

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

C.M., Appellant)	
)	
and)	Docket No. 24-0560
)	Issued: July 5, 2024
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Miami, FL,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Capp P. Taylor, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 12, 2024 appellant, through counsel, filed a timely appeal from an October 24, 2023 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 October 24, 2023 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 his burden of proof to expand the acceptance of his claim to include additional conditions as causally related to the accepted September 3, 2014 employment injury.

FACTUAL HISTORY

On September 12, 2014 appellant, then a 54-year-old mail handler equipment operator, filed a traumatic injury claim (Form CA-1) alleging that on September 3, 2014 he sustained injuries to his left ear, nose and right eye socket when an overhead automatic door closed and fell onto his head in the performance of duty. He stopped work on September 4, 2014. OWCP accepted the claim for face, scalp, neck abrasions without infection; left face, scalp, and neck contusions, and post-traumatic headache.

In a report dated May 24, 2021, Dr. Robert R. Reppy, an osteopathic physician specializing in family medicine, recounted appellant's history of injury, reviewed diagnostic studies, and provided physical examination findings. He related that appellant had undergone a C3-4 discectomy while in the Marine Corps. Dr. Reppy noted the progression of appellant's cervical conditions in diagnostic studies performed in 2015, 2016, and 2021. He reported that appellant had migraine headaches for the past six years since his accepted September 13, 2014 employment injury. On examination Dr. Reppy reported extremely limited cervical spinal range of motion (ROM) and significant left upper extremity strength deficits. Based on the objective evidence and appellant's symptoms, he diagnosed severe anterolisthesis of C2 on C3 and C4, severe C2-3 foraminal stenosis, severe bilateral C4-5 foraminal stenosis, C6-7 herniated disc, and cervical radiculopathy. Dr. Reppy concluded that these conditions were consequentially related to the accepted September 3, 2014 employment injury.

On June 2, 2021 appellant, through counsel, requested expansion of appellant's claim to include the diagnoses offered by Dr. Reppy.

In a development letter dated November 22, 2021, OWCP informed appellant that the evidence of record was insufficient to establish expansion of his claim. It advised him of the additional medical evidence required and afforded him 30 days to submit the requested evidence.

In a February 6, 2023 report, Dr. Reppy related results from appellant's May 24, 2021 upper extremity nerve conduction velocity (NCV) test, which revealed abnormal findings of cervical radiculopathy, and an April 29, 2016 magnetic resonance imaging (MRI) scan, which showed C3-4 severe disc height loss, C6-7 cord compression, C3-4 severe left foraminal stenosis, bilateral C4-5 severe foraminal stenosis, and C6-7 herniated disc resulting in moderate-to-severe thecal sac stenosis. He again opined that appellant's claim should be expanded to include these conditions as consequential to the accepted September 3, 2014 employment injury.

Dr. Reppy, in a February 23, 2023 report, requested that OWCP expand acceptance of appellant's claim to include his additional cervical diagnoses. He stated that appellant's continued symptomatology was not caused by a contusion and that the diagnosis of contusion was not intended to be a final diagnosis. Further, Dr. Reppy reported that appellant's diagnoses were confirmed by diagnostic testing. Thus, he concluded that the accepted September 3, 2014 employment injury was the direct and proximate cause of appellant's diagnosed conditions.

Dr. Reppy also noted that these diagnosed conditions were mechanically related to the accepted September 3, 2014 employment injury.

On June 23, 2023 OWCP referred appellant for a second opinion evaluation, together with a statement of accepted facts (SOAF), medical record, and list of questions, to Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon, to determine the nature and extent of his accepted conditions and whether he developed any additional medical conditions causally connected to the September 3, 2014 employment injury.

