United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 16-0147**
	)	**Issued: June 17, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Little Rock, AR, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 2, 2015 appellant filed a timely appeal from an October 6, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 met his burden of proof to establish a consequential bilateral shoulder condition causally related to his accepted conditions.

FACTUAL HISTORY

This case has previously been before the Board on appeal. The facts and the circumstances as outlined in the prior Board decisions are incorporated herein by reference. The relevant facts are set forth below.

[1] 5 U.S.C. § 8101 *et seq.*

On October 27, 2008 OWCP accepted that appellant, then a 51-year-old letter carrier, developed carpal tunnel syndrome, bilateral lateral epicondylitis, and permanent aggravation of right elbow osteoarthritis as a result of the repetitive movements required by his employment duties. He stopped work on September 29, 2008 and returned to full-time light duty on March 16, 2009. Appellant continued to receive medical treatment for his accepted conditions and receive medical benefits.[2]

In a letter dated April 16, 2013, appellant requested that OWCP expand his claim to accept bilateral shoulder conditions. He stated that over the past several months he experienced increasing pain and soreness in his shoulders, especially his right shoulder, and needed steroid shots for relief. Appellant explained that because of his elbow and hand conditions, he used his shoulders more to do his work, which caused injury. He believed that his work at the employing establishment exacerbated and worsened the overall condition of his body. Appellant noted that he did not perform other activities that heightened his soreness or pain, and he was not involved in any sport or athletic activities.

Appellant received medical treatment from Dr. Robert E. Holder, a Board-certified family practitioner, for complaints of right shoulder pain. In an April 24, 2013 report, Dr. Holder related that appellant experienced pain in his right shoulder when he raised his arms to shoulder height. Examination of appellant's right shoulder revealed moderate tenderness in the greater tuberosity and mild-to-moderate tenderness along the long head of the biceps. Dr. Holder observed that circulation was intact with normal pulses and no edema, range of motion was full without pain. He further reported no swelling or edema and normal pulses. Acromioclavicular (AC) joint compression test and AC joint distraction tests were negative. Cross shoulder adduction, Hawkin's test, Neer's test, and impingement sign were positive. Upon examination of the left shoulder, Dr. Holder observed normal inspection, palpation, range of motion, muscle strength and tone, and stability. He diagnosed shoulder pain, rotator cuff syndrome, and impingement syndrome. Dr. Holder reported that based on x-ray examination appellant had AC joint osteoarthritis and impingement. He recommended a magnetic resonance imaging (MRI) scan and cortisone injection.

On May 14, 2013 appellant underwent a right shoulder MRI scan with Dr. Chintan Desai, a Board-certified diagnostic radiologist. He observed mild T2 hyperintense signals within the substance of supraspinatus tendon, consistent with tendinosis and moderate fibro-osseous capsular hypertrophy with marrow edema at the contiguous articular margins. Dr. Desai diagnosed supraspinatus tendinosis, AC joint arthrosis, and superior labrum anterior posture type 1 superior labral tear.

OWCP referred appellant's claim, along with the statement of accepted facts and medical record, to an OWCP medical adviser to determine whether appellant's claim should be expanded to include a bilateral shoulder condition. In a July 19, 2013 report, Dr. Daniel D. Zimmerman, a Board-certified internist and the medical adviser, reviewed appellant's medical records and noted that appellant first mentioned problems with his right shoulder in a February 24, 2009 physical

[2] On May 29, 2009 appellant filed a claim for a schedule award (Form CA-7). OWCP granted a schedule award of four percent permanent impairment of the left arm and six percent permanent impairment of the right arm. It granted an additional schedule award on August 15, 2011 for seven percent impairment of the right arm.

therapy record. He pointed out that medical records from March 3, 2010 to August 8, 2012 from Dr. Wesley Cox, a Board-certified orthopedic surgeon, did not mention shoulder pain. Dr. Zimmerman noted that there was no medical opinion of record as to whether appellant's shoulder pain was work related. He reported that there was no medical rationale from a physician to indicate how a bilateral shoulder condition could be consequential to appellant's accepted conditions. Dr. Zimmerman concluded that OWCP should not accept a bilateral shoulder condition related to appellant's employment injury.

