United States Department of Labor
Employees' Compensation Appeals Board

J.G., Appellant	)	
and	)	**Docket No. 19-1303**
	)	**Issued: February 6, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Sarasota, FL, 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, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 24, 2019 appellant filed a timely appeal from a May 3, 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.[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 May 3, 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 that the acceptance of her claim should be expanded to include the additional condition of failed back syndrome as causally related to her accepted April 16, 2015 employment injury.

FACTUAL HISTORY

On May 18, 2015 appellant, then a 64-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that, on April 16, 2015, she injured her lower back when performing her work duties of pushing and pulling while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that she stopped work on May 5, 2015. On June 30, 2015 OWCP accepted appellant's claim for sprain of back, left thoracic region.

In an operative report dated October 20, 2015, Dr. Tan Ly, an osteopath, performed a T12-L1 minimally invasive spinal stenosis decompression, partial laminectomy, partial facetectomy, partial foraminotomy, and partial discectomy with compression of cauda equine nerve roots. He diagnosed thoracolumbar spinal stenosis, thoracolumbar disc displacement, thoracolumbar radiculopathy, T12-L1 bilateral lateral recess spinal stenosis secondary to ligamentum flavum hypertrophy, facet capsular hypertrophy, and neural foraminal narrowing secondary to disc space height and collapse and bulging.

On November 4, 2015 OWCP expanded appellant's accepted conditions to include intervertebral disc disorders with radiculopathy, thoracic region, right.

On June 2, 2016 appellant, through counsel, appellant requested that the accepted conditions in her claim be expanded to include the additional conditions of spinal stenosis of the lumbar region, disc herniation at T12-L1, muscle spasms, sciatica, other intervertebral thoracolumbar disc displacement, and thoracolumbar radiculopathy.

In a development letter dated June 27, 2016, OWCP informed appellant of the deficiencies of her claim and advised her of the evidence needed to establish additional diagnosed conditions as work related. It afforded appellant 30 days to submit the necessary evidence.

On March 8, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF) and her medical record, to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated March 29, 2017, Dr. Dinenberg reviewed appellant's history of injury and performed a physical examination. He noted that she continued to complain of muscle spasms, cramping in her lumbar spine, and lower extremity pain. Dr. Dinenberg further indicated that appellant was placed on modified-duty postoperation, which she reported caused significant pain in her lower back. After review of her medical history, diagnostic tests, and physical examination, he related impressions of administratively accepted thoracic sprain, herniated nucleus pulposus at T12-L1, status post partial laminectomy, facetectomy, foraminotomy, and discectomy, and failed back syndrome of lumbar spine. Dr. Dinenberg noted that the original thoracic sprain had resolved. He further indicated that the most recent magnetic resonance imaging (MRI) scan on February 8, 2017 did not reveal a thoracolumbar intervertebral disc herniation at T12-L1. Dr. Dinenberg noted that the condition appeared to have resolved postsurgical intervention, and that the only diagnosis that remained was the failed back syndrome of the lumbar spine with persistent low back pain, diminished range of

motion of the lumbar spine, and radicular symptoms. He noted that the disabling residuals included tenderness of the lumbosacral spine, diminished range of motion of the lumbosacral spine, and subjective complaints of radiculopathy all of which were secondary to the failed back syndrome of the lumbar spine. Dr. Dinenberg indicated that appellant reached maximum medical improvement (MMI) on March 29, 2017, and that she could return to light-duty work.

On July 17, 2017 appellant, through counsel, requested that OWCP expand her accepted conditions to also include failed back syndrome of the lumbar spine based on Dr. Dinenberg's March 29, 2017 second opinion examination report.

In a development letter dated August 3, 2017, OWCP advised appellant of the deficiencies in her claim and instructed her to provide additional evidence necessary to support expansion to include additional conditions as work related. It afforded her 30 days to submit the necessary evidence. No additional evidence was received.

By decision dated September 27, 2017, OWCP denied expansion of the acceptance of appellant's claim to include additional diagnoses of lumbar spinal stenosis, muscle spasms, sciatica, and failed back syndrome. It found that the evidence of record failed to establish that the additional conditions were related to the accepted employment injury. OWCP noted that appellant remained entitled to receive medical treatment for thoracolumbar radiculopathy at T12-L1.

On October 3, 2017 appellant, through counsel, requested a telephonic hearing. The hearing was held on March 15, 2018. Appellant described her employment history and duties as a custodian, described the April 16, 2015 injury and the conditions sustained as a result of that incident, she noted the medical care she received, as well as her continued symptoms and treatment.

Subsequent to the hearing, OWCP received medical reports, treatment notes, and diagnostic test results from Dr. Stuart Krost, a Board-certified orthopedic surgeon, dated between December 5, 2016 and April 30, 2018. In his April 30, 2018 report, Dr. Krost diagnosed other intervertebral thoracolumbar disc displacement, radiculopathy, and thoracic sprain.

By decision dated May 31, 2018, the hearing representative affirmed, in part, the September 27, 2018 decision with regard to appellant's request to expand her accepted conditions to include spinal stenosis, muscle spasms, and sciatica. However, she remanded the case for further development of her request to expand the accepted conditions in the claim to include her diagnosed failed back syndrome. On remand the hearing representative requested that Dr. Krost review the opinion of Dr. Dinenberg who had opined that appellant's failed back syndrome was due to the original work injury.

In a letter dated June 6, 2018, OWCP requested that Dr. Krost review Dr. Dinenberg's March 29, 2017 report and explain whether he agreed that appellant sustained a failed back syndrome due to the accepted April 15, 2016 employment injury or subsequently authorized surgery or treatment.

In reports dated May 14 and June 11, 2018, Dr. Krost indicated that he reviewed appellant's history of injury and performed a physical examination. He noted that she underwent an electromyography (EMG) on May 14, 2018 of her bilateral lower extremities which revealed paravertebral muscle spasm. Dr. Krost diagnosed other intervertebral thoracolumbar disc displacement, thoracolumbar radiculopathy, and thoracic spine sprain.

By decision dated July 17, 2018, OWCP denied appellant's claim to expand her accepted conditions to include the additional condition of failed back syndrome finding that the evidence of record failed to establish that the medical condition was related to the accepted April 16, 2015 employment injury.

On July 26, 2018 appellant, through counsel, requested a telephonic hearing.

In a report dated August 6, 2018, Dr. Krost examined appellant in a follow-up examination. He reviewed her history of injury, diagnostic studies, and confirmed his prior diagnoses. Dr. Krost noted that he reviewed Dr. Dinenberg's March 29, 2017 second opinion examination report, and indicated that he concurred with his conclusion that appellant sustained failed back syndrome causally related to the April 16, 2015 accepted employment injury.

In a letter dated September 6, 2018, appellant notified OWCP that Dr. Krost was no longer her treating physician. She indicated that she was in the process of finding another doctor to provide additional evidence for her case, and requested approval for the change in physicians.

In reports dated October 18 and November 26, 2018, Dr. Mark Seldes, a Board-certified orthopedic surgeon, reviewed appellant's medical records and performed a physical examination. He diagnosed thoracolumbar spinal stenosis, other intervertebral thoracolumbar disc displacement, thoracolumbar radiculopathy, and thoracolumbar surgery at T12-L1 on October 20, 2015 to include facetectomy, foraminotomy, and discectomy with laminectomy. On November 28, 2018 a telephonic hearing was held before an OWCP hearing representative. Appellant stated that she was no longer being treated by Dr. Krost, and that her new treating physician was Dr. Seldes. The hearing representative advised appellant that after the hearing she was permitted to submit a report by Dr. Seldes in which he addressed the issue of causal relationship of the condition of failed back syndrome. The record was held open for 30 days to submit additional evidence.

In a report dated December 31, 2018, Dr. Seldes performed a follow-up examination. He confirmed prior diagnoses which did not include failed back syndrome.

By decision dated January 17, 2019, the hearing representative affirmed the July 17, 2018 decision finding that the evidence of record was insufficient to establish that appellant's diagnosed failed back syndrome was causally related to the accepted April 16, 2015 employment injury.

In a report dated March 4, 2019, Dr. Seldes reviewed appellant's medical records and performed a physical examination. He defined "failed back syndrome" as a condition characterized by chronic pain following back surgeries, and that many factors could contribute to the onset or development of this condition including residual recurrent spinal disc herniation, persistent postoperative pressure on a spinal nerve, altered joint mobility, joint hypermobility with instability scar tissue, depression, anxiety, sleeplessness, and spinal muscular deconditioning. Dr. Seldes further noted that an individual may be predisposed to the development of failed back syndrome due to systemic disorders, but appellant had no such precipitating disorders. He explained that "what was certain is that [appellant] did have surgery that included partial laminectomy with the partial facetectomy and partial foraminotomy on October 25, 2015 at T12-L1" which had resulted in the disabling pain and numbness which caused her to retire. Dr. Seldes explained that Dr. Dinenberg had informed OWCP that appellant had failed back syndrome and thus it did not make sense for it to deny the condition. He concurred with Dr. Dinenberg that appellant had failed back syndrome due to her October 25, 2015 surgery, which was causally

related to the accepted April 16, 2015 employment incident, noting that he had already explained appellant's physical findings on which the diagnosis was based. Dr. Seldes requested that OWCP expand appellant's accepted conditions to include the additional condition of failed back syndrome as diagnosed by Dr. Dinenberg.

On March 15, 2019 appellant, through counsel, requested reconsideration of the January 17, 2019 decision.

By decision dated May 3, 2019, OWCP denied modification of the January 17, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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,[5] 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.[6] 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.[7]

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[8]

The medical evidence required to establish causal relationship is rationalized medical opinion evidence.[9] Rationalized medical opinion evidence is evidence which includes a physician's rationalized opinion on the issue of whether there is causal relationship between the claimant's diagnosed condition and the established employment injury. 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 accepted employment injury.[10]

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent

[4] *Supra* note 2.

