United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 17-0119**
	)	**Issued: July 11, 2017**
DEPARTMENT OF VETERANS AFFAIRS, HEART OF TEXAS HEALTH CARE NETWORK, Arlington, TX, Employer	)	

Appearances:
Edward L. Daniel, 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 October 25, 2016 appellant, through her representative, filed a timely appeal from a September 27, 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 over the merits of the case.

ISSUE

The issue is whether appellant has met her burden of proof to establish a right shoulder injury causally related to an August 27, 2014 employment incident.

[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

On September 17, 2014 appellant, then a 50-year-old management analyst, filed a traumatic injury claim (Form CA-1), alleging that on August 27, 2014, when opening the car door to exit a vehicle parked on an incline, she pulled the door with extra strength and hyperextended her right shoulder. She was diagnosed with right rotator cuff tear. Appellant did not stop work at that time. The employing establishment noted that she was in the performance of duty when injured.

By letter dated September 25, 2014, OWCP advised appellant of the type of evidence needed to establish her claim, particularly requesting that she submit a physician's reasoned opinion addressing the relationship of her claimed condition and specific employment factors. It noted that medical evidence must be submitted by a qualified physician and nurses and physician assistants are not considered qualified physicians under FECA.

In an October 22, 2014 statement, appellant indicated that while on a work-related business trip she opened a van door and injured her right shoulder. She submitted a statement from W.S., a coworker, dated October 20, 2014, who witnessed the injury to appellant's shoulder on August 27, 2014 while exiting a government vehicle. W.S. indicated that they were performing logistics inspections at Kerrville Hospital and, while appellant exited the vehicle and opened the sliding rear door of the van, she injured her right shoulder. Appellant submitted a September 8, 2014 magnetic resonance imaging (MRI) scan of the right shoulder which revealed a full-thickness tear in the anterior supraspinatus tendon and significant degenerative changes of the acromioclavicular joint.

In a September 15, 2014 report, Dr. Charles T. Whittenburg, an osteopath, treated appellant for right shoulder pain which began two weeks prior. Physical examination of the right shoulder revealed intact neurovascular examination, intact sensory and motor examination, and painful range of motion on abduction and external rotation with associated weakness. Dr. Whittenburg noted an MRI scan of the right shoulder revealed a full-thickness tear. He diagnosed complete rotator cuff rupture, shoulder bursa, tendon disorders, and rotator cuff disorders. Dr. Whittenburg recommended surgical repair.

In an October 2, 2014 letter to Dr. Whittenburg, the employing establishment indicated that appellant filed a workers' compensation claim for a workplace injury which occurred on August 27, 2014. Appellant reported that she hyperextended her right shoulder when she exited a government van parked on an incline. She indicated that she used extra strength on the door due to the vehicle being on a downward slope. The employing establishment requested Dr. Whittenburg comment on whether the work factors of August 27, 2014 listed above were the direct cause appellant's current condition. If Dr. Whittenburg determined that they were not the direct cause then did the August 27, 2014 incident aggravate, precipitate, or accelerate any preexisting nonwork-related conditions.

On October 21, 2014 Dr. Whittenburg responded to the employing establishment's October 2, 2014 letter and opined that he was unable to state whether appellant's injury was directly caused by the work factors, but in his professional opinion her right shoulder injury could have been caused by a series of events that occurred on August 27, 2014. He indicated

that he could not address any preexisting conditions since she had not been an established patient until September 15, 2014.

In a decision dated October 31, 2014, OWCP denied appellant's claim because the evidence or record was insufficient to establish that the claimed medical condition was causally related to the accepted work-related events.

On November 6, 2014 appellant requested an oral hearing which was held on July 6, 2015.

Appellant submitted a November 11, 2014 report from Dr. Paul Chong, a Board-certified orthopedist, who treated her for right shoulder pain. She had reported that, on August 27, 2014, she forcefully pulled open a van door and her right arm was forced into external rotation. Appellant was diagnosed with a right rotator cuff tear and underwent right shoulder arthroscopic surgery on October 7, 2014. Dr. Chong noted physical examination of the right shoulder revealed no obvious deformity or infection, pain on range of motion, intact sensation, and positive impingement sign. He noted an x-ray of the right shoulder revealed a type two acromion and acromioclavicular degenerative joint disease. Dr. Chong diagnosed right shoulder pain, impingement, status post full rotator cuff tear repair, and possible strain. He opined that, based on appellant's history, she sustained an injury which led to her having significant symptoms of pain and weakness in the right shoulder. Dr. Chong noted that MRI scan findings revealed an acute full-thickness rotator cuff tear.

Appellant was treated by a nurse practitioner on March 2, 2015 for pain in her limb. She reported traveling for work on August 27, 2014 and hyperextending her right shoulder. Appellant noted that an MRI scan of the right shoulder revealed a full-thickness tear and she underwent surgery. The nurse practitioner diagnosed pain in the limb and muscle pain.

