

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

N.B., Appellant)	
)	
and)	Docket No. 24-0726
)	Issued: September 23, 2024
DEPARTMENT OF VETERANS AFFAIRS,)	
WEST HAVEN VA HOSPITAL,)	
West Haven, CT, Employer)	
)	

Appearances:
Andrew Douglas, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 27, 2024 appellant, through counsel, filed a timely appeal from an April 30, 2024 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 an 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 April 30, 2024 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 his additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a back condition causally related to the accepted February 18, 2022 employment incident.

FACTUAL HISTORY

On March 10, 2022 appellant, then a 46-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on February 18, 2022 she sustained a low back strain when repositioning a sedated patient while in the performance of duty. She stopped work on February 18, 2022.

OWCP received a return-to-work note dated February 24, 2022 from Cindy Anderson, a physician assistant, indicating that appellant was unable to return to work.

In a March 16, 2022 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

A March 16, 2022 magnetic resonance imaging (MRI) scan of appellant's lumbar spine demonstrated minimal to mild degenerative disc disease at L4-5 with bulging disc and ligamentum flavum hypertrophy and minimal bilateral facet arthropathy at L5-S1.

In February 24 and March 18, 2022 reports, Dr. Rizwan S. Ahmad, a Board-certified family medicine and sports medicine specialist, recounted appellant's history of injury and diagnosed acute lumbar pain due to trauma.

In a March 10, 2022 report, Dr. Lawrence P. Kirschenbaum, a Board-certified anesthesiologist, noted appellant's history of injury, and physical examination findings. He provided an impression of lumbar spondylosis and lumbar disc degeneration and noted that a 2019 lumbar spine MRI scan demonstrated degenerative changes with no impingement. A March 10, 2022 return-to-work note was also provided wherein Dr. Kirschenbaum advised that appellant was unable to return to work.

In April 6 and 15, 2022 reports, Dr. Kirschenbaum diagnosed bilateral lumbar radiculitis, lumbar spondylosis and lumbar disc degeneration. He opined that appellant's current pain complaint was due to the February 18, 2022 work-related injury as she had no significant symptoms prior to that injury. Dr. Kirschenbaum also opined that she was temporarily totally disabled from work, and provided an April 6, 2022 duty status report (Form CA-17).

By decision dated April 28, 2022, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish that the claimed medical conditions were causally related to the February 18, 2022 accepted employment incident.

On May 9, 2022 appellant requested reconsideration and submitted additional medical evidence.

In a May 2, 2022 report, Dr. Kirschenbaum related that she injured her lower back at work on February 18, 2022 while rolling an obese intubated patient. Appellant stated that she felt a “pop” and then intense pain thereafter. Dr. Kirschenbaum indicated that appellant had no lower back pain prior to the injury, despite degenerative disc disease being noted on a March 21, 2019 MRI scan, which showed degenerative disc disease predominately at L4-5 with degenerative changes at L4-5 and L5-S1 related to a motor vehicle accident years prior. He noted that, after the February 18, 2022 low back injury, appellant developed acute lower back pain exacerbated by physical activity. Dr. Kirschenbaum opined that appellant’s diagnoses of bilateral lumbar radiculitis exacerbation, lumbar spondylosis exacerbation and lumbar disc degeneration exacerbation were directly related to acute trauma of the lower back on February 18, 2022 while rolling an obese intubated patient. A May 2, 2022 progress report, a May 2, 2022 duty status report, and May 2, 2022 a return-to-work note by Dr. Kirschenbaum were also provided, indicating that appellant was unable to return to work.

In June 6 and July 7, 2022 progress reports, Dr. Kirschenbaum continued to opine that appellant’s bilateral lumbar radiculitis, lumbar spondylosis, and lumbar disc degeneration were causally related to the February 18, 2022 work incident, noting that she had no pain prior to the work injury. Duty status reports and return-to-work notes dated June 6 and July 7, 2022 by Dr. Kirschenbaum were also provided. On July 7, 2022 Dr. Kirschenbaum indicated that appellant could return to sedentary work as of July 8, 2022.

By decision dated July 19, 2022, OWCP denied modification of its April 28, 2022 decision.

