United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 16-1769**
	)	**Issued: May 24, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Minneapolis, MN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 1, 2016 appellant filed a timely appeal from a June 20, 2016 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 of proof to establish a lumbar injury causally related to the accepted December 8, 2014 employment incident.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 30, 2015 appellant, then a 51-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 8, 2014 she sustained a strain in the right hip and buttock when she slipped on ice while carrying a package. She received medical care on the date of the alleged injury and did not stop work. Appellant notified her supervisor of the injury on June 1, 2015. On the reverse side of the form, the employing establishment controverted the claim arguing that it had not been filed within 30 days.

In a December 8, 2014 report, Dr. Bruce W. Kuhlmann, an osteopathic physician, reported that appellant complained of pain in the right sacroiliac and right buttocks region which occurred when she was carrying packages and slipped. He noted that she worked as a rural carrier and had recently begun parcel delivery on December 1, 2014, which entailed pushing large wheeled flats to load the truck which she would then drive and deliver. Dr. Kuhlmann provided findings on physical examination noting tenderness to palpation over the gluteal muscles on the right and the anterior cecum on the right. He reported that appellant had suffered a new injury to the lumbar and pelvis region, but examination of the lumbar spine revealed normal findings.

In a December 12, 2014 medical report, Dr. Kuhlmann reported that appellant had an earlier injury on May 6, 2009 when she worked as a rural carrier.[3] Appellant had recently returned to work, after a long hiatus, and her duties required a lot of lifting and arm work to deliver parcel packages. She believed that she had reached maximum medical improvement, but experienced significant deterioration since returning to work. Dr. Kuhlmann noted pain in the upper back and neck. In a February 13, 2015 medical report, he provided work restrictions due to pain in the bilateral lateral epicondyles.

Progress notes dated December 9, 2014 through May 5, 2015 were also submitted from certified medical assistants and registered nurses. In a December 22, 2014 progress note, Joanna Myers, a certified medical assistant, noted complaints of back pain and a history of prior back surgery. She also noted that appellant had slipped at work and was seen on December 8, 2014 due to difficulty sitting, walking, and standing. In a December 29, 2014 note, Ms. Myers reported that Dr. Kuhlmann did not believe that the back issue was work related.

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[2] Docket No. 15-1618 (issued March 7, 2016).

[3] The Board notes that on August 17, 2009 appellant filed an occupational disease claim (Form CA-2) alleging that she developed a cervical spine injury on or about May 6, 2009 due to steering with her left arm while sitting in the passenger seat of her vehicle delivering mail, OWCP File No. xxxxxx517. By decision dated November 20, 2009, OWCP accepted the claim for cervical spondylosis without myelopathy at C5-6 and C6-7.

The Board notes that appellant also has a prior November 22, 2006 occupational disease claim, OWCP File No. xxxxxx223. By decision dated December 15, 2006, OWCP accepted the claim for bilateral carpal tunnel syndrome and bilateral lateral epicondylitis. By decision dated November 8, 2007, it accepted the claim for a recurrence of disability on September 24, 2007.

In a July 6, 2015 medical report, Dr. Joel C. Shobe, a Board-certified orthopedic surgeon, reported that appellant returned for a follow-up visit due to left hip and leg symptoms with difficulty sitting. He noted a history of laminectomy surgery at L4-5 with left L4-5 discectomy and facet joint cyst excision in March 2014. Review of a May 11, 2015 magnetic resonance imaging (MRI) scan of the lumbar spine suggested recurrent disc herniation on the left at L4-5 with some facet hypertrophy contributing to subarticular recess stenosis. Dr. Shobe further noted collapse of the L2-3 and L4-5 disc. He recommended surgical intervention to redo the left L4-5 laminectomy and discectomy. Dr. Shobe provided appellant work restrictions.

By decision dated July 16, 2015, OWCP found that, while appellant established that the December 8, 2014 employment incident occurred as alleged, she failed to establish that the diagnosed medical condition was causally related to the accepted employment incident. It found that the evidence of record failed to establish that her diagnosed condition of recurrent disc herniation on the left at L4-5 was causally related to the accepted December 8, 2014 employment incident.

On July 23, 2015 appellant filed an appeal with the Board.[4]

By decision dated March 7, 2016, the Board affirmed the July 16, 2015 OWCP merit decision finding that the medical evidence of record failed to establish that appellant sustained an injury causally related to the accepted December 8, 2014 employment incident.[5]

On March 29, 2016 appellant requested reconsideration. She explained that on December 8, 2014 she slipped on ice while carrying a parcel and struggled to keep herself from falling. Appellant explained that she sought treatment with Dr. Kuhlmann, who failed to send her for an MRI scan, causing her to seek treatment with Dr. Shobe due to progressive worsening of her pain. In support of her claim, appellant submitted new medical reports from Dr. Shobe.

