United States Department of Labor
Employees' Compensation Appeals Board

E.W., Appellant **and** **DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Denver, CO, Employer**	)	**Docket No. 16-1729** **Issued: May 12, 2017**

Appearances:
Bernard Humbles, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 15, 2016 appellant, through her representative, filed a timely appeal from a May 12, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).[2]

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[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] Appellant also filed a timely request for oral argument in this case, pursuant to 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated March 1, 2017, the Board denied appellant's request for oral argument as oral argument would further delay issuance of a Board decision and not serve a useful purpose. *Order Denying Request for Oral Argument*, Docket No. 16-1729 (issued March 1, 2017).

Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether appellant met her burden of proof to establish a right shoulder injury causally related to her accepted factors of her federal employment.

FACTUAL HISTORY

On October 9, 2015 appellant, then a 52-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on March 1, 2015 she sustained cumulative trauma from repositioning a patient. She stopped work and first received medical care on March 1, 2015.

By letter dated October 28, 2015, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised of the factual and medical evidence needed and afforded 30 days to respond. OWCP provided a questionnaire for completion and requested she submit a response in order to substantiate the factual basis of her claim. It also noted that it was not clear if appellant was filing an occupational disease or traumatic injury and requested clarification on her claim. Appellant did not respond and no further evidence was received.

By decision dated December 2, 2015, OWCP denied appellant's claim finding that the evidence of record failed to establish fact of injury to support that the injury or event occurred as alleged. It noted that she failed to submit any evidence in support of her claim and did not respond to OWCP's October 28, 2015 questionnaire.

On December 7, 2015 appellant requested review of the written record before an OWCP hearing representative.

In an April 19, 2016 narrative statement, appellant responded to OWCP's questionnaire and described her employment duties as a nursing assistant. She explained that she was claiming an occupational disease claim as her work in a nursing home for over 10 years consisted of very hard physical work. Appellant reported that her duties involved handling geriatric patients and was often pushing, pulling, lifting, and turning patients over a period of time. She reported that she initially filed the workers' compensation claim incorrectly because the new nurse manager in her unit was not aware of the process. Appellant noted that she continued to have pain in her shoulder and a magnetic resonance imaging (MRI) scan revealed a rotator cuff tear requiring her to undergo surgery. She explained that the operation further revealed bursitis, a previously diagnosed condition. Appellant reported that she had no prior issues with her right shoulder and continued to experience a great deal of pain radiating down her arm.

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[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that appellant submitted additional evidence after OWCP rendered its May 12, 2016 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision and therefore, this additional evidence cannot be considered on appeal. 20 C.F.R. § 501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

In support of her claim, appellant submitted Kaiser Permanente Past Visit Information Summaries dated April 9 through October 5, 2015 documenting treatment for right shoulder pain, bilateral tendinitis of the rotator cuff, nontraumatic right rotator cuff tear, and impingement syndrome of the right shoulder.

In treatment notes dated January 26 through February 17, 2016, Jillian Ramer and Douglas Clark, licensed physical therapists, documented treatment for appellant's right shoulder.

In an August 15, 2015 diagnostic report, Dr. Margarita Sevilla, Board-certified in family medicine, reported that a right shoulder MRI scan revealed high grade partial bursal-sided tear of the supraspinatus tendon and mild rotator cuff tendinosis.

In a November 16, 2015 Family and Medical Leave Act (FMLA) health care provider form, Dr. Tyler Skaife, a Board-certified orthopedic surgeon, reported that he began treating appellant on September 10, 2015. He provided a diagnosis of right rotator cuff tear and reported that surgery was scheduled for January 19, 2016. Dr. Skaife explained that appellant would be unable to perform any kind of work during her postoperative period and would likely be incapacitated until April 12, 2016.

In a January 19, 2016 operative report, Dr. Skaife performed a right shoulder arthroscopy with rotator cuff repair and subacromial decompression. Postoperative examinations dated February 3 and 25, 2016 revealed normal findings.

By letter dated April 13, 2016, Dr. Skaife reported that appellant was initially examined by Dr. Sevilla on April 14, 2015. He reported that the pain appellant complained of for years was exacerbated in March 2015 from lifting patients and other care duties at work, reporting no discrete fall or trauma. Dr. Skaife provided findings on physical examination and review of diagnostic testing. He noted that a March 26, 2015 x-ray of the right shoulder revealed no fracture or dislocation. A July 23 and an August 12, 2015 MRI scan of the right shoulder revealed near full-thickness tear of anterior and mid supraspinatus on the bursal side of the tendon, as well as increased fluid signal within the subacromial space with an inferior facing osteophyte of the anterolateral acromion. Dr. Skaife diagnosed high grade partial thickness bursal-sided rotator cuff tear and subacromial impingement. He noted that after appellant was unresponsive to conservative measures she underwent surgery on January 19, 2016 for arthroscopic rotator cuff repair and subacromial decompression. Dr. Skaife reported that his most recent follow up revealed that she was improving her range of motion, but was not back to her preoperative baseline. He concluded that appellant's job duties involved patient care activities with lifting of patients, repetitive motion, and overhead motion which could aggravate a preexisting rotator cuff disease/pathology and subacromial impingement.

By decision dated May 12, 2016, OWCP's hearing representative affirmed the December 2, 2015 decision, as modified, finding that the evidence of record failed to establish that her diagnosed conditions were causally related to her accepted federal employment factors.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[5] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[6]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[7] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[8]

To establish a causal relationship between the condition, as well as any attendant disability claimed, and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[9] The opinion of the physician 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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[10]

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[5] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[6] *Michael E. Smith*, 50 ECAB 313 (1999).

[7] *Elaine Pendleton*, *supra* note 5.

[8] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish,* 46 ECAB 276, 279 (1994).

[9] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[10] *James Mack*, 43 ECAB 321 (1991).

ANALYSIS

OWCP accepted that as part of her employment duties appellant engaged in repetitive activities of pushing, pulling, lifting, and turning patients in her employment duties as a nursing assistant as alleged. It denied her claim, however, because the evidence of record failed to establish a causal relationship between those activities and her right shoulder injury. The Board finds that the medical evidence of record is insufficient to establish that appellant developed a right shoulder rotator cuff tear and subacromial impingement causally related to factors of her federal employment as a nursing assistant.

In support of her claim, appellant submitted treatment and operative reports dated November 16, 2015 through April 13, 2016 from Dr. Skaife, her treating physician. Dr. Skaife diagnosed right rotator cuff tear and subacromial decompression for which he performed a right shoulder arthroscopy on January 19, 2016. The Board finds that the reports of Dr. Skaife are not well rationalized and insufficient to establish appellant's occupational disease claim.

Dr. Skaife explained that appellant's job duties involved patient care activities with lifting of patients, repetitive motion, and overhead motion, which could aggravate a preexisting rotator cuff disease/pathology and subacromial impingement. The Board notes that Dr. Skaife's opinion on causation is speculative as he notes that appellant's employment duties could aggravate her preexisting condition without a firm conclusion that these duties did in fact cause or aggravate her injury.[11] To be of probative value, a physician's opinion on causal relationship should be one of reasonable medical certainty.[12] Furthermore, he attributes appellant's rotator cuff disease and subacromial impingement to a preexisting condition. Dr. Skaife reported that appellant complained of pain for years which was exacerbated in March 2015. However, he failed to provide a detailed medical history of her preexisting conditions or prior injuries related to the pain in her right shoulder. Moreover, Dr. Skaife failed to discuss whether her preexisting injury had progressed beyond what might be expected from the natural progression of that condition.[13] It is unclear if appellant's diagnosed conditions were caused or aggravated by her occupational employment duties, or were due to a preexisting condition, or to degenerative changes. A well-rationalized opinion is particularly warranted when there is a history of a preexisting condition.[14]

While Dr. Skaife did have some knowledge of appellant's employment duties, he failed to detail the number of hours per day spent performing each task and the frequency of the physical movements which appellant attributes to her injury. His statement on causation failed to provide a sufficient explanation as to the mechanism of injury pertaining to this occupational disease claim as alleged by appellant, namely, how repetitive pushing, pulling, lifting, and turning patients would cause or aggravate her right shoulder injury.[15] Without explaining how

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[11] *See Michael R. Shaffer*, 55 ECAB 339 (2004).

[12] *See Beverly R. Jones*, 55 ECAB 411 (2004).

[13] *R.E.*, Docket No. 14-868 (issued September 24, 2014).

[14] *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

[15] *S.W.*, Docket 08-2538 (issued May 21, 2009).

physiologically the movements involved in appellant's employment duties caused or contributed to her diagnosed conditions, his opinion on causal relationship is equivocal in nature and of limited probative value.[16]

The remaining medical evidence of record is also insufficient to establish appellant's claim. Dr. Sevilla's August 15, 2015 diagnostic report only interpreted imaging studies related to the right shoulder and provided no opinion on the cause of appellant's injury.[17] Without any mention of the repetitive employment duties, and any discussing causal relationship, his report is of limited probative value.[18]

The physical therapy reports documenting treatment of appellant's right shoulder are also insufficient to establish her claim. A physical therapist is not considered a physician as defined under FECA, and his opinion is of no probative value.[19]

The Board notes that if work-related exposures caused, aggravated, or accelerated appellant's condition, she is entitled to compensation.[20] However, an award of compensation may not be based on surmise, conjecture, speculation, or on the employee's own belief of causal relation.[21] Appellant's honest belief that her occupational employment duties caused her medical injury is not in question, but that belief, however sincerely held, does not constitute the medical evidence necessary to establish causal relationship.[22] As such, appellant has failed to meet her burden of proof.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish a right shoulder injury causally related to factors of her federal employment.

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[16] *See L.M.*, Docket No. 14-973 (issued August 25, 2014); *R.G.*, Docket No. 14-113 (issued April 25, 2014); *K.M.*, Docket No. 13-1459 (issued December 5, 2013); *A.J.*, Docket No. 12-548 (issued November 16, 2012).

[17] *D.H.*, Docket No. 11-1739 (issued April 18, 2012).

[18] *S.Y.,* Docket No. 11-1816 (issued March 16, 2012).

[19] 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *Roy L. Humphrey*, *supra* note 8. *See F.G.,* Docket No. 16-1482 (issued January 25, 2017) (physical therapists); *see also V.W.,* Docket No. 16-1444 (issued March 14, 2017) (physical therapists).

[20] *See Beth P. Chaput*, 37 ECAB 158, 161 (1985); *S.S.*, Docket No. 08-2386 (issued June 5, 2008).

[21] *D.D.,* 57 ECAB 734 (2006).

[22] *See B.H.,* Docket No. 16-1553 (issued March 27, 2017).

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 12, 2017
Washington, DC

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

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

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