United States Department of Labor
Employees' Compensation Appeals Board

R.E., Appellant	)	
and	)	**Docket No. 16-1568**
	)	**Issued: February 9, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Portland, ME, Employer	)	

Appearances:
Patricia K. Turley, Esq., for the appellant[1]
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 27, 2016 appellant, through counsel, filed a timely appeal from a June 8, 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof to establish total disability for the period March 22 to April 4, 2014 due to his accepted employment injuries.

[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.*

On appeal counsel contends that appellant had sustained a consequential injury and that there was an unresolved conflict of medical opinion evidence.

FACTUAL HISTORY

On August 9, 2013 appellant, then a 68-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained right arm injuries on July 29, 2013 in the performance of duty. He reported that he stopped to make a delivery, closed the mailbox door, and began to drive off, but the door reopened. Appellant reached to close the door as his vehicle rolled forward and his arm was caught. He sustained bruising from his wrist to his elbow and his elbow was twisted. Appellant stopped work on August 3, 2013.

Appellant submitted a series of notes from Emily Byrne, a nurse practitioner. Dr. Janusz Porowski, Board-certified in emergency medicine, examined appellant on August 2, 2013. He noted that appellant reported bumping his right elbow against the car door while delivering mail. Dr. Porowski found redness and edema in appellant's forearm. He noted that appellant denied right clavicle, shoulder, or wrist pain. Dr. Porowski diagnosed developing cellulitis extending from the distal right arm to the distal forearm. On August 4, 2013 appellant was hospitalized due to cellulitis of the right arm. Dr. Matthew K. Rapp, an internist, described appellant's history as carrying a mailbag and banging his elbow on a mailbox. He noted that appellant developed swelling and progressive redness for which he sought outpatient treatment. Appellant's symptoms failed to improve and he was hospitalized for intravenous antibiotics. Dr. Francis Cook, a family practitioner, examined appellant on August 22, 2013 and reported that he had contused his elbow at work and developed forearm cellulitis. He diagnosed contusion and cellulitis with continued elbow soreness.

OWCP accepted appellant's claim on September 4, 2013 for contusion of the right elbow and cellulitis of the right elbow and forearm. It authorized wage-loss compensation benefits through March 21, 2014.

Dr. Cook examined appellant on September 13, 2013 and diagnosed contusion and cellulitis. He noted that appellant had a contusion followed by severe cellulitis, that he was in a sling, and that he had developed loss of range of motion and persistent pain.

Appellant submitted notes dated October 11, 24 and November 18, 2013 from Dr. Susan Olsen, a general practitioner. Dr. Olsen described appellant's history of injury noting that he was delivering mail, closed the door of the mailbox, and the door reopened. Appellant tried to close the mailbox by leaning out of his car window, but his arm jammed in the box door and he lost his footing on his car brake. The car rolled forward, scraping his forearm on the closed box door, as well as pulling his elbow and shoulder into forced rear extension. Dr. Olsen noted that appellant's treatment for cellulitis, but found that his shoulder pain had not been addressed. Appellant indicated that, due to focus on his elbow and pain medication, he did not realize or mention his shoulder condition. Dr. Olsen also noted that he tried to pull on his chainsaw recently and sustained severe right shoulder pain. Appellant reported that he had lost range of motion in his right shoulder and was experiencing significant pain. Dr. Olsen noted that he could not currently perform his preinjury work duties as he could not raise his right arm over his head to case mail. She also noted that appellant was currently unable to reach out the window to

deposit mail into boxes with his right arm. Appellant attributed the change in his right shoulder condition to his July 29, 2013 work incident and stated that his right shoulder was fine prior to his incident. Dr. Olsen opined that the degree of motion and pain in the right shoulder was "not congruent with delivering mail." She diagnosed right elbow injury with resultant cellulitis resolved, right elbow and shoulder strain with residual pain, and immobility.

On October 21, 2013 appellant underwent a right shoulder magnetic resonance imaging (MRI) scan, which demonstrated a supraspinatus tendon chronic rupture with obliteration of the humero-acromial space, subscapularis tendon partial tear, intraarticular biceps tendon rupture, glenoid labrum tear, and degenerative changes. Dr. Olsen in a November 18, 2013 report noted that the supraspinatus tear was preexisting as it was visible on appellant's 2008 MRI scan. However, she also reported several new changes in appellant's right shoulder visible on MRI scan including a biceps rupture, labral tear, and subscapularis tear.

