United States Department of Labor
Employees' Compensation Appeals Board

D.H., Appellant	)	
	)	**Docket No. 19-0931**
and	)	**Issued: October 2, 2019**
DEPARTMENT OF VETERANS AFFAIRS, CARL T. HAYDEN VETERANS MEDICAL CENTER, Phoenix, AZ, Employer	)	

Appearances:
Alan J. Shapiro, 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
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 27, 2019 appellant, through counsel, filed a timely appeal from a March 8, 2019 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 to consider 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 his burden of proof to expand the acceptance of his claim to include additional right shoulder conditions causally related to his accepted May 5, 2017 employment injury.

FACTUAL HISTORY

On July 18, 2017 appellant, then a 55-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that on May 5, 2017 he strained and sprained his right shoulder when he tried to "untighten" a piece of equipment attached to an operation table while in the performance of duty.

Appellant was initially treated at the employing establishment's health unit. In a progress note dated May 10, 2017, Dr. Nanette T. Auriemma, a Board-certified internist, indicated that appellant related a history of injury that on May 5, 2017 he strained his right shoulder while trying to loosen a clamp on equipment that he was removing from a bed at work. She reported findings on physical examination, provided an assessment of acute strain of the right shoulder, and listed appellant's work restriction. In a progress note dated May 24, 2017, Dr. Auriemma reexamined appellant and provided an assessment of resolving right shoulder strain.

OWCP received an employing establishment incident report dated May 10, 2017. Appellant described that on May 5, 2017 he was working in an operating room (OR) and he attempted to disengage a very tightly placed piece of equipment on an OR table used for a specific surgical procedure by using his gloved hands to twist the knob open, which resulted in overexertion of his right shoulder. He did not give it much thought that day, finished his shift, and went home and medicated creams/pads on the affected area. By Monday, appellant still had discomfort and sought medical attention in the employing establishment occupational health unit. He lost no time from work and was placed on restricted duty.

OWCP thereafter received reports by physical therapists who noted diagnoses of unspecified injury muscle(s) and tendon(s) of right shoulder rotator cuff, initial encounter, and right shoulder pain.

Additional medical evidence was received from Dr. Auriemma. In a report and a progress note dated July 25, 2017 and an undated duty status report (Form CA-17), Dr. Auriemma noted a date of injury as May 5, 2017 and reiterated her diagnosis of right shoulder strain, diagnosed persistent right shoulder pain, and listed appellant's work restrictions. In the Form CA-17 report, she noted that the diagnosed right shoulder strain was due to the "May 10, 2017" employment incident.[3]

In a report of employee's treatment dated September 28, 2017, Erlinda M. Singarajah, a certified nurse practitioner from the employing establishment's health unit, advised that appellant could return to full-duty work and continue his physical therapy treatment.

[3] The date of incident noted by Dr. Auriemma appears to be a typographical error.

Dr. Hermenegildo H. Almaria, Jr., a Board-certified diagnostic radiologist, in a right shoulder x-ray report dated July 25, 2017, provided an impression of slight narrowing of the acromioclavicular joint space.

In a consultation note dated January 26, 2018, Dr. Richard J. Orbon, a Board-certified orthopedic surgeon, indicated that appellant related a history of injury of lifting a heavy object in an OR with immediate right shoulder pain and weakness. He discussed findings on physical examination. Dr. Orbon noted that an x-ray of the right shoulder revealed a torn long head biceps tendon, which required rotator cuff repair.

Dr. Stephen Shinault, a Board-certified diagnostic radiologist, provided impressions of a right shoulder magnetic resonance imaging scan report dated April 20, 2018. He indicated severe diffuse tendinosis along the rotator crescent; diffuse high-grade partial articular surface tearing and bursal surface fraying distal supraspinatus and infraspinatus tendons, two centimeter (cm) x two cm (coronal x sagittal dimension, respectively) full-thickness tear infraspinatus tendon, and Goutallier grade 1 supraspinatus muscle atrophy. Dr. Shinault also provided impressions of full-thickness tear subscapularis tendon deep and superficial fibers, teres minor tendon intact, and Goutallier grade 3 subscapularis muscle atrophy. He further provided impressions of degenerative-type raying and tearing anterosuperior and anteroinferior labrum, complete tear proximal long head biceps tendon from the labral biceps anchor, residual extra-articular tendon fibers located along the bicipital groove, capsule and capsuloligamentous structures maintained, grade 2 to 3 glenohumeral joint and superior humeral head articular surface chondromalacia, no acute fracture nor distinct osseous sequela of prior dislocation injury, mild acromioclavicular joint degenerative arthrosis with a slight laterally downsloping type 1 acromion, small glenohumeral joint effusion and no distinct loose bodies in the synovial space, and regions and structures of the suprascapular and spinoglenoid notches, as well as quadrilateral and axillary spaces maintained and no signal alterations to suggest denervation-type injury.

In a report dated July 26, 2018, Dr. Kostas J. Economopoulos, a Board-certified orthopedic surgeon, noted that appellant presented for evaluation of his right shoulder, which he injured in May 2017 while "undoing and pulling a strap on an OR bed." He discussed findings on physical examination and reviewed diagnostic test results. Dr. Economopoulos provided assessments of right shoulder pain, rotator cuff tear, and biceps tear. He recommended right rotator cuff repair. Dr. Economopoulos advised that appellant could return to work with no restrictions as of July 26, 2018.

OWCP, in a development letter dated August 13, 2018, informed appellant that, when his claim was received, it appeared to be for a minor injury that resulted in minimal medical bills and minimal or no lost time from work and, based on these criteria and because the employing establishment did not controvert continuation of pay or challenge the case, payment of a limited amount of medical expenses was administratively approved. It reopened the claim for formal consideration of the merits because he had requested authorization for surgery. OWCP requested that appellant submit a narrative medical report from his physician which contained a detailed description of findings and diagnoses, explaining how the reported work activities caused, contributed to, or aggravated his medical condition. It also provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond. No response was received within the time allotted.

By decision dated September 17, 2018, OWCP denied appellant's traumatic injury claim, finding that the factual component of fact of injury had not been established. It also found that he had not submitted medical evidence to establish a diagnosed medical condition causally related to the alleged employment incident. OWCP concluded, therefore, that appellant had not met the requirements to establish an injury as defined by FECA.

On September 21, 2018 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review.

In a narrative statement dated September 25, 2018, appellant responded to OWCP's development questionnaire. He described the circumstances surrounding the May 5, 2017 employment incident, a right shoulder diagnosis, and subsequent course of treatment.

OWCP subsequently received a Certification of Health Care Provider for Employee's Serious Medical Condition (Family and Medical Leave Act (FMLA)) dated November 14, 2018 and completed by Dr. Economopoulos. Dr. Economopoulos noted that appellant had right shoulder pain that commenced May 5, 2017. He related that the probable duration of his condition was from the date of his report to April 14, 2019. Dr. Economopoulos also related that appellant was incapacitated and unable to perform a certain job function due to the condition during this period.

During a telephonic hearing, held on January 30, 2019, appellant again described the circumstances surrounding the May 5, 2017 employment incident.

Following the hearing, OWCP received a witness statement dated January 22, 2019 from appellant's coworker who indicated that he was present when appellant injured his shoulder while cleaning a table in procedure room number 4 at work. The coworker related that the table had a very heavy and awkward piece of equipment on it. He reported that appellant suddenly yelled and when he turned around appellant was grabbing his shoulder.

An OWCP hearing representative, by decision dated March 8, 2019, modified and affirmed the September 17, 2018 decision. The decision found that the factual evidence was sufficient to establish that the May 5, 2017 employment incident occurred, as alleged. The hearing representative accepted that appellant sustained a right shoulder strain in connection with the accepted May 5, 2017 employment incident. However, it was determined that the medical evidence of record was insufficient to establish additional right shoulder conditions causally related to the accepted May 5, 2017 employment incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim, including the fact that he or she is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or

[4] *Id*.

specific 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]

When 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.[7] 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.[8] 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.[9] 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]

ANALYSIS

The Board finds that appellant has not met his burden of proof to expand the acceptance of his claim to establish that the acceptance of his claim should be expanded to include additional right shoulder conditions causally related to his accepted May 5, 2017 employment injury.

Dr. Orbon's January 26, 2018 consultation note related a history of the accepted May 5, 2017 employment incident and diagnosed a torn long head biceps tendon of the right shoulder that required rotator cuff repair. Dr. Economopoulos' July 26, 2018 report also provided a history of the accepted employment incident of May 5, 2017. He diagnosed right shoulder pain, rotator cuff tear, and biceps tear, and recommended right rotator cuff repair. Neither physician offered a medical opinion, finding that the diagnosed conditions were causally related to the accepted work injury.[11] Further, in his November 14, 2018 FMLA certification of health care provider form, Dr. Economopoulos diagnosed right shoulder pain that commenced May 5, 2017. However, the Board has held that pain is a symptom, not a diagnosis and therefore does not constitute the basis

[5] *See F.H.*, Docket No. 18-1238 (issued January 18, 2019); *Tracey P. Spillane*, 54 ECAB 608 (2003).

[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] *See T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

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

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

[10] *F.H.*, *supra* note 5.

[11] *See R.J.*, Docket No. 17-1365 (issued May 8, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

for the payment of compensation.[12] For the foregoing reasons, the Board finds that these reports are insufficient to establish appellant's burden of proof.

The diagnostic reports of Dr. Almaria and Dr. Shinault addressed appellant's right shoulder conditions. Diagnostic studies are of limited probative value as they do not address whether the employment incident caused any of the diagnosed conditions.[13] These reports, therefore, are also insufficient to establish appellant's claim.

Appellant submitted reports from his physical therapists. This evidence has no probative medical value because a physical therapist is considered a "physician" as defined under FECA.[14]

The Board finds that appellant has not submitted sufficient rationalized medical evidence to establish causal relationship between the accepted May 5, 2017 employment injury and the claimed additional right shoulder conditions. As such, appellant has not met his burden of proof.

On appeal counsel contends that OWCP's March 8, 2019 decision is contrary to fact and law. For the reasons set forth above, the Board finds that appellant has not met his burden of proof.

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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that the acceptance of his claim should be expanded to include additional right shoulder conditions causally related to his accepted May 5, 2017 employment injury.

[12] *R.J., id.*; *John L. Clark*, 32 ECAB 1618 (1981).

[13] *See R.J., id.*; *E.G.*, Docket No. 17-1955 (issued September 10, 2018).

[14] 5 U.S.C. § 8101(2) provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. *See* 5 U.S.C. § 8102(2); *S.O.*, Docket No. 19-0307 (issued June 18, 2019); *J.B.*, Docket Nos. 18-1751 and 19-0792 (issued May 6, 2019); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants and physical therapists are not competent to render a medical opinion under FECA). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 2, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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