United States Department of Labor
Employees' Compensation Appeals Board

I.C., Appellant	)	
and	)	**Docket No. 14-1927**
	)	**Issued: February 13, 2015**
U.S. POSTAL SERVICE, TEXTILE FINANCE POST OFFICE, Los Angeles, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2014 appellant, through counsel, filed a timely appeal from an August 11, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 to prove that she sustained an injury to her neck, shoulder, arms, and hands causally related to factors of her federal employment.

FACTUAL HISTORY

This case has previously been before the Board. On April 1, 2011 appellant, then a 52-year-old sales associate clerk, filed an occupational disease claim alleging that she sustained an injury to her neck, shoulder, arms, and hands due to performing repetitive work duties. She

[1] 5 U.S.C. § 8101 *et seq.*

became aware of her condition and its asserted relationship to her employment on March 2, 2011. Appellant did not stop work.

By letter dated April 15, 2011, OWCP requested that appellant submit further factual and medical information, including a detailed report from her attending physician addressing the causal relationship between any diagnosed condition and the identified work factors.

In a decision dated June 3, 2011, OWCP denied appellant's claim after finding that she did not submit sufficient factual evidence to establish that she experienced the identified work duties. It noted that she had not responded to its request for additional evidence.

An August 6, 2009 magnetic resonance imaging (MRI) scan study, received by OWCP on June 9, 2011, showed straightening of the cervical lordotic curve, degenerative spondylosis from C4-5 to C6-7 with osteophyte formation and narrowing of the intervertebral disc spaces, a small syrinx from mid C6 to C6-7, and an arachnoid cyst at C6-7 on the right.

In a report dated September 28, 2009, Dr. Ben Shwachman, a Board-certified anesthesiologist, reviewed appellant's history of neck pain radiating into the left upper extremity for the past year. He diagnosed degenerative disc disease of the cervical spine with radiculopathy. In a September 28, 2009 addendum, Dr. Shwachman reviewed the MRI scan study and diagnosed cervical lordotic curve straightening and spondylosis from C4-5 and C6-7 with disc space narrowing and osteophyte formation.

On April 19, 2010 Dr. Shwachman discussed appellant's complaints of "neck pain radiating to the left upper extremity with some cramping in her hand." He noted that an MRI scan study showed an arachnoid cyst at C6-7.[2]

In an August 31, 2010 certification of health care provider form submitted in connection with a leave request under the Family and Medical Leave Act, Dr. Shwachman diagnosed cervical sprain/strain, degenerative disc disease, cervical syrinx at C5 to C7, foraminal stenosis of the cervical spine, and a right arachnoid cyst at C6-7. He advised that appellant would have flare-ups of her condition and be periodically incapacitated from work.

On May 11, 2011 Dr. Kaleem Uddin, a Board-certified neurologist, discussed appellant's symptoms of pain on the left side from the hand to the scapula area. He diagnosed possible left scapular myofascitis and left carpal tunnel syndrome. Electrodiagnostic testing performed on May 18, 2011 yielded normal findings.

On November 17, 2011 Dr. Antoine G. Khoury, a chiropractor, diagnosed cervical sprain and strain and myofascial pain syndrome of the cervical spine with left radiculopathy, thoracic and lumbar strain/sprain, bilateral carpal tunnel syndrome, cephalgia, and depression. He indicated that the injury occurred due to bending, lifting, reaching over the shoulder, and using a keyboard. Dr. Khoury advised that x-rays of the cervical spine revealed a reversal of the normal cervical lordosis, osteoarthritis, osteoporosis, and discogenic conditions at C5-6 and C6-7. He further found that x-rays of the lumbar spine showed straightening of the normal lumbar lordosis,

[2] On May 5, 2010 Dr. Shwachman preformed a cervical epidural steroid injection.

osteoarthritis, osteoporosis, severe rotatory scoliosis on the left, and discogenic conditions at L3 to S1.

On November 19, 2011 appellant requested reconsideration. She described in detail the repetitive work duties to which she attributed her condition, including casing mail, lifting trays, working at the window section, working as a machine operator, and working as a flat sorter operator.