Dr. Mahlon A. Bradley, a Board-certified orthopedic surgeon, examined appellant on November 4, 2013. He described appellant's July 29, 2013 work incident as catching his right shoulder on a mailbox as he lost footing on his car brake. Appellant extended and abducted his shoulder forcefully and sustained elbow and shoulder pain. Dr. Bradley noted that, although appellant denied a prior right shoulder injury, he had undergone an MRI scan of the right shoulder in 2008, which showed a complete supraspinatus tendon tear. He reviewed appellant's October 21, 2013 right shoulder MRI scan and found that there was "tremendous fat atrophy of the supraspinatus indicating this is a very old tear." Dr. Bradley provided a 2008 MRI scan, which demonstrated moderate degenerative changes in the acromial joint with a chronic rupture of the supraspinatus tendon with muscle retraction and superior migration of the humeral head. He opined that this was the exact same tear with chronic nature and high level retraction on both MRI scans. Dr. Bradley opined that appellant had an exacerbation of his previously torn right rotator cuff documented in 2008. He found that appellant had a flare-up of a previous injury.

OWCP's medical adviser reviewed the medical records on January 3, 2014 and opined that appellant's right shoulder condition was not aggravated by his July 29, 2013 employment injury. He noted that appellant did not report his right shoulder pain until October 11, 2013 after trying to start his chainsaw. OWCP's medical adviser noted that the contemporaneous medical records did not mention subjective complaints by appellant or objective findings relative to a right shoulder injury.

On March 7, 2014 OWCP referred appellant for a second opinion with Dr. Daniel O'Neill, a Board-certified orthopedic surgeon. In a report dated March 21, 2014 Dr. O'Neill described appellant's history as injuring his right forearm and elbow by putting some mail in a box and hitting the accelerator accidentally. He described appellant's 2008 shoulder pain with rehabilitation. Dr. O'Neill noted the medical treatment for the July 2013 work injury, including elbow treatment, until October 2013. He provided results on examination and diagnosed a previous rotator cuff tear and current rotator cuff arthropathy. Dr. O'Neill agreed that appellant had a temporary aggravation of his right shoulder condition in October 2013, but opined that this "clearly was not related to the work incident on July 29, 2013" noting appellant's shoulder pain while starting his chainsaw. He found that appellant had no residuals of his accepted work injury, had reached maximum medical improvement, and could return to work in any capacity,

where he would not be raising his shoulder past 30 degrees. This restriction was based on the non-accepted rotator cuff tear.

Dr. John T. Nutting, a Board-certified orthopedic surgeon, examined appellant on March 31, 2014, reviewed appellant's MRI scan, and diagnosed rotator cuff tear arthropathy.

Beginning April 8, 2014, appellant filed claims for compensation (Form CA-7) requesting reimbursement for leave without pay from March 22 through April 18, 2014. In a letter dated April 22, 2014, OWCP requested that he provide additional medical evidence supporting disability for the claimed period. It allowed 30 days for a response.

On May 20, 2014 counsel argued that appellant's use of a sling following his elbow injury resulted in aggravation of his underlying right shoulder condition. She requested that Dr. Cook respond to a series of questions on May 15, 2014. There were handwritten notes written on a copy of counsel's letter, noting that most of appellant's attention was directed at the cellulites and not the shoulder.

Appellant provided form reports dated February 21 and May 5, 2014 from Dr. Cook, which diagnosed contusion elbow, cellulitis, and rotator cuff tear shoulder. He also submitted notes from physician assistants, dated from January 9 through July 31, 2014. Appellant returned to part-time light-duty work on July 2, 2014.

By decision dated September 30, 2014, OWCP denied appellant's claim for compensation beginning March 22, 2014.

In an undated note, Dr. Nutting indicated that he was treating appellant for his right shoulder pain and that he could return to full duty on October 2, 2014.

Dr. Michael J. Rowan, an orthopedic surgeon, examined appellant on December 18 2014. He noted that appellant had successfully rehabilitated his right shoulder to a functional level. Dr. Rowan released appellant from medical care.

