

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

_____)	
W.A., Appellant)	
)	
and)	Docket No. 18-0798
)	Issued: October 19, 2018
U.S. POSTAL SERVICE, DOMINICK V.)	
DANIELS PROCESSING & DISTRIBUTION)	
CENTER, Kearny, NJ, Employer)	
_____)	

Appearances:
Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 6, 2018 appellant, through counsel, filed a timely appeal from a December 5, 2017 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 met her burden of proof to establish a right shoulder injury causally related to the accepted November 11, 2011 employment incident.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On May 2, 2012 appellant, then a 56-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured her right shoulder while sorting letters into mail bins on November 11, 2011. In an attached statement, she indicated that she had to reach and sort letters into mail slots which caused right arm and shoulder pain. Appellant noted that she did not reach above her shoulders, but that the pain continued to worsen throughout her shift.⁴

The employing establishment controverted the claim, noting that appellant had been on the periodic compensation rolls since 2004,⁵ returned to work on November 11, 2011, worked one shift, and had not worked since. It further noted that appellant filed the instant claim after a previous claim for a separate incident on November 11, 2011 was denied. In that claim, adjudicated by OWCP under OWCP File No. xxxxxx293, appellant claimed knee, neck, and lower back injuries caused by a revolving door.

In a November 14, 2011 report, Dr. Cornelius I. Nicoll, an orthopedic surgeon, noted appellant's complaint of bilateral shoulder pain and inability to elevate either arm above the shoulder. He described a history that appellant developed severe pain at work and went to the emergency room that day. Dr. Nicoll opined that her problem was chronic and advised that she was totally disabled.

By decision dated June 20, 2012, OWCP accepted that the November 11, 2011 incident occurred as alleged, but denied the claim because appellant failed to provide medical evidence sufficient to establish that a right shoulder condition was causally related to the accepted work incident.

On July 2, 2012 appellant, through counsel, timely requested a hearing before an OWCP hearing representative. A hearing was held before the Branch of Hearings and Review on October 24, 2012.

³ Docket No. 14-1336 (issued October 9, 2014); *Order Dismissing Appeal*, Docket No. 15-1584 (issued December 18, 2015); Docket No. 16-1544 (issued May 10, 2017).

⁴ OWCP assigned the present claim OWCP File No. xxxxxx394.

⁵ The 2004 injury was adjudicated by OWCP under OWCP File No. xxxxxx514.

In a September 12, 2012 report, Dr. Nicoll noted that appellant had “major problems” with her right shoulder. X-rays revealed post-traumatic arthritis and a possible right rotator cuff tear.

By decision dated January 11, 2013, an OWCP hearing representative affirmed the June 20, 2012 decision. He found the medical evidence presented was insufficient to establish a causal connection between the diagnosed condition and the November 11, 2011 work incident.

On December 5, 2013 counsel requested reconsideration and submitted a November 21, 2013 report in which Dr. Nicoll noted that appellant had injured her right shoulder on March 15, 2004 for which she had surgery. He reported that she continued to experience chronic pain, stiffness, and limited right shoulder motion. Dr. Nicoll advised that appellant had been totally disabled until she attempted to return to work on November 11, 2011 and developed severe pain in her right shoulder after performing job duties. He opined that she reinjured or aggravated the original right shoulder condition.

By decision dated February 3, 2014, OWCP denied modification of its prior decision. It found that Dr. Nicoll had provided insufficient rationale to support his opinion that the November 11, 2011 employment incident caused or aggravated appellant’s right shoulder condition.

Appellant, through counsel, appealed to the Board on May 30, 2014. By decision dated October 9, 2014, the Board affirmed OWCP’s February 3, 2014 decision. It found that appellant had not met her burden of proof to establish causal relationship between the accepted November 11, 2011 employment incident and her diagnosed right shoulder conditions.⁶

On January 28, 2015 appellant, through counsel, requested reconsideration and submitted a January 8, 2015 report in which Dr. Nicoll reiterated his previous opinion that appellant reinjured her 2004 right shoulder injury on November 11, 2011. Dr. Nicoll asserted that the repetitive motion activity on November 11, 2011 caused severe pain and stiffness in the right shoulder to the point that appellant was unable to elevate her arm.

By decision dated April 13, 2015, OWCP denied modification of its prior decision. It found that Dr. Nicoll’s January 8, 2015 report was insufficient to establish that the November 11, 2011 work incident was causally related to the claimed right shoulder injury.

On July 16, 2015 appellant, through counsel, again appealed to the Board. By order dated December 18, 2015, the Board dismissed appellant’s July 16, 2015 appeal at her request so that she could pursue reconsideration with OWCP.⁷

On January 20, 2016 appellant, through counsel, again requested reconsideration of the merits of the claim.

In a report dated August 27, 2015, Dr. Nicoll advised that appellant sustained a new twisting right shoulder injury on November 11, 2011. He noted that she had developed post-

⁶ Docket No. 14-1336 (issued October 9, 2014).

⁷ Docket No. 15-1584 (issued December 18, 2015).

traumatic arthritis in the right shoulder following surgery for a right labrum tear that occurred 25 years prior, and that she had additional surgery a few years later for subacromial joint decompression which provided some, but not total, improvement. Dr. Nicoll indicated that a recent magnetic resonance imaging (MRI) scan showed a new partial tear of the rotator cuff that was not present in the past. He related that he based his opinion on the results of this MRI scan and on his examination and treatment of appellant.

