United States Department of Labor
Employees' Compensation Appeals Board

L.J., Appellant	)	
and	)	**Docket No. 19-1343**
	)	**Issued: February 26, 2020**
DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF MEDICARE HEARINGS & APPEALS, Cleveland, OH, 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:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 4, 2019 appellant, through counsel, filed a timely appeal from an April 11, 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 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 April 11, 2019 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.*

ISSUE

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

FACTUAL HISTORY

On March 23, 2018 appellant, then a 39-year-old hearing clerk legal assistant, filed an occupational disease claim (Form CA-2) alleging that she developed shoulder bursitis as a result of factors of her federal employment.[4] She explained that her employment duties involved daily exhibiting of files, repetitive movement, and hole punching. Appellant reported that she had the same pain back in 2012 and 2013, which resulted in surgery. She noted that she first became aware of her condition and realized its relationship to her federal employment on August 21, 2017. On the reverse side of claim form, G.C., appellant's supervisor, indicated that the employee was last exposed to the conditions alleged to have caused her illness on April 13, 2018. He also noted that she had a 10-pound lifting restriction since 2013 and had not lifted any materials or boxes of substantial weight.

In a narrative statement, appellant related that, since May and June 2017, she exhibited case files five days a week for eight hours a day. She described that exhibiting case files included sorting through case files, which contained anywhere between 100 to 1,000 pages per file, by page, lifting and transporting those files to the sequence machine, manually hole punching the pages, and binding them to a folder. Appellant alleged that this repetitive motion caused severe pain in her right shoulder and difficulty with activities of daily living. She reported that the same situation happened to her right shoulder when she was exhibiting full time as a legal assistant in 2012-2013 and that she eventually underwent surgery.

Appellant submitted diagnostic testing reports from 2013. A February 25, 2013 right shoulder magnetic resonance imaging (MRI) scan report revealed a small amount of fluid at the subacromial-subdeltoid bursa indicative of mild bursitis with mild degenerative hypertrophy at the acromioclavicular (AC) joint. A September 23, 2013 electromyography and nerve conduction velocity study of appellant's bilateral upper extremities demonstrated a normal study with no evidence of cervical radiculopathy or plexopathy and no focal injuries to the left or right radial, median, or ulnar nerves.

In progress notes dated February 18 to March 18, 2013, Dr. Brett McCoy, a Board-certified orthopedic surgeon, indicated that appellant was evaluated for increasing pain in her left wrist and right shoulder. He reported that she had a presumptive diagnosis of right shoulder impingement versus possible rotator cuff tear. Dr. McCoy noted right shoulder examination findings of pain with impingement and mild tenderness over the AC joint. Neer and Hawkins tests were positive. In a March 4, 2013 note, Dr. McCoy indicated that the source of appellant's pain was not clear, but that MRI scan findings did not suggest a fracture or significant ligamentous injury.

Appellant also submitted examination notes dated March 20 to December 27, 2013 by Dr. Andre F. Wolanin, a Board-certified orthopedic surgeon, who indicated that he treated her for right shoulder AC joint arthrosis. Examination of her right shoulder revealed positive

[4] Appellant was working in a full-time, limited-duty capacity with restrictions of limited bending, twisting, pushing/pulling, lifting up to 10 pounds, and sitting and ambulating according to her tolerance.

impingement sign of Hawkins, Neer, and Watson maneuver. In an April 23, 2013 operative report, Dr. Wolanin indicated that appellant underwent subacromial decompression and resection of the distal clavicle of the right shoulder. The preoperative diagnosis noted AC joint arthrosis and right shoulder bursitis. In an April 25, 2013 note, Dr. Wolanin reported that appellant's wounds were healing well.

In reports dated April 17 to August 26, 2017, Dr. Wolanin related appellant's complaints of right shoulder and left wrist pain. He noted her previous right shoulder surgery and indicated that she had recently developed pain, tenderness, swelling, and difficulty with overhead activity. Upon examination of appellant's right shoulder, Dr. Wolanin observed positive crepitus and positive impingement sign. He diagnosed recurrent right shoulder bursitis.

In an April 17, 2018 development letter, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of factual information and medical evidence necessary to support her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the requested information. A similar letter of even date requested additional information from the employing establishment.

In a May 14, 2018 examination note, Dr. Wolanin indicated that appellant had undergone a distal clavicle resection of her shoulder in 2013 and now developed severe pain and tenderness with overhead activity at work. He noted examination findings of positive drop arm test and positive impingement sign. Dr. Wolanin reported that x-rays revealed evidence of calcific tendinitis and diagnosed right shoulder calcific tendinitis and possible rotator cuff tear. He completed a duty status report (Form CA-17), which advised that appellant could return to work in a limited-duty capacity on May 15, 2018.

On May 16, 2018 OWCP received appellant's completed questionnaire. Appellant explained that, beginning August 2017, her work included organizing case records (exhibiting), numbering pages, manually hole punching pages, binding pages to case files, and lifting each file multiple times. She indicated that she performed these activities approximately five days a week for eight hours a day. Appellant also reported that beginning May 2018 she had work restrictions of no pushing/pulling, no reaching above the shoulder, no overhead lifting, and no reaching with her right upper extremity. She submitted pictures of the case records and boxes.

OWCP also received additional medical evidence. An October 5, 2015 work restriction note by Dr. Wolanin indicated that appellant could work with restrictions of no lifting greater than five pounds and no heavy pushing or pulling with the left hand/wrist.

In an August 4, 2016 letter, Dr. Steven C. Funlop, a Board-certified neurosurgeon, indicated that appellant was seen in his office for a lumbar disc herniation and advised to limit her physical activities. In a December 8, 2016 work restriction note, he recommended that she return to work in a full-time, limited-duty capacity beginning December 12, 2016.

In a May 21, 2018 development letter, OWCP requested additional information from appellant regarding her work status beginning August 21, 2017 and the level of her exposure to work activities based on her work restrictions.

Appellant submitted additional medical reports. In examination notes dated December 10, 2012 to January 14, 2013, Dr. McCoy indicated that she was seen in his office for complaints of left wrist pain. He provided examination findings and diagnosed left dorsodial wrist pain

consistent with tendinitis. In a January 14, 2013 note, Dr. McCoy reported that appellant had informed him that her right shoulder had also started to bother her. Examination of appellant's right shoulder revealed mild tenderness over her AC joint and positive Hawkins test. Dr. McCoy diagnosed right shoulder impingement.

In an August 21, 2017 examination note, Dr. Wolanin reported that appellant worked "repetitive labor" where she does internal and external rotation of the shoulder with pronation motion. Examination of appellant's right shoulder revealed positive impingement sign of Hawkins and Neer tests. Dr. Wolanin diagnosed right shoulder recurrent bursitis.

In examination notes dated August 6, 2014 to May 14, 2018, Dr. Wolanin related appellant's complaints of continued and recurrent left wrist pain. In an April 24, 2017 note, he indicated that she began to complain of right shoulder pain and left wrist pain. Dr. Wolanin noted that appellant was status post subacromial decompression resection of the right shoulder distal clavicle. He reported right shoulder examination findings of positive crepitus and positive impingement sign. Dr. Wolanin diagnosed right shoulder bursitis and right shoulder calcific tendinitis, possible rotator cuff tear.

In a June 12, 2018 letter, G.C. a supervisory attorney, indicated that the employing establishment did not concur with appellant's allegation that she injured herself at work on August 21, 2017. He alleged that she did not report any injuries on that date and that her request for Family and Medical Leave Act leave was not related to a shoulder-related impairment. G.C. also pointed out that appellant had been on a 10-pound lifting restriction since 2013. He indicated that the employing establishment did not make any written job offers for a formal limited-duty position, but a reasonable accommodation memorandum was approved on January 19, 2018. G.C. reported that in 2017 informal accommodations were made to appellant's work duties as a legal assistant based on medical restrictions recommended by her physician. He asserted that she did not have any other medical restrictions which the employing establishment was not able to accommodate. G.C. contended that, from August 21, 2017 to the present, appellant was not responsible for lifting case files or boxes weighing over 10 pounds.

OWCP received a position description for a legal assistant/hearing clerk and time and leave records from 2017.

On June 19, 2018 OWCP received appellant's completed questionnaire dated June 18, 2018. Appellant clarified that during the period August 21, 2017 through the present she worked with activity restrictions due to a previous medical condition. She reported that her restrictions were on bending, twisting, pushing, and pulling, and lifting over 10 pounds, and no overhead reaching with right arm. Appellant responded "yes" that, during the time period, she was directed to lift case files and boxes over 10 pounds and that her restrictions on lifting were not accommodated by the employing establishment.

By decision dated July 26, 2018, OWCP denied appellant's occupational disease claim finding the medical evidence submitted was insufficient to establish a causal relationship between her condition and the accepted factors of her federal employment.

On July 31, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on December 11, 2018.

In a July 23, 2018 letter, Dr. Wolanin related that in 2013 appellant underwent a procedure to remove a bone spur from her distal clavicle. He indicated that since that time she has experienced a significant amount of recurrent bursitis of the shoulder as she does repetitive work with that shoulder. Dr. Wolanin noted that appellant's diagnosis was calcific tendinitis of the right shoulder with possible rotator cuff tear. He opined that her condition was an aggravation of her preexisting condition. Dr. Wolanin explained that "repetitive work as the patient does clerking would support this diagnosis as the calcific tendinitis has a direct result of chronic repetitive trauma to this area." He recommended that appellant limit her overhead activity and lifting greater than 10 pounds.

By decision dated January 11, 2019, an OWCP hearing representative affirmed the July 26, 2018 decision.

On April 1, 2019 appellant, through counsel, requested reconsideration.

In a February 1, 2019 witness statement, D.T. indicated that from September 1 to 4, 2017 appellant had volunteered as a box office cashier. He explained that her duties involved overseeing ticket sales and that her roles and responsibilities were limited.

In an April 11, 2019 progress report, Dr. Wolanin related appellant's complaints of chronic right shoulder pain. He noted a diagnosis of right shoulder calcific tendinitis with possible rotator cuff tear. Examination of appellant's right shoulder demonstrated positive drop arm test and impingement sign. Dr. Wolanin completed a Form CA-17, which indicated that appellant could work with restrictions beginning May 15, 2018.

By decision dated April 11, 2019, OWCP denied modification of the January 11, 2019 hearing representative's decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim, including 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 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]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors

[5] *Supra* note 2.

[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).

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 claimant.[9]

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.[10] The opinion of the physician must be based on a complete factual and medical background of the employee, 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 specific employment factors identified by the employee.[11]

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship, therefore, involves aggravation, acceleration or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.[12]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a right shoulder condition causally related to the accepted factors of her federal employment.

Appellant submitted a series of reports and work restriction notes by Dr. Wolanin dated December 10, 2012 to April 11, 2019. In a January 14, 2013 note, Dr. Wolanin related that her right shoulder had started to bother her and diagnosed right shoulder impingement. In an April 23, 2013 operative report, he indicated that appellant underwent subacromial decompression and resection of the distal clavicle of her right shoulder to treat her AC joint arthrosis and bursitis. In an April 17, 2017 report, Dr. Wolanin recounted that she had recently developed pain, tenderness, swelling, and difficulty with overhead activity in her right shoulder. He provided examination findings and diagnosed recurrent right shoulder bursitis. In an August 21, 2017 note, Dr. Wolanin described that appellant worked "repetitive labor" which involved internal and external rotation of her shoulder. In a July 23, 2018 letter, he noted her previous right shoulder surgery and recounted that she had continued to experience a significant amount of recurrent bursitis of the shoulder as she does "repetitive work" with that shoulder. Dr. Wolanin opined that appellant had sustained an aggravation of her preexisting condition. He explained that her repetitive work as a clerk would support the diagnosis of calcific tendinitis as it is a "direct result of chronic repetitive trauma to this area."

The Board notes that Dr. Wolanin accurately described appellant's previous right shoulder surgery and provided an affirmative opinion that she sustained an aggravation of her preexisting

[9] *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

[10] *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

[11] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *N.C.*, Docket No. 19-1191 (issued December 19, 2019); *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

condition. However, Dr. Wolanin did not provide sufficient, medical rationale, explaining how her physical activity at work actually caused or aggravated the diagnosed right shoulder condition.[13] He did not discuss any specific employment duties, but merely referenced "repetitive work." The Board has found that rationalized medical opinion evidence must relate specific employment factors identified by the claimant to the claimant's condition, with stated reasons by a physician.[14] The Board notes that this is particularly important in light of the reference to preexisting conditions.[15] As Dr. Wolanin did not provide a reasoned explanation of how appellant's specific employment duties caused or contributed to her current right shoulder condition, his reports are insufficient to establish her claim.

In progress notes dated February 18 to March 18, 2013, Dr. McCoy provided examination findings and diagnosed right shoulder impingement. However, he did not provide an opinion on whether appellant's right shoulder condition was related to her employment. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[16] These reports, therefore, are insufficient to establish appellant's claim.

The additional diagnostic tests are also insufficient to establish causal relationship as diagnostic tests do not provide an opinion on the cause of the diagnosed conditions and, therefore, lack probative value to establish causal relationship.[17] The August 4, 2016 letter by Dr. Funlop, likewise, is insufficient to establish appellant's claim as it addressed her lumbar condition and did not provide any discussion on her right shoulder symptoms.

On appeal counsel alleges that the decision was contrary to law and fact, that OWCP failed to adjudicate the claim in accordance with the proper standard of causation, and that OWCP failed to give due deference to the findings of appellant's attending physician. As discussed, the medical evidence of record is insufficient to meet appellant's 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 her burden of proof to establish a right shoulder condition causally related to the accepted factors of her federal employment.

[13] *D.W.*, Docket No. 19-0968 (issued October 9, 2019); *K.W.*, Docket No. 10-0098 (issued September 10, 2010).

[14] *See D.M.*, Docket No. 18-0844 (issued December 19, 2019); *see also L.F.*, Docket No. 10-2287 (issued July 6, 2011); *Solomon Polen*, 51 ECAB 341 (2000).

[15] *See B.R.*, Docket No. 16-0456 (issued April 25, 2016).

[16] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[17] *See A.B.*, Docket No. 17-0301 (issued May 19, 2017).

ORDER

IT IS HEREBY ORDERED THAT the April 11, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 26, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board