On October 4, 2022 appellant requested reconsideration. She asserted that, despite a motor vehicle accident that occurred over ten years prior, she had been asymptomatic and pain-free after rehabilitation. Appellant indicated that her March 2019 lumbar MRI scan was performed in relation to her hip pain from a left hip labral tear and ruled out lumbar radiculopathy.

Appellant submitted additional evidence. In progress reports dated July 14 and August 4, September 1, October 6, 2022, Dr. Kirschenbaum continued to opine, that appellant’s bilateral lumbar radiculitis, lumbar spondylosis, and lumbar disc degeneration conditions were causally related to the February 18, 2022 work incident, noting that she had no pain prior to the work injury. In his October 6, 2022 report, he reported that the MRI showed degenerative disc disease predominately at L4-5 with degenerative changes at L4-5 and L5-S1 and that appellant had undergone a left L4-5 interlaminar epidural steroid injection on September 16, with no benefit. In September 1 and November 9, 2022 return-to-work notes and September 1, October 6, November 8, December 6, 2022 duty status reports, Dr. Kirschenbaum related that appellant could perform sedentary work.

By decision dated December 30, 2022, OWCP denied modification of its July 19, 2022 decision.

On January 30, 2023 appellant requested reconsideration and submitted additional evidence.

In a January 23, 2023 report, Dr. Gary A. Zimmerman, a Board-certified neurosurgeon, reported that appellant was injured in February 2022 while lifting a heavy patient and developed pain in her back, buttocks, hips and groin. He noted that her symptoms had persisted and were exacerbated with any activity, noting that she has been on restricted duty since September 7, 2023,

however, appellant had related that working was painful. Dr. Zimmerman provided an impression of vertebrogenic low back pain and acute lumbar pain due to trauma. A January 23, 2023 return-to-work note was also provided, wherein Dr. Zimmerman related that appellant could perform light-duty work.

In a February 20, 2023 progress note, Dr. Zimmerman continued to opine that appellant's vertebrogenic low back pain and acute lumbar pain were due to trauma.

A February 28, 2023 MRI scan of appellant's lumbar spine demonstrated findings of retrolisthesis, a broad-based disc bulge and moderate facet hypertrophy at the L4-5 level, a possibility of active Schmorl's node formation, and a shallow broad-based disc bulge at the L5-S1 level without compressive discopathy.

In a March 20, 2023 report, Dr. Zimmerman indicated that appellant's recent MRI scan was benign from a nerve compression standpoint. He continued to provide impressions of vertebrogenic low back pain and lumbar acute pain due to trauma. A March 20, 2023 light-duty work capacity note by Dr. Zimmerman was also provided.

By decision dated April 25, 2023, OWCP denied modification of its December 30, 2022 decision.

On April 22, 2024 appellant, through counsel, requested reconsideration and submitted additional evidence, including January 29 and March 27, 2019 reports of Dr. James FitzGibbons, a Board-certified orthopedic surgeon, along with diagnostic studies regarding appellant's left hip and left lumbar radiculopathy. In his January 29, 2019 report, Dr. FitzGibbons diagnosed lumbar spondylosis with radiculopathy, left hip femoracetabular impingement, left hip contusion/hematoma, left hip trochanteric bursitis. He ordered an MRI of the lumbar spine to evaluate for nerve root impingement as appellant had a herniated disc in her lower back a couple of years prior. In his March 27, 2019 report, Dr. FitzGibbons diagnosed left hip conditions. He indicated that the March 21, 2019 MRI of the lumbar spine demonstrated minimal to mild degenerative disc disease at L4-5, minimal bilateral facet arthropathy at L5-S1, and minimal generalized bulging disc and minimal bilateral facet arthropathy at L4-4 with no significant spinal stenosis or foraminal stenosis. The remaining levels revealed no evidence of disc herniation or spinal stenosis.