In an October 15, 2015 report, Dr. Nicoll reiterated that appellant had a twisting injury to her right shoulder at work on November 11, 2011 which had remained painful since that date. He noted the recent MRI scan findings and advised that, after comparing the recent MRI scan with one from November 19, 2012, which did not reveal a new injury, he believed that her right rotator cuff tear was a result of the November 11, 2011 work incident.⁸

By decision dated April 5, 2016, OWCP denied modification of its prior decision, again finding that the medical evidence of record was insufficient to establish a right shoulder injury causally related to the accepted November 11, 2011 employment incident.

Appellant, through counsel, filed an appeal with the Board on July 26, 2016. By decision dated May 10, 2017, the Board found that appellant failed to meet her burden of proof to establish a right shoulder condition causally related to the accepted November 11, 2011 employment incident.⁹

On September 13, 2017 appellant, through counsel, requested reconsideration and submitted an August 28, 2017 report from Dr. Nicoll.

In the August 28, 2017 report, Dr. Nicoll noted that appellant complained of pain, limitation of motion, and difficulty using her right arm. He opined that she remained totally disabled from work. Dr. Nicoll reported a history that in November 2011 appellant received notification to return to work after a prior injury or she would lose her workers' compensation benefits.¹⁰ He related that she returned to work without his clearance and was on potent opioid medication which would give her difficulty. Dr. Nicoll indicated that on November 11, 2011 appellant developed severe right shoulder pain while casing mail on a stool and reaching out in front and above her head. He indicated that the constant reaching out and above her head worsened her previous right shoulder condition. Dr. Nicoll concluded that appellant remained totally disabled.

By decision dated December 5, 2017, OWCP found Dr. Nicoll's August 27, 2017 report insufficient to establish causal relationship.

⁸ The record does not contain an MRI scan dated November 19, 2012. A September 28, 2012 MRI scan of the right shoulder demonstrated moderate degenerative arthritis involving the acromioclavicular and glenohumeral joints and moderate rotator cuff degeneration without evidence of tear.

⁹ Docket No. 16-1544 (issued May 10, 2017).

¹⁰ *Supra* note 4.

LEGAL PRECEDENT

An employee seeking benefits under FECA¹¹ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial medical evidence, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained 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.¹²

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 he or she actually experienced the employment incident at the time and place, and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.¹³

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.¹⁴ 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 employee.¹⁵ 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.¹⁶

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a right shoulder condition causally related to the accepted November 11, 2011 employment incident.

Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁷ Dr. Nicoll, an attending orthopedic surgeon, submitted

¹¹ *Supra* note 2.

¹² *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

¹³ *T.H.*, 59 ECAB 388 (2008).

¹⁴ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁵ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹⁶ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁷ *T.D.*, Docket No. 17-1495 (issued January 4, 2018).

reports dated from November 14, 2011 to August 28, 2017. The Board had previously reviewed all of Dr. Nicoll's reports, except that dated August 28, 2017.¹⁸

The Board finds that the new report of Dr. Nicoll is insufficient to establish causal relationship. In his August 28, 2017 report, Dr. Nicoll reported a history that in November 2011 appellant returned to work without clearance from him and was on opioid medication which would give her difficulty. He indicated that on November 11, 2011 appellant developed severe right shoulder pain casing mail while on a stool and reaching out in front and above her head. Dr. Nicoll opined that the constant reaching out and above her head worsened her previous right shoulder condition. He concluded that appellant remained totally disabled.

By appellant's own admission, she did not reach above her head while working on November 11, 2011. She has alleged that she was reaching to place mail in slots. Moreover, Dr. Nicoll had previously opined that appellant sustained a twisting injury on November 11, 2011. The Board has found that medical opinions based on an inaccurate factual history and unsupported by rationale are of little probative value.¹⁹

Medical reports without adequate rationale on causal relationship are of diminished probative value and do not meet an employee's burden of proof.²⁰ The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record, and provide medical rationale explaining the relationship between the diagnosed condition and the established incident of employment.²¹

Contrary to counsel's assertion on appeal, Dr. Nicoll did not sufficiently discuss how the newly submitted medical findings supported that appellant's injury resulted from the specific event on November 11, 2011. His opinion was conclusory in nature and did not contain necessary rationale explaining why he believed that the accepted employment incident resulted in the diagnosed condition.²² A mere conclusory opinion provided by a physician without the necessary rationale explaining how and why the incident was sufficient to result in the diagnosed medical condition is insufficient to meet a claimant's burden of proof to establish a claim.²³

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.

¹⁸ *Supra* notes 5 and 8.

¹⁹ *See J.M.*, Docket No. 16-1265 (issued September 21, 2017).

²⁰ *D.E.*, Docket No. 17-1874 (issued February 9, 2018).

²¹ *Supra* note 14.

²² *See D.O.*, Docket No. 18-0086 (issued March 28, 2018).

²³ *J.D.*, Docket No. 14-2061 (issued February 27, 2015).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a right shoulder condition causally related to the accepted November 11, 2011 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 19, 2018
Washington, DC

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

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

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