

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

D.B., Appellant

and

**U.S. POSTAL SERVICE, SULPHUR SPRINGS
POST OFFICE, Tampa, FL, Employer**

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**Docket No. 17-0500
Issued: August 21, 2017**

Appearances:
Michael Welsh, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 3, 2017 appellant, through his representative, filed a timely appeal from an October 13, 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof to establish a left shoulder condition causally related to factors of his federal employment.

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 has previously been before the Board on appeal.³ On the first appeal, the Board reviewed the January 23, 2015 nonmerit decision regarding the issue of whether OWCP properly denied appellant's reconsideration request as untimely filed and failing to demonstrate clear evidence of error.⁴

In a decision and order dated August 14, 2015, the Board found that the most recent request for reconsideration was timely filed, set aside OWCP's nonmerit January 23, 2015 decision, and remanded the case for review of the merits.⁵

In the second appeal, the Board on July 14, 2016, affirmed an October 19, 2015 OWCP merit decision, finding that appellant had not met his burden of proof to establish his occupational disease claim.⁶ The Board found that the reports of appellant's attending physicians, including Dr. Samy F. Bishai, a Board-certified orthopedic surgeon, had not established a left shoulder injury causally related to the implicated employment factors. Additionally, the Board found that Dr. Bishai's reports were insufficient to establish a consequential right shoulder injury. Following the Board's July 14, 2016 decision, appellant submitted an additional report from Dr. Bishai dated August 16, 2016. He noted work-related loss of range of motion and pain in appellant's left shoulder and arm, as well as a consequential injury to the right shoulder due to overuse from his left shoulder condition. Dr. Bishai diagnosed internal derangement of the left shoulder, posterior superior subluxation of the humeral head of the left shoulder, chondromalacia posterior glenoid left shoulder, complex tears of the posterior glenoid labrum, left shoulder impingement syndrome, distal supraspinatus tendinopathy left shoulder, effusion left shoulder joint, internal derangement of the right shoulder, rotator cuff tear right shoulder, and cervical disc syndrome with degenerative disc disease and radiculopathy to the upper extremities. He provided a detailed description of appellant's employment duties of carrying a mail satchel, lifting parcels weighing up to 70 pounds, as well as lifting trays of mail weighing up to 20 pounds. Dr. Bishai also reviewed diagnostic testing. He opined that appellant's work activities caused and contributed to his left shoulder conditions.

Dr. Bishai noted that lifting at work caused a strain on the muscle fibers of all of the shoulder joint muscles and that the strain and pull of the muscles caused the development of pain in the left shoulder joint. He further opined that lifting also caused appellant to develop tendinitis in the supraspinatus tendon, the tendons of the rotator cuff muscles, and the shoulder

³ On October 4, 2012 appellant, then a 56-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed pain in his neck, and both shoulders, and arms due to factors of his federal employment. He first became aware of his conditions on July 10, 2009 and first attributed these conditions to his federal employment on September 19, 2012. Appellant described his employment duties of casing mail and lifting parcels weighing up to 70 pounds. He noted that his route had 626 deliveries and that he performed dismounted deliveries from his postal vehicle for a portion of his route. Appellant also parked his vehicle to walk and deliver mail from a satchel weighing up to 35 pounds for 55 residential deliveries

⁴ Docket No. 15-0666 (issued August 14, 2015).

⁵ Docket No. 15-0666 (issued August 14, 2015).

⁶ Docket No. 16-0210 (issued July 14, 2016).

muscles which lead to the development of scar tissue formation as well as the development of degenerative changes in the acromioclavicular (AC) joint and glenohumeral joint. Dr. Bishai reported, “The heavy weight of wearing a satchel weighing 35 [pounds] on his left shoulder has caused him to suffer from a direct force acting to downwardly pull the shoulder and the muscles and the joint and the force exerted by having to wear the satchel for many hours a day and sometimes all day has caused the tendons to be attenuated and caused them to develop further injury to the muscle fibers leading to the development of scar tissue and the development of tendinitis and impingement in the shoulder.” He concluded that appellant’s left shoulder conditions were due to his work-related activities. Dr. Bishai also opined that appellant had developed a consequential right shoulder injury due to his work-related left shoulder condition as appellant had been unable to use his left shoulder and was required to “overuse” his right shoulder and arm in order to perform his work activities.

Appellant, through his representative, requested reconsideration on August 30, 2016 based on Dr. Bishai’s August 2016 report.

By decision dated October 13, 2016, OWCP denied modification of its prior decision, finding that Dr. Bishai had not demonstrated accurate knowledge of the date of appellant’s injury, which he listed as July 10, 2009, that he had not performed diagnostic testing, discussed prior injuries, nor demonstrated knowledge of treatment or diagnostic tests prior to his treatment of appellant. It also found that Dr. Bishai simply opined that appellant’s right shoulder injury was due to the left shoulder condition claimed and did not provide accurate factual and medical history.

LEGAL PRECEDENT

OWCP’s regulations define an occupational disease as “a condition produced by the work environment over a period longer than a single workday or shift.”⁷ To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.

A medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.⁸ Medical rationale includes a physician’s detailed opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment activity. The opinion of the physician must be based on a complete factual and medical background of the claim, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship

⁷ 20 C.F.R. § 10.5(q).

⁸ *T.F.*, 58 ECAB 128 (2006).

between the diagnosed condition and specific employment activity or factors identified by the claimant.⁹ The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.¹⁰

ANALYSIS

The Board finds that the case is not in posture for decision. Following the Board's July 14, 2016 decision, Dr. Bishai submitted an August 16, 2016 report. He explained the process by which carrying a mail satchel would "attenuate" appellant's left shoulder tendons causing injury to the muscle fibers which would lead to the development of scar tissue and contribute to the development of tendinitis and impingement in the left shoulder. Dr. Bishai also explained that lifting at work caused a strain on the muscle fibers of all of the shoulder joint muscles and that the strain and pull of the muscles caused the development of pain in the left shoulder joint. He determined that lifting also caused appellant to develop tendinitis which lead to the development of scar tissue formation as well as the development of degenerative changes in the AC joint and glenohumeral joint. Dr. Bishai has explained a link between appellant's duties of lifting mail and carrying a mail satchel, injury to muscle fibers, the development of scar tissue, and finally appellant's diagnosed conditions of tendinitis and degenerative joint changes in the left shoulder. The Board finds that Dr. Bishai's report lends support to a causal relationship between appellant's employment duties and his diagnosed conditions. His report contains an accurate description of appellant's employment duties, objective findings, diagnostic studies, and an opinion discussing the mechanism of injury.¹¹ While the discussion of the mechanism of injury contained in the report is insufficient to meet appellant's burden of proof to establish his claim, it is sufficient to require further development of the medical evidence of record.¹²

The case will therefore be remanded to OWCP for referral to a second opinion physician in the appropriate field of medicine to determine whether appellant's left shoulder condition is causally related to the implicated factors of his federal employment and, if so, whether his claimed right shoulder condition is a consequential injury of the left shoulder condition.¹³ After such development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

⁹ *A.D.*, 58 ECAB 149 (2006).

¹⁰ *M.L.*, Docket No. 16-1808 (issued February 21, 2017); *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

¹¹ *Douglas M. Bahl*, Docket No. 02-0007 (issued May 1, 2002).

¹² *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

¹³ The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable injury. *See K.S.*, Docket No. 16-0404 (issued April 11, 2016); *see also Charles W. Downey*, 54 ECAB 421 (2003).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 13, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: August 21, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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