[5] *L.C.*, Docket No. 19-0724 (issued September 5, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *D.W.*, Docket No. 18-1139 (issued May 21, 2019); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *D.W.*, *id.*; *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).

[8] *L.C. supra* note 5; *F.L.*, Docket No. 17-1613 (issued August 15, 2018).

[9] *L.C.*, *id.*; *M.B.*, Docket No. 17-1999 (issued November 13, 2018).

[10] *M.L.*, Docket No. 18-1605 (issued February 26, 2019).

intervening cause attributable to the claimant's own conduct.[11] Thus, a subsequent injury, be it an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[12] A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, the claimant must present rationalized medical opinion evidence.[13]

ANALYSIS

The Board finds that appellant has met her burden of proof to establish that her claim should be expanded to include acceptance of the additional condition of failed back syndrome as causally related to her accepted April 16, 2015 employment injury.

Appellant sustained an injury at work on April 16, 2015 which resulted in diagnosed medical conditions of her spine for which she required treatment, including thoracolumbar surgery at T12-L1 on October 25, 2015. She requested that the acceptance of her claim be expanded to include additional conditions and OWCP undertook development of this issue by referring appellant to a second opinion examination with Dr. Dinenberg. In his second opinion report of March 4, 2019, Dr. Dinenberg noted his physical examination findings and indicated that appellant had been placed on modified duty following her surgery because of a complaint of significant pain in her lower back. He concluded that the original thoracic sprain had resolved based upon MRI scan findings. However, Dr. Dinenberg opined that appellant's accepted conditions had resulted in failed back syndrome of the lumbar spine based upon documented persistent low back pain, diminished range of motion of the lumbar spine, and radicular symptoms he had found on examination. He noted that the residuals of appellant's employment injury caused failed back syndrome. This diagnosed condition caused tenderness of the lumbosacral spine, diminished range of motion of the lumbosacral spine, and subjective complaints of radiculopathy all of which were secondary to the failed back syndrome of the lumbar spine. The Board finds that the report of Dr. Dinenberg is based on a complete factual and medical background of the claimant as set forth in the SOAF, is based upon reasonable medical certainty, and is supported by medical rationale explaining how the failed back syndrome is related to the progression of the accepted medical conditions and resulting treatment.[14] Thus Dr. Dinenberg's report is found to carry the weight of the medical evidence on the issue of causal relationship.

Following receipt of Dr. Dinenberg's March 4, 2019 report, in a report dated August 16, 2018, Dr. Krost, appellant's treating physician, noted that he had reviewed Dr. Dinenberg's March 29, 2017 second opinion examination report. Dr. Krost indicated that he concurred with his conclusion that appellant had developed failed back syndrome causally related to the accepted employment injury and resulting treatment. Although Dr. Krost failed to provide his own medical rationale as to causal relationship, he noted his consideration of the rationalized opinion of

[11] *D.W., supra* note 6; *A.M.*, Docket No. 18-0685 (issued October 26, 2018); *Mary Poller*, 55 ECAB 483, 487 (2004); Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* 10-1 (2006).

[12] *F.L., supra* note 8; *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139, 141 n.7 (2001).

[13] *See D.W., supra* note 6; *J.B.*, Docket No. 18-0522 (issued January 16, 2019); *Charles W. Downey*, 54 ECAB 421 (2003).

[14] *M.S.*, Docket No. 19-1096 (issued November 12, 2019); *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

Dr. Dinenberg and concurred with that opinion. Therefore Dr. Krost's report is supportive of a finding of causal relationship.

In support of her claim appellant also submitted a March 4, 2019 report by Dr. Seldes who reviewed Dr. Dinenberg's report and defined failed back syndrome, within his own understanding, as a condition characterized by chronic pain following back surgeries, and that many factors could contribute to the onset or development of this condition including residual recurrent spinal disc herniation persistent postoperative pressure on a spinal nerve altered joint mobility, joint hypermobility with instability scar tissue, depression, anxiety, sleeplessness, and spinal muscular deconditioning. Dr. Seldes noted Dr. Dinenberg's status as a second opinion physician and explained that he agreed with the rationale provided as to why the additional condition of failed back syndrome should be accepted as work related. Thus the March 4, 2019 report by Dr. Seldes is supportive evidence for a finding of causal relationship.

As the record includes a well rationalized, supportive medical opinion by an OWCP referral physician on the issue of causal relationship, and as there is no evidence of record containing an opposing opinion, the Board finds that appellant has met her burden of proof to establish that the diagnosed condition of failed back syndrome must be accepted as work related and that the case shall therefore be remanded for consideration of appellant's wage-loss compensation and medical benefits, if any, attributable to this additional condition.

CONCLUSION

The Board finds that appellant has met her burden of proof to establish that the acceptance of her claim should be expanded to include the additional condition of failed back syndrome as causally related to her accepted April 16, 2015 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2019 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 6, 2020
Washington, DC

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

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

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