In an August 5, 2015 medical report, Dr. Shobe reported that he had been treating appellant since April 19, 2012 with original complaints of lower back pain and left-sided hip and leg pain. He noted no specific work injury as the cause of her pain. Dr. Shobe explained that appellant subsequently underwent surgery on March 18, 2014 for decompressive laminectomy L4-5 with left-sided partial medial facetectomy and left L4-5 discectomy. He explained that following her March 2014 surgery, she had some residual aching in her lower back and left hip, but overall seemed to be gradually improving and was doing reasonably well on her June 12, 2014 visit. Appellant did not return for treatment until May 18, 2015 when she informed

[4] The Board notes that on September 29, 2015 appellant also requested reconsideration of the July 16, 2015 OWCP decision. By decision dated December 14, 2015, OWCP denied modification of the July 16, 2015 decision finding that the medical evidence of record failed to establish that her injury was causally related to the accepted December 8, 2014 employment incident. As the Board had properly exercised jurisdiction over the appeal, OWCP improperly issued the December 14, 2015 decision on reconsideration. Subsequently, by decision dated June 20, 2016, OWCP vacated the December 14, 2015 decision as OWCP could not exercise simultaneous jurisdiction with the Board over the same issue in the same case. *See* 20 C.F.R. § 501.2(c)(3); *see also B.T.*, Docket No. 16-0866 (issued August 18, 2016); *A.J.*, Docket No. 10-0619 (issued June 29, 2010); *Jacqueline S. Harris*, 54 ECAB 139 (2002); *Douglas E. Billings*, 41 ECAB 880 (1990).

[5] Docket No. 15-1618 (issued March 7, 2016).

Dr. Shobe that she had been doing well with her back until she sustained an injury on December 8, 2014 while working as a postal carrier. She reported that on that date she slipped on ice while delivering mail. Appellant did not actually fall on the ice, but twisted her back significantly when trying to avoid the fall.

Dr. Shobe reported that a May 11, 2015 MRI scan of the lumbar spine revealed a recurrent disc herniation on the left at L4-5 contributing to foraminal stenosis. He further noted degenerative changes at L2-3, L3-4, and L4-5. A May 18, 2015 x-ray of the lower back revealed some moderate lumbar scoliosis present extending from L1 through 4. Appellant also had some narrowing of the disc spaces in the mid lumbar region consistent with degenerative changes, but no excessive motion was noted to suggest any instability. Dr. Shobe diagnosed recurrent disc herniation on the left at L4-5 with associated foraminal stenosis and degenerative disc disease at L2-3, L3-4, and L4-5 levels. He explained that appellant's degenerative condition was relatively stable after her surgery until she reinjured it with the December 8, 2014 claimed work incident. Dr. Shobe recommended a redo of left L4-5 laminectomy and discectomy.

Dr. Shobe opined that appellant had a degenerative condition involving her lower back, but did not have evidence for recurrent disc herniation until she sustained the injury on December 8, 2014 which aggravated her previous degenerative condition and caused a recurrent disc herniation at the L4-5 level on the left. In an attending physician's report (Form CA-20) that same date, he reported that on December 8, 2014 appellant slipped on ice while delivering mail and twisted her back. Dr. Shobe checked the box marked "yes" when asked if the condition was caused or aggravated by the employment activity.

In a January 7, 2016 medical report, Dr. Shobe explained that there was no lumbar MRI scan performed prior to the December 8, 2014 work injury for comparison purposes. However, the subsequent lumbar MRI scan demonstrated a recurrent disc herniation at L4-5 on the left. Thus, the findings of the lumbar MRI scan correlated with the history provided by appellant, who was doing well with her back injury until the December 8, 2014 twisting injury. Dr. Shobe diagnosed a degenerative condition in the lumbar spine with disc herniation at the L4-5 level. He opined that appellant's recurrent disc herniation at L4-5 on the left represented an aggravation and acceleration of her symptoms beyond their usual progression due to the twisting nature of the injury sustained.

By decision dated June 20, 2016, OWCP denied modification of the March 7, 2016 decision finding that the evidence of record failed to establish that appellant's diagnosed condition was causally related to the accepted December 8, 2014 employment incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed are causally related to the

employment injury.[6] 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.[7]

In order to determine whether an employee actually sustained an 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 which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[8] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence supporting such a causal relationship.[9] The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[10]

ANALYSIS

OWCP accepted that the December 8, 2014 employment incident occurred as alleged. The issue is whether appellant established that the incident caused her diagnosed lumbar condition. The Board finds that she failed to submit sufficient medical evidence to support that her diagnosed lumbar condition was causally related to the December 8, 2014 employment incident.[11]

The Board's review of the previous medical evidence of record is *res judicata*.[12] Following the Board's last decision of March 7, 2016, which affirmed the denial of the claim, appellant submitted to OWCP a March 29, 2016 request for reconsideration accompanied by new medical evidence.

