United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 13-618**
	)	**Issued: March 6, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 24, 2013 appellant, through her attorney, filed a timely appeal from a December 26, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying a claim for an employment-related injury. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained lower back conditions in the performance of duty on December 21, 2009, as alleged.

On appeal, counsel contends that OWCP's decision was contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 29, 2011 appellant, then a 35-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging injury to her lower back due to a slip and fall on snow-covered wooden stairs in the performance of duty on December 21, 2009. The employing establishment controverted the claim.

In an April 13, 2011 letter, OWCP notified appellant of the deficiencies of her claim and afforded 30 days for the submission of additional evidence.

Appellant submitted a September 23, 2010 surgical report from Dr. Edward J. Goldberg, a Board-certified orthopedic surgeon, who diagnosed left herniated nucleus pulposus (HNP) at L5-S1 and performed a left L5-S1 hemilaminotomy and discectomy that day. Dr. Goldberg released her to light-duty work effective January 3, 2011 with restrictions. On March 30, 2011 he indicated that appellant had some residual symptoms from her disc herniation. Appellant reported that she injured her back in December 2009.

On August 17, 2010 Dr. April Fetzer, a Board-certified physiatrist, diagnosed lumbar HNP and lumbar myofascial pain.

A May 17, 2010 x-ray showed hypolordosis of the lumbar spine and a May 24, 2010 magnetic resonance imaging (MRI) scan revealed a protrusion at L5-S1.

Appellant submitted physical therapy notes dated October 18 through November 24, 2010. A May 17, 2010 report from Dr. Sal J. Cirrincione, a chiropractor, noted that she was not able to perform her regular work duties as of May 12, 2010.

By decision dated May 19, 2011, OWCP denied the claim finding that fact of injury had not been established.

On August 15, 2011 appellant, through her attorney, requested reconsideration. In a June 1, 2011 report, Dr. Cirrincione opined that lifting a tub of mail on May 11, 2010 ruptured a weakened bulging lumbar disc that occurred on December 21, 2009 when she fell down snow-covered stairs. Appellant also submitted a July 6, 2011 report from Dr. Goldberg, who reiterated the factual history of the December 21, 2009 incident and opined that her herniated disc was due to the work-related accident.

By decision dated November 15, 2011, OWCP denied modification of its May 19, 2011 decision.

On August 8, 2012 appellant, through her attorney, requested reconsideration and submitted additional physical therapy notes and chiropractic notes from Dr. Cirrincione. She also submitted a June 20, 2011 electromyography (EMG) report and an MRI scan of the lumbar spine dated June 20, 2011. In a January 18, 2012 report, Dr. Goldberg opined that appellant was totally incapacitated and unable to work. In a report dated March 28, 2012, he diagnosed chronic lower back pain and left lumbosacral radiculopathy. Dr. Goldberg opined that appellant's condition was causally related to the work incident of December 21, 2009. Appellant reported that, when she slipped and fell, the stairs hit her lower back and she began to experience

immediate throbbing pain in her lower back and noticed three separately spaced welts on her lower back. Dr. Goldberg stated that these welts were from the impact of the three stairs on which she landed.

By decision dated December 26, 2012, OWCP denied modification of its November 15, 2011 decision finding that the evidence submitted was not sufficient to establish causal relationship.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] 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 FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury[3] 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.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. A fact of injury determination is based on two elements. 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. 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. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[5]

Causal relationship is a medical issue and the medical evidence generally 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 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 the specific employment factors identified by the employee.[6]

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[2] *Id.* at §§ 8101-8193.

[3] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

[4] *See T.H.*, 59 ECAB 388 (2008). *See also Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *Id. See Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

[6] *Id. See Gary J. Watling*, 52 ECAB 278 (2001).

ANALYSIS

OWCP accepted that the employment incident of December 21, 2009 occurred at the time, place and in the manner alleged. The issue is whether appellant's lower back conditions resulted from the December 21, 2009 employment incident. The Board finds that she did not meet her burden of proof to establish a causal relationship between her lumbar condition and the accepted employment incident.

Dr. Goldberg diagnosed left herniated disc at L5-S1, chronic lower back pain and left lumbosacral radiculopathy. He found that appellant was totally incapacitated and unable to work. On March 28, 2012 Dr. Goldberg opined that her condition was causally related to the December 21, 2009 employment incident. Appellant reported that, when she slipped and fell, the stairs hit her lower back and she began to experience immediate throbbing pain in her lower back and noticed three separately spaced welts on her lower back. Dr. Goldberg did not provide adequate medical rationale explaining the mechanism of her lower back conditions or how they were caused or aggravated by slipping and falling down stairs on December 21, 2009. He noted that appellant's conditions occurred after slipping and falling at work, however, such generalized statements do not establish causal relationship because they merely repeat her allegations and are unsupported by adequate medical rationale explaining how this physical activity actually caused the diagnosed conditions.[7] Lacking thorough medical rationale on the issue of causal relationship, Dr. Goldberg's reports are of limited probative value and insufficient to establish that appellant sustained an employment-related injury in the performance of duty on December 21, 2009.

On August 17, 2010 Dr. Fetzer diagnosed lumbar HNP and lumbar myofascial pain. The Board has held that 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.[8] Dr. Fetzer failed to address the issue of causal relationship between the December 21, 2009 employment incident and the diagnosed conditions. Therefore, the Board finds that appellant did not meet her burden of proof with this submission.

The notes and reports dated May 17, 2010 and June 1, 2011 from Dr. Cirrincione, a chiropractor, are of no probative value. The Board has held that a chiropractor is a physician as defined under FECA to the extent that the reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[9] There is no indication in the report that the doctor diagnosed a subluxation as demonstrated by x-ray to exist. The Board finds that Dr. Cirrincione is not a physician as defined under FECA and thus his reports do not constitute competent medical opinion evidence.

[7] *See K.W.*, Docket No. 10-98 (issued September 10, 2010).

[8] *See C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[9] 20 C.F.R. § 10.311(a). *Cf.*, *D.S.*, Docket No. 09-860 (issued November 2, 2009).

Similarly, the physical therapy notes submitted do not constitute medical evidence as they were not prepared by a physician.[10] As such, the Board finds that appellant did not meet her burden of proof with these submissions.

The May 17, 2010 x-ray, June 20, 2011 EMG report and MRI scans dated May 24, 2010 and June 20, 2011 are diagnostic in nature and do not address causal relationship. As such, the Board finds that they are insufficient to establish appellant's claim.

As appellant has not submitted any rationalized medical evidence to support her allegation that she sustained an injury causally related to the December 21, 2009 employment incident, she has failed to meet her burden of proof to establish a claim.

On appeal, counsel contends that OWCP's decision was contrary to fact and law. For the reasons stated above, the Board finds that counsel's arguments are not substantiated.

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 has not met her burden of proof to establish that she sustained lower back conditions in the performance of duty on December 21, 2009, as alleged.

[10] Physical therapists are not physicians under FECA. *See* 5 U.S.C. § 8101(2).

ORDER

IT IS HEREBY ORDERED THAT the December 26, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 6, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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