

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

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<b>W.W., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 09-828</b>
	)	<b>Issued: November 13, 2009</b>
<b>U.S. POSTAL SERVICE, POST OFFICE, Cheboygan, MI, Employer</b>	)	
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*Appearances:*  
Daniel Loznak, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 5, 2009 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated May 23, 2008 and a nonmerit decision dated December 23, 2008. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a left shoulder condition causally related his accepted December 17, 2003 employment injury; and (2) whether appellant sustained a recurrence of disability as of March 15, 2005 causally related to his accepted December 17, 2003 employment injury; and (3) whether the Office abused its discretion by denying his authorization for March 15, 2005 left shoulder surgery.

**FACTUAL HISTORY**

This is the second appeal before the Board. On December 18, 2003 appellant, then a 75-year-old letter carrier, filed a claim for benefits, alleging that he injured his right shoulder, right arm and right hand on December 17, 2003. In a report issued on the date of the alleged incident,

Dr. Donald Ramsey, an osteopath, indicated that appellant fell with his right hand extended and had right shoulder and wrist pain.

The Office accepted the claim for right shoulder and right wrist contusion. In subsequent reports, however, appellant submitted medical evidence which indicated that he may have also injured his left shoulder as a result of the December 17, 2003 fall. In reports dated February 24 and July 2, 2004, Dr. Daniel Wilcox, a specialist in orthopedic surgery, noted that appellant experienced pain in his left shoulder in addition to symptoms in his right shoulder.<sup>1</sup> He stated in his February 24, 2004 report that left shoulder testing indicated possible glenohumeral anterior capsular disruption, rotator cuff tendinitis and increased glenohumeral joint laxity of the left shoulder; a July 23, 2004 magnetic resonance imaging (MRI) scan of the left shoulder showed a partial tear of the left rotator cuff. In a December 10, 2004 report, Dr. Wilcox diagnosed bilateral shoulder degenerative arthritis, most likely exacerbated by his December 17, 2003 work incident, which in addition produced tears in both rotator cuffs. In a report dated December 14, 2004, Dr. Roderick Baltzer, an osteopath, stated that in the course of appellant's fall he injured both shoulders, the right initially worse than the left; he stated, however, that the left shoulder had progressed to the point that surgery was contemplated.

In order to determine whether appellant had sustained an injury to his left shoulder as a result of the December 17, 2003 work incident, the Office referred appellant, a statement of accepted facts and medical records to Dr. Bruce Abrams, an orthopedic surgeon, for a second opinion examination. Dr. Abrams stated based on his examination that, although appellant's left shoulder showed extensive degenerative changes which preexisted the December 17, 2003 fall, it was unlikely that a fall on the right side as described would have caused injury to or aggravated the preexisting condition of his left shoulder.

Appellant had left shoulder surgery on March 15, 2005 and filed a Form CA-7 claim for compensation commencing March 15, 2005.

The Office determined that a conflict in the medical evidence existed and referred appellant, together with a statement of accepted facts and medical records, to Dr. Norman Pollak, a Board-certified orthopedic surgeon for an impartial medical examination. In a report dated May 20, 2005, Dr. Pollak reviewed the medical history and stated that there was no mention of left shoulder symptoms until July 2, 2004. He opined that there was no documentation in the medical records that a left shoulder injury occurred on December 17, 2003. By decision dated July 20, 2005, the Office denied appellant's claim for compensation for a left shoulder injury. By decision dated February 8, 2006, an Office hearing representative affirmed the July 20, 2005 decision. In a January 26, 2007 decision,<sup>2</sup> the Board set aside the Office's July 20, 2005 and February 8, 2006 decisions. The Board found that the Office erred in relying on Dr. Pollak's referee opinion, which it found was not sufficient to resolve the conflict in the medical evidence. The Board noted that Dr. Pollak had stated that there was no mention of left shoulder symptoms in the record until July 2, 2004, despite the fact that the case file contained Dr. Wilcox's February 24, 2004 report stating that left shoulder testing indicated possible left glenohumeral anterior capsular disruption, left rotator cuff tendinitis and increased left glenohumeral joint

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<sup>1</sup> On February 3, 2004 Dr. Wilcox performed rotator repair surgery on appellant's right shoulder.

<sup>2</sup> Docket No. 06-824 (issued January 26, 2007).

laxity. The Board found that this statement by Dr. Pollak indicated that it was unclear as to whether he had a complete and accurate background on which to base his opinion. The Board therefore remanded to the Office to obtain a new impartial medical evaluation regarding whether appellant sustained a left shoulder injury resulting from the December 17, 2003 work incident, based on a complete review of the relevant evidence of record. The complete facts of this case are set forth in the Board's January 26, 2007 decision and are herein incorporated by reference.

In a report dated April 13, 2007, Dr. David Frye, an osteopath and the new referee medical specialist, reviewed the medical record, stated findings on examination and noted appellant's complaints of left shoulder pain. He opined that appellant's left shoulder problems were not causally related to the December 17, 2003 work injury. Dr. Frye stated that there was no mention of any injury to the left shoulder in the medical report issued on December 17, 2003, the date appellant fell and injured his right shoulder. He related that appellant indicated that he subsequently began treatment with Dr. Wilcox and told him that he had left shoulder complaints in addition to his right shoulder issues; Dr. Wilcox diagnosed a torn left rotator cuff and performed left shoulder rotator cuff surgery on March 15, 2005. Dr. Frye noted that Dr. Wilcox's medical records were incomplete in that his account of appellant's treatment began on July 2, 2004 and concluded with an examination dated March 10, 2006. He stated that based on his review of the medical record there was indication of left shoulder complaints for several months after the December 17, 2003 work incident. Dr. Frye further stated that the type of left shoulder pathology Dr. Wilcox addressed is degenerative and consistent with appellant's age. He indicated, however, that if additional medical records from Drs. Baltzer and Dr. Wilcox were made available he would review and evaluate them.

By letter dated June 20, 2007, the Office asked Dr. Frye to submit an addendum report to clarify his opinion that appellant's left shoulder condition was not causally related to the December 17, 2003 work injury. It specifically asked Dr. Frye to review Dr. Wilcox's February 24, 2004 report and indicate more definitively whether appellant sustained a work-related left shoulder injury as a result of the December 17, 2003 work injury.

In a report dated July 16, 2007, which the Office did not receive until August 8, 2007, Dr. Frye indicated that, contrary to the Office's assertion in its June 20, 2007 letter, he had not received a copy of Dr. Wilcox's February 24, 2004 report. He reiterated his suggestion that all of the records from Drs. Wilcox and Baltzer be made available for review. In addition, Dr. Frye restated his opinion that appellant's left shoulder condition was not the result of the December 16, 2003 event. He noted that when appellant presented himself to the hospital on December 17, 2003 he did not complain of left shoulder or left upper extremity pain; in addition, there was no record of any observed trauma to the left upper extremity such as an abrasion or discoloration. Dr. Frye stated that the findings of osteoarthritis, biceps tendon pathology, loss of articular cartilage and rotator cuff tear in the left shoulder shown by x-ray and MRI scan results in July 2004 were not the kind of changes that occurred in seven months, the period of time since the December 2003 work injury. He advised that these were changes that took years to develop. Dr. Frye further advised that these findings did not constitute problems which occurred as a result of a slip and fall such that appellant experienced in December 2003. He opined that there were no changes to suggest that the left shoulder joint structures or soft tissues were ever affected by the December 17, 2003 work incident.

In a July 12, 2007 memorandum, the Office indicated that it faxed a copy of Dr. Wilcox's February 24, 2004 report to Dr. Frye. In a telephone call dated July 17, 2007, Dr. Frye stated

that he had reviewed Dr. Wilcox's February 24, 2004 report and had not changed his previously issued findings and opinions. However, he did not indicate that he had reviewed Dr. Wilcox's February 2004 report in either of his reports.

By decision dated August 2, 2007, the Office denied appellant's claim for a left shoulder injury causally related to the accepted December 17, 2003 employment injury, finding that Dr. Frye's referee opinion represented the weight of the medical evidence. It also denied his claim for a recurrence of disability as of March 15, 2005 causally related to the accepted December 17, 2003 employment injury. The Office found that appellant stopped work on March 15, 2005 to undergo surgery for his left shoulder, a condition unrelated to the accepted December 2003 work injury.

On August 27, 2007 appellant requested an oral hearing, which was held on March 12, 2008. At the hearing, appellant's attorney stated that appellant had returned to light duty following right shoulder surgery in 2004 but was unable to perform the duties of the modified job. Counsel and appellant stated that, when he attempted to return to duty following his March 2005 surgery to the left shoulder, the employing establishment told him there were no positions available. Appellant filed a grievance, the result of which was his separation from the employing establishment effective May 4, 2007.

By decision dated May 23, 2008, an Office hearing representative affirmed the August 2, 2007 decision. She considered Dr. Frye's July 16, 2007 addendum report which restated his opinion that appellant's left shoulder injury was not causally related to the December 17, 2003 employment injury; this report was not contained in the record at the time the Office issued its August 2, 2007 decision. The hearing representative noted that Dr. Frye did not review Dr. Wilcox's February 24, 2004 report, as the Board had instructed in its January 26, 2007 decision. She stated, however, that this report was entitled to little weight because it was actually a physical therapy evaluation dated February 24, 2004, signed by Dr. Wilcox on March 5, 2004, which contained no indication that Dr. Wilcox participated in this evaluation.<sup>3</sup> The hearing representative therefore affirmed the Office's previous finding that Dr. Frye's opinion negating a causal connection between the claimed left shoulder injury and the December 2003 work injury represented the weight of the medical evidence.

By letter dated September 24, 2008, appellant's attorney requested reconsideration. He argued that appellant's right shoulder injury, which had improved with surgery, had recently deteriorated to the point where he was unable to use his right arm for any work activities.

