United States Department of Labor
Employees' Compensation Appeals Board

J.P., Appellant	)	
and	)	**Docket No. 16-0954**
	)	**Issued: December 13, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Paragould, AR, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 4, 2016 appellant, through counsel, filed a timely appeal from a March 10, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has met her burden of proof to establish an injury causally related to the accepted June 3, 2011 employment incident.

[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 September 6, 2012 appellant, then a 52-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 3, 2011 she injured her right arm when she collapsed and fell due to heat stroke. She did not stop work.

A copy of a partially illegible employing establishment accident report for the June 3, 2011 incident was submitted along with a July 21, 2012 witness statement from a coworker, T.G. who related that appellant was standing with her hands on a metal table and told him that she felt hot. As he was bringing her a chair, he saw her sitting on the floor. T.G. indicated that appellant could not speak, that 911 was called, and that she was taken to the hospital. Partially illegible emergency records and lab results from Arkansas Methodist Medical Center dated June 3, 2011 were submitted.

In a November 21, 2011 treatment note, Jamie Jordan, a nurse practitioner, noted a medical history of heat stroke on June 3, 2011. She reported that appellant had bilateral shoulder pain for three months with no identified injury. Ms. Jordan noted that appellant had x-rays taken by a chiropractor, which showed inflammation, and that appellant's work required a lot of heavy lifting. An assessment of right shoulder pain was provided and a magnetic resonance imaging (MRI) scan scheduled.

A November 22, 2011 right shoulder MRI scan showed a tear in the supraspinatus tendon, joint infusion, degenerative change of the acromioclavicular joint with mild impingement of the supraspinatus tendon, and a partial substance tear of the glenohumeral ligament. The clinical history related that appellant had pain in her right shoulder for two months with no known trauma. It was noted that she performed lots of lifting.

In a December 7, 2011 treatment note, Dr. Jeremy Swymn, a Board-certified surgeon, reported that appellant was a mail carrier with a long history of right shoulder pain. He reported that she had pain with her work and was unable to lift anything overhead. Dr. Swymn noted examination findings, his review of x-ray and MRI scan studies, and provided an assessment of right rotator cuff tear. He indicated that a right arthroscopic rotator cuff repair was planned. In a January 19, 2012 work note, Dr. Swymn indicated that appellant would be off work from January 21, 2012 until surgery for her right shoulder injury. On March 13, 2012 appellant underwent right shoulder arthroscopic rotator cuff repair and arthroscopic subacromial decompression, which he performed.

In a March 12, 2012 partial progress note, Dr. Samuel Burchfield, a Board-certified family practitioner, reported that appellant had chronic recurrent shoulder pain with acute exacerbations caused by her job at the employing establishment. An assessment of thrombocytopenia and rotator cuff rupture were provided. In an April 9, 2012 letter, Dr. Burchfield indicated that appellant was under his care for a shoulder injury sustained July 2, 2004 while delivering mail. He noted that the documentation supported a history of traumatic hyperextension of the right shoulder. Dr. Burchfield further noted that appellant presented documentation supporting exacerbation of her injury as she passed out due to heat stroke while at the employing establishment on June 3, 2011. He indicated that she sought his care on November 21, 2011 and that the MRI scan of her right shoulder indicated traumatic injury.

Dr. Burchfield reported that appellant had also undergone corrective surgery. He opined that she had an injury, which could easily have been caused while delivering mail in July 2004.

In a March 28, 2012 treatment note, Dr. Brian G. Dickson, a Board-certified orthopedic surgeon, reported on appellant's condition status post arthroscopic rotator cuff repair. He noted that she was off work and advised that therapy would be continued.

In an April 25, 2012 letter, Dr. Swymn indicated that he first examined appellant on December 7, 2011. At that time, appellant informed him that she had an injury on June 3, 2011 when she fell while working. She also indicated that she had previously been involved in an accident at work on July 2, 2004, when she was delivering mail from her vehicle, her arm was in a mailbox, and her vehicle was hit from behind. Dr. Swymn noted that while he did not put this in his report, appellant informed him of what had happened. He indicated that a right shoulder or MRI scan revealed a full thickness rotator cuff tear and that she had it surgically repaired. Dr. Swymn opined that it was within reason that appellant's "injury" could have caused her rotator cuff tear. Appellant had indicated that she never had shoulder pain prior to this specific incident.