In the July 31, 2013 report, Dr. Holder related appellant's continued complaints of right shoulder pain. He reported that appellant's right shoulder had improved, but impingement was still positive bilaterally. Dr. Holder noted that appellant's right elbow lateral epicondylitis tested positive today, but no significant changes justified additional intervention. He recommended that appellant continue to work with modifications.

In a decision dated August 29, 2013, OWCP denied appellant's claim for bilateral shoulder conditions finding insufficient medical evidence to establish causal relationship to his employment injury.

On September 30, 2013 OWCP received appellant's request for reconsideration. Appellant requested that it expand his claim to include bilateral shoulder tendinitis. He noted that he asked Dr. Cox to answer OWCP's questions regarding causal relationship and he believed that Dr. Cox's response was clear that he sustained a work-related injury.

In a September 20, 2013 report, Dr. Cox noted that he had treated appellant for several years for bilateral elbow tendinitis and bilateral shoulder impingement and tendinitis. He opined that due to the repetitive nature of appellant's work and the significant elbow tendinitis for which he treated appellant there was clear evidence of "overuse and adjusted use which has led to his bilateral shoulder tendinitis."

By decision dated October 17, 2013, OWCP denied modification of the August 29, 2013 denial decision. Appellant filed an appeal to the Board.

In a decision dated April 8, 2014, the Board affirmed the denial of appellant's bilateral shoulder claim finding insufficient evidence to establish that he sustained a consequential bilateral shoulder condition causally related to factors of his employment.[3]

On August 18, 2014 OWCP received appellant's request for reconsideration. Appellant stated that he brought the April 8, 2014 decision for Dr. Cox to review and was enclosing Dr. Cox's response.

In an August 8, 2014 medical report, Dr. Cox noted that he had treated appellant for many years for work-related injuries of his bilateral extremities. He reported that appellant's bilateral elbow injuries had been approved for a workers' compensation claim. Dr. Cox explained that it was impossible for someone with appellant's elbow pain and dysfunction to carry out the regular duties of his occupation at the employing establishment without making

[3] Docket No. 14-0198 (issued April 8, 2014).

necessary adjustments in shoulder positioning and function. He related that he reviewed appellant's job description regarding repetitive activities of lifting, pulling, pushing, and the demands of his upper extremity. Dr. Cox reported that, with the frequency and duration of appellant's adjustments, he would correlate appellant's shoulder pain directly to the adjustments needed for appellant to perform his duties with his elbow dysfunction. He opined that appellant's shoulder issues were directly related to appellant's workers' compensation injuries.

By decision dated February 2, 2015, OWCP denied modification of the April 8, 2014 denial decision. Appellant filed another appeal to the Board.

On July 9, 2015 the Board set aside and remanded the February 2, 2015 decision for further development. The Board determined that Dr. Zimmerman had not reviewed all the medical evidence of record, specifically Dr. Cox's August 8, 2014 medical report. The Board remanded the case for referral to an OWCP medical adviser for further review.[4]

Following the Board's decision, OWCP referred appellant's case, along with Dr. Cox's August 8, 2014 report, back to Dr. Zimmerman to determine whether the medical evidence established that appellant sustained a consequential bilateral shoulder condition as a result of his accepted employment injury.

In an August 31, 2015 report, Dr. Zimmerman opined that, based on all of the medical records in the file, appellant did not sustain consequential bilateral shoulder conditions. He reviewed Dr. Cox's August 8, 2014 report and noted that Dr. Cox believed that appellant's shoulder issues were related to his repetitive work duties of lifting, pulling, and pushing and his accepted bilateral upper extremity conditions. Dr. Zimmerman pointed out that Dr. Cox did not explain the activities appellant performed at work, and did not provide specific information about the amount, frequency, and weight of lifting, pulling, and pushing required by his job. He explained that a generic description of "workers' compensation injuries" could not be used to support any work-related bilateral shoulder condition. Dr. Zimmerman further noted that Dr. Cox's reference of shoulder "issues" was not a valid diagnosis. He concluded that there was nothing in appellant's file to establish that he sustained a bilateral shoulder condition as a result of his accepted conditions.