In a progress report dated December 28, 2011, Dr. Khoury diagnosed cervical sprain/strain with myofascial pain syndrome and radiculopathy on the left side, thoracic and lumbar sprain/strain, cephalgia, depression, bilateral carpal tunnel syndrome, and foraminal stenosis of the cervical spine.[3] He found that appellant was disabled from work.

By decision dated February 22, 2012, OWCP modified its June 3, 2011 decision to reflect that appellant established the occurrence of the work factors identified as causing her condition. It denied her claim after finding that the medical evidence was insufficient to show that she sustained a diagnosed condition as a result of the accepted work factors.

By letter dated November 12, 2012, counsel for appellant wrote, "I am submitting documentation to support the above-numbered claim. Upon receipt, please review the file and provide the status." He enclosed a November 5, 2012 report from Dr. Khoury, who again discussed the November 2011 x-ray findings and further found that a March 8, 2012 MRI scan study showed disc bulging at L4-5 and a possible disc herniation with some spinal stenosis and degenerative changes at multiple levels. Dr. Khoury diagnosed cephalgia, cervical radiculopathy, carpal tunnel syndrome, thoracic, and lumbar sprain/strain, cervical disc conditions, and stenosis, a disc herniation and stenosis at L4-5, degenerative disc disease of the cervical and lumbar spine, anxiety and insomnia.

In a report dated January 8, 2013, Dr. Frederic G. Nicola, a Board-certified orthopedic surgeon, noted that appellant had worked 34 years for the employing establishment. He discussed her work duties, including reaching, pushing, pulling, and performing repetitive neck and back movement using a computer. Dr. Nicola reviewed appellant's history of resolved injuries to her lower back in 1983 and 2001 from unspecified events and an injury to her low back in 2002 from a motor vehicle accident. Appellant also experienced a whiplash injury in 2006 from a fall. Dr. Nicola provided findings on examination and reviewed the diagnostic studies. He diagnosed cervical degenerative disc disease with radiculopathy and lumbosacral degenerative disc disease. Dr. Nicola stated, "Review of records indicates that [appellant] has been treated for long periods of time with a permanent aggravation sustained to her neck and back from her industrial exposure of working for the [employing establishment] from January 1979 until current. She has been on partial disability and temporary disability in those timeframes and has been on restrictions by her treating physician." He opined that appellant experienced a permanent aggravation of degenerative joint disease of the cervical and lumbar spine based on her history, findings on examination, and his review of past medical records. He provided work restrictions.

[3] Dr. Khoury provided similar findings in progress reports dated February 9 through September 5, 2012.

By letter dated May 14, 2013, counsel related that on March 19, 2013 he forwarded a January 8, 2013 report from Dr. Nicola. He asserted that OWCP had received the report within one year of its prior denial and requested that OWCP determine whether the report was "sufficient for reconsideration."

In a letter dated June 5, 2013, counsel maintained that he requested reconsideration before OWCP on December 5, 2012. On July 25, 2013 OWCP informed him that it did not have a request for reconsideration. By letter dated August 1, 2013, counsel related that he had submitted medical evidence from Dr. Nicola in April 2013 and noted that OWCP had also received a January 8, 2013 medical report from Dr. Nicola. Citing *S.C.*,[4] he argued that a request for reconsideration did not need to be in any certain form and that OWCP had an obligation to develop new medical evidence received.

By decision dated August 12, 2013, OWCP denied appellant's request for reconsideration as untimely and insufficient to establish clear evidence of error. It indicated that it had received her May 14, 2013 request for reconsideration, submitted by counsel, on May 16, 2013, more than one year from the last merit decision. OWCP considered the January 8, 2013 report from Dr. Nicola, which it noted it had received on April 15, 2013, and found that it was insufficient to establish clear evidence of error.

