

FACTUAL HISTORY

On June 27, 2014 appellant, then a 27-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date he suffered a sprain of his right upper arm when a coworker grabbed his right arm, twisted it behind his back, lifted him off the ground, and slammed him into a pie cart. The employing establishment did not controvert the claim. On September 11, 2014, OWCP accepted the claim for resolved right shoulder strain.² It subsequently expanded acceptance to include an adjustment disorder.

Appellant received treatment in an emergency room on July 27, 2014 for a sprain and strain of his elbow and forearm.

In an initial evaluation dated June 30, 2014, Dr. Craig H. Stagg, who specializes in occupational medicine, treated appellant for injuries sustained when a coworker grabbed his right arm, extended it, and put it behind his back. He related, “[Appellant] states he is still having pain in the shoulder. What is more bothersome is his left shoulder which is related to a previous injury that has been aggravated.” Dr. Stagg diagnosed a strain of the right shoulder and elbow and an aggravation of chronic left shoulder pain. He found that appellant could perform modified employment.

Dr. Stagg, in a July 25, 2014 progress report, noted that appellant’s left shoulder had worsened and that he was “fearful about the attack.” He diagnosed an improving right shoulder strain, an exacerbation of chronic pain in the left shoulder and cervical spine, and “psychological distress related to the injury.” In a state workers’ compensation form dated July 25, 2014, Dr. Stagg provided work restrictions.

In a progress report dated July 31, 2014, Dr. Stagg diagnosed resolved right shoulder strain, an exacerbation of left shoulder and cervical pain, and psychological issues due to the work injury. He found that appellant could perform modified employment.

On August 15, 2014 Dr. Stagg indicated that he treated appellant beginning June 30, 2014 for injuries sustained when a coworker pulled his right arm back, twisted it, and “lifted him above the ground.” He advised that he “sustained an injury to his right shoulder and aggravated a prior injury in his cervical spine and left shoulder. I feel that his current symptoms are related to the injury as he described it.”

Appellant, on August 26, 2014, filed a claim for compensation (Form CA-7) for disability from work beginning August 9, 2014. Thereafter, he continued to file claims for compensation.

On September 16, 2014 the employing establishment advised appellant that he should return to his usual employment.

² By decision dated August 7, 2014, OWCP denied appellant’s traumatic injury claim as he had not established the occurrence of the alleged work incident. It noted that he had not responded to its questionnaire. Appellant requested reconsideration on August 22, 2014. In a decision dated September 11, 2014, OWCP vacated the August 7, 2014 decision and accepted resolved right shoulder strain.

Dr. Stagg, in an October 8, 2014 report, related that appellant had a preexisting history of cervical and left shoulder symptoms and also a history of a right shoulder injury due to an assault. He related, “[Appellant] also strained and reinjured his left shoulder and cervical spine. This was related to a previous injury; however, [it] was aggravated by the actions at work. I feel that causally it has been an exacerbation of his chronic left-sided cervical and shoulder problems.”

On October 20, 2014 OWCP referred appellant to Dr. James K. Weaver, a Board-certified orthopedic surgeon, for an opinion regarding whether appellant had residuals of his accepted condition, whether he sustained additional diagnosed conditions due to the June 27, 2014 work injury, and whether he had work restrictions.³

In a report dated November 19, 2014, Dr. Weaver discussed appellant’s history of the June 27, 2014 work injury and prior history of a motor vehicle accident in June 2006.⁴ He diagnosed an aggravation of disc disease of the cervical spine, a resolving sprain of the right shoulder, and depression. Dr. Weaver related, “I think that the sprain of [appellant’s] right shoulder is resolving quickly, and he should reach MMI [maximum medical improvement] for the sprain in the right shoulder in another six weeks. However, he is having [an] aggravation of his preexisting cervical disc problems by this incident, and that is what is giving him major problems at the present time.” Dr. Weaver, in response to the question of whether appellant had additional work injuries due to the June 27, 2014 work injury, indicated that the trauma on that date aggravated his cervical disc disease. He found that appellant was unable to return to his regular employment. Dr. Weaver recommended a magnetic resonance imaging (MRI) scan study of the cervical spine. In a work restriction evaluation, he found that appellant could perform light-duty work with one arm.

OWCP determined that a conflict arose because the second opinion physician found “an additional injury” even though the new injury appeared after the original injury. It referred appellant to Dr. Robert P. Hansen, a Board-certified orthopedic surgeon, for an impartial medical examination.

On January 27, 2015 Dr. Hansen reviewed appellant’s history of a 2006 motor vehicle accident and a June 2014 work injury.⁵ On examination he found a normal evaluation of the right shoulder and some tenderness of the left shoulder. Dr. Hansen diagnosed resolved right shoulder sprain/strain and pain in the left shoulder and neck “without specific diagnosis

³ In a report dated October 21, 2014, Dr. Dale E. Bowen, a clinical psychologist, diagnosed an adjustment disorder with mixed anxiety and depressed mood due to the June 27, 2014 employment incident.

⁴ Dr. Stagg continued to submit progress reports describing his treatment of appellant for right shoulder strain, and an aggravation of cervical and left shoulder symptoms. Dr. Ellen W. Price, an osteopath, evaluated appellant on November 13, 2014 for Dr. Stagg. She diagnosed a history of right shoulder strain, pain disorder, situational depression, an exacerbation of left shoulder and thoracic outlet syndrome, and epicondylitis. Dr. Price recommended an electromyogram.

⁵ In a January 19, 2015 progress report, Dr. Stagg diagnosed resolved right shoulder strain and an “[a]ggravation of underlying cervical symptoms/shoulder symptoms with a history of thoracic outlet syndrome. He found that appellant could perform modified employment with an anticipated increase in work ability.

unrelated to [appellant's] right shoulder sprain on June 27, 2014.” He noted that appellant did not complain on the date of injury of neck or left shoulder pain. Dr. Hansen opined that the mechanism of injury would not have aggravated the preexisting condition.

By decision dated February 3, 2015, OWCP denied appellant's claim for compensation beginning August 9, 2014. It found that the medical evidence, as represented by the referee opinion, established that his right shoulder sprain had resolved and that his left shoulder and neck symptoms were unrelated to his work injury.

On March 11, 2015 appellant requested a telephone hearing before an OWCP hearing representative.

Appellant filed claims for compensation (Form CA-7) requesting compensation from January 24 to February 6, and February 7 to 20, 2015. In a decision dated April 10, 2015, OWCP denied his claims for compensation from January 24 to February 6, 2015 and February 7 to 20, 2015 as the medical evidence was insufficient to establish disability causally related to the June 27, 2014 employment injury.

On June 4, 2015 OWCP referred appellant to Dr. Thomas P. Moore, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether he had residuals of his accepted employment injury of right shoulder sprain.⁶ On July 28, 2015 Dr. Moore advised that he had no residuals of his accepted right shoulder strain.

At the hearing, held on October 15, 2015, appellant's counsel contended that the record did not contain a conflict in medical opinion at the time OWCP referred appellant to Dr. Hansen for an impartial medical examination.⁷ He additionally argued that Dr. Hansen's report was not that of a second opinion physician as OWCP did not notify appellant of his right to have a physician present at the examination.

In a decision dated February 1, 2016, an OWCP hearing representative affirmed the February 3, 2015 decision. She found that the opinion of Dr. Hansen was that of a second opinion physician rather than an impartial medical examiner. The hearing representative determined that his opinion constituted the weight of the evidence and established that appellant did not sustain a cervical or left shoulder condition resulting in disability for work due to his employment injury.⁸

⁶ On August 25, 2015 OWCP referred appellant to Dr. George Kalousek, a Board-certified psychiatrist, for a psychiatric evaluation. Based on Dr. Kalousek's report OWCP expanded acceptance of his claim to include an adjustment disorder.

⁷ Dr. Stagg continued to submit progress reports. On May 5, 2015 he found that appellant should be able to resume full duty in two or three weeks. On June 25, 2015 Dr. Stagg diagnosed resolved right shoulder strain with an aggravation of left upper extremity pain, found that he had no work restrictions, and released him from care.

⁸ The hearing representative additionally noted that Dr. Bowen's report was insufficient to establish a psychiatric condition. However, OWCP accepted adjustment disorder based on the report of Dr. Kalousek. *See supra* note 6.

On appeal appellant notes that Dr. Weaver agreed with his attending physician, Dr. Stagg. He maintains that the opinions of Dr. Weaver and Dr. Stagg constituted the weight of the evidence.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁹ For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.¹⁰ Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.¹¹

Causal relationship is a medical issue, and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.¹² The opinion of the physician must be based on a complete factual and medical background of the claimant,¹³ must be one of reasonable medical certainty¹⁴ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁵

Section 8123(a) provides that, 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.¹⁶ The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁷

ANALYSIS

OWCP accepted that appellant sustained right shoulder strain and an adjustment disorder after an assault by a coworker. His attending physician, Dr. Stagg, found on July 31, 2013 that

⁹ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986).

¹⁰ See *Amelia S. Jefferson*, *id.*

¹¹ See *Edward H. Horton*, 41 ECAB 301 (1989).

¹² *John J. Montoya*, 54 ECAB 306 (2003).

¹³ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

¹⁴ *Supra* note 12.

¹⁵ *Judy C. Rogers*, 54 ECAB 693 (2003).

¹⁶ 5 U.S.C. § 8123(a).

¹⁷ 20 C.F.R. § 10.321.

his right shoulder strain had resolved but diagnosed an exacerbation of left shoulder and cervical symptoms due to his work injury. He provided work restrictions. In reports dated August 15 and October 8, 2014, Dr. Stagg opined that appellant aggravated a preexisting injury to his cervical spine and left shoulder as a result of his June 2014 employment injury.

On November 19, 2014 Dr. Weaver, an OWCP referral physician, reviewed appellant's history of a work injury on June 27, 2014 and a motor vehicle accident in June 2006. He diagnosed an aggravation of cervical disc disease, resolving right shoulder sprain, and depression. Dr. Weaver attributed the aggravation of appellant's cervical disc disease to the June 27, 2014 assault at work and advised that he was unable to perform his usual work duties. In a work restriction evaluation, he found that appellant could perform limited duty with one arm.

OWCP determined that a conflict existed between Dr. Stagg and Dr. Weaver regarding whether appellant sustained more than a right shoulder sprain due to his employment injury. It referred him to Dr. Hansen for an impartial medical examination. At the time of OWCP's referral of appellant to Dr. Hansen, however, there was no conflict in the medical evidence between Dr. Stagg and Dr. Weaver, and thus his opinion is not that of an impartial medical examiner.¹⁸

In a report dated January 27, 2013, Dr. Hansen diagnosed resolved right shoulder sprain/strain and left shoulder and neck pain unrelated to his June 2014 employment injury. He found that the mechanism of injury would not have resulted in an aggravation of a preexisting condition.

The Board finds that the case is not in posture for decision due to a conflict in medical opinion between Dr. Stagg, appellant's physician, and Dr. Hansen, an OWCP referral physician, regarding whether appellant sustained an aggravation of a left shoulder and cervical condition causing disability from employment due to his June 27, 2014 employment injury.¹⁹ Section 8123(a) provides that, 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.²⁰ On remand, OWCP should refer appellant for an impartial medical examination to resolve the conflict in medical opinion. Following any further development deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion evidence.

¹⁸ See *C.D.*, Docket No. 15-0446 (issued April 27, 2015).

¹⁹ See *T.O.*, Docket No. 15-1146 (issued February 2, 2016) (converting the opinion of an improperly designated impartial medical examiner to that of a second opinion physician and finding an unresolved conflict in medical opinion).

²⁰ 5 U.S.C. § 8123(a).

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 1, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy 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