

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

L.P., Appellant)	
)	
and)	Docket No. 20-0434
)	Issued: February 2, 2021
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF PRISONS, New York, NY,)	
Employer)	
)	

Appearances:
James D. Muirhead, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 18, 2019 appellant, through counsel, filed a timely appeal from a November 8, 2019 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.³

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.*

³ The Board notes that following the November 8, 2019 decision, OWCP received 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a medical condition causally related to the accepted October 23, 2016 employment incident.

FACTUAL HISTORY

On October 26, 2016 appellant, then a 44-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on October 23, 2016 she injured her lower back, left eye, right shoulder, right elbow, and right hip, knee, ankle and foot, when the chair she was sitting in tipped forward causing her to fall on the floor while in the performance of duty. She stopped work on October 24, 2016.

Appellant was treated by Dr. Russell H. Silver, a Board-certified physiatrist, on October 27, 2016, for an injury to her lumbar back, right leg, right arm, and right hip. Dr. Silver advised that appellant was disabled from work.

In a November 10, 2016 development letter, OWCP informed appellant that the evidence submitted was insufficient to establish her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the requested information.

In an October 23, 2016 report, Dr. David L. Gutteridge, Board-certified in emergency medicine, treated appellant for injuries sustained to her right side during a fall. He indicated that appellant related that earlier that day she fell from a chair and was “told” that she struck her head on a table, which she did not remember doing, and landed on her right shoulder. Findings on examination revealed right hip tenderness, mild superior patellar tenderness, and limited passive range of motion in the right hip. Dr. Gutteridge diagnosed right hip and shoulder pain status post fall.⁴

By decision dated December 19, 2016, OWCP denied the claim finding that, although the October 23, 2016 employment incident occurred as alleged, the medical evidence submitted was insufficient to establish causal relationship between her diagnosed condition and the accepted employment incident.

In an employing establishment staff injury assessment form dated October 23, 2016, Dr. Robert Beaudouin, a Board-certified internist, treated appellant for a work-related injury, which occurred when she fell from a sitting position onto her right side. He diagnosed right elbow sprain/strain and right leg sprain/strain and recommended an elbow brace.

An October 23, 2016 x-ray of the right hip revealed no displaced fracture or dislocation, contour deformity with a small osseous bump at the superolateral femoral head, prominent lateral superior acetabular osteophyte, moderate osteoarthritic joint space narrowing, and femoral acetabular impingement. X-rays of the lumbar spine dated November 3, 2016, revealed small multilevel anterior osteophyte formation. A November 10, 2016 electromyogram and nerve conduction velocity (EMG/NCV) study of the upper extremities revealed no evidence of peripheral

⁴ Appellant attended physical therapy sessions.

neuropathy or cervical radiculopathy. An EMG/NCV of the lower extremities of even date revealed evidence of “bilateral L-S lumbosacral radiculopathy.”

A magnetic resonance imaging (MRI) scan of the lumbar spine dated November 15, 2016 revealed L5-S1 mild-to-moderate degenerative disc disease, left paramedian disc herniation, left lateral recess stenosis with impingement of the left S1 nerve, moderate canal stenosis, L4-5 disc bulge with small left lateral disc herniation, and encroachment on the left L4 nerve with mild left foraminal stenosis.

In reports dated January 12 and February 2, 2017, Dr. Silver treated appellant in follow-up of the October 23, 2016 fall. Findings on examination revealed decreased range of motion of the lumbar spine, right hip pain, and right shoulder pain. Dr. Silver opined that appellant’s condition and diagnoses were a direct result and causally related to the work injury that occurred on October 23, 2016 and she was totally disabled. In a duty status report (Form CA-17) of even date, he diagnosed capsulitis and disc disease and advised that appellant could not resume work at this time. On February 16, 2017 Dr. Silver diagnosed lumbosacral radiculopathy, right shoulder tendinitis, and capsulitis. He found that these diagnoses were a direct result of the injuries that occurred on October 23, 2016 and were the competent producing cause of her existing pathology. Dr. Silver performed a series of ultrasound-guided lumbar injections from March 2 through May 25, 2017. On March 30, 2017 he opined that appellant continued to be totally disabled from work due to the work-related accident that occurred on October 23, 2016.

