

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

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**J.E., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Woodville, WI, Employer**

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**Docket No. 16-0509  
Issued: September 16, 2016**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

COLLEEN DUFFY KIKO, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 22, 2016 appellant, through counsel, filed a timely appeal from a November 2, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP) Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that appellant submitted additional evidence after OWCP rendered its November 2, 2015. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c)(1).

## ISSUE

The issue is whether appellant met her burden of proof to establish a left shoulder injury causally related to an October 4, 2011 employment incident.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as outlined in the prior Board decision are incorporated herein by reference. The relevant facts are set forth below.

On August 17, 2012 appellant, then a 53-year-old part-time flexible sales and services distribution associate, filed a traumatic injury claim (Form CA-1) alleging that she developed a left shoulder injury in the performance of duty. She alleged that on October 4, 2011 she injured her shoulder as she was handling a bent shelf. Appellant did not stop work at that time, but later stopped work subsequent to undergoing surgery. In an August 27, 2012 statement, she noted that her claim was filed after the date of injury because her supervisor was hesitant to file the claim. Appellant also stated that she waited until January 4, 2012 to receive medical treatment because the employing establishment was shorthanded and that there was no coverage during the holiday season.

In a February 1, 2012 report, Dr. Lance Weagant, a Board-certified family practitioner, noted that appellant was injured on October 4, 2011 when she attempted to bring a cart down from a shelf. He advised that appellant reinjured her shoulder in mid-December when she had a fall at work.

In July 13 and September 26, 2012 reports, Dr. Jason Dieterle, a Board-certified osteopath specializing in orthopedic surgery, diagnosed left shoulder impingement syndrome with partial thickness tear of the rotator cuff and acromioclavicular arthrosis. He noted that appellant injured herself when she pulled a cart at work. In a March 12, 2013 addendum report, Dr. Dieterle clarified the history of injury from jamming her shoulder while pulling on a mail cart to holding onto a shelf on a cart that gave way and jammed her shoulder.

By decision dated September 26, 2012, although OWCP found that the October 4, 2011 incident occurred as alleged, it denied the claim as fact of injury causally related to the work incident was not established. An OWCP hearing representative affirmed this decision on May 1, 2013 and OWCP denied modification on April 17, 2014.

Appellant appealed to the Board. In a decision dated February 4, 2015, the Board affirmed OWCP's April 17, 2014 decision, finding that appellant failed to meet her burden of proof to establish a left shoulder condition causally related to the October 4, 2011 employment incident. The Board found that the medical evidence of record was insufficient to establish that the work incident caused appellant's left shoulder condition.<sup>5</sup>

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<sup>4</sup> Docket No. 14-1502 (issued February 4, 2015).

<sup>5</sup> *Id.*

On August 18, 2015 appellant, through counsel, requested reconsideration and submitted a July 14, 2015 report from Dr. Dieterle wherein he noted that he had provided several reports regarding appellant's condition and advised that his current report was intended to specifically address the pathophysiological process of the injury. He advised that when a jamming motion occurs there is a reflex response where the muscle of the rotator cuff contracts. Dr. Dieterle explained that if the arm is not allowed the arc of motion that the muscle is intending, the force directed to the tendon can cause the tendon to pull away from the bone causing a rotator cuff tear. He opined that this is what occurred in appellant's case when she jammed her shoulder. Dr. Dieterle indicated that she likely tore her rotator cuff or at least exacerbated her condition when the tendon pulled away from the bone secondary to the jamming event as described.

By decision dated November 2, 2015, OWCP denied modification of its prior decision.

### **LEGAL PRECEDENT**

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim by the weight of reliable, probative, and substantial evidence,<sup>6</sup> including that he or she is an "employee" within the meaning of FECA and that he or she filed his or her claim within the applicable time limitation.<sup>7</sup> The employee must also establish that he or she sustained an injury in the performance of duty as alleged and that his or her disability for work, if any, was causally related to the employment injury.<sup>8</sup>

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. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.<sup>9</sup>

Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on 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 factors identified by the claimant.<sup>10</sup>

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<sup>6</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

<sup>7</sup> *R.C.*, 59 ECAB 427 (2008).

<sup>8</sup> *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>9</sup> *T.H.*, 59 ECAB 388 (2008).

<sup>10</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

## ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a left shoulder condition causally related to the October 4, 2011 employment incident.

OWCP has accepted an employment incident of October 4, 2011. The issue is whether appellant's left shoulder condition resulted from the October 4, 2011 employment incident. The Board finds that appellant did not meet her burden of proof to establish causal relationship between the condition for which compensation is claimed and the employment incident.

In his July 14, 2015 report, Dr. Dieterle advised that when a jamming motion occurs there is a reflex response where the muscle of the rotator cuff contracts. He noted that if the arm is not allowed the arc of motion that the muscle is intending, the force directed to the tendon can cause the tendon to pull away from the bone causing a rotator cuff tear. Dr. Dieterle opined that this is what occurred in appellant's case when she jammed her shoulder and that this likely tore her rotator cuff or at least exacerbated her condition. He used the term likely in describing the connection between the work incident and the diagnosed condition. The Board has held that medical opinions that are speculative or equivocal in character are of diminished probative value.<sup>11</sup> In reports previously considered by the Board, Dr. Dieterle explained that appellant was injured as she was holding onto a shelf on a cart that gave way and jammed her shoulder; however, the mechanism of injury described in this current report does not mention the shelf giving way and jamming appellant's shoulder. The Board has held that medical opinions based on an inaccurate or incomplete history have diminished probative value.<sup>12</sup> As Dr. Dieterle failed to explain how holding onto a shelf that gave way would result in appellant's shoulder injury, his report is insufficient to discharge appellant's burden of proof.

Appellant submitted no other rationalized medical evidence addressing how the October 4, 2011 work incident caused or contributed to a diagnosed medical condition. Consequently, she has submitted insufficient medical evidence to establish her claim. The need for medical reasoning, or rationale, is particularly necessary where appellant did not file her claim for over 10 months, did not seek medical treatment for three months after the claimed injury, and sustained an intervening injury in December 2011. Because appellant has not provided such medical opinion evidence in this case, she has failed to meet 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.

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<sup>11</sup> See *S.E.*, Docket No. 08-2214 (issued May 6, 2009) (finding that opinions such as the condition is probably related, most likely related or could be related are speculative and diminish the probative value of the medical opinion); *Cecilia M. Corley*, 56 ECAB 662, 669 (2005) (finding that medical opinions which are speculative or equivocal are of diminished probative value).

<sup>12</sup> See *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

**CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish a left shoulder injury causally related to an October 4, 2011 employment incident.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 2, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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