On March 6, 2015 counsel requested reconsideration of the September 30, 2014. She described appellant's work activities as a rural carrier and his right shoulder treatment in 2008 including a cortisone injection, which ended his pain. Counsel resubmitted Dr. Bradley's November 3, 2013 report, Dr. Olsen's 2013 notes, Dr. Nutting's March 31, 2014 note, appellant's October 21, 2013 MRI scan, hospital notes from Drs. Rapp and Porowski, physician assistant notes, as well as the handwritten unsigned additions to her May 15, 2014 letter to Dr. Cook. She also resubmitted portions of notes and reports from Dr. Cook dated August 22, as well as February 21, and May 5, 2014. Counsel also submitted new notes from Dr. Cook dated September 16, October 18, and November 26, 2013. In his September 16, 2013 note, Dr. Cook indicated that appellant continued to have elbow and right shoulder pain. On October 18, 2013 he provided appellant's work restrictions. In his February 21, 2014 note, Dr. Cook found that appellant's elbow was still sore, but that his main area of concern was his right shoulder. He diagnosed rotator cuff disorder and actinic keratosis. On November 26, 2013 Dr. Cook noted appellant's continued elbow and right shoulder pain. He reported that appellant had a previous history of rotator cuff issues which were advanced. Dr. Cook diagnosed diabetes mellitus, rotator cuff dysfunction, and elbow contusion.

On March 13, 2015 counsel resubmitted the 2008 MRI scan and argued that there were changes in appellant's tendons not visible until the 2013 MRI scan.

By decision dated April 14, 2015, OWCP denied modification of its prior decisions denying appellant's claim for compensation from March 22 to April 4, 2014 finding that he had not submitted medical opinion evidence to establish total disability during this period due to his accepted employment incident.

On April 12, 2016 counsel requested reconsideration. She argued that appellant's right shoulder condition was aggravated by the July 29, 2013 work incident. Counsel argued that appellant sustained new tears to his right shoulder as demonstrated on MRI scans in 2008 and 2013. She noted that Drs. Cook, Bradley, Olsen, and Nutting supported causal relationship between appellant's July 29, 2013 employment incident and his ongoing right shoulder conditions. Counsel referenced a January 8, 2014 report from Dr. Nutting.[3] She further disagreed with the findings and conclusions of Dr. O'Neill. Counsel resubmitted previous evidence including reports from Dr. Nutting, Dr. Cook, Dr. Bradley, Dr. Porowski, Dr. Rapp, and Dr. Olsen.

By decision dated June 8, 2016, OWCP reviewed the merits of its prior decisions and denied modification of its prior decision denying appellant's claim for compensation from March 22 through April 4, 2014. It noted that the medical evidence of record failed to establish a causal relationship between his accepted employment incident and his diagnosed right shoulder condition.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[4] The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.[5]

Whether a particular injury causes an employee to be disabled from employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative, and substantial medical evidence.[6] Findings on examination are generally needed to support a physician's opinion that an employee is disabled from work. When a

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[3] The record does not contain a January 8, 2014 signed by Dr. Nutting. The language that counsel references is included in a January 9, 2014 note from Mr. Gibbs, a physician assistant, which is not electronically or otherwise signed by Dr. Nutting.

[4] *G.T.,* 59 ECAB 447 (2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] 20 C.F.R. § 10.5(f); *see e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury, but no loss of wage-earning capacity).

[6] *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[7] The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[8]

Causal relationship is a medical issue and the medical evidence required to establish causal relationship rationalized medical evidence.[9] Rationalized medical evidence is medical evidence which includes a physician's detailed medical 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, 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.[10] Neither the fact that a disease or condition manifest 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.[11]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish total disability from March 22 to April 4, 2014 due to his accepted employment injuries.

OWCP accepted that appellant sustained a traumatic injury on July 29, 2013 when he attempted to reclose a mailbox and his vehicle moved. Appellant initially reported only a right elbow and forearm injury. Dr. Porowski examined appellant on August 2, 2013 and noted explicitly that appellant denied right clavicle, shoulder, or wrist pain. Appellant did not report his right shoulder pain until October 11, 2013, when Dr. Olsen described appellant's employment incident to include hyperextension of his shoulder.