In a report dated July 11, 2023, Dr. Millheiser discussed appellant's history of injury and medical treatment. He noted that he had reviewed a June 22, 2010 computerized tomography (CT) scan of appellant's cervical spine and an April 8, 2014 MRI scan of appellant's cervical spine, but had not received any medical examination reports for review dated prior to the September 3, 2014 employment injury. On physical examination, Dr. Millheiser observed markedly restricted cervical spine ROM with minimal flexion, extension, rotation, and lateral bend. He related that appellant's accepted conditions had resolved, but that appellant had cervical spine degenerative disease. Dr. Millheiser noted that appellant's foraminal stenosis and disc herniation at C6-7 were preexisting conditions. Appellant's severe anterolisthesis of C2 on C3 was not present on the April 28, 2014 MRI scan, however no flexion/extension views were done. Dr. Millheiser concluded that if there was no prior mention of anterolisthesis prior to the employment injury, then this condition would be causally related to the employment injury. He also related that if there was an increase in appellant's anterolisthesis, this would be an aggravation of the preexisting condition. Dr. Millheiser concluded that new imaging and diagnostic studies are necessary to determine whether or not there was an increase in appellant's anterolisthesis.

Dr. Reppy, in a September 14, 2023 report, again requested expansion of the claim. He noted his disagreement with Dr. Millheiser's opinion that appellant's current C6-7 disc herniation with left-sided thecal sac stenosis was preexisting since he had not reviewed medical examination reports prior to the employment injury. Dr. Reppy concluded that the evidence of record clearly demonstrated an aggravation of appellant's preexisting C6-7 disc herniation.

By decision dated October 24, 2023, OWCP denied expansion of the claim to include C2-5 severe anterolisthesis, C3-4 severe left foraminal stenosis, C4-5 bilateral severe left foraminal stenosis, and C6-7 disc herniation, with radiculopathy as causally related to the accepted employment injury

LEGAL PRECEDENT

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 accepted employment injury.⁴

⁴ *M.T.*, Docket No. 23-0251 (issued February 22, 2024); *J.R.*, Docket No. 21-0790 (issued June 21, 2022); *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

To establish causal relationship between the condition as well as any additional conditions claimed and the employment injury, an employee must submit rationalized medical evidence.⁵ 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 incident identified by the claimant.⁶

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.⁷

ANALYSIS

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

In denying appellant's expansion claim, OWCP relied on the opinion of Dr. Millheiser, OWCP's second opinion examiner. In a July 11, 2023 report, Dr. Millheiser provided appellant's current physical examination findings noting markedly restricted cervical spine ROM with minimal flexion, extension, rotation, and lateral bend. He opined that appellant's C6-7 disc herniations and foraminal stenosis were preexisting conditions. However, Dr. Millheiser opined that to determine whether the accepted employment injury aggravated preexisting anterolisthesis, additional imaging and diagnostic studies are necessary.

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.⁸ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.⁹ Accordingly, once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁰ In this case, undertook development of the expansion issue when it referred appellant to Dr. Millheiser for a second opinion examination. As Dr. Millheiser opined that to determine whether the accepted employment injury aggravated preexisting anterolisthesis, additional

⁵ *M.T., id.*; *S.S.*, Docket No. 23-0391 (issued October 24, 2023); *T.K.*, Docket No. 18-1239 (issued May 29, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

⁶ *M.T., id.*; *S.S., id.*; *T.K., id.*; *I.J.*, 59 ECAB 408 (2008).

⁷ *J.M.*, Docket No. 23-0251 (issued January 9, 2023); *G.D.*, Docket No. 20-0966 (issued July 21, 2022); *R.C.*, Docket No. 19-0376 (issued July 15, 2019); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (May 2023).

⁸ *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

⁹ *C.L.*, Docket No. 20-1631 (issued December 8, 2021); *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁰ *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

imaging and diagnostic studies are necessary.¹¹ OWCP should have completed that development prior to denying expansion of the claim.

Therefore, the Board finds that the case must be remanded for further development. On remand OWCP shall obtain the additional imaging and diagnostic studies requested by Dr. Millheiser. It shall then refer the complete record to Dr. Millheiser for a supplemental opinion. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2023 decision of the Office of Workers' Compensation Programs is set aside, and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 5, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹¹ *Id.*