

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

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| T.S., Appellant |) | |
| |) | |
| and |) | Docket No. 18-1702 |
| |) | Issued: October 4, 2019 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Chanute, KS, Employer |) | |
| |) | |

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 10, 2018 appellant, through counsel, filed a timely appeal from April 10 and August 24, 2018 merit decisions of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (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 The Board notes that appellant initially timely requested an oral argument before the Board. By letter dated September 24, 2018, appellant withdrew his request for oral argument due to his inability to travel to Washington, DC.

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a bilateral shoulder condition causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On November 14, 2016 appellant, then a 50-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a bilateral shoulder condition as a result of his employment duties which had required repetitive reaching and lifting over the course of 23 years. He noted that he first became aware of his condition on October 1, 2016 and related it to his federal employment on November 1, 2016. Appellant notified his supervisor of his injury on November 14, 2016. He stopped work on October 19, 2016 when he elected Office of Personnel Management disability retirement benefits.

In an accompanying narrative statement, appellant described the employment duties which caused bilateral shoulder pain, and noted that the pain had worsened in the past few months.

By development letter dated December 6, 2016, OWCP informed appellant that the evidence of record was insufficient to support his claim. It advised him of the factual and medical evidence needed and provided him with a questionnaire for completion. OWCP afforded appellant 30 days to submit the necessary evidence.

On December 22, 2016 appellant responded to OWCP's development letter and described the circumstances surrounding his occupational disease injury.

In support of his claim, appellant also submitted medical reports dated November 1, 2016 and February 8, 2017 from Dr. Aaron M. McGuire, an osteopathic physician specializing in orthopedic surgery. In his November 1, 2016 report, Dr. McGuire related that appellant was evaluated on that date for cumulative occupational trauma of the bilateral shoulders, sustained while working as a letter carrier. He noted that appellant worked at the employing establishment for over 23 years, worked more than 45 hours per week, and had been in his current position for eight years. Dr. McGuire described his employment duties which involved repetitive reaching, lifting, casing, sorting, and delivering mail. He reported that all of appellant's duties required repetitive overhead and reaching away from the body. Dr. McGuire explained that this repetitive motion can cause undue pressure and trauma to the muscle, tendons, and ligaments of the shoulders which can result in progressively worsening pain. He further explained that cumulative trauma disorders were injuries of the musculoskeletal system to joints, muscles, tendons, and ligaments, due to overuse syndrome and repetitive motion. These cumulative trauma symptoms developed from the accumulation of repeated small injuries or stresses to the musculoskeletal system which was a response to excessive or repeated demands on the body without enough time to recover before adding more stress. Dr. McGuire explained that, due to appellant's physically demanding repetitive job requirements, he had been suffering from progressively worsening pain in his bilateral shoulders with decreased range of motion. He provided findings on physical examination and reviewed x-rays of the left and right shoulders which revealed acromioclavicular (AC) joint arthropathy and glenohumeral arthrosis. Dr. McGuire diagnosed bilateral shoulder impingement syndrome, rotator cuff tear and osteoarthritis. He opined that appellant's bilateral shoulder

conditions were caused by the cumulative occupational trauma described and recommended a magnetic resonance imaging (MRI) scan for further assessment. Dr. McGuire's February 8, 2017 report responded to OWCP's development letter and repeated the assertions provided in his prior report.

On February 6, 2017 the employing establishment controverted the claim. It reported that appellant had been seen delivering packages for FedEx when he was exhausting his leave from the employing establishment. The employing establishment noted that the alleged injury was not reported to local management until he retired. It described appellant's employment duties as casing mail, reaching in and out of the vehicle, and lifting packages which he performed on a daily basis. The employing establishment reported that he had no specific accommodations in place and that any overtime he worked was voluntary.

OWCP subsequently referred appellant, together with a statement of accepted facts (SOAF) and the medical record, to Dr. Sami R. Framjee, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In his June 6, 2017 report, Dr. Framjee reported that appellant had developed complaints regarding his bilateral shoulders approximately 6 to 12 months ago with no history of injury. He reported that, based on appellant's history, his physical examination findings, and review of radiographic studies, he was unable to identify any evidence of any injury to the right or left shoulder secondary to any occupational activity with the employing establishment. Dr. Framjee noted that appellant had nonspecific symptoms in reference to the right and left right shoulders. However, there was no evidence of any anatomical abnormality of the bilateral shoulders secondary to his occupational activities and the physical examination was within normal limits. Further medical care was not recommended and appellant could continue with his normal occupational activities.

On November 2, 2017 OWCP found that a conflict of medical opinion existed between Dr. Framjee, the second opinion physician, and Dr. McGuire, appellant's treating physician. It referred appellant, the case file, and a SOAF to Dr. Terry Sites, a Board-certified orthopedic surgeon, for an impartial medical examination to determine whether his federal employment duties caused, contributed, or aggravated any diagnosed bilateral shoulder conditions.