On September 6, 2013 appellant, through counsel, requested reconsideration. He argued that in *S.C.*,[5] the Board found that "the filing of additional information constituted a request for reconsideration." Counsel also maintained that OWCP found that appellant had established fact of injury in its February 22, 2012 decision, but denied the claim based on causal relationship. He contended that the January 8, 2013 report from Dr. Nicola was sufficient to establish causal relationship.

By decision dated September 25, 2013, OWCP denied appellant's request for reconsideration after finding that the request was untimely and did not show clear evidence of error. It found that it was not required to further develop a claim upon receipt of new medical evidence and that a request for reconsideration was necessary to consider the evidence.

Appellant appealed to the Board. By decision dated June 3, 2014, the Board determined that OWCP improperly concluded that appellant did not timely file a reconsideration request.[6] The Board found that counsel submitted a request for reconsideration on November 12, 2012, which was within one year from the last merit decision dated February 22, 2012. The Board noted that, even though counsel did not use the word reconsideration, he submitted additional evidence under the proper file number and requested that OWCP review the evidence. It thus set aside the August 12 and September 24, 2013 OWCP decisions and remanded the case for OWCP to consider the evidence submitted under the standard for timely reconsideration requests.

[4] Docket No. 13-0738 (issued July 8, 2013).

[5] *Id*.

[6] Docket No. 14-170 (issued June 3, 2014).

By decision dated August 11, 2014, OWCP denied modification of its February 22, 2012 decision. It determined that Dr. Khoury was not a physician under FECA as he did not diagnose a spinal subluxation. OWCP further found that Dr. Nicola's report was insufficiently rationalized to establish that appellant sustained a permanent aggravation of a spinal condition due to factors of her federal employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA[7] 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 filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[8] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[9]

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;[10] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[11] and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[12]

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant,[13] must be one of reasonable medical certainty[14] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[15]

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[7] *See supra* note 1.

[8] *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[9] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[10] *Michael R. Shaffer*, 55 ECAB 386 (2004).

[11] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[12] *Beverly A. Spencer*, 55 ECAB 501 (2004).

[13] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[14] *John W. Montoya*, 54 ECAB 306 (2003).

[15] *Judy C. Rogers*, 54 ECAB 693 (2003).

Section 8101(2) of FECA provides that 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…."[16] A chiropractor cannot be considered a physician under FECA unless it is established that there is a subluxation as demonstrated by x-ray evidence.[17] OWCP regulations at 20 C.F.R. § 10.5(bb) define subluxation as an incomplete dislocation, off-centering, misalignment, fixation, or abnormal spacing of the vertebrae, which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.[18]

ANALYSIS

Appellant alleged that she experienced pain in her neck, shoulder, arms, and hands as a result of repetitive work duties. OWCP accepted the occurrence of the claimed employment factors. The issue therefore is whether the medical evidence establishes a causal relationship between the claimed conditions and the identified employment factors.

In a report dated September 28, 2009, Dr. Shwachman discussed appellant's history of neck pain for the past year radiating into the left upper extremity. He diagnosed degenerative disc disease of the cervical spine with radiculopathy and, after reviewing an MRI scan study, straightening of the cervical lordotic curve, spondylosis from C4-5 and C6-7 with disc space narrowing, and osteophyte formation. On April 10, 2010 Dr. Shwachman related that appellant complained of radiating neck pain and that an MRI scan study showed a C6-7 arachnoid cyst. In his reports, however, he did not address the cause of the diagnosed conditions. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[19]

In a certification of health care provider form dated August 31, 2010, Dr. Shwachman diagnosed cervical sprain/strain, degenerative disc disease, cervical syrinx at C5 to C7, foraminal stenosis of the cervical spine and a right arachnoid cyst at C6-7. He opined that appellant would experience intermittent disability from employment due to her condition. Again, however, Dr. Shwachman did not address causation and thus his report is of little probative value on the issue of causal relationship.[20]

In a report dated May 11, 2011, Dr. Uddin reviewed appellant's history of pain from the left hand to left scapula. He diagnosed possible left scapular myofascitis and left carpal tunnel syndrome. Dr. Uddin did not provide an opinion on the cause of the diagnosed conditions of left scapular myofascitis and left carpal tunnel syndrome. Consequently, his report is insufficient to meet appellant's burden of proof.

