

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

R.P., Appellant)	
)	
and)	Docket No. 18-1591
)	Issued: May 8, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Palos Verdes, CA, Employer)	
)	

Appearances:
Appellant, pro se
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 August 16, 2018 appellant filed a timely appeal from April 30 and July 11, 2018 merit decisions of the Office of Workers' Compensation Programs (OWCP).¹ 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.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that her claim should be expanded to include cervical spinal stenosis, cervical myelopathy, cervical disc displacement, and intervertebral disc stenosis of the cervical neural canal causally related to her March 1, 2014 employment injury; and (2) whether she has met her burden of proof to establish

¹ The Board notes that following the July 11, 2018 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 additional evidence for the first time on appeal. *Id.*

² 5 U.S.C. § 8101 *et seq.*

disability from work beginning August 18, 2016 causally related to her March 1, 2014 employment injury.

FACTUAL HISTORY

On July 16, 2014 appellant, then a 33-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she experienced pain in her neck and right shoulder causally related to factors of her federal employment. The employing establishment indicated that she was last exposed to the conditions alleged to have caused her condition on July 16, 2014 and was currently performing modified-duty work.

OWCP accepted the claim for impingement syndrome of the right shoulder. Appellant stopped work on August 25, 2015 and returned to full-time employment on January 9, 2016. She stopped work again on May 25, 2016 and returned to part-time employment on June 20, 2016. OWCP paid appellant intermittent wage-loss compensation for time lost from work due to disability and medical appointments. Appellant stopped work on August 18, 2016 and has not returned.

In progress reports dated 2015, Dr. Basimah Khulusi, a Board-certified physiatrist, opined that appellant had sustained a right shoulder and neck condition on March 1, 2014. She diagnosed other conditions of the right shoulder region, cervical intervertebral disc syndrome with myelopathy, cervical degenerative disc disease, and cervical disc herniations.

In a report dated June 11, 2015, Dr. Edward Mittleman, who specializes in family medicine, requested that OWCP expand appellant's claim to include cervical disc protrusions and desiccation.

OWCP, on October 22, 2015, referred appellant to Dr. Joseph S. Klemek, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that he address her current condition and disability and whether her claim should be expanded to include cervical intervertebral disc syndrome with myelopathy, cervical degenerative disc disease, and cervical disc herniations.

Appellant filed claims for compensation (Form CA-7) requesting wage-loss compensation for intermittent time lost from work from October 2015 to January 2016.

In a November 11, 2015 report, Dr. Klemek diagnosed early degenerative disc disease without right cervical radiculopathy and mild impingement syndrome of the right shoulder. He opined that her degenerative disc disease was unrelated to employment. Dr. Klemek advised that a magnetic resonance imaging (MRI) study dated January 20, 2015 had revealed widespread mild degenerative disc disease without evidence of myelopathy and opined that the findings were "underlying and preexisting, age[-]related changes." He found that appellant had continued residuals of her shoulder injury and could work with limitations of lifting no more than 20 pounds for four hours per day and pushing and pulling up to 30 pounds for no more than four hours per day.

On November 19, 2015 Dr. Khulusi advised that appellant's neck condition had worsened such that she was unable to work from September 19 through October 16, 2015. She indicated that she was going to be deployed by the military to Japan, and removed appellant's work

restrictions so that she could do desk work in Japan as part of her military service. Upon appellant's return from deployment, Dr. Khulusi had "lifted the restrictions that she had at the [employing establishment]. She went back to doing her regular activities on the job..." Dr. Khulusi opined that appellant's employment activities resulted in an aggravation of her neck and shoulder symptoms. She requested that OWCP expand appellant's claim to include cervical disc protrusions as employment related.

In a duty status report (Form CA-17) dated August 18, 2016, Dr. Mittleman found that appellant was temporarily totally disabled from employment.

On August 24, 2016 appellant filed a Form CA-7 requesting wage-loss compensation for intermittent disability for the period August 6 to 19, 2016. In a time analysis form (Form CA-7a) the employing establishment related that she had claimed compensation for time lost for medical therapy on August 16 and 17, 2016. In a September 6, 2016 Form CA-7, the employing establishment indicated that appellant had stopped work on August 18, 2016.

In a development letter dated September 6, 2016, OWCP informed appellant that the evidence was currently insufficient to establish that she was disabled due to her employment injury. It noted that she stopped work on August 18, 2016 and had not returned. OWCP advised appellant of the type of medical evidence needed to establish her claim for wage-loss compensation, including a reasoned report from her attending physician addressing whether she was unable to perform her employment beginning August 18, 2016. It afforded her 30 days to submit the necessary evidence.