In his February 27, 2018 report, Dr. Sites provided findings on physical examination, noted diagnostic testing findings, and diagnosed bilateral shoulder pain with acromioclavicular (AC) arthropathy. He also reported that additional pathologies included rotator cuff tendinopathy/tear and long head biceps tendinopathy. Subjective findings included pain, stiffness, and tenderness over the greater tuberosity and AC joint. Dr. Sites reported that a diagnosis of rotator cuff tear could not accurately be determined unless there was a massive tear that would demonstrate superior migration of the humeral head on x-ray evidence and a positive drop arm sign on physical examination which were not present in appellant's case. He noted that an MRI scan of the bilateral shoulders was indicated from a medical standpoint in this setting to obtain additional information as it related to the rotator cuff and surrounding structures which would be important in treating appellant's shoulder pain. However, Dr. Sites found that additional testing was not indicated as it related to any employment-related activity. He opined that the medical record did not support that appellant's bilateral shoulder pain was the result of a work-related injury because there was no

documentation in the medical record of appellant having sustained a specific injury, that he lost work during his period of employment as a result of right or left shoulder pathologies, or that he claimed any shoulder problems prior to the cessation of his work activities on October 19, 2016. Dr. Sites noted that the earliest documentation for treatment to the left shoulder was Dr. McGuire's November 1, 2016 evaluation.

Dr. Sites opined that there was no reasonable way to separate appellant's nonwork activity, including throwing sports such as softball, from his work activity as it may relate to right or left shoulder pathology. He reported that certainly, some occupations may be more physically demanding than others, but there was no testing available to accurately determine the timing or specific cause of shoulder pathology such as a rotator cuff tear in this type of setting. Dr. Sites stated that he was unaware of any well-designed proactive scientific studies that had definitively determined the risk associated with specific work activities. He reported that the pain that occurred in the shoulder from degenerative conditions such as rotator cuff pathology, AC arthropathy, and impingement increased with each decade over the age of 40 and were very common in the population regardless of activity levels. As such, Dr. Sites opined it was not likely that appellant's bilateral shoulder pain was as a result of his work activity as a letter carrier. He added that his opinion was made within a reasonable degree of medical certainty based upon the objective factors cited.

By decision dated April 10, 2018, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish that his bilateral shoulder conditions were causally related to the accepted factors of federal employment. It found that the special weight of the medical evidence rested with Dr. Sites, serving as the referee physician, who opined that appellant's bilateral shoulder conditions were not related to his federal employment duties.

On April 17, 2018 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. In support of his claim, he submitted a June 1, 2018 medical report from Dr. M. Stephen Wilson, a specialist in occupational and orthopedic surgery. Dr. Wilson provided physical examination findings and diagnosed impingement syndrome, rotator cuff tear, and osteoarthritis of the bilateral shoulders. He opined that appellant's diagnoses were causally related to his occupational duties and discussed the mechanism of injury pertaining to his bilateral shoulder conditions.

A hearing was held on July 11, 2018 where appellant testified in support of his claim. He explained that he applied for disability retirement as a result of his previously accepted OWCP claims, but was in a paid status through November 2017 due to accumulated leave. Appellant explained that he had no prior hobbies that would cause his shoulder conditions and no prior injuries involving the same area. He described his employment duties over the course of 24 years. Appellant further reported that he continued to deal with shoulder pain and was currently working as a high school teacher. He explained that immediately after he retired, he delivered for FedEx for the holiday rush season while he was in a paid leave status with the employing establishment. Appellant provided the employing establishment as a reference who then informed him that he had to quit his job, which he did. He explained that he was not delivering packages and was only driving the vehicle while another employee ran the packages for delivery. Counsel argued that employment factors need not be the only cause of appellant's condition as FECA recognized dual

and proximate causation. He further argued that Dr. Wilson's report established appellant's occupational disease claim. The record was held open for 30 days. No additional evidence was received.

By decision dated August 24, 2018, OWCP's hearing representative affirmed the April 10, 2018 decision denying appellant's occupational disease claim. He found that the special weight of the medical evidence rested with Dr. Sites, serving as the referee physician, who opined that appellant's bilateral shoulder conditions were not causally related to the accepted factors of federal employment.

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,⁴ 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 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.⁶

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.⁷

Rationalized medical opinion evidence is required to establish causal relationship.⁸ The opinion of the physician must be based on a complete factual and medical background, 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 incident.⁹ This medical opinion must include an accurate history of the employee's employment injury and

⁴ *T.H.*, Docket No. 18-1585 (issued March 22, 2019); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *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).