By decision dated December 23, 2008, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

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<sup>3</sup> The hearing representative noted that Dr. Wilcox's February 2004 report contained the first mention of any complaints to the left shoulder. She also stated that the December 18, 2003 Form CA-1 only references injuries to the right arm, shoulder and hand, while making no mention of any left shoulder complaints.

## LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act<sup>4</sup> has the burden of establishing that 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>5</sup> 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.<sup>6</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed, or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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.<sup>7</sup>

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his claimed right shoulder condition and his federal employment. This burden includes providing medical evidence from a physician who concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.<sup>8</sup>

## ANALYSIS

The Board finds that Dr. Frye's referee opinion regarding whether appellant's claimed left shoulder injury was causally related to the accepted December 17, 2003 employment injury is not based upon an adequate factual foundation and requires clarification. The Office had accepted that appellant sustained the conditions of right shoulder contusion and right wrist

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>6</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>7</sup> *Id.*

<sup>8</sup> *See Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

contusion as a result of the December 2003 incident. The Board, in its January 26, 2007 decision, stated that it was unclear whether the previous medical specialist, Dr. Pollak, had a complete and accurate background on which to base his opinion because he did not consider Dr. Wilcox's February 24, 2004 report indicating that appellant had left shoulder symptomatology stemming from the December 17, 2003 slip and fall incident. The Board therefore instructed the Office to obtain an opinion from an impartial medical examiner regarding whether appellant sustained a left shoulder injury resulting from the December 17, 2003 employment injury based on a complete review of the relevant evidence of record. The Office, however, failed to submit Dr. Wilcox's February 2004 report to the new referee examiner, Dr. Frye, prior to his submission of his April 13 and July 16, 2007 reports.<sup>9</sup> Notwithstanding this omission, the Office in its August 2, 2007 and May 23, 2008 decisions relied on Dr. Frye's opinion in finding that appellant failed to establish that he sustained a left shoulder injury causally related to the December 17, 2003 injury, without having reviewed Dr. Wilcox's February 24, 2004 report. While the Office hearing representative in the May 23, 2008 decision specifically discounted the need for Dr. Frye to review the February 24, 2004 report as it was dictated by a physical therapist, the Board notes that the report was read and countersigned by Dr. Wilcox. As Dr. Wilcox was actively treating appellant for his right shoulder injury following the December 2003 injury, and performed surgical repair of the right shoulder in February 2004, he was in the best position to know of appellant's left shoulder complaints, if any. The Board therefore finds that the Office disregarded its instructions by failing to provide Dr. Frye with relevant medical evidence of record; *i.e.*, Dr. Wilcox's February 24, 2004 report. The Board set aside the May 23, 2008 Office decision and remands for further development regarding the issue of whether he sustained a left shoulder injury in the performance of duty on December 17, 2003.

Accordingly, the Office's May 23, 2008 decision is set aside and remanded for referral to a new impartial medical examiner to resolve the outstanding conflict in the medical evidence regarding whether appellant sustained a left shoulder injury in the performance of duty on December 17, 2003. In the event that it finds that the claimed left shoulder injury was work related, it should then determine whether appellant sustained a recurrence of disability as of March 15, 2005 causally related to his accepted December 17, 2003 employment injury, and whether the March 15, 2005 left shoulder surgery was necessitated by an accepted condition. After such further development of the record as it deems necessary, the Office shall issue a *de novo* decision.<sup>10</sup>

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<sup>9</sup> The Board further notes that the Office sought clarification from Dr. Frye through telephone contact. The Board has previously held that oral communication should not occur between the Office and impartial medical examiners as it undermined the appearance of impartiality; the product of such contacts therefore have no probative value. *Carlton L. Owens*, 36 ECAB 608 (1985).

<sup>10</sup> In his appeal to the Board, appellant's attorney argues, as he did below, that the condition of appellant's right shoulder has deteriorated to the point where he is unable to use his right arm for any work activities. Counsel therefore seeks compensation for wage loss based on his right shoulder condition. The Board notes that counsel can claim compensation for appellant's right shoulder by filing a Form CA-2a claim for a recurrence of disability with the Office.

## **CONCLUSION**

The Board finds that the case is not in posture for decision with regard to the issue of whether appellant's claimed left shoulder injury was causally related to the accepted December 17, 2003 employment injury. The Board finds that the case is not in posture for decision with regard to the issue of whether he was entitled to compensation for a recurrence of disability as of March 15, 2005 causally related to his accepted December 17, 2003 employment injury. The Board finds that the case is not in posture for decision with regard to the issue of whether appellant's March 15, 2005 left shoulder surgery was necessitated by an accepted condition.<sup>11</sup>

## **ORDER**

**IT IS HEREBY ORDERED THAT** the May 23, 2008 decision of the Office of Workers' Compensation Programs be set aside and remanded for further development consistent with this decision.

Issued: November 13, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>11</sup> In light of the Board's disposition in this case, the December 23, 2008 decision is moot.