Thereafter, OWCP received an August 18, 2016 report from Dr. Mittleman. Dr. Mittleman obtained a history of appellant waking up with severe pain in her right shoulder. He diagnosed other affections of the right shoulder, cervical intervertebral disc disease with myelopathy, cervical degenerative disc disease, cervical disc herniations, and possible shoulder-hand syndrome. Dr. Mittleman found that appellant could perform modified employment with limited use of the right upper extremity. He noted that she continually used her right upper extremity working as a distribution clerk.

In a report dated August 22, 2016, Dr. Khulusi discussed appellant's history of a March 1, 2014 right shoulder injury with increased pain on August 18, 2016. She related that she had undergone aqua therapy on August 17, 2016. Dr. Khulusi diagnosed other affections of the right shoulder, cervical intervertebral disc disease with myelopathy, cervical degenerative disc disease, cervical disc herniations, and possible shoulder-hand syndrome. She opined that appellant was disabled from employment.³ Dr. Khulusi submitted similar progress reports on August 30 and September 27, 2016.

OWCP found that a conflict existed between appellant's attending physicians Drs. Khulusi and Mittleman and Dr. Klemek regarding whether appellant's claim should be expanded to include additional cervical conditions.

³ In August 22 and 30, 2016 CA-17 forms, Dr. Khulusi indicated that appellant was disabled from employment.

By decision dated October 7, 2016, OWCP denied appellant's claim for wage-loss compensation beginning August 18, 2016. It found that she had not submitted sufficient medical evidence to establish that she was unable to perform her employment duties for the claimed period.

Thereafter, appellant submitted a September 29, 2016 progress report from Dr. Mittleman, who found that she could resume modified employment on October 3, 2016 with restrictions. On November 7, 2016 he noted that she had been working full time with restrictions of lifting no more than 15 pounds, pushing or pulling more than 30 pounds on wheels, performing more than two hours of fine manipulation, or reaching above the right shoulder.⁴

On November 18, 2016 appellant requested reconsideration.

OWCP, on January 10, 2017, referred appellant to Dr. James Fait, a Board-certified orthopedic surgeon, for an impartial medical examination.

By decision dated February 16, 2017, OWCP denied modification of its October 7, 2016 decision. It found that the medical evidence from Dr. Khulusi failed to establish that appellant was disabled due to her accepted employment injury. OWCP indicated that it had referred her to a second opinion examiner and impartial medical examiner (IME) regarding the issue of whether the claim should be expanded to include a cervical condition.

OWCP subsequently received a report dated February 1, 2017, wherein Dr. Fait noted that it had requested that he resolve a conflict regarding whether appellant's claim should be expanded to include cervical conditions and whether residuals of her shoulder injury would prevent her from performing her usual employment. Dr. Fait discussed appellant's history of injury and current complaints of neck pain radiating into her right shoulder, radiating right shoulder pain, and upper extremity weakness. On examination he found tenderness to palpation with paraspinal spasm on the right extending into the trapezius. Dr. Fait measured full manual motor strength of the upper extremities with reduced sensation in the hands bilaterally, trace crepitation with motion of the right shoulder, and pain on the right with impingement testing. He further found a positive Tinel's sign bilaterally. Dr. Fait provided the diagnoses as a strain/sprain of the cervical spine with degenerative disc disease at C3-4 and C5-6, a broad-based central posterior disc herniation at C5-6, probable C5 right radiculopathy based on objective testing, but without examination evidence of right C6 radiculopathy, and right shoulder subacromial bursitis, biceps tenosynovitis, and AC joint arthropathy with a history of adhesive capsulitis. He discussed appellant's description of her employment duties, noting that he had not received an official position description. Based on his physical examination and review of diagnostic studies, Dr. Fait found the diagnoses of cervical degenerative disc disease, right shoulder subacromial bursitis with AC joint osteoarthritis, and bicipital tenosynovitis had been established. He attributed the right shoulder subacromial bursitis, bicipital tendinitis, and aggravation of AC joint osteoarthritis to the accepted employment injury. Dr. Fait found that appellant's cervical degenerative disc disease was unrelated to the employment injury. He opined that, "Based upon [her] self-reported job duties, I do not find evidence of repetitive neck motions, repetitive awkward positioning, or repetitive overhead work." Dr. Fait indicated instead that appellant performed a "highly-varied group of job assignments that do not involve repetitive or continuous movements. Rather, there is frequent changing of movements and

⁴ In a January 9, 2017 report, Dr. Khulusi noted that appellant had recently undergone a left carpal tunnel release. She found that she could otherwise continue with her same work restrictions.

positions and limited overhead work, reaching, gripping, or grasping above shoulder level.” Dr. Fait opined that the aggravation of appellant’s right shoulder condition was temporary, but that she had not yet received sufficient treatment. He recommended a subacromial decompression with excision of the distal clavicle of the right shoulder. Dr. Fait found that appellant was currently partially disabled and could work within the restrictions provided by Dr. Klemek of no lifting over 20 pounds, pushing or pulling over 30 pounds, and no overhead reaching on the right side.