On May 5, 2015 appellant was treated by Dr. Marvin Van Hal, a Board-certified orthopedist, for bilateral shoulder pain. She had reported performing an onsite inspection at work and upon exiting the vehicle she grabbed the release of the van door and extremely rotated and elevated her arm. Appellant suffered right shoulder pain, underwent right shoulder surgery on October 7, 2014, and continued to report residual symptoms of right and left shoulder pain. Physical examination revealed limited range of motion of bilateral shoulders, positive Phalen's and Tinel's sign of the right wrist, and intact motor strength in the upper extremity. Dr. Van Hal noted an x-ray of the left shoulder revealed tendinosis of supraspinatus and spurring in the acromioclavicular joint area. He diagnosed status post right shoulder surgery for rotator cuff tear and probable left shoulder rotator cuff tear. Dr. Van Hal opined that within reasonable medical probability the mechanism of injury of pulling upward and externally rotating her arm could exacerbate and aggravate an underlying degenerative shoulder condition. He indicated that the work incident described would be a "probable source" of the right shoulder rotator cuff injury documented by Dr. Whittenburg. In a report dated June 23, 2015, Dr. Van Hal explained that when he indicated that appellant's work incident was a "probable source" of her right shoulder rotator cuff injury, he was unable to confirm this unequivocally, however, within a reasonable medical probability the right shoulder rotator cuff injury did appear to be causally related to the work incident based on his education, training, and experience in dealing with shoulder issues.

In a decision dated September 9, 2015, an OWCP hearing representative affirmed the October 31, 2014 decision.

On August 18, 2016 appellant requested reconsideration. She submitted an October 17, 2007 report from Dr. Thomas Arthur Small, an internist, who treated her for right shoulder pain. Physical examination of the right shoulder revealed tenderness on palpation of the acromioclavicular joint, deltoid muscle, trapezius muscle, and rhomboid muscle, crepitus on palpation, and decreased range of motion. Dr. Small diagnosed tendinitis of the right shoulder. Reports from Dr. David H. Rice, a Board-certified pulmonologist, dated October 26, 2007 to January 23, 2008, noted appellant's treatment for narcolepsy.

Appellant submitted a July 11, 2011 report from Dr. Jeffrey J. Fisher, a Board-certified family practitioner, who treated her for sciatic nerve pain on and off for the past two years and right shoulder pain. She had reported a history of tendinitis. Dr. Fisher diagnosed back pain and shoulder joint pain. In an August 8, 2016 report, he noted that appellant had been treated several times, but had not mentioned that her shoulder condition was work related until after the March 2, 2015 office visit. Dr. Fisher noted that, pursuant to her description, he believed the incident that occurred on August 27, 2014 aggravated her preexisting nonwork-related right shoulder condition that resulted in the arthroscopic rotator cuff repair performed on October 7, 2014. A July 15, 2011 lumbar spine x-ray was normal.

Appellant was treated by Dr. Geetha N. Shivakumar, a Board-certified psychiatrist, on May 16, 2012, for subsyndromal post-traumatic stress disorder. Dr. Shivakumar noted that appellant served in the Air Force from February 24, 1988 to February 29, 2008 and was honorably discharged.

Appellant submitted physical therapy reports from August 19, 2013. She was also treated by a nurse practitioner on September 3, 2014 and February 5, 2015 for chronic tendinitis of the right shoulder, left shoulder pain, and bilateral wrist pain.

In a decision dated September 27, 2016, OWCP denied modification of its September 9, 2015 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

[3] *Supra* note 2.

[4] *Gary J. Watling*, 52 ECAB 357 (2001).

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.[5]

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.[6]

ANALYSIS

It is undisputed that, on August 27, 2014, appellant opened a car door to exit a government vehicle parked on an incline. However, the Board finds that she has failed to submit sufficient medical evidence to establish that this work incident caused or aggravated her diagnosed right shoulder condition.

Appellant submitted reports from Dr. Whittenburg dated September 15 and October 21, 2014 who diagnosed complete rotator cuff rupture, shoulder bursae and tendon disorders, and rotator cuff disorders. On October 21, 2014 Dr. Whittenburg opined that he was unable to state that appellant's condition was a direct cause of the work factors, but in his professional opinion her right shoulder injury "could have" been caused by a series of events that occurred on August 27, 2014. He indicated that he could not address preexisting conditions since appellant was not an established patient until September 15, 2014.

Similarly, on May 5, 2015 appellant was treated by Dr. Van Hal who diagnosed status post arthroscopic rotator cuff repair of the right shoulder and acromioplasty on October 7, 2014. Dr. Van Hal opined that within reasonable medical probability that the mechanism of injury of pulling upward and externally rotating her arm "could" exacerbate and aggravate an underlying degenerative condition of her shoulder. He indicated that the work incident described could be a "probable source" of the right shoulder rotator cuff injury. Likewise, in a June 23, 2015 report, Dr. Van Hal indicated that he "could not confirm unequivocally"; however, within a reasonable medical probability the right shoulder rotator cuff injury did appear to be causally related to the work incident based on his education, training and experience in dealing with shoulder issues.