In an April 19, 2024 report, Dr. Pardeep Sood, a Board-certified anesthesiologist, related that he first evaluated appellant on May 25, 2022, and that she described a February 18, 2022 work injury of hearing a pop in her back and onset of lower back pain while helping with two other nurses to reposition a patient. He noted that the March 2023 MRI scan of appellant's lumbar spine showed spondylolisthesis/retrolisthesis at L4-5 level with a broad-based disc bulge, abutment of the nerve roots bilaterally at L5 level, and significant facet joint hypertrophy. Given the nature of the work injury and the temporal relationship of appellant's symptoms to that injury, Dr. Sood opined that the February 18, 2022 work injury was the causal event precipitating her low back pain. He noted that earlier, in 2019, appellant underwent an MRI scan of the lumbar spine to rule out radiculopathy as the cause of her hip pain, which duly showed labral tear which explained the hip pain. Dr. Sood opined that, as appellant was asymptomatic with regard to back pain symptoms prior to the February 2022 work injury, her work injury was the cause of her ongoing low back pain with diagnosis of spondylolisthesis/retrolisthesis, lumbar facet arthropathy and lumbar radiculopathy. He indicated that the MRI scans of the lumbar spine showed progression with L4-5 retrolisthesis, disc bulge and nerve root abutment and that appellant denied any injury to the lower

back between the February 2022 work injury and March 1, 2023 MRI scan of the lumbar spine. Dr. Sood opined, in all probability, that the progression of the degenerative changes as noted at L4-5 level with retrolisthesis, disc bulge and nerve root abutment following the February 18, 2022 traumatic injury was the explanation of her current symptomatology as she was asymptomatic regarding low back pain prior to the February 2022 low back injury. He explained that the pressure and strain on the lumbar disc nature from the February 18, 2022 work injury resulted in a disc bulge, retrolisthesis and bilateral L5 nerve root abutment as noted on the 2023 MRI scan. Progress reports dated May 25 and June 27, 2023 by Dr. Sood were also provided which noted an impression of lumbar spondylosis without myelopathy or radiculopathy.

A July 28, 2023 report from Imran Mridha, a physician assistant was provided.

By decision dated April 30, 2024, OWCP denied modification of its April 25, 2023 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including 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 of FECA,⁵ that an injury was sustained while 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 on a traumatic injury or an occupational disease.⁷

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.⁸ There are two components involved in establishing fact of injury. The first component is whether the employee actually experienced the employment incident at the time and place, and in the manner alleged.⁹ The second component is whether the employment incident caused an injury.¹⁰

⁴ *Supra* note 1.

⁵ *C.B.*, Docket No. 21-1291 (issued April 28, 2022); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *N.B.*, Docket No. 23-0690 (issued December 5, 2023); *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *R.C.*, 59 ECAB 427 (2008).

⁷ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *S.S.*, Docket No. 18-1488 (issued March 11, 2019); *T.H.*, 59 ECAB 388 (2008).

⁹ *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

¹⁰ *Id.*

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹¹ The opinion of the physician must be based upon a complete factual and medical background, 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.¹²

In a case where 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.¹³

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a back condition causally related to the accepted February 18, 2022 employment incident.

Appellant submitted reports from Dr. Ahmad dated February 14 and March 18, 2022, which noted the history of appellant's February 18, 2022 employment incident and diagnosed acute lumbar pain due to trauma. Dr. Zimmerman provided reports dated January 23, 2023 wherein he related impressions of vertebrogenic low back pain and acute lumbar pain due to trauma. Neither physician, however, provided an opinion on causal relationship. The Board has held that a medical report that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁴ These reports were therefore insufficient to establish appellant's claim.

Appellant submitted multiple reports from Dr. Kirschenbaum. In a March 10, 2022 report, Dr. Kirschenbaum noted appellant's history of injury, as well as her prior medical history of a labral tear to the hip. He provided an impression of lumbar spondylosis and lumbar disc degeneration. Dr. Kirschenbaum did not, however, provide an opinion on causal relationship or relate the diagnosed condition to the accepted February 18, 2022 employment incident.¹⁵ As noted above, the Board has held that a medical report that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁶

In a series of reports, Dr. Kirschenbaum diagnosed bilateral lumbar radiculitis, lumbar spondylosis and lumbar disc degeneration. He opined that her current conditions were due to the February 18, 2022 work-related injury as she had no significant symptoms of back pain prior to that injury. A medical opinion that an employee was asymptomatic before the injury, but

¹¹ *E.G.*, Docket No. 20-1184 (issued March 1, 2021); *T.H.*, 59 ECAB 388 (2008).