By decision dated June 27, 2017, OWCP denied expansion of appellant’s claim to include a cervical condition. It determined that Dr. Fait’s opinion represented the special weight of the evidence and established that her degenerative disc disease of the cervical spine was unrelated to her employment injury.⁵

By decision dated February 12, 2018, OWCP denied appellant’s claim for wage-loss compensation for the period “October [16 to 19,] 2015,” December 12 to 25, 2015, and December 26 to January 4, 2016. It found that Dr. Fait’s opinion constituted the special weight of the evidence and established that she was partially rather than totally disabled during these periods.

On February 15, 2018 appellant requested reconsideration. In support of her request she submitted a February 12, 2018 report from Dr. Khulusi. Dr. Khulusi related that she had reviewed OWCP’s finding that she had failed to explain how appellant’s condition had worsened objectively. She advised that a comparison of MRI scan studies dated May 12, 2014 and July 18, 2016 revealed the development of supraspinatus tendinopathy. Dr. Khulusi opined that the accepted right shoulder impingement syndrome had caused the supraspinatus tendinopathy and increased symptoms. She related, “That explains the worsening of [appellant’s] shoulder condition and symptoms that required minimizing the use of her right upper extremity by keeping her off of work for a while, then by giving her more restrictions on the job until her condition got under better control.”

By decision dated April 30, 2018, OWCP denied modification of its February 16, 2017 decision. It found that Dr. Khulusi’s February 12, 2018 report was insufficient to establish that appellant was disabled from employment beginning August 18, 2016.

In a report dated June 14, 2018, Dr. Khulusi indicated her opinion that Dr. Fait had relied upon an inaccurate work history in finding that appellant’s cervical condition was unrelated to her employment. She related, “Dr. Fait’s report is not thorough because he did get a detailed description of [her] activities on the job...” Dr. Khulusi discussed appellant’s specific employment duties and opined that the duties required continual repetitive neck movements, including while in awkward positions and while lifting and throwing heavy weight and working overhead. She also advised that Dr. Fait had failed to consider that activities requiring force could cause neck disorders and did not have her March 10, 2016 report for review. Dr. Khulusi again requested expansion of appellant’s claim to include cervical intervertebral disc syndrome, a cervical disc herniation, and cervical spinal stenosis.

⁵ In a July 20, 2017 progress report, Dr. Khulusi noted that Dr. Fait had provided work restrictions similar to those she had provided, noting that “with these restrictions [appellant] had been working eight hours.” The employing establishment, on August 11, 2017, advised that appellant was currently working with restrictions provided by her attending physician. It requested updated medical evidence.

Appellant, on June 26, 2018, requested reconsideration of the June 27, 2017 decision.

By decision dated July 11, 2018, OWCP denied modification of its June 27, 2017 decision. It found that Dr. Fait based his opinion on a statement of accepted facts, the medical records, and an examination, and that his report constituted the special weight of the evidence.

LEGAL PRECEDENT -- ISSUE 1

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,⁶ 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.⁷ 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.⁸ 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.⁹ To establish 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.¹⁰ 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.¹¹ 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.

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."¹² Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of

⁶ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁹ See *T.F.*, Docket No. 17-0645 (issued August 15, 2018).

¹⁰ See *S.A.*, Docket No. 18-0399 (issued October 16, 2018).

¹¹ See *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

¹² 5 U.S.C. § 8123(a).

such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish that her claim should be expanded to include cervical spinal stenosis, cervical myelopathy, cervical disc displacement, and intervertebral disc stenosis of the cervical neural canal causally related to her March 1, 2014 employment injury.

OWCP properly determined that a conflict in medical opinion arose between appellant's attending physicians, Dr. Khulusi and Dr. Mittleman, and OWCP's second opinion physician, Dr. Klemek, regarding causal relationship between her cervical condition and the March 1, 2014 employment injury. It referred her to Dr. Fait, a Board-certified orthopedic surgeon, for an impartial medical examination.

When a case is referred to an IME 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.¹⁴

On February 1, 2017 Dr. Fait reviewed appellant's history of injury and noted that she had complained of upper extremity weakness and neck pain radiating into her right upper extremity. On examination, he found paraspinal spasms into the right trapezius, reduced sensation in the hands bilaterally, pain on the right with impingement testing, and a positive Tinel's sign bilaterally. Dr. Fait diagnosed a cervical spine strain/sprain with degenerative disc disease at C3-4 and C5-6, a broad-based central posterior disc herniation at C5-6, probably C5 right radiculopathy based on objective testing, but without examination evidence of right C6 radiculopathy, and right shoulder subacromial bursitis, biceps tenosynovitis, and AC joint arthropathy with a history of adhesive capsulitis. He opined that appellant had sustained subacromial bursitis and bicipital tendinitis of the right shoulder and an aggravation of AC joint osteoarthritis due to her employment injury. Dr. Fait found, however, that her existing cervical degenerative disc disease was unrelated to her employment, providing as a rationale that she performed a variety of work tasks rather than repetitive or continued neck or overhead motions.