In a July 24, 2012 letter, Dr. Chris Curtis, a chiropractor, indicated that appellant was involved in a motor vehicle accident in 2004 when her vehicle was hit from behind while her arm was in a mailbox. He noted that the x-rays were negative and that no MRI scan was obtained for review. Dr. Curtis indicated that she underwent treatment to restore normal function to her right shoulder, but her pain remained. He reported that appellant then went to a physician who performed a right shoulder MRI scan and determined that she needed shoulder surgery. Dr. Curtis opined that her shoulder problems originated from the 2004 motor vehicle accident.

In a September 12, 2012 letter, Dr. Burchfield indicated that appellant required corrective surgery due to the effect of her job duties, which required repetitive arm and shoulder movements, and prevented resolution of the initial injury sustained on July 2, 2004. He indicated that she was improved and back to full unrestricted employment.

In a September 21, 2012 letter, OWCP advised appellant of the deficiencies in her claim. It was requested that she provide a detailed narrative medical report from her treating physician containing a history of the injury and a medical explanation with objective evidence of how the reported work incident of June 3, 2011 caused or aggravated her right arm condition. Appellant was afforded 30 days to submit such evidence.

In response, OWCP received the following: a September 27, 2012 telephone call from appellant wanting to explain how her injury occurred; a September 27, 2012 statement from appellant's supervisor, J.G., indicating that he did not witness appellant's fall on June 3, 2011; appellant's October 1, 2012 responses to OWCP's development questionnaire; and an October 23, 2012 e-mail from the employing establishment controverting appellant's claim.

By decision dated October 25, 2012, OWCP denied appellant's claim. It found that the medical evidence of record did not contain a physician's rationalized opinion supported by a medical explanation as to how the June 3, 2011 incident caused, contributed to, or aggravated her right shoulder condition.

In an October 1, 2013 report, Dr. Swymn reitered the history of injury from his April 25, 2012 report and again diagnosed rotator cuff tear.

On October 8, 2013 OWCP received appellant's October 2, 2013 request for reconsideration. Appellant submitted a Form SF-50, Notification of Personnel Action, and a January 17, 2014 statement from the employing establishment controverting the claim.

By decision dated January 31, 2014, OWCP denied modification of its October 25, 2012 decision. It found the medical evidence submitted did not contain a physician's opinion that was supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the accepted employment incident.

On December 19, 2014 OWCP received counsel's request for reconsideration based on new medical evidence. In a November 24, 2014 report, Dr. Swymn reiterated that he began treating appellant on December 7, 2011. He indicated that she had an injury on June 3, 2011 when she fell and landed on her right shoulder. Appellant's arm was in a position that was abducted, which can give a contusion versus a tear of the rotator cuff secondary to the fact that the tendon can hit on the acromion and cause pain. Dr. Swymn indicated that he had obtained a complete factual background and a medical history from appellant at the time of her initial treatment and had continued to obtain this at every visit afterward, which was well documented. He indicated appellant's course of medical treatment and noted that she "subsequently had a wreck while at work in July." Dr. Swymn indicated that her arm was out of the vehicle in an abducted and externally rotated position and that she got hit from behind by another car. He medically explained how the mechanism of injury would cause a rotator cuff tear. Dr. Swymn also indicated that, in a person of appellant's age, with a possible shoulder subluxation, the more common injury would be a rotator cuff tear as opposed to a labral tear. He opined that both of those incidents could have caused her rotator cuff tear. Dr. Swymn also noted that appellant never had pain prior to her injury and that her pain in June 2011 never went away. He opined that "she probably had her rotator cuff tear initially with her fall in June and then possibly exacerbated it or made it worse by her wreck in July." Dr. Swymn concluded that since both of appellant's injuries occurred at work, and the evidence showed that the rotator cuff tear caused her pain, her injuries at work caused her rotator cuff tear.

By decision dated March 10, 2016, OWCP denied modification of its January 31, 2014 decision. It found that Dr. Swymn's opinion as to how the June 3, 2011 employment incident affected appellant's right shoulder condition had no probative value, as it was based on an inaccurate factual and medical history.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish 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 FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while 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.[3] 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.[4]

In order to determine whether an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components that must be considered conjunctively. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident that is alleged to have occurred.[5] An employee has not met his or her burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[7]

The medical evidence required to establish causal relationship is generally rationalized medical opinion 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.[8] Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[9]

ANALYSIS

OWCP accepted that the employment incident of June 3, 2011 occurred at the time, place, and in the manner alleged. The issue is whether appellant sustained an injury as a result of the June 3, 2011 employment incident. The Board finds that appellant has not met her burden of proof to establish an injury causally related to the June 3, 2011 employment incident. Appellant has not submitted sufficient medical evidence supporting that the June 3, 2011 employment incident caused or contributed to a diagnosed medical condition.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[5] *Gary J. Watling*, 52 ECAB 278 (2001).

[6] *S.N.*, Docket No. 12-1222 (issued August 23, 2013); *Tia L. Love*, 40 ECAB 586, 590 (1989).

[7] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[8] *Solomon Polen*, 51 ECAB 341 (2000).

[9] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

The emergency room notes from June 3, 2011 do not address any injury to the right arm/shoulder or diagnose any medical condition. As such they lack probative value.[10]

In his December 7, 2011 treatment note, Dr. Swymn reported that appellant was a mail carrier with a long history of right shoulder pain. While he provided an assessment of right rotator cuff tear, he did not mention the June 3, 2011 employment incident or provide an opinion as to whether this condition was due to the June 3, 2011 employment incident. The Board has found that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[11]

Similarly, the March 13, 2012 operative report and the March 28, 2012 treatment note from Dr. Dickson failed to mention the June 3, 2011 employment incident or provide an opinion on whether appellant's right rotator cuff tear was causally related to the June 3, 2011 employment incident, those reports are of limited probative value on the issue of causal relationship.[12]

In his April 25, 2012 and October 1, 2013 letters, Dr. Swymn discussed an original shoulder injury on July 2, 2004 and a subsequent injury on June 3, 2011. He opined that it was within reason that her injury could have caused her rotator cuff tear. However, this opinion is not definitive, but is speculative in nature, as Dr. Swymn did not indicate the specific injury to which he related the rotator cuff tear condition. Additionally, he did not provide a detailed discussion of any possible shoulder conditions resulting from the July 2, 2004 employment injury and whether those conditions were exacerbated by the June 3, 2011 employment injury. Without explaining how physiologically the act of falling on June 3, 2011 caused or contributed to the diagnosed condition, Dr. Swymn's diagnosis of rotator cuff tear is of limited probative value.[13] Therefore, his April 25, 2012 and October 1, 2013 letters are insufficient to establish a medical diagnosis in connection with the injury.

In his November 24, 2014 report, Dr. Swymn indicated that appellant had an injury on June 3, 2011 when she fell and landed on her right shoulder. He stated that her arm was in a position that was abducted, which can give a contusion versus a tear of the rotator cuff secondary to the fact that the tendon can hit on the acromion and cause pain. Dr. Swymn noted appellant's course of medical treatment and noted that she subsequently had a wreck while at work in July, which he described. While he provided an explanation as to how the mechanism of injury would cause a rotator cuff tear, he again did not identify which work injury he was referring to in his medical report. Additionally, Dr. Swymn has an inaccurate medical history as he reversed the timeline of when appellant's work injuries occurred. He indicated that she had a fall in "June" and was then subsequently involved in a motor vehicle accident in "July." However, the evidence reflects that appellant's motor vehicle accident occurred in July. While Dr. Swymn later opined that, both of those work incidents could have caused her rotator cuff tear, he

[10] *Supra* note 8.

[11] *R.E.*, Docket No. 10-0679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007).

[12] *See supra* note 9.

[13] *See Lee R. Haywood*, 48 ECAB 145 (1996).

indicated that she probably had her rotator cuff tear initially with her fall in June 2011 and then possibly exacerbated it or made it worse by her wreck in July. It is well established that medical reports must be based on a complete and accurate factual and medical background, and medical opinions based on an incomplete or inaccurate history are of little probative value.[14] Thus, this report is insufficient to establish appellant's claim.