[6] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[7] *Michael E. Smith*, 50 ECAB 313 (1999).

[8] *Elaine Pendleton*, *supra* note 6.

[9] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[10] *James Mack*, 43 ECAB 321 (1991).

[11] *See Robert Broome*, 55 ECAB 339 (2004).

[12] *E.L.*, Docket No. 16-635 (issued November 7, 2016).

The only new evidence received following OWCP's last merit decision were the August 5, 2015 and January 7, 2016 reports from Dr. Shobe. The Board finds that his reports fail to establish that appellant developed a lumbar injury as a result of the December 8, 2014 employment incident.[13]

In his August 5, 2015 and January 7, 2016 medical reports, Dr. Shobe reported that he had been treating appellant since April 19, 2012 for complaints of back pain and left-sided hip and leg pain. On March 18, 2014 appellant underwent decompressive laminectomy L4-5 with left-sided partial medial facetectomy and left L4-5 discectomy with microscope and C-arm imaging. Dr. Shobe explained that, following appellant's injury, she was gradually improving and stopped seeking treatment after June 12, 2014. Appellant returned on May 18, 2015 when she informed Dr. Shobe that she had been doing well with her back until she sustained an injury on December 8, 2014 while working as a postal carrier. She reported that on that date she slipped on ice while delivering mail. Appellant did not actually fall on the ice, but twisted her back significantly when trying to avoid the fall. Upon review of a May 11, 2015 MRI scan of the lumbar spine, Dr. Shobe diagnosed recurrent disc herniation on the left at L4-5 with associated foraminal stenosis and degenerative disc disease at L2-3, L3-4, and L4-5. He explained that appellant's degenerative condition was relatively stable after her March 2014 surgery until she reinjured it with the December 8, 2014 strain sustained when she slipped on ice and twisted her back. Dr. Shobe diagnosed a degenerative condition in the lumbar spine with disc herniation at the L4-5 level, which was caused by the December 8, 2014 employment incident. He opined that appellant's recurrent disc herniation at L4-5 on the left represented an aggravation and acceleration of her symptoms beyond their usual progression due to the twisting nature of the injury sustained.

The Board finds that the opinion of Dr. Shobe is not well rationalized.[14] Dr. Shobe did not evaluate appellant until May 2015, more than five months after the December 8, 2014 employment incident. The record reflects that appellant sought treatment with Dr. Kuhlmann on the date of injury. However, Dr. Kuhlmann made no mention of any left-sided back and hip complaints as reported by Dr. Shobe. In fact, he only noted tenderness to palpation over the gluteal muscles on the right side and the anterior cecum on the right. Dr. Shobe related that appellant had a preexisting degenerative back condition and a left L4-5 disc herniation for which she underwent surgery in March 2014. When opining that the December 8, 2014 employment incident aggravated her preexisting conditions and caused a recurrent disc herniation, he failed to explain why appellant's complaints immediately surrounding the incident only pertained to the right hip and buttock, nor did he explain how findings pertaining to the right gluteal muscles would correlate with an aggravation of a left L4-5 disc herniation or degenerative disc disease.[15]

Dr. Shobe opined that appellant's recurrent disc herniation at L4-5 on the left represented an aggravation and acceleration of her symptoms beyond their natural progression due to the twisting nature of the injury she sustained. The Board has held that an opinion that a condition is

[13] *R.M.*, Docket No. 11-1921 (issued April 10, 2012).

[14] *D.H.*, Docket No. 14-1852 (issued January 27, 2015).

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

causally related because the employee was asymptomatic before the injury is insufficient, without adequate rationale, to establish causal relationship.[16] Dr. Shobe's statement that appellant's symptoms were a direct result of the injury is highly speculative as he is attributing symptoms to the employment incident without explaining with medical rationale why her medical condition was not due to her preexisting conditions.[17] A well-rationalized opinion is particularly warranted in this case due to appellant's history of preexisting conditions.[18]

An award of compensation may not be based on surmise, conjecture, or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that her condition was caused, precipitated, or aggravated by her employment is sufficient to establish causal relationship.[19] As appellant failed to provide a rationalized medical report in support of a traumatic injury on December 8, 2014, she has failed to meet her burden of proof.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 and 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that her lumbar condition was causally related to the accepted December 8, 2014 employment incident.

[16] *T.M.*, Docket No. 08-0975 (issued February 6, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

[17] *M.R.*, Docket No. 14-0011 (issued August 27, 2014).

[18] *K.P.*, Docket No. 14-1330 (issued October 17, 2014).

[19] *See Dennis M. Mascarenas*, 49 ECAB 215 (1997).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated June 20, 2016 is affirmed.

Issued: May 24, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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