The Board finds that Dr. Fait's opinion is well rationalized and based on a proper factual and medical history and thus entitled to special weight.¹⁵ Dr. Fait 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.¹⁶

In a report dated July 14, 2018, Dr. Khulusi opined that Dr. Fait's report was not thorough as he had relied upon an incomplete description of appellant's employment duties in finding that

¹³ V.K., Docket No. 18-1005 (issued February 1, 2019).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ J.L., Docket No. 18-0990 (issued March 5, 2019).

her cervical condition was not employment related. She related that her work duties required continuous repetitive motion, including repetitive overhead work and working in awkward positions. Dr. Khulusi also indicated that Dr. Fait had failed to consider that activities requiring the use of force could cause cervical conditions. She, however, was on one side of the conflict resolved by Dr. Fait. The Board has held that reports from a physician who was on one side of a medical conflict are generally insufficient to overcome the special weight accorded to the IME, or to create a new conflict.¹⁷

For the reasons set forth above, the Board finds that Dr. Fait's opinion was entitled to the special weight accorded an IME and establishes that appellant did not sustain an employment-related cervical condition.¹⁸

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.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.¹⁹ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled for work as a result of the accepted employment injury.²⁰ Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.²¹

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.²² Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.²³ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.²⁴ When, however, the medical evidence establishes that the residuals or sequelae of an

¹⁷ *C.L.*, Docket No. 18-1379 (issued February 5, 2019).

¹⁸ *Supra* note 13.

¹⁹ *See T.A.*, Docket No. 18-0431 (issued November 7, 2018).

²⁰ *M.C.*, Docket No. 18-0919 (issued October 18, 2018).

²¹ *See K.C.*, Docket No. 17-1612 (issued October 16, 2018).

²² 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

²³ *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

²⁴ *See D.G.*, Docket No. 18-0597 (issued October 3, 2018).

employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.²⁵

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.²⁶ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.²⁷

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision regarding whether appellant has met her burden of proof to establish disability from work beginning August 18, 2016 causally related to her March 1, 2014 employment injury.

OWCP found that the medical evidence from Dr. Khulusi was insufficient to support that appellant was disabled from employment during the claimed period. It did not, however, discuss the reports of its referral physicians Dr. Klemek and Dr. Fait, in reaching its determination relative to ongoing disability.

In a report dated November 11, 2015, Dr. Klemek diagnosed mild right shoulder impingement syndrome and early cervical disc degeneration. He found that appellant had continued residuals of her accepted shoulder injury and prescribed physical work limitations of lifting no more than 20 pounds and pushing and pulling no more than 30 pounds for four hours per day.

On February 1, 2017 Dr. Fait diagnosed as employment-related right shoulder subacromial bursitis, bicipital tendinitis, and an aggravation of AC joint osteoarthritis. He opined that appellant was partially disabled and could work in accordance with the restrictions set forth by Dr. Klemek.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. Once OWCP undertakes to further develop the medical evidence, it must do a complete job in procuring medical evidence that will resolve the relevant issues.²⁸ It denied appellant's claim for wage-loss compensation without verifying that the employing establishment had provided her with limited-duty employment for the period in question within the restrictions set forth by its referral physicians. The Board will therefore remand the case to OWCP for appropriate development of the evidence to determine whether modified employment was available within her restrictions at the employing establishment for the claimed period.²⁹ After such further development as deemed necessary, OWCP shall issue a *de novo* decision.

²⁵ See *D.R.*, Docket No. 18-0232 (issued October 2, 2018).

²⁶ *A.D.*, Docket No. 17-1984 (issued March 19, 2018).

²⁷ 20 C.F.R. § 10.121.

²⁸ *J.W.*, Docket No. 17-0715 (issued May 29, 2018).

²⁹ *T.L.*, Docket No. 17-1391 (issued July 3, 2018); *M.M.*, Docket No. 14-0581 (issued September 8, 2014).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that her claim should be expanded to include cervical spinal stenosis, cervical myelopathy, cervical disc displacement, and intervertebral disc stenosis of the cervical neural canal causally related to her March 1, 2014 employment injury. The Board further finds that the case is not in posture for decision regarding whether appellant has met her burden of proof to establish her disability from work beginning August 18, 2016 causally related to her March 1, 2014 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2018 decision of the Office of Workers' Compensation Programs is affirmed. The April 30, 2018 decision of OWCP is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 8, 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