OWCP's second opinion physician, Dr. O'Neill examined appellant on March 21, 2014 and described appellant's history as injuring his right forearm and elbow by putting some mail in a box and hitting the accelerator accidentally. He reviewed appellant's 2008 MRI scan and right shoulder condition. Dr. O'Neill found that appellant had a previous rotator cuff tear and currently had rotator cuff arthropathy. He found that appellant could return to work, but the non-accepted rotator cuff tear condition warranted restrictions. Dr. O'Neill opined that appellant had

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[7] *Id.*

[8] *Id.*

[9] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[10] *Leslie C. Moore*, 52 ECAB 132 (2000).

[11] *Dennis M. Mascarenas*, 49 ECAB

a temporary aggravation of his right shoulder condition in October 2013, but determined that this "clearly was not related to the work incident on July 29, 2013" noting that his shoulder pain began while he was starting his chainsaw. This report is based on a proper history of injury including appellant's preexisting right shoulder condition for which he received medical treatment in 2008 and his 2013 nonemployment-related incident of starting his chainsaw. Dr. O'Neill noted that appellant failed to report a shoulder injury until October 11, 2013, over two months after the July 29, 2013 employment incident and after the intervening event of starting his chainsaw. The Board finds that this well-reasoned report is entitled to the weight of the medical evidence.

Dr. Olsen submitted a series of notes beginning on October 11, 2013 attributing appellant's ongoing right shoulder condition to his July 29, 2013 employment incident and to starting his chainsaw at home. She had not been initially aware of his 2008 rotator cuff tear. It was not until November 18, 2013, that Dr. Olsen reported that appellant's supraspinatus tear was preexisting as it was visible on his 2008 MRI scan. She also reported several new changes in his right shoulder visible on MRI scan including a biceps rupture, labral tear, and subscapularis tear. While Dr. Olsen opined more than two months after the fact, that she attributed appellant's current shoulder condition and total disability to his work injury, she did not provide medical rationale explaining how and why she believed that the accepted employment incident was the cause of the shoulder condition rather than the intervening incident of starting the chainsaw. Without medical reasoning, her reports are insufficient to establish total disability due to employment injuries for the period claimed.[12]

Dr. Bradley began treating appellant on November 4, 2013 and described appellant's July 29, 2013 work injury as catching his right shoulder on a mailbox as he lost footing on his car brake. He reported that during this incident appellant had extended and abducted his shoulder forcefully resulting in both elbow and shoulder pain. Dr. Bradley reviewed both the 2008 MRI scan which showed a complete supraspinatus tendon tear and the October 21, 2013 MRI scan. He found that the exact same tear was shown on both. Dr. Bradley opined that the July 29, 2013 incident exacerbated the previously torn right rotator cuff documented in 2008. He found that appellant had a flare-up of a previous injury. The Board finds that this report is also insufficient to meet appellant's burden of proof to establish total disability due to his accepted work injuries. Dr. Bradley did not provide an opinion on disability, include a history of appellant's intervening chainsaw incident, offer a clear opinion that the diagnosed "exacerbation" was due to the July 2013 employment incident, or provide any medical reasoning in support of his opinions.[13]

Appellant also submitted a series of reports from Dr. Cook. Dr. Cook initially treated appellant beginning on August 22, 2013 for an elbow contusion and resulting forearm cellulitis. It was not until November 26, 2013 that he mentioned appellant's right shoulder pain. Dr. Cook provided a history of prior rotator cuff injury, but did not describe the chainsaw incident mentioned by Dr. Olsen. These notes are insufficient to meet appellant's burden of proof to establish employment-related disability. Dr. Cook also did not provide an opinion on disability,

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[12] *Supra* note 10; *see also N.G.,* Docket No. 16-1421 (issued December 12, 2016).

[13] *Id*.

a complete history of injury, a clear opinion that appellant's right shoulder condition was related to his employment, or provide medical reasoning to support appellant's claims.[14]

Appellant also submitted several reports from physician assistants. Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered physicians as defined under FECA.[15] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[16] As such these reports are not medical evidence and cannot establish appellant's claim for disability compensation.

On appeal counsel argues that the rotator cuff injury was a consequential injury of the accepted condition. However, OWCP has not ruled on that issue and thus is not ripe for review by the Board.[17]

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 his burden of proof to establish total disability for the period March 22 to April 4, 2014 due to his accepted employment injuries.

[14] *Id*.

[15] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[16] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

[17] 20 C.F.R. § 501.2(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 9, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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