On March 6, 2017 appellant requested reconsideration.

By decision dated May 24, 2017, OWCP denied modification of the December 19, 2016 decision.

Dr. Silver performed another series of ultrasound-guided lumbar injections from June 8 through October 12, 2017. On July 20, 2017 he diagnosed lumbosacral disc herniation, lumbosacral radiculopathy, right hip capsulitis, and right shoulder tendinitis. Dr. Silver opined that appellant’s diagnoses were the direct result of the work-related accident on October 23, 2016, when she fell from a sitting position onto a concrete floor.

On August 7, 2017 appellant requested reconsideration.

By decision dated November 1, 2017, OWCP denied modification of the decision dated May 24, 2017.

In a report dated December 7, 2017, Dr. Silver noted first treating appellant on October 27, 2016 for injuries to her right hip, knee, shoulder and low back sustained when she fell from a broken chair onto a hard tiled floor at work. He provided a description of appellant’s job duties and subsequent medical treatment. Dr. Silver noted that appellant reported that she was unable to stand greater than 20 minutes and experienced right paraspinal and hip pain. He indicated that her prognosis was poor and she continued to be totally disabled.

On February 1, 2018 appellant requested reconsideration.

By decision dated March 9, 2018, OWCP denied modification of the November 1, 2017 decision.

Dr. Silver continued to perform ultrasound-guided lumbar injections from May 3 through October 18, 2018. On August 25, 2018 he noted appellant's history was significant for a motor vehicle accident in 2011 when she sustained injuries to her neck and low back, a right hip fracture in 1986 after a fall, and a work injury in October 2016 when her chair tipped over and she fell onto the concrete floor. Dr. Silver opined that appellant's weight and the suddenness of the incident caused lumbar radiculopathy and right hip labrum tear. He diagnosed lumbar radiculopathy and right hip labrum tear. Dr. Silver opined that, after examination, review of the test results, and the fact that appellant had no complications after her surgery in 1986 and the accident in 2011, the incident that took place on October 23, 2016 was the competent producing cause of [appellant's] existing pathology and she was totally disabled.

On August 31, 2018 appellant requested reconsideration.

By decision dated November 29, 2018, OWCP denied modification of the March 9, 2018 decision.

On January 17, 2019 Dr. Arthur Becan, a Board-certified orthopedist, provided a history of injury and examination findings. He diagnosed chronic post-traumatic lumbar strain and sprain; aggravation of preexisting quiescent lumbar spine pathology (status post motor vehicle accident in 2011); herniated discs at L3-4, L4-5; bilateral L5-S1 radiculopathy; EMG/NCV positive; post-traumatic subacromial impingement syndrome of the right shoulder; rotator cuff tendinopathy of the right shoulder; severe adhesive capsulitis of the right shoulder; labral tear of the right hip; aggravation of preexisting right hip pathology (status post slipped femoral capital apophysis at age 12 necessitating Knowles pinning with subsequent removal of pins); and severe osteoarthritis of the right hip. Dr. Becan noted that appellant sustained significant musculoskeletal trauma to her lumbar spine, right shoulder, and right hip secondary to the fall from a chair on October 23, 2016. He explained that the fall from the chair resulted in a twisting and extension-type injury to her lumbosacral spine, a twisting injury to her right hip, and a right shoulder injury when she attempted to break her fall with her right upper extremity. Dr. Becan noted appellant's medical history was significant for a lumbosacral sprain that occurred during a motor vehicle accident in 2011 and a slipped femoral capital apophysis of her right hip when she was 12, which required Knowles pinning. He opined that the competent producing factor for appellant's ongoing permanent orthopedic disability, aggravation and acceleration of her preexisting lumbar spine and right hip pathology, and subsequent increase in her overall permanent disability, was related to the work injury on October 23, 2016.

Dr. Silver performed ultrasound-guided lumbar injections on February 28 through March 21, 2019.

By decision dated May 10, 2019, OWCP denied modification of the November 29, 2018 decision.

