

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

H.R., Appellant	)	
	)	
and	)	Docket No. 19-1403
	)	Issued: February 11, 2020
U.S. POSTAL SERVICE, POST OFFICE,	)	
Oakdale, NY, Employer	)	
	)	

*Appearances:*  
Stephen Larkin, for the appellant<sup>1</sup>  
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 June 13, 2019 appellant, through her representative, filed a timely appeal from a December 17, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> The Board notes that, following the December 17, 2018 decision, OWCP received additional evidence. Appellant also submitted additional evidence on appeal. 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.*

Pursuant to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

### **ISSUE**

The issue is whether appellant has met her burden of proof to establish cervical spine and left shoulder conditions causally related to the accepted November 23, 2016 employment incident.

### **FACTUAL HISTORY**

On November 29, 2016 appellant, then a 55-year-old sales, services, and distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that, on November 23, 2016, when scanning parcels which had fallen to the floor, a heavy box fell from a collapsing pallet and struck the back of her head while in the performance of duty. Immediately after the incident, she was transported by ambulance to a hospital. Appellant stopped work on the date of injury and did not return.

In support of her claim, appellant submitted November 29, 2016 reports by Dr. Brett Spain, an osteopathic physician Board-certified in family practice. Dr. Spain diagnosed cervical degenerative disc disease, left upper extremity radiculopathy, and a probable herniated nucleus pulposus. He held appellant off from work for four weeks.

In a December 20, 2016 development letter, OWCP notified appellant of the deficiencies in her claim, enclosed a questionnaire for her completion, and afforded her 30 days to submit additional evidence.

In response, appellant provided a December 29, 2016 statement describing the onset of left shoulder pain and neck stiffness on November 23, 2016. She submitted a November 23, