

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

_____)	
E.C., Appellant)	
)	
and)	Docket No. 18-0780
)	Issued: October 11, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
New York, NY, Employer)	
_____)	

Appearances:
Stephen Larkin, for the appellant¹
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 March 3, 2018 appellant, through her representative, filed a timely appeal from a January 19, 2018 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.

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.*

ISSUE

The issue is whether appellant has established that OWCP should expand acceptance of her claim to include a supraspinatus tear of the left shoulder and bulging cervical discs.

FACTUAL HISTORY

On February 4, 2015 appellant, then a 56-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on January 20, 2015, while at work, she sustained a concussion when a fence fell striking the left side of her head. She stopped work on January 22, 2015. OWCP accepted the claim for neck sprain and a concussion without loss of consciousness. It paid appellant wage-loss compensation for total disability beginning March 11, 2015.

In a February 15, 2015 attending physician's report (Form CA-20), Dr. Deborah Eisen, specializing in critical care medicine, provided a history of appellant being hit on the head by an unsecured gait while moving mail on a deck. She diagnosed a concussion and cervical sprain/strain due to the employment activity.

A magnetic resonance imaging (MRI) scan study of the cervical spine, obtained on February 26, 2015, revealed bulging discs at C3 to C7, straightening of the cervical lordosis, and a chronic loss of height at C5 and C6.

Dr. Eisen, in an undated report received by OWCP on March 4, 2015, discussed appellant's work injury and noted that she complained of neck and radiating shoulder pain, headaches, and dizziness. She diagnosed a concussion, a cervical spine bulge, and cervical sprain/strain. Dr. Eisen related, "There are seven cervical vertebrae that are separated by discs that support the spinal cord. With axial compression to the spinal vertebrae, such as in this case with a blunt force to the head, the vertebrae get compressed putting pressure on the discs. When the contents (nucleus pulposus) get pressed together, this results in a cervical disc bulge." She advised that the "act of the gate hitting [appellant] in the head causing an acceleration-deceleration injury would result in a concussion with no loss of consciousness, a bulge to the cervical discs and a cervical sprain strain." Dr. Eisen advised that the diagnoses were also consistent with appellant's symptoms and the findings on examination.

An OWCP medical adviser reviewed the evidence on March 12, 2015 and related, "I do not believe the multiple bulging cervical discs between C3 and C7 seen on the MRI scan were due to the trauma of January 20, 2015. Bulging discs are seen on most MRI scans of the spine and are usually considered either normal or incidental findings. This is especially true when they are seen at multiple levels at one section of the spine, as in this case." The medical adviser recommended a second opinion examination.

By decision dated April 1, 2015, OWCP denied appellant's request to expand acceptance of her claim to include cervical disc bulges as causally related to the January 20, 2015 employment injury. It noted that an OWCP medical adviser had considered the request and found that the evidence did not establish that she sustained employment-related diagnoses other than a neck sprain and concussion without loss of consciousness.

OWCP subsequently received a January 22, 2015 report from the emergency room. Dr. Elizabeth Marilyn Franzek, who specializes in emergency medicine, obtained a history of appellant being struck by a fence post and subsequently experiencing dizziness and syncope. She noted that the fence was “too heavy to lift off [and] someone had to help her.” Dr. Franzek found that appellant likely had postconcussive syndrome.

On July 6, 2015 Dr. Eisen referred appellant for a left shoulder MRI scan. The MRI scan study, obtained on August 7, 2015, revealed a moderate full-thickness distal supraspinatus tendon tear with retraction of the tendon margin to the medial humeral head, narrowing of the acromioclavicular joint space, and spurring of the distal clavicle and distal acromion process.

In a report dated August 18, 2015, Dr. Eisen requested that OWCP expand acceptance of the claim to include a left shoulder condition. She noted that appellant was hit by a gate on her head and left side and that she could not “lift the gate off of herself.” At the time she initially sought treatment her physicians focused on her head rather than her shoulder. Dr. Eisen related, “In addition, when [appellant] told this office the history it was thought that the gate was too heavy to lift off of her rather than she was physically unable to lift the gate due to injuring her shoulder.” She related that examination findings showed a positive left supraspinatus test and Apley’s test and that the left shoulder MRI scan study showed a full-thickness distal supraspinatus tear.

OWCP referred appellant to Dr. Thomas P. Nipper, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated January 27, 2016, Dr. Nipper discussed her current complaints of pain in the left shoulder and neck and reviewed the evidence of record. On examination, he found left shoulder weakness with external rotation and abduction, full range of motion of the cervical spine, and normal strength and sensation of the upper extremities. Dr. Nipper diagnosed a resolved neck sprain. He further found a left shoulder rotator cuff tear, which he noted OWCP indicated was unrelated to the employment injury. Dr. Nipper opined that appellant could resume work considering only her neck condition.

On April 1, 2016 Dr. Eisen, in an addendum to her August 18, 2015 report, indicated that appellant’s diagnosis was a left supraspinatus tear.

OWCP, on June 3, 2016, requested that Dr. Nipper address whether the acceptance of appellant’s claim should be expanded to include a supraspinatus tear of the left shoulder. It enclosed additional medical evidence for his review.

Dr. Nipper, in a June 7, 2016 addendum, reviewed the additional medical evidence and noted that the January 22, 2015 report from the emergency department did not refer to a left shoulder injury or support Dr. Eisen’s finding that appellant fell on her left shoulder. He opined that OWCP should not expand acceptance of the claim to include a left supraspinatus tear given the fact that it was not mentioned in the initial reports from the emergency department.

On November 7, 2016 OWCP advised appellant of its proposed termination of her wage-loss compensation and entitlement to medical benefits. It found that Dr. Eisen’s reports represented the weight of the evidence and established that she had no further disability or residuals of her accepted injury.

In a November 18, 2016 initial evaluation, Dr. Jason R. Baynes, a Board-certified orthopedic surgeon, obtained a history of a fence falling on appellant, hitting her head, and “having her fall with the fence falling on her left shoulder...” He related that she had shoulder symptoms when she sought treatment for dizziness on January 22, 2015, but that physicians did not concentrate on her shoulder complaints. Dr. Baynes diagnosed a traumatic full thickness rotator cuff tear of the left shoulder after an employment-related accident. He recommended a rotator cuff repair and advised that appellant was totally disabled.

By decision dated January 5, 2017, OWCP terminated appellant’s wage-loss compensation and authorization for medical benefits. It noted that she did not initially assert that she fell on the ground on her left shoulder or needed help lifting the gate. OWCP found that appellant had no disability due to her accepted neck sprain or concussion, but instead had disability due to a left rotator cuff tear, which it had not accepted as work related.

Appellant, on January 30, 2017, requested a telephone hearing before an OWCP hearing representative. At the telephone hearing, held on July 13, 2017, she related that on January 20, 2015 she was helping a new driver take mail off a truck when a metal gate fell and hit her head. Appellant was unable to lift it off and yelled for assistance, and the new driver lifted it off of her. She did not know the driver, but his name was in a report given to her supervisor. At the time appellant sought treatment she was dizzy and confused, so the medical professionals evaluated her head rather than her neck and shoulder. She related that she tried to lift the gate off with her left shoulder, but it was too heavy. Appellant asserted that the fence hit her head and then landed on her shoulder after she fell.

By decision dated September 25, 2017, OWCP’s hearing representative reversed the January 5, 2017 decision. He found that Dr. Nipper did not provide a reasoned opinion regarding whether appellant’s bulging discs were caused or aggravated by the work injury. The hearing representative instructed OWCP to obtain a supplemental report from Dr. Nipper addressing whether her disc bulges were caused or aggravated by the work incident and whether her attempt to lift the metal gate resulted in or aggravated her rotator cuff tear.

Dr. Nipper, in an October 3, 2017 supplemental report, again noted that the hospital report did not mention a left shoulder injury. He related:

“Based on these emergency room records, the left shoulder condition does not appear to be causally related to the accident of January 20, 2015.

“As to whether the claimant’s disc bulges (documented in the MRI scan of February 26, 2015) were caused or aggravated by the work accident of January 20, 2015, when a metal gate struck her head and hand it should be noted that the disc bulges noted on this MRI scan are part of degenerative disc disease and not trauma related.”

By decision dated January 19, 2018, OWCP denied expansion of the acceptance of appellant’s claim to include a left shoulder supraspinatus tear and bulging cervical discs. It determined that Dr. Nipper’s reports constituted the weight of the evidence and established that

her left shoulder rotator cuff tear and cervical disc bulges were not causally related to the January 20, 2015 employment injury.

On appeal appellant's representative asserts that the reports from Dr. Eisen were sufficient to expand acceptance of the claim to include cervical disc bulges and a left shoulder supraspinatus tear. He maintains that the emergency room did not address every issue, but instead the primary concern at the time, and thus Dr. Nipper used an inaccurate basis for finding the conditions unrelated. The representative further contends that Dr. Nipper did not provide rationale for his opinion and thus OWCP did not adequately comply with the remand instructions of the hearing representative.

LEGAL PRECEDENT

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.³

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.⁴ 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, 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.⁵ 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.⁶ Neither the mere fact that a disease or condition manifests 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.⁷

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁸ The implementing regulation provides that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a

³ See *V.B.*, Docket No. 12-599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁴ See *Kenneth R. Love*, 50 ECAB 276 (1999).

⁵ See *John W. Montoya*, 54 ECAB 306 (2003).

⁶ See *H.H.*, Docket No. 16-0897 (issued September 21, 2016); *James Mack*, 43 ECAB 321 (1991).

⁷ See *V.W.*, 58 ECAB 428 (2007); *Ernest St. Pierre*, 51 ECABA 623 (2000).

⁸ 5 U.S.C. § 8123(a).

physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁹

ANALYSIS

The Board finds that the case is not in posture for decision as there is an unresolved conflict in medical opinion between Dr. Eisen, appellant's attending physician, and Dr. Nipper, an OWCP referral physician, regarding whether she sustained bulging cervical discs and a left shoulder supraspinatus tear as a result of the accepted January 20, 2015 employment injury.

OWCP accepted that appellant sustained a cervical sprain and a concussion without loss of consciousness on January 20, 2015 when she was struck by a falling fence. Dr. Eisen, on March 4, 2015, noted that she complained of neck pain radiating into her shoulder, headaches, and dizziness. She opined that axial compression to the vertebrae of the spine due to blunt force trauma to the head had resulted in pressure on the discs and cervical bulging discs as demonstrated by MRI scan study. On August 18, 2015 Dr. Eisen found that a left shoulder MRI scan revealed a full-thickness distal supraspinatus tear, which she attributed to appellant trying to lift the fence off of her left side on the date of injury.

By contrast Dr. Nipper, the second opinion physician, opined in reports dated June 7, 2016 and October 3, 2017 that appellant did not sustain a left shoulder condition as a result of the January 20, 2015 work injury. He further concluded, in his October 3, 2017 report, that her cervical disc bulges were unrelated to the January 20, 2015 employment injury, but instead resulted from a degenerative condition.

Both Dr. Eisen and Dr. Nipper provided a description of the employment injury and both discussed the medical evidence and their physical findings. The Board, therefore, finds that a conflict in medical opinion exists regarding whether appellant's bulging cervical discs and left shoulder supraspinatus tear were causally related to the accepted work injury of January 20, 2015.¹⁰ OWCP regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.¹¹ The Board will thus remand the case to OWCP for referral to an impartial medical examiner regarding whether the acceptance of appellant's claim should be expanded to include bulging cervical discs and a left shoulder condition.¹² Following this and any such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

⁹ 20 C.F.R. § 10.321.

¹⁰ See *W.B.*, Docket No. 17-1994 (issued June 8, 2018).

¹¹ 5 U.S.C. 8123(a); see also *G.K.*, Docket No. 16-1119 (issued March 16, 2018).

¹² See *P.S.*, Docket No. 17-0802 (issued August 18, 2017).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 11, 2018
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