

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

R.O., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Los Angeles, CA, Employer**

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**Docket No. 16-1516
Issued: August 28, 2017**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

COLLEEN DUFFY KIKO, Judge

ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 19, 2016 appellant, through counsel, filed a timely appeal from a May 31, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 right shoulder injury as a consequence of his accepted left elbow injury.

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

This case was previously before the Board.³ On November 1, 2004 appellant, then a 37-year-old correctional officer, injured his left upper extremity pushing and pulling food carts. OWCP initially accepted his traumatic injury claim (Form CA-1) for left elbow strain. Appellant underwent left elbow surgery on July 16, 2008 and again on February 17, 2009. OWCP accepted a recurrence of disability with respect to the latter surgery, and on April 30, 2010, it expanded his claim to include left elbow loose bodies and left cubital tunnel syndrome (ulnar nerve lesion). On June 7, 2010 appellant underwent left elbow cubital tunnel release and anterior transposition, which OWCP authorized.⁴

In late November 2011, appellant reportedly aggravated his left elbow and injured his right shoulder when he fell while performing physical therapy exercises at home. He submitted a March 22, 2012 narrative statement indicating that on November 25, 2011 at approximately 6:00 p.m. he was at home in the kitchen “performing the physical therapy prescribed counter top push-ups exercise” on a stationary table. Appellant attached an illustration of a “PUSH UP PLUS” exercise routine and stated that the “immediate effects following the fall while doing the counter top push-ups exercise included left elbow pain, excruciating right shoulder pain, [and] soreness in [his] right bicep and left elbow.”

By decision dated April 30, 2012, OWCP denied appellant’s claim for a right shoulder consequential injury. Appellant requested review by a hearing representative. In an October 19, 2012 decision, a representative of OWCP’s Branch of Hearings and Review affirmed the April 30, 2012 decision. Appellant requested reconsiderations.

Appellant requested a schedule award. In a January 14, 2014 decision, OWCP granted eight percent permanent impairment of the left upper extremity.

In a January 23, 2014 decision, OWCP denied modification of its October 19, 2012 decision regarding appellant’s claimed right shoulder consequential injury. Appellant appealed the January 14 and 23, 2014 decisions to the Board.

By decision dated November 10, 2014, the Board affirmed the January 14, 2014 schedule award decision and set aside the January 23, 2014 decision regarding appellant’s claimed right shoulder consequential injury. With respect to the issue of consequential injury, the Board found that his home exercise regimen was part of his treatment following surgery for left cubital tunnel release. The Board remanded the case for further evidentiary development regarding the issue of whether appellant sustained an “employment-related right shoulder injury during approved at

³ Docket No. 14-0835 (issued November 10, 2014).

⁴ Beginning June 7, 2010, OWCP paid appellant wage-loss compensation for temporary total disability. It placed him on the periodic compensation rolls effective November 21, 2010. Because the employing establishment was unable to accommodate appellant’s left upper extremity restrictions, OWCP referred him to vocational rehabilitation. Effective December 16, 2012, OWCP reduced his wage-loss compensation based on his ability to earn weekly wages of \$360.00 in the constructed position of user support analyst. The December 13, 2012 loss of wage-earning capacity determination was subsequently affirmed by the Branch of Hearings and Review on April 3, 2013. Effective June 29, 2013, appellant elected to receive benefits from the Office of Personnel Management. As such, OWCP terminated his FECA wage-loss compensation.

home physical therapy sessions, which included the performance of counter top push-up exercises.” The facts and circumstances of the case, as set forth in the Board’s prior decision, are incorporated herein by reference.

On remand, OWCP sent a letter dated December 31, 2014 to appellant’s treating physician Dr. Hannah H. Kim, an occupational medicine specialist, requesting a supplemental report in order to address the issue of whether self-guided push-ups as described by appellant were part of the physical therapy regimen for his accepted left arm conditions and, if so, how push-ups benefited an upper arm condition post three surgical interventions. It further requested a rationalized medical opinion regarding which right shoulder diagnosis should be accepted as consequential to the accepted injuries. Dr. Kim did not respond.

By decision dated July 8, 2015, OWCP denied appellant’s claim for a consequential injury finding that the medical evidence of record was insufficient to establish that his right shoulder condition was a consequence of his accepted left elbow injury.

