claim for OWCP to request a supplemental report from Dr. Maitino based on the complete medical record and noted that appellant would submit additional supportive medical evidence.

Appellant retired from the employing establishment, effective July 1, 2014. OWCP paid her wage-loss compensation benefits under File No. xxxxxx344.

In a letter dated July 16, 2014, OWCP requested that appellant submit the additional medical evidence referenced in the June 5, 2014 decision. No additional medical evidence was received.

By decision dated March 17, 2015, OWCP denied appellant's claim, finding that she had not established an injury causally related to the accepted November 20, 2012 employment incident.

On March 25, 2015 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated August 19, 2015, OWCP's hearing representative set aside OWCP's March 17, 2015 decision and remanded the case for OWCP to obtain a supplemental report from Dr. Maitino, as had been ordered on prior remand.

In a letter dated October 23, 2015, OWCP afforded appellant 30 days to submit additional medical records and imaging studies regarding the November 20, 2012 injury. In response, appellant submitted an October 1, 2013 report by Dr. Scott C. Robertson, a Board-certified neurosurgeon, who provided a history of injury and noted her prior treatment. On examination, Dr. Robertson noted limited lumbar range of motion and slightly positive bilateral straight leg raising tests. He diagnosed degenerative lumbar disc disease, lumbar radiculitis, lumbar stenosis, lumbar spondylosis, and lumbar scoliosis. Dr. Robertson opined that these conditions had been exacerbated by appellant's work.[4]

By decision dated December 15, 2015, OWCP denied the claim, finding that causal relationship had not been established.

On December 28, 2015 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated June 16, 2016, an OWCP hearing representative set aside the December 15, 2015 decision and remanded the case for OWCP to obtain a supplemental report from Dr. Maitino addressing causal relationship, as had been ordered on prior remands.

OWCP subsequently referred appellant to Dr. Sami Framjee, a Board-certified orthopedic surgeon, and provided a SOAF and a copy of the medical record for his review.[5] In a January 10, 2017 report, Dr. Framjee opined that the November 20, 2012 sneezing episode had not caused the clinically established disc herniation.

By decision dated January 24, 2017, OWCP denied appellant's claim, finding that causal relationship had not been established.

On January 31, 2017 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

[4] Appellant also submitted imaging and diagnostic study reports. A September 23, 2013 lumbar MRI scan report demonstrated facet arthropathy from L2 through S1 with neuroforaminal narrowing. An October 24, 2013 electromyography and nerve conduction velocity (EMG/NCV) study demonstrated chronic bilateral lumbar radiculopathy. A September 18, 2015 MRI scan demonstrated a right paracentral disc herniation at L4-5, and a broad central disc protrusion at L5-S1.

[5] The medical reports submitted to Dr. Framjee with the SOAF contained extraneous remarks on several reports.

By decision dated May 25, 2017, OWCP's hearing representative set aside the January 24, 2017 decision, finding that the SOAF provided to Dr. Framjee was improper. The hearing representative remanded the claim for OWCP to refer appellant to a new second opinion specialist.

On February 22, 2018 OWCP referred appellant, the medical record, and an updated SOAF to Dr. Christopher Jordan, a Board-certified orthopedic surgeon. Dr. Jordan provided a March 12, 2018 report noting that he had reviewed the SOAF and the medical record. On examination, he observed limited lumbar motion in all planes and diffuse paraspinal tenderness on palpation. Dr. Jordan opined that while the sneezing episode could have caused an exacerbation of her prior injuries, the diagnostic testing did not demonstrate an acute change following the sneezing incident. He concluded that there was no anatomic evidence that the sneezes on November 20, 2012 caused a worsening of her anatomic pathology and that, at most, it could have aggravated her prior symptoms for a short period. Dr. Jordan noted her prior injury conditions and noted findings of degeneration, which was not work related and would not require further treatment, other than a back brace and a structured work hardening program so she could return to sedentary work.

By decision dated March 28, 2018, OWCP denied appellant's claim, finding that causal relationship had not been established.