¹² *D.C.*, Docket No. 19-1093 (issued June 25, 2020).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (May 2023); *see also L.S.*, Docket No. 18-0518 (issued February 19, 2020).

¹⁴ *See R.B.*, Docket No. 23-1027 (issued April 3, 2024); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁵ *Id.*

¹⁶ *Id.*

symptomatic after it, is insufficient, without supporting rationale, to establish causal relationship.¹⁷ This evidence is, therefore, insufficient to establish the claim.

In his April 19, 2024 report, Dr. Sood opined that appellant's February 18, 2022 employment incident was the cause of her ongoing low back pain with diagnoses of spondylolisthesis/retrolisthesis, lumbar facet arthropathy and lumbar radiculopathy and bilateral L5 nerve root abutment. He explained that appellant was asymptomatic with regard to back pain symptoms prior to the February 2022 work injury and that the March 2023 MRI scan of the lumbar spine showed progression of the degenerative changes at L4-5 level with spondylolisthesis/retrolisthesis, disc bulge, and nerve root abutment bilaterally at L5 level, and significant facet joint hypertrophy. Dr. Sood explained that the pressure and strain on appellant's lumbar disc due to the nature of the February 18, 2022 work injury resulted in appellant's current conditions of disc bulge, retrolisthesis and nerve root abutment. However, he did not provide sufficient rationale explaining the pathophysiological process of how the accepted employment incident caused or contributed to appellant's diagnosed conditions.¹⁸ Dr. Sood's opinion is therefore of limited probative value and insufficient to establish the claim.¹⁹

OWCP also received medical reports from Dr. FitzGibbons dated from 2018 to 2019 which predate the accepted incident of February 18, 2022. The Board has held that medical evidence which predates the date of a traumatic injury has no probative value on the issue of causal relationship of a current medical condition.²⁰

The record also contains reports from physician assistants. The Board has held that medical reports signed solely by physician assistants are of no probative value, as such healthcare providers are not considered physicians as defined under FECA and, therefore, are not competent to provide a medical opinion.²¹ Thus, this evidence is insufficient to establish the claim.

The remainder of the evidence of record consists of lumbar MRI scans. The Board has held that diagnostic studies, standing alone, lack probative value on the issue of causal relationship

¹⁷ See *D.K.*, Docket No. 24-0195 (issued May 23, 2024); *R.S.*, Docket No. 16-1469 (issued December 8, 2016); *D.R.*, Docket No. 16-0411 (issued June 10, 2016); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹⁸ *J.D.*, Docket No. 19-1953 (issued January 11, 2021); *J.C.*, Docket No. 18-1474 (issued March 20, 2019); *M.M.*, Docket No. 15-0607 (issued May 15, 2015); *M.W.*, Docket No. 14-1664 (issued December 5, 2014).

¹⁹ See *A.G.*, Docket No. 24-0647 (issued July 31, 2024); *T.F.*, Docket No. 20-0260 (issued June 12, 2020); *D.J.*, Docket No. 18-0694 (issued March 16, 2020); *K.G.*, Docket No. 18-1598 (issued January 7, 2020); *K.O.*, Docket No. 18-1422 (issued March 19, 2019).

²⁰ *J.K. (nee R.)*, Docket No. 22-0945 (issued December 16, 2022); *B.P.*, Docket No. 21-0872 (issued December 8, 2021).

²¹ Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a (May 2023); *C.G.*, Docket No. 20-0957 (issued January 27, 2021) (physician assistants are not considered physicians as defined under FECA); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

as they do not address whether the accepted employment factors caused any of the diagnosed conditions.²²

As the medical evidence of record is insufficient to establish a medical condition causally related to the accepted employment factors, the Board finds that appellant has not met 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(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 establish a back condition causally related to the accepted February 18, 2022 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 2024
Washington, DC

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

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

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

²² *F.D.*, Docket No. 19-0932 (issued October 3, 2019); *J.S.*, Docket No. 17-1039 (issued October 6, 2017).