⁷ *J.P.*, Docket No. 19-0303 (issued August 13, 2019); *see Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁸ *See* 20 C.F.R. § 10.110(a); *M.M.*, Docket No. 18-1366 (issued February 27, 2019); *John M. Tornello*, 35 ECAB 234 (1983).

⁹ *S.S.*, Docket No. 18-1488 (issued March 11, 2019).

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

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.¹¹ For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.¹² Where OWCP has referred the case to an impartial medical examiner (IME) to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.¹³

When OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report.¹⁴ If the referee physician fails to respond or does not provide an adequate response, it should refer appellant for a new impartial medical examination.¹⁵

ANALYSIS

The Board finds that this case is not in posture for decision.¹⁶

OWCP properly found a conflict in medical opinion between Dr. McGuire, appellant's treating physician, and Dr. Framjee, the second opinion physician, regarding whether his federal employment duties caused or aggravated his bilateral shoulder conditions. On February 27, 2018 it referred appellant to Dr. Sites for an impartial medical evaluation to resolve the conflict, pursuant to 5 U.S.C. § 8123(a).

The Board finds, however, that Dr. Sites' opinion is equivocal and not well rationalized.¹⁷ Therefore, his report is insufficient to resolve the conflict between Dr. McGuire and Dr. Framjee. In his February 27, 2018 report, Dr. Sites opined that appellant's bilateral shoulder conditions could be caused by numerous factors. He related that there was no reasonable way to separate appellant's nonwork activity from his work activity as it may have related to his shoulder pathology. Dr. Sites reported that, because there was no scientific way to decipher what caused

¹⁰ *S.H.*, Docket No. 17-1660 (issued March 27, 2018); *James Mack*, 43 ECAB 321 (1991).

¹¹ 5 U.S.C. § 8123(a); *A.R.*, Docket No. 18-0632 (issued October 19, 2018).

¹² *C.H.*, Docket No. 18-1065 (issued November 29, 2018).

¹³ *W.M.*, Docket No. 18-0957 (issued October 15, 2018).

¹⁴ *C.B.*, Docket No. 16-1713 (issued April 21, 2017).

¹⁵ See also *W.H.*, Docket No. 16-0806 (issued December 15, 2016); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(e) (September 2010).

¹⁶ *R.W.*, Docket No. 18-1457 (issued February 1, 2019).

¹⁷ *K.C.*, Docket No. 17-0844 (issued July 16, 2018).

his condition, then it was not caused by his federal employment duties. His statement on causal relationship is equivocal and speculative, opining that it was not likely that appellant's bilateral shoulder pain was a result of his work activity as a letter carrier. The Board has held that medical opinions which are equivocal or speculative are of diminished probative value.¹⁸ As such, the Board finds that Dr. Sites did not provide adequate medical rationale to explain the basis of his conclusion on causal relationship.¹⁹ When an impartial medical report lacks medical reasoning to support conclusory statements about the claimant's condition, it is insufficient to resolve a conflict in the medical evidence.²⁰ Thus, the Board finds that Dr. Sites' opinion is of insufficient probative value to carry the special weight of the evidence and the case must be remanded for further development.²¹

Once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.²² On remand, it should refer appellant, the case record, and an updated SOAF to an appropriate impartial medical specialist to resolve the conflict pertaining to whether appellant's bilateral shoulder conditions were causally related to the accepted factors of his federal employment, either directly or through aggravation, precipitation, or acceleration.²³ Following this and any other further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's occupational disease claim.²⁴

CONCLUSION

The Board finds this case is not in posture for decision.

¹⁸ See *P.H.*, Docket No. 16-0654 (issued July 21, 2016); *S.R.*, Docket No. 16-0657 (issued July 13, 2016). See also *S.E.*, Docket No. 08-2214 (issued May 6, 2009) (the Board has generally held that opinions such as the condition is probably related, most likely related, or could be related are speculative and diminish the probative value of the medical opinion); *Cecilia M. Corley*, 56 ECAB 662 (2005) (medical opinions which are speculative or equivocal are of diminished probative value).

¹⁹ *D.B.*, Docket No. 17-1845 (issued February 16, 2018); *T.H.*, Docket No. 14-0326 (issued February 5, 2015).

²⁰ *R.T.*, Docket No. 17-0925 (issued December 14, 2017).

²¹ *Id.*

²² See *K.S.*, Docket No. 18-0845 (issued October 26, 2018).

²³ *J.W.*, Docket No. 15-0020 (issued August 17, 2016).

²⁴ *C.T.*, Docket No. 19-0508 (issued September 5, 2019).

ORDER

IT IS HEREBY ORDERED THAT the August 24 and April 10, 2018 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further development consistent with this decision.

Issued: October 4, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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