In his March 12, 2012 partial progress note, Dr. Burchfield reported that appellant had chronic recurrent shoulder pain with acute exacerbations caused by her job at the employing establishment. While he provided an assessment of thrombocytopenia and rotator cuff rupture, he did not provide a rationalized medical opinion relating a condition to the June 3, 2011 employment incident.[15] In his April 9, 2012 letter, Dr. Burchfield indicated that appellant sustained a traumatic hyperextension injury of the right shoulder on July 2, 2004 while delivering mail. He also noted that appellant presented documentation which supported an exacerbation of her injury as she passed out due to heat stroke while at the employing establishment on June 3, 2011. However, Dr. Burchfield does not specify what condition was exacerbated or how the June 3, 2011 fall exacerbated any preexisting shoulder condition. A well-rationalized opinion is particularly warranted when there is a history of preexisting condition.[16] Rather, he generally opined that appellant had an injury which could easily have been caused while delivering mail in July 2004. Dr. Burchfield provided no discussion of the role her preexisting shoulder condition, if any, may have played in relation to a new shoulder condition. In his September 12, 2012 letter, he indicated that appellant required corrective surgery due to the effect of the repetitive arm and shoulder movements of her position, which prevented resolution of the initial injury sustained on July 2, 2004. However, Dr. Burchfield does not mention the June 3, 2011 employment incident or any effects sustained therefrom. Because his medical reports do not address how the June 3, 2011 employment incident caused or aggravated a right shoulder condition, these reports are of limited probative value and are insufficient to establish that the June 3, 2011 employment incident caused or aggravated a specific injury.[17]

Appellant was treated by Dr. Curtis, a chiropractor, for right shoulder pain following the July 2, 2004 employment incident. Dr. Curtis did not diagnose a subluxation of the spine and did not provide x-rays demonstrating such a subluxation of the spine. The Board thus finds that he does not qualify as a physician under FECA.[18]

[14] *Douglas M. McQuaid*, 52 ECAB 382 (2001).

[15] *See Linda I. Sprague*, 48 ECAB 386, 389-90 (1997).

[16] *M.B.*, Docket No. 16-884 (issued September 8, 2016).

[17] *Id.*

[18] 5 U.S.C. § 8101(2) provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary. *See Merton J. Sills*, 39 ECAB 572, 575 (1988); *P.R.*, Docket No 14-1007 (issued August 13, 2014).

Other evidence submitted by appellant included a November 21, 2011 treatment note from a nurse practitioner. However, the Board has held that treatment notes signed by a nurse, physical therapist, or a physician assistant are not considered medical evidence as these providers are not considered physicians under FECA.[19]

The remainder of the medical evidence of record , including reports of diagnostic testing, is insufficient to establish the claim as it fails to provide an opinion on causal relationship between appellant's job, the June 3, 2011 employment incident, and her diagnosed conditions.[20]

On appeal, counsel argues that the probative evidence was nit-picked and not given a proper analysis. As discussed above, OWCP properly found that appellant has not established a causal relationship between the June 3, 2011 employment incident and her diagnosed condition. None of the medical evidence appellant submitted constitutes rationalized medical evidence, based upon a specific and accurate history of employment conditions, which are alleged to have caused or exacerbated her medical condition.

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference of causal relation.[21] An award of compensation may not be based on surmise, conjecture, speculation, or on the employee's own belief of causal relation. To establish a firm medical diagnosis and causal relationship, appellant must submit a physician's report in which the physician reviews those factors of employment alleged to have caused her condition and, taking these factors into consideration, as well as findings upon examination and her medical history, explain how these employment factors caused or aggravated any diagnosed condition, and present medical rationale in support of his opinion.[22]

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 an injury on June 3, 2011.

[19] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2).

[20] *L.L.*, Docket No. 16-896 (issued September 13, 2016).

[21] *Daniel O. Vasquez*, 57 ECAB 559 (2006).

[22] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 10, 2016 is affirmed.

Issued: December 13, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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