On July 15, 2015 counsel requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review. A telephonic hearing was held on March 15, 2016. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

In response, appellant submitted a March 31, 2016 report from Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, who noted that appellant had undergone physical therapy in November 2011 for his left elbow and he injured his right shoulder while performing counter top push-ups as part of the recuperative therapy. Dr. Tauber reported that appellant was experiencing frequent pain in his right shoulder and arm. He diagnosed status post left elbow surgery with consequential right shoulder injury with right shoulder subscapularis tendon tear and biceps tendon subluxation. Dr. Tauber found that appellant’s self-guided push-ups were verified by treating physicians at Kaiser Permanente as being part of his postoperative exercise regimen. He opined that appellant’s right shoulder injury was consequential to his left upper extremity conditions.

By decision dated May 31, 2016, OWCP’s hearing representative affirmed the prior decision. She found that the evidence of record did not support that the therapy/shoulder exercises were medically directed or monitored at the time of the claimed consequential injury.

LEGAL PRECEDENT

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employees own intentional conduct.⁵ A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship.⁶ Rationalized medical evidence is

⁵ See *S.S.*, 59 ECAB 315 (2008).

⁶ See *Charles W. Downey*, 54 ECAB 421 (2003).

evidence which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.⁷

ANALYSIS

The Board finds that this case is not in posture for decision and must be remanded for further development.

OWCP accepted appellant's November 1, 2004 traumatic injury for left elbow strain, left elbow loose bodies, and left cubital tunnel syndrome (ulnar nerve lesion). Appellant underwent several left elbow surgical procedures, including a June 7, 2010 cubital tunnel release, and anterior transposition, which OWCP authorized. He claimed that on November 25, 2011 at approximately 6:00 p.m. he was at home in the kitchen "performing the physical therapy prescribed counter top push-ups exercise" on a stationary table, when he fell and injured his right shoulder. In its November 10, 2014 decision, the Board remanded the case to OWCP for further evidentiary development regarding the issue of whether appellant sustained an employment-related right shoulder injury during approved at home physical therapy sessions, which included the performance of counter top push-up exercises.

OWCP sent a December 31, 2014 letter to Dr. Kim, appellant's treating physician, requesting a supplemental report in order to address the issue of whether self-guided push-ups as described by appellant were part of the physical therapy regimen for his accepted left arm conditions and, if so, how push-ups benefited an upper arm condition post three surgical interventions. It further requested a rationalized medical opinion regarding which right shoulder diagnosis should be accepted as consequential to the accepted injury. Dr. Kim did not respond.

Thereafter, appellant submitted a March 31, 2016 report from Dr. Tauber who asserted that appellant was undergoing physical therapy in November 2011 for his left elbow area when he injured his right shoulder area while performing counter top push-ups as part of the therapy. Dr. Tauber reported that appellant was experiencing frequent pain in his right shoulder and arm and diagnosed status post left elbow surgery with consequential right shoulder injury with right shoulder subscapularis tendon tear and biceps tendon subluxation. He found that appellant's self-guided push-ups were verified by treating physicians at Kaiser Permanente as being part of his postoperative exercise regimen and opined that his right shoulder injury was consequential to his left upper extremity conditions.

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.⁸ It failed to develop the evidence as instructed by the Board. When Dr. Kim failed to respond to request for her opinion, appellant was not referred to a second opinion physician for an examination to

⁷ *Id.*

⁸ See *Phillip L. Barnes*, 55 ECAB 426 (2004); see also *Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); *William J. Cantrell*, 34 ECAB 1233 (1993); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

determine whether he sustained a right shoulder injury as a consequence of physical therapy for his accepted left elbow injury.⁹

For these reasons, the May 31, 2016 decision will be set aside and the case remanded to OWCP to refer appellant to an appropriate Board-certified specialist for a second opinion regarding whether he sustained an employment-related right shoulder injury during approved at home physical therapy sessions, which included the performance of counter top push-up exercises. Following such development as OWCP deems necessary, it shall issue an appropriate merit decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case remanded for further development consistent with this decision.

Issued: August 28, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.7(e) (September 2010); *J.G.*, Docket No. 09-1714 (issued April 7, 2010). If a reply is not received from the treating physician within the specified time frame (usually 30 to 45 days), or if the reply is equivocal, OWCP should consider a second opinion. *Id.*