The Board notes that Dr. Whittenburg and Dr. Van Hal's reports provide some support for causal relationship, but are insufficient to establish that the claimed right shoulder rotator cuff tear was causally related to appellant's employment duties. In Dr. Van Hal's October 21, 2014 report, Dr. Whittenburg opined that he could not state that her injury was a direct cause of the worker factors, but it "could have" been caused by a series of events that occurred. Similarly, he opined that the work incident described would be a "probable source" of the right shoulder

[5] *T.H.*, 59 ECAB 388 (2008).

[6] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

rotator cuff injury, but he "could not confirm unequivocally." However, at best, these reports provide only speculative support for causal relationship as the physicians qualify their support by noting that appellant's employment "could have" caused his condition or was a "probable source" of the injury. Dr. Whittenburg and Dr. Van Hal provided no medical reasoning to support their opinions on causal relationship.[7] Therefore, these reports are insufficient to meet appellant's burden of proof.

Appellant submitted a November 11, 2014 report from Dr. Chong who diagnosed right shoulder pain, impingement, and full-thickness rotator cuff tear status post arthroscopic repair. She had reported that on August 27, 2014, after pulling open a van door forcefully, her right arm was forced into external rotation. Dr. Chong opined that, based on appellant's history, she sustained a work injury leading to significant symptoms of pain and weakness in the right shoulder. Similarly, in an August 8, 2016 report, Dr. Fisher opined that, pursuant to her report, he believed the incident that occurred on August 27, 2014 aggravated her preexisting nonwork-related right shoulder condition that resulted in the arthroscopic rotator cuff repair performed on October 7, 2014. However, Drs. Chong and Fisher merely repeat the history of injury as reported by appellant without providing their own opinion regarding whether appellant's condition was work related.[8] To the extent that they are providing their own opinion, Drs. Chong and Fisher failed to provide a rationalized opinion regarding the causal relationship between appellant's right shoulder condition and the factors of employment believed to have caused or contributed to such condition.[9] Therefore, these reports are insufficient to meet appellant's burden of proof.

Other medical reports either predate the claimed injury or do not specifically address whether appellant's employment activities caused or aggravated a diagnosed medical condition. These reports are of limited probative value.[10]

Appellant also submitted reports from a nurse practitioner and a physical therapist. The Board has held that treatment notes signed by nurse practitioners[11] and physical therapists have no probative value as these providers are not considered physicians under FECA.[12] Thus, the

[7] Medical opinions that are speculative or equivocal in character are of diminished probative value. *D.D.*, 57 ECAB 734 (2006).

[8] *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); *see A.M.*, Docket No. 10-205 (issued October 5, 2010) (a physician's opinion must be independent from a claimant's belief regarding causal relationship).

[9] *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

[10] *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[11] *Paul Foster*, 56 ECAB 208 (2004) (a nurse practitioner is not a "physician" pursuant to FECA).

[12] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

treatment records from a physical therapist and a nurse practitioner are of no probative medical value in establishing appellant's claim.

An award of compensation may not be based on surmise, conjecture, or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated, or aggravated by his employment is sufficient to establish causal relationship. Causal relationship must be established by rationalized medical opinion evidence.[13] As appellant failed to submit such evidence, he has not met his burden of proof.

Consequently, the Board finds that appellant has not submitted medical evidence sufficient to establish that appellant's work activities on August 27, 2014 caused or aggravated a diagnosed medical condition.

On appeal appellant, through her representative, asserts that OWCP improperly denied her claim noting that she believed she submitted sufficient evidence to establish that on August 27, 2014 her employment factors contributed to her right shoulder condition. The representative argues that it was not necessary for the employment injury by itself to have caused appellant's condition in order for it to be compensable. Rather, he referenced *Arnold Gustafson,*[14] and asserted that a person with a preexisting condition which was not disabling, but which becomes disabling because of aggravation related to employment is entitled to compensation.[15] In *Gustafson*, the employee asserted that he had a myocardial infarction and coronary condition causally related to emotional stress he experienced at work. The Board determined that a person, with a preexisting condition which is not disabling but which becomes disabling because of aggravation related to employment, regardless of the degree of such aggravation, the resulting disability is compensable.

In the case before us, however, appellant has failed to submit sufficient medical evidence establishing that her diagnosed right shoulder condition was caused or aggravated by her federal employment. She has not submitted a physician's rationalized report of causal relationship based upon an accurate history of employment conditions, which describes how the work incident on August 27, 2014 caused or aggravated her right shoulder condition. The Board notes that medical rationale on causal relationship must be established before reference to the preexisting right shoulder condition.[16]

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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[13] *See Dennis M. Mascarenas,* 49 ECAB 215 (1997).

[14] 41 ECAB 131 (1989).

[15] *Rudy C. Sixta, Jr.*, 44 ECAB 727-31 (1993); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

[16] *See J.M.*, 58 ECAB 478 (2007) (where the Board found that appellant did not meet his burden of proof in establishing a work-related right wrist condition where his physician provided only conclusory support for causal relationship; medical rationale was particularly necessary given that appellant injured his wrist while lifting luggage in private employment); *see also A.M., supra* note 8 (the need for reasoning or rationale is especially important where the claimant has a prior injury history involving the claimed condition).

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish a right shoulder injury causally related to the August 27, 2014 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 11, 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