In a September 18, 2019 report, Dr. Becan responded to counsel's request that he review the claim denial and provide a responsive, supplemental report. He noted his review of OWCP's denial of the claim and his prior report. In a supplemental report, Dr. Becan noted his prior opinion and in support thereof cited to a medical publication. He again noted the onset of radicular pain from the low back and hips following the accepted employment incident. Dr. Becan explained that the pain complaints corresponded to examination findings and diagnostic test results. He noted his reliance on a review and assessment of available epidemiologic evidence. Dr. Becan

noted his supportive opinion as to causal relationship was based upon the publication's guidance that "a worker with a low back injury who experiences pain shortly after that injury, is associated with that exposure whether he or she has nonoccupational conditions or not." He concluded that the accepted fall at work was the precipitating factor in the development of the claimed conditions.

By decision dated November 8, 2019, OWCP denied modification of the May 10, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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 filed within the applicable time limitation of FECA,⁶ 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.⁷ 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.⁸

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.⁹ 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.¹⁰ The second component is whether the employment incident caused a personal injury.¹¹ 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 employment incident.¹²

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹³ A physician's opinion on whether there is a causal relationship between the diagnosed condition and the accepted employment incident must be based on a

⁵ *Supra* note 2.

⁶ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

⁸ *K.M.*, Docket No. 15-1660 (issued September 16, 2016).

⁹ *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

¹⁰ *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹¹ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

¹² *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

¹³ *T.H.*, *supra* note 9; *Robert G. Morris*, 48 ECAB 238 (1996).

complete factual and medical background.¹⁴ 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 the specific employment incident.¹⁵

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.¹⁶

ANALYSIS

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

In his report dated January 17, 2019, Dr. Becan opined that appellant sustained significant musculoskeletal trauma to her lumbar spine, right shoulder, and right hip secondary to the fall from a chair on October 23, 2016. He opined that the competent producing factor for appellant's ongoing permanent orthopedic disability, aggravation and acceleration of her preexisting lumbar spine and right hip pathology, and subsequent increase in her overall permanent disability, was related to the accepted employment incident occurring on October 23, 2016. Dr. Becan explained that the fall from the chair resulted in a twisting and extension-type injury to her lumbosacral spine, a twisting injury to her right hip, and a right shoulder injury when she attempted to break her fall with her right upper extremity. In a similar report dated September 18, 2019, he further explained that appellant's complaints of pain corresponded to examination findings and diagnostic test results. Dr. Becan noted his opinion as to causal relationship was based upon epidemiologic evidence that a worker with a low back injury who experiences pain shortly after that injury, is associated with that exposure whether he or she has nonoccupational conditions or not. In conclusion, he opined that the accepted employment incident was the precipitating factor in the development of the claimed conditions.

The Board finds that the reports from Dr. Becan are sufficient to require further development of the medical evidence. Dr. Becan is a Board-certified physician in orthopedics who is qualified in his field of medicine to render rationalized opinions on the issue of causal relationship and he provided a comprehensive understanding of the medical record and case history. His reports provide a pathophysiological explanation as to how appellant's fall from a chair on October 23, 2016, resulted in her diagnosed lumbar spine, right shoulder, and right hip conditions. The Board has long held that it is unnecessary that the evidence of record in a case be so conclusive as to suggest causal connection beyond all possible doubt. Rather, the evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational,

¹⁴ *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

¹⁵ *Id.*; *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013). See *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

sound, and logical.¹⁷ Accordingly, Dr. Becan's medical opinion is therefore sufficient to require further development of appellant's claim.¹⁸

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁹ OWCP has an obligation to see that justice is done.²⁰

On remand OWCP shall refer appellant, a statement of accepted facts, and the medical record to a specialist in the appropriate field of medicine. The chosen physician shall provide a rationalized opinion as to whether the diagnosed conditions are causally related to the accepted factors of appellant's federal employment. If the physician opines that the diagnosed conditions are not causally related, he or she must explain, with rationale, how or why the opinion differs from that of Dr. Becan. Following this and such other 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.

¹⁷ *W.M.*, Docket No. 17-1244 (issued November 7, 2017); *E.M.*, Docket No. 11-1106 (issued December 28, 2011); *Kenneth J. Deerman*, 34 ECAB 641, 645 (1983) and cases cited therein.

¹⁸ *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁹ *See id.* *See also A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

²⁰ *See B.C.*, Docket No. 15-1853 (issued January 19, 2016); *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the November 8, 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.²¹

Issued: February 2, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²¹ 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.