On April 5, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

In April 16, 2018 reports, Dr. Emily D. Friedman, a Board-certified neurosurgeon, noted a history of the accepted 2007 and 2012 occupational injuries.[6] She diagnosed lumbar stenosis, lumbosacral spondylosis, and lumbar radiculopathy attributable to the accepted March 27, 2012 employment injury.[7] Dr. Friedman recommended an L4-5 laminectomy or implanted dorsal stimulator, however, appellant did not wish to undergo that treatment at that time.

By decision dated August 3, 2018, OWCP's hearing representative set aside the March 28, 2018 decision and remanded the case to OWCP to obtain a supplemental opinion from Dr. Jordan.

In an October 2, 2018 supplemental report, Dr. Jordan opined that there was no direct cause between the accepted sneezing incident and appellant's symptoms from her prior lumbar injuries. He reiterated that while there could have been an aggravation of her symptoms that would have been a temporary aggravation.

By decision dated February 21, 2019, OWCP denied appellant's claim, finding that causal relationship had not been established. It afforded the weight of the medical evidence to Dr. Jordan's second opinion.

[6] OWCP filed the medical reports in File No. xxxxxx344.

[7] An April 16, 2018 lumbar MRI scan under OWCP File No. xxxxxx344 showed multilevel degenerative disc disease with moderate spinal canal narrowing at L4-5, moderate bilateral lateral recess narrowing, and severe right and moderate to severe left neural foraminal narrowing.

On February 27, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on June 17, 2019.

By decision dated August 9, 2019, OWCP's hearing representative denied the claim finding that causal relationship had not been established.

LEGAL PRECEDENT

An employee seeking benefits under FECA[8] has the burden of proof to establish 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 FECA, that the claim was timely filed within the applicable time limitation period of FECA,[9] 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.[10] 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.[11]

To determine whether a claimant sustained a traumatic injury in the performance of duty, it must first be determined whether fact of injury has been established.[12] Fact of injury consists of two components that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.[13] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[14]

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical

[8] *Supra* note 2.

[9] *G.L.*, Docket No. 18-1057 (issued April 14, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[10] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[11] *See J.C.*, Docket No. 18-1803 (issued April 19, 2019); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[12] *G.L.*, *supra* note 9; *S.S.*, Docket No. 18-1488 (issued March 11, 2019); *T.H.*, 59 ECAB 388 (2008).

[13] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[14] *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *J.N.*, Docket No. 18-0675 (issued December 10, 2018); *E.H.*, Docket No. 16-1786 (issued January 30, 2017).

certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment incident.[15]

ANALYSIS

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

Dr. Jordan, serving as the second opinion examiner, opined in his March 12, 2018 report that the November 20, 2012 employment incident could have temporarily aggravated appellant's lumbar conditions, but did not specify the duration and extent of such aggravation. The Board finds that as Dr. Jordan indicated that appellant may have sustained a resolved aggravation of an underlying condition, this aspect of his opinion requires additional development.

Additionally, in his October 2, 2018 supplemental report, Dr. Jordan opined that there was no "direct cause" between the employment incident and the claimed lumbar condition. However, this is not the correct standard of causation. Under FECA, any contribution of work factors to the development of a condition renders such condition compensable.[16] Given that Dr. Jordan based his opinion on an incorrect standard of causation, it requires additional clarification. As OWCP undertook development of the evidence by referring appellant to Dr. Jordan, it had the duty to secure an appropriate report.[17]

Accordingly, this case will be remanded to OWCP for clarification from Dr. Jordan as to whether there was a new employment-related injury or an employment-related aggravation of appellant's preexisting condition applying the correct standard of causation. If Dr. Jordan is unavailable or unwilling to clarify his opinion, OWCP shall refer appellant to a new second opinion physician. After 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]

[15] *H.B.*, Docket No. 18-0781 (issued September 5, 2018).

[16] *Beth C. Chaput*, 37 ECAB 148 (1985).

[17] *See D.W.*, Docket No. 20-0674 (issued September 29, 2020).

[18] The case record contains an authorization for examination and/or treatment (Form CA-16) executed by the employing establishment on November 20, 2012. The Board notes that where an employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for a work-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. *See Tracy P. Spillane*, 54 ECAB 608 (2003). 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. *See* 20 C.F.R. § 10.300(c).

ORDER

IT IS HEREBY ORDERED THAT the August 9, 2019 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.[19]

Issued: February 19, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

[19] Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after January 20, 2021.