United States Department of Labor
Employees' Compensation Appeals Board

V.K., Appellant	)	
and	)	**Docket No. 18-1005**
	)	**Issued: February 1, 2019**
U.S. POSTAL SERVICE, POST OFFICE, West Caldwell, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
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 April 18, 2018 appellant, through counsel, filed a timely appeal from a December 20, 2017 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 this case.[3]

[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.*

[3] The Board notes that, following the December 20, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish that acceptance of her claim should be expanded to include a left shoulder condition causally related to her accepted May 22, 2015 employment injury.

FACTUAL HISTORY

On May 26, 2015 appellant, then a 62-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on May 22, 2015 she slipped and fell on a waxed floor while in the performance of duty. She indicated that she injured her left wrist. Appellant stopped work on the date of injury. On July 10, 2015 OWCP accepted the claim for left distal radial fracture. Subsequently, on November 29, 2016, it expanded acceptance of the claim to include left carpal tunnel syndrome.

On May 22, 2015 Dr. Michael Benke, an orthopedic surgeon, treated appellant and noted that she had slipped and fallen at work onto her outstretched left upper extremity. He diagnosed a displaced distal radius fracture. Hospital treatment notes dated May 22, 2015, from Dr. Viswanathan Subbhash, Board-certified in emergency medicine, related that appellant denied head injury, shoulder pain, back pain, hip pain, and neck pain. He reported that her left shoulder examination was normal.

Dr. Frank Capecci, a Board-certified orthopedic surgeon, examined appellant on May 26, 2015 and noted that she injured her left wrist when she fell and that she reported no other injuries with the fall. He diagnosed a displaced metaphysical fracture of the distal radius with persistent angular deformity and an ulnar steroid fracture. Dr. Richard Kim, a Board-certified internist, also saw appellant on May 26, 2015. He indicated that she slipped and fell onto her left wrist. Dr. Kim performed left wrist surgery to repair the distal radius fracture on May 28, 2015.

Dr. Capecci examined appellant on July 22, 2015 and noted that she related that she sustained a left shoulder injury at the same time as the wrist injury, but she became more aware of the shoulder overtime. He reported findings of tenderness to palpation, nearly full range of motion, no muscle atrophy, no deformity of shoulder girdle, no skin changes, no swelling, and x-rays showed degenerative changes and cystic changes, otherwise negative. Dr. Capecci noted that he was only providing an opinion regarding the left shoulder. He recommended a magnetic resonance imaging (MRI) scan to rule out a rotator cuff tear.

An August 5, 2015 left shoulder MRI scan read by Dr. Hsiu Su, a Board-certified diagnostic radiologist, revealed a partial thickness tear of the supraspinatus tendon and a partial thickness tear at the infraspinatus insertion.

On September 22, 2015 counsel requested that the claim be expanded to include a left shoulder condition.

In a report dated October 13, 2015, Dr. Capecci related that, at the time of the injury, he focused his attention on the painful left wrist because the left distal fracture was so severe that the injury to the left shoulder did not become apparent until a week or so later. He explained the focus of the visit was appellant's ongoing problems with her left shoulder. Dr. Capecci examined

her and found no deformity or swelling of the left shoulder, tenderness to palpation near the rotator cuff insertion, and tenderness anteriorly in the region of the biceps and some tenderness over the acromioclavicular joint as well. He found no instability on mechanical testing, palpable crepitus with active range of motion and severe pain, and limited range of motion. Dr. Capecci opined that "within a reasonable degree of medical probability that [appellant's] current symptoms of left shoulder pain as well as the MRI [scan] findings of a moderate to high grade partial thickness tear of the rotator cuff is directly related to the slip and fall at work that occurred [five] months ago."

On November 20, 2015 OWCP referred appellant for a second opinion examination with Dr. Jeffery Lakin, a Board-certified orthopedic surgeon, and requested that he respond to questions relative to left distal radius fracture. It inquired as to whether the fracture was present and active and, if so, explain any current disability or residuals causally related to the accepted employment injury of May 22, 2015.[4]

In a December 8, 2015 report, Dr. Lakin noted appellant's history of injury and treatment. He explained that she developed a left wrist fracture and developed carpal tunnel syndrome as a result of her fall. Dr. Lakin noted that appellant was also noted to have had left shoulder pain and treatment for that condition with Dr. Capecci, but she had not yet had physical therapy or injections of the left shoulder. Examination of the left shoulder revealed some tenderness anteriorly; motor strength of 5/5 in all planes tested; and range of motion of 130 degrees of abduction, 145 degrees of forward flexion, and internal and external rotation to 80 degrees compared to appellant's right shoulder which had 170 degrees of forward flexion, 165 degrees of abduction, and internal and external rotation to 80 degrees. Dr. Lakin noted that a left shoulder MRI scan revealed a 9 millimeter (mm) moderate grade partial thickness tear of the anterior fibers of the distal supraspinatus tendon, a 5 mm moderate to high partial thickness articular sided tear of the superior fibers of the infraspinatus insertion superimposed with mild supraspinatus and mild infraspinatus tendinosis. He responded to OWCP's questions which were limited to questions regarding appellant's left distal radius fracture and carpal tunnel syndrome.

On December 31, 2015 OWCP requested that Dr. Lakin provide an opinion with regard to whether appellant had any work-related left shoulder conditions. Dr. Lakin was provided with the August 5, 2015 left shoulder MRI scan.

In a January 5, 2016 addendum, Dr. Lakin explained that the MRI scan findings were age-related and due to degeneration, rather than trauma. He added that the examination of the left shoulder was consistent with arthroplasty and arthritic changes. Dr. Lakin opined that the shoulder problem was preexisting and unrelated to the work injury of May 22, 2015. He noted that surgery might be necessary for future subacromial decompression and rotator cuff repair.

By decision dated April 7, 2016, OWCP denied expansion of appellant's claim to include a left shoulder condition.

On April 12, 2016 appellant, through counsel, requested an oral hearing before a hearing representative with OWCP's Branch of Hearings and Review. The hearing was held on September 28, 2016.

[4] OWCP provided the physician with a statement of accepted facts and copies of medical evidence of record.

OWCP subsequently received a report from Dr. Capecci dated October 25, 2016. Regarding the left shoulder, Dr. Capecci explained that, when he examined appellant on July 22, 2015, she advised him that she hurt her left shoulder at the time of the work injury. He repeated his findings and noted her course of treatment. Dr. Capecci opined that the left shoulder condition was causally related to the fall on May 22, 2015. He explained that his examination findings differed greatly from those described by Dr. Lakin. Dr. Capecci noted that Dr. Lakin was of the opinion that the mild arthritic changes of the left shoulder displayed on the August 5, 2015 MRI scan predated the work-related injury of May 22, 2015. However, he explained that the rotator cuff tear was acute and directly related to the fall at work on May 22, 2015. Dr. Capecci indicated that there was bone marrow edema at the insertion site of the supraspinatus tendon which reflected an acute injury rather than a chronic condition. He also noted that there was no atrophy of the rotator cuff muscles on MRI scan. Dr. Capecci opined that appellant had mild preexisting osteoarthritis of the left shoulder which was subclinical and asymptomatic. He opined that it was "the recent tear of the rotator cuff which I attribute to the fall that occurred on May 22, 2015 that is responsible for [appellant's] current symptoms of limited function and pain."

By decision dated November 28, 2016, OWCP's hearing representative set aside the April 7, 2016 decision, finding a conflict between the opinions of the treating physician, Dr. Capecci, and the second opinion physician, Dr. Lakin, regarding causal relationship of appellant's left shoulder condition and the accepted employment injury. The hearing representative ordered OWCP to refer her for an impartial medical examination to resolve the existing conflict as to causal relationship between her left shoulder condition and the accepted May 22, 2015 employment injury, followed by a *de novo* decision.

On January 6, 2017 OWCP referred appellant for an impartial medical examination with Dr. Dean Carlson, a Board-certified orthopedic surgeon, to resolve the conflict as to whether her left shoulder condition was related to the accepted injury.

In a February 2, 2017 report, Dr. Carlson noted appellant's history of injury and physical examination findings. He explained that she was diagnosed with a displaced left distal radius fracture status post-open reduction and internal fixation, left carpal tunnel syndrome, gleno-humeral osteoarthritis left shoulder, partial tear rotator cuff left shoulder of the supraspinatus and infraspinatus tendons, and degenerative rotator cuff tendinosis of the left shoulder. Dr. Carlson noted that Dr. Capecci opined that "bone marrow edema in the insertion site of the supraspinatus tendon" reflected "an acute injury rather than a chronic condition." However, Dr. Carlson explained that "this is the usual manner in which bone marrow on an MRI [scan] is seen by the orthopedic surgeon following trauma such as a bone bruise." He explained that when it was "accompanied by subchondral cystic formation at the insertion of the supraspinatus tendon," it was a sign of rotator cuff disease. Dr. Carlson also explained that, despite a lack of supra and infraspinatus atrophy on the MRI scan study, "there was enough intact tendon for the muscle tissue to remain normal." He found that appellant had limited range of motion and weakness of the left shoulder due to glenohumeral osteoarthritis and degenerative partial tearing of the rotator cuff of her left shoulder. Dr. Carlson further offered that the presence of such conditions was preexisting in nature and not related to the accepted employment injury of May 22, 2015.

By decision dated March 23, 2017, OWCP again denied expansion of the claim to include the claimed left shoulder condition.

On March 30, 2017 counsel requested an oral hearing before a hearing representative with OWCP's Branch of Hearings and Review, which was held on May 9, 2017.

By decision dated June 12, 2017, OWCP's hearing representative affirmed the March 23, 2017 decision. She found that Dr. Carlson's opinion continued to carry special weight.

On September 28, 2017 appellant, through counsel, requested reconsideration.

OWCP received progress notes from Dr. Capecci dated August 22 and September 12, 2017. Dr. Capecci diagnosed left rotator cuff tear and recommended arthroscopic surgery of the left shoulder with subacromial decompression with debridement or repair of the rotator cuff.

In a September 18, 2017 report, Dr. Capecci diagnosed rotator cuff tear of the left shoulder. He opined that appellant's left shoulder condition was causally related to the fall that occurred on May 22, 2015. Dr. Capecci recommended arthroscopic surgery for a rotator cuff repair.

By decision dated December 20, 2017, OWCP denied modification of its June 12, 2017 decision. It found that Dr. Capecci had provided medical findings without providing a well-rationalized medical opinion explaining how that accepted injury caused or aggravated the diagnosed condition. OWCP concluded that the impartial medical examiner's report remained the special weight of the medical opinion evidence.

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 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 medical condition for which compensation is claimed is causally related to the employment injury.[5]

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.[6]

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.[7] 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.[8]

[5] *See M.V.*, Docket No. 18-0884 (issued December 28, 2018); *see also T.H.*, 59 ECAB 388 (2008).

[6] *See C.W.*, Docket No. 17-1636 (issued April 25, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[7] *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[8] *L.D., id.; see also Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

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.[9]

Section 8123(a) of FECA provides, in pertinent part: "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."[10] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[11]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that acceptance of her claim should be expanded to include a left shoulder condition causally related to her accepted May 22, 2015 employment injury.

OWCP properly determined that a conflict in medical opinion evidence arose between appellant's attending physician, Dr. Capecci, and OWCP's second opinion physician, Dr. Lakin regarding causal relationship between appellant's left shoulder condition and the May 22, 2015 employment injury.

On January 6, 2017 OWCP referred appellant to Dr. Carlson, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical evidence. When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, is sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.[12] The Board finds that Dr. Carlson's report is entitled to special weight.

On February 2, 2017 Dr. Carlson examined appellant and provided findings. Regarding whether her left shoulder condition was work related, he explained why bone marrow edema at the insertion site did not support an acute injury. Dr. Carlson explained that "this is the usual manner in which bone marrow on an MRI [scan] is seen by the orthopedic surgeon following trauma such as a bone bruise." He further explained that, when it was accompanied by subchondral cystic formation at the insertion of the supraspinatus tendon, it was a sign of rotator cuff disease. Dr. Carlson reviewed appellant's MRI scan study and determined that she had limited range of motion and weakness of the left shoulder due to glenohumeral osteoarthritis and degenerative partial tearing of the rotator cuff of her left shoulder. He explained that the presence of such conditions was preexisting in nature and not related to the work injury of May 22, 2015. Dr. Carlson concluded that appellant's left shoulder condition was not work related.

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

[10] 5 U.S.C. § 8123(a).

[11] *See Darlene R. Kennedy*, 57 ECAB 414 (2006).

[12] *See M.S.*, Docket No. 15-1064 (issued June 15, 2016); *V.G.*, 59 ECAB 635 (2008).

The Board finds that Dr. Carlson's opinion is well-rationalized and based on a proper factual and medical history. Dr. Carlson accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached his conclusion about appellant's left shoulder condition which comported with his findings.[13] As his report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.[14]

Subsequent to the report of Dr. Carlson, Dr. Capecci provided a September 18, 2017 report, in which he repeated his opinion that appellant's left distal radius fracture was causally related to her fall at work on May 22, 2015. Dr. Capecci merely reiterated previous findings and conclusions regarding her condition. As he had been on one side of the conflict in the medical opinion that the impartial specialist resolved, the treating physician's reports are insufficient to overcome the special weight accorded the impartial specialist or to create a new medical conflict.[15]

Additionally, because Dr. Capecci's reports do not address how the May 22, 2015 work injury caused or aggravated appellant's left shoulder conditions they are insufficient to establish her claim. The Board has held that, 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.[16]

On appeal, counsel asserts that the report of Dr. Carlson could not constitute the weight of the medical evidence as he provided merely conclusory responses and contradictory answers. He also asserts that Dr. Capecci's October 25, 2016 report provided a rationalized opinion as to how the rotator cuff tear was acute and directly related to the fall and that the September 18, 2017 report further explained why the left shoulder condition was directly related to the fall. For the reasons set forth above the Board found that the impartial medical examiner's report was entitled to the special weight accorded an impartial medical examiner.[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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that the acceptance of her claim should be expanded to include a left shoulder condition causally related to the accepted May 22, 2015 employment injury.

[13] *Manuel Gill*, 52 ECAB 282 (2001).

[14] *See N.R.*, Docket No. 16-1613 (issued February 7, 2017); *J.O.*, Docket No. 14-0039 (issued April 2, 2014).

[15] *Alice J. Tysinger*, 51 ECAB 638 (2000); *Barbara J. Warren*, 51 ECAB 413 (2000).

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

[17] *See supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 1, 2019
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