

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

M.J., Appellant)	
)	
and)	Docket No. 24-0148
)	Issued: June 18, 2024
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Cleveland, OH,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 8, 2023 appellant, through counsel, filed a timely appeal from a November 21, 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.

ISSUE

The issue is whether appellant has met her burden of proof to expand the acceptance of her claim to include aggravation of preexisting degenerative disc disease and spondylolisthesis at L4-5 as causally related to her accepted January 23, 2003 employment injury.

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.*

FACTUAL HISTORY

On January 23, 2003 appellant, then a 33-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that day she developed lower back pain when sweeping a machine while in the performance of duty. OWCP accepted the claim for thoracic strain/sprain and paid appellant wage-loss compensation.

In a March 28, 2017 progress note, Dr. Timothy J. Nice, an attending Board-certified orthopedic surgeon, noted a history of the accepted January 23, 2003 employment injury. He related that, x-rays and a magnetic resonance imaging (MRI) scan of the lumbar spine revealed a rather significant issue at L4 with spondylolisthesis and disc disease. Dr. Nice advised, *inter alia*, that appellant aggravated an underlying back condition that was either not discussed or was treated as a congenital first-degree slip. He indicated that her claim had been allowed for a thoracic spine condition but questioned if the current diagnosis was missed in 2003. Dr. Nice recommended that the acceptance of appellant's claim be expanded to include chronic aggravation of preexisting problem at L4.

On October 28, 2021 OWCP expanded the acceptance of appellant's claim for lumbar sprain.

On November 3, 2021 OWCP referred appellant, a statement of accepted facts (SOAF), the case record, and a series of questions, to Dr. Michael R. Magoline, a Board-certified orthopedic surgeon, for a second opinion examination.

In his February 17, 2022 report, Dr. Magoline recounted appellant's history of injury and noted his review of the medical evidence, including the results of diagnostic studies. He noted that MRI scan studies and x-rays of the thoracic and lumbar spines demonstrated multi-level degenerative changes of the lumbar spine with spondylolisthesis, which was degenerative in nature; and degenerative changes at multiple levels of the thoracic spine. Dr. Magoline provided an impression of preexisting thoracic and lumbar spine degeneration. He opined that the mechanism of injury on January 23, 2003 did not support the expansion of appellant's claim to include aggravation of preexisting degenerative disc disease and spondylolisthesis at L4-5. Dr. Magoline explained that these conditions were clearly a result of a degenerative process rather than an acute injury. He concluded that the accepted conditions of lumbar and thoracic sprains had resolved, and no further medical treatment was warranted. Dr. Magoline further concluded that appellant could work with restrictions related to her multiple nonwork-related underlying orthopedic conditions.

On March 16, 2022 OWCP requested that Dr. Nice review Dr. Magoline's February 17, 2022 report and respond to a series of questions regarding causal relationship between appellant's preexisting lumbar conditions, current disability, and the accepted employment injury.

In a report dated April 5, 2022, Dr. Nice disagreed with Dr. Magoline's opinion that appellant had no additional lumbar conditions causally related to her January 23, 2003 employment injury. He again explained that appellant suffered from a substantial aggravation of her underlying lumbar conditions due to the accepted work injury. Dr. Nice explained that the

mechanism of injury was a bending and twisting motion on the postal machine when appellant had to bend to low levels and twist to place mail in trays.

On November 28, 2022 OWCP declared a conflict in medical opinion between Dr. Nice and Dr. Magoline as to whether the acceptance of appellant's claim should be expanded to include aggravation of her preexisting degenerative disc disease and spondylolisthesis L4-5, and whether she had continuing residuals of her accepted conditions.

On December 6, 2022 OWCP referred appellant, a SOAF, the case record, and a series of questions to Dr. Mark S. Berkowitz, a Board-certified orthopedic surgeon, for an impartial medical examination.

In his January 24, 2023 report, Dr. Berkowitz, serving as the impartial medical examiner (IME), provided his findings on physical examination of appellant, and his review of the SOAF and the medical evidence of record, including the results of diagnostic studies. He noted that a repeat lumbar spine MRI scan performed on February 23, 2021 revealed findings which appeared to be age-appropriate degenerative changes that were physiological and not pathologic in nature. There were multilevel degenerative disc disease and multilevel degenerative joint disease findings in the forms of disc bulges, facet degenerative change and arthropathy, canal narrowing and stenosis, neural foraminal narrowing, grade 1 anterolisthesis at L4-5, disc height loss, and retrolisthesis of L5 on S1. These were bony productive changes consistent with the normal imaging process in the lumbosacral spine. There were no findings or evidence of acute, or acute on chronic changes, or post-traumatic changes, or findings that suggested remote or recent trauma that would be expected if there was a relationship of the findings to the injury in question via direct causation or substantial aggravation of preexisting conditions. There was an abundance of disc bulges and loss of disc height in the lumbosacral spine. Dr. Berkowitz advised that a single traumatic event was unlikely to be responsible for causing all these lesions at the same time. Furthermore, he noted that there was no single disc bulge or disc space narrowing that exhibited signs of acuity such as edema or annular tear. The lesions appeared to be part of an ongoing degenerative process. In addition, the repeat MRI scan demonstrated grade 1 anterolisthesis at the L4-5 level with no progression since a prior lumbar spine MRI scan performed on February 21, 2017. Dr. Berkowitz opined that the accepted conditions of thoracic and lumbar sprains had resolved and that the diagnoses of preexisting degenerative disc disease and spondylolisthesis at L4-5 were not caused, aggravated, accelerated, or precipitated by the January 23, 2003 employment injury. Dr. Berkowitz explained that appellant had relatively normal objective findings on physical examination of her thoracic and lumbosacral spine. There were no signs or symptoms of radiculopathy, myelopathy, neurological deficits, muscle atrophy, muscle weakness, muscle spasms or guarding, and no sensory or deep tendon reflex disturbances. Appellant had no pathological reflexes. However, she had some limited range of motion in her thoracic and lumbosacral region due to her morbid obesity. Appellant had some significant subjective complaints of pain for which she rested and took medication on an as-needed basis.

OWCP, by decision dated April 14, 2023, denied expansion of the acceptance of appellant's claim to include additional diagnoses of aggravation of preexisting degenerative disc disease and spondylolisthesis at L4-5, causally related to the accepted January 23, 2003 employment injury. It found that the January 24, 2023 report from Dr. Berkowitz, the IME, was entitled to the special weight of the evidence.

On April 25, 2023 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on September 26, 2023.

By decision dated November 21, 2023, an OWCP hearing representative affirmed the April 14, 2023 decision.

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 employment injury.³

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁴ A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.⁵ Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's employment injury.⁶

The Board has held that when the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working conditions or injuries, such disability is compensable.⁷ However, the normal progression of untreated disease cannot be stated to constitute "aggravation" of a condition merely because the performance of normal work duties reveals the underlying condition.⁸

Section 8123(a) of FECA provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."⁹ This is called an impartial examination and OWCP will select a physician who is qualified in the appropriate

³ *G.C.*, Docket No. 21-0527 (issued September 20, 2021); *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).

⁴ *W.N.*, Docket No. 21-0123 (issued December 29, 2021); *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

⁵ *F.A.*, Docket No. 20-1652 (issued May 21, 2021); *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁶ *Id.*

⁷ *G.C.*, Docket No. 21-0176 (issued July 6, 2022); *R.K.*, Docket No. 21-0387 (issued May 20, 2022); *C.H.*, Docket No. 17-0488 (issued September 12, 2017).

⁸ *Id.*

⁹ 5 U.S.C. § 8123(a).

specialty and who has no prior connection with the case.¹⁰ When a case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹¹

ANALYSIS

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include aggravation of preexisting degenerative disc disease and spondylolisthesis at L4-5 as causally related to her accepted January 23, 2003 employment injury.

OWCP properly determined that a conflict in medical opinion existed between Dr. Nice, appellant's treating physician, and Dr. Magoline, an OWCP second opinion physician, regarding whether the acceptance of appellant's claim should be expanded to include aggravation of preexisting degenerative disc disease and spondylolisthesis at L4-5 due to her accepted January 23, 2003 employment injury. It referred appellant to Dr. Berkowitz for an impartial medical examination to resolve the conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a).¹²

In his January 24, 2023 report, Dr. Berkowitz reviewed the SOAF and medical record, and provided his examination findings. He opined that appellant's preexisting degenerative disc disease and spondylolisthesis at L4-5 were not caused, aggravated, accelerated, or precipitated by the January 23, 2003 employment injury, and that the accepted conditions of lumbar and thoracic sprains had resolved and no further medical treatment was warranted. In support of his opinion, Dr. Berkowitz relied on his relatively normal objective findings on physical examination of appellant's thoracic and lumbosacral spines. He also relied on the February 21, 2017, and February 23, 2021 lumbar spine MRI scan findings, which he noted revealed degenerative changes, lesions, and an abundance of disc bulges and loss of disc height consistent with her age and the progression of degenerative changes not related to the January 23, 2023 employment injury.

The Board finds that Dr. Berkowitz accurately described the accepted employment injury and noted his review of the medical record. Dr. Berkowitz performed a thorough clinical examination and provided detailed findings. He provided a rationalized opinion regarding whether appellant's claim should be expanded, finding that there was no evidence of preexisting degenerative disc disease and spondylolisthesis at L4-5 resulting from the accepted January 23, 2003 employment injury based on imaging studies and his examination findings. The Board therefore finds that Dr. Berkowitz' opinion is entitled to the special weight accorded to an IME and establishes that appellant has not met her burden of proof to expand the acceptance of her claim to include aggravation of preexisting degenerative disc disease and spondylolisthesis at

¹⁰ 20 C.F.R. § 10.321; *L.R.*, Docket No. 21-0018 (issued February 17, 2023); *J.K.*, Docket No. 21-0007 (issued July 30, 2021); *C.W.*, Docket No. 18-1536 (issued June 24, 2019).

¹¹ *V.K.*, Docket No. 18-1005 (issued February 1, 2019); *D.M.*, Docket No. 17-1411 (issued June 7, 2018); *Gary R. Sieber*, 46 ECAB 215, 225 (1994); *James P. Roberts*, 31 ECAB 1010 (1980).

¹² *R.C.*, Docket No. 21-1018 (issued September 1, 2023); *G.B.*, Docket No. 19-1510 (issued February 12, 2020); *R.H.*, 59 ECAB 382 (2008).

L4-5.¹³ 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 expand the acceptance of her claim to include aggravation of preexisting degenerative disc disease and spondylolisthesis at L4-5 as causally related to her accepted January 23, 2003 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹³ *A.P.*, Docket No. 24-0170 (issued March 26, 2024); *M.G.*, Docket No. 23-0674 (issued October 3, 2023); *F.A.*, *supra* note 5; *W.C.*, Docket No. 19-1740 (issued June 4, 2020); *M.M.*, Docket No. 16-1655 (issued April 4, 2018).