[16] 5 U.S.C. § 8101(2); *see also Michelle Salazar*, 54 ECAB 523 (2003).

[17] *Pamela K. Guesford*, 53 ECAB 726 (2002).

[18] 20 C.F.R. § 10.5(bb); *Mary A. Ceglia*, 55 ECAB 626 (2004).

[19] *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Conard Hightower*, 54 ECAB 796 (2003).

[20] *Id*.

On November 17, 2011 Dr. Khoury diagnosed cervical sprain and strain and myofascial pain syndrome of the cervical spine with left radiculopathy, thoracic and lumbar strain/sprain, bilateral carpal tunnel syndrome, cephalgia, and depression. He attributed the conditions to appellant's work duties. Dr. Khoury advised that x-rays of the cervical spine revealed a reversal of the normal cervical lordosis, osteoarthritis, osteoporosis, and discogenic conditions at C5-6 and C6-7. He further found that x-rays of the lumbar spine showed straightening of the normal lumbar lordosis, osteoarthritis, osteoporosis, severe rotatory scoliosis on the left, and discogenic conditions at L3 to S1.[21] In a report dated November 5, 2012, Dr. Khoury found that appellant's work duties at the employing establishment caused her neck, back, and wrist injury. He diagnosed cephalgia, cervical radiculopathy, carpal tunnel syndrome, thoracic, and lumbar sprain/strain, cervical disc conditions and stenosis, a disc herniation and stenosis at L4-5, degenerative disc disease of the cervical and lumbar spine, anxiety and insomnia and provided permanent work restrictions. As discussed, section 8101(2) of FECA provides that 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…."[22] A chiropractor cannot be considered a physician under FECA unless it is established that there is a subluxation as demonstrated by x-ray evidence.[23] Dr. Khoury did not diagnose a subluxation as demonstrated by x-ray; consequently, he is not considered a "physician" under FECA and his reports are of no probative value.[24]

On January 8, 2013 Dr. Nicola discussed appellant's history of working at the employing establishment performing repetitive movements with her neck and back using a computer and reaching, pushing, and pulling. He noted that she sustained prior low back injuries in 1983, 2001, and 2002 and a whiplash injury in 2006. Dr. Nicola diagnosed cervical degenerative disc disease with radiculopathy and lumbosacral degenerative disc disease. He determined that appellant sustained a permanent aggravation of cervical and lumbar degenerative joint disease from working at the employing establishment. Dr. Nicola did not, however, provide any rationale for his causation finding. A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimant's accepted exposure could result in a diagnosed condition is not sufficient to meet a claimant's burden of proof.[25]

An award of compensation may not be based on surmise, conjecture, speculation, or upon appellant's own belief that there is a causal relationship between her claimed condition and his employment.[26] She must submit a physician's report in which the physician reviews those

[21] Dr. Khoury submitted progress reports dated December 28, 2011 through September 5, 2012 in which he diagnosed cervical sprain/strain with myofascial pain syndrome and radiculopathy on the left side, thoracic and lumbar sprain/strain, cephalgia, depression, bilateral carpal tunnel syndrome, and foraminal stenosis of the cervical spine.

[22] 5 U.S.C. § 8101(2).

[23] *See supra* note 18.

[24] *Isabelle Mitchell*, 55 ECAB 623 (2004).

[25] *See supra* note 12.

[26] *D.E.*, 58 ECAB 448 (2007); *George H. Clark*, 56 ECAB 162 (2004); *Patricia J. Glenn*, 53 ECAB 159 (2001).

factors of employment identified by her as causing his condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[27] Appellant failed to submit such evidence and therefore failed to discharge her burden of proof.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden to prove that she sustained an injury to her neck, shoulder, arms, and hands causally related to factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

[27] *D.D.*, 57 ECAB 734 (2006); *Robert Broome*, 55 ECAB 339 (2004).