By decision dated October 6, 2015, OWCP denied appellant's claim for a consequential bilateral shoulder condition based on the opinion of Dr. Zimmerman.

LEGAL PRECEDENT

The Board has held that, if a member weakened by an employment injury contributes to a later injury, the subsequent injury will be compensable as a consequential injury, if the further medical complication flows from the compensable injury, so long as it is clear that the real operative factor is the progression of the compensable injury.[5]

[4] Docket No. 15-0783 (issued July 9, 2015).

[5] *S.M.*, 58 ECAB 166 (2006); *Raymond A. Nester*, 50 ECAB 173, 175 (1998).

A claimant bears the burden of proof to establish a claim for a consequential injury.[6] As part of this burden, he or she must present rationalized medical opinion evidence showing causal relationship.[7] The opinion of the physician must be based on a complete factual and medical background of the employee, 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 or employment injury.[8]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.[9]

ANALYSIS

The Board finds that the case is not in posture for decision.

Appellant alleges that he sustained consequential bilateral shoulder conditions as a result of his accepted upper extremity conditions. In support of his claim, appellant submitted various reports from Dr. Cox dated September 20, 2013 and August 8, 2014. Dr. Cox opined that due to the repetitive nature of appellant's work and the significant elbow tendinitis there was clear evidence of "overuse and adjusted use" which contributed to his bilateral shoulder tendinitis. He further explained that, upon reviewing appellant's employment duties, which involved repetitive actions of lifting, pushing, and pulling with the upper extremities, it was impossible for someone with appellant's elbow dysfunction to carry out these duties without making necessary adjustments in shoulder positioning and function. Dr. Cox concluded, therefore, that appellant's shoulder issues were directly related to his accepted elbow conditions.

In a July 19, 2013 report, Dr. Zimmerman, an OWCP medical adviser, disagreed with Dr. Cox's opinion. He indicated that there was nothing in the medical record to support that appellant sustained a consequential bilateral shoulder condition related to his accepted elbow conditions. In another August 3, 2015 report, Dr. Zimmerman further explained that Dr. Cox's "generic description of workers' compensation injuries" was insufficient to support a work-related bilateral shoulder condition. He concluded that there was nothing in appellant's file to establish that he sustained a bilateral shoulder condition as a result of his accepted conditions.

The Board finds that, although Drs. Cox and Zimmerman provided opinions regarding causal relationship, neither of the physicians supported their opinions with probative medical rationale.

[6] *J.A.*, Docket No. 12-603 (issued October 10, 2012).

[7] *L.B.*, Docket No. 16-0092 (issued March 24, 2016).

[8] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

[9] *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

It is well established that proceedings under FECA are not adversarial in nature, and while the employee has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence in order to see that justice is done.[10] Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[11]

The Board finds that, although the opinions of Dr. Cox and Dr. Zimmerman are of insufficient probative value to determine whether or not appellant sustained a consequential bilateral shoulder condition as a result of his employment injury, they are of sufficient value to warrant further development of the evidence.[12] Accordingly, the case will be remanded to OWCP for further development of the medical evidence. On remand, OWCP should further develop the medical evidence by preparing a statement of accepted facts and referring appellant for a second opinion examination in accordance with its procedures.[13] After such further development, as it deems necessary, it should issue an appropriate *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

[10] *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[11] *See B.C.*, Docket No. 15-1853 (issued January 19, 2016).

[12] The Board notes that the opinions of Dr. Cox and Dr. Zimmerman are also of insufficient probative value to create a conflict in medical opinion.

[13] OWCP's procedures provide that, if a medical adviser provides an opinion which is not strong enough to constitute a conflict with the opinion of the treating physician, but is of sufficient value to warrant additional action, OWCP may refer the claim for a second opinion examination. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluation Medical Evidence*, Chapter 2.810.8(h) (September 2010).

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this opinion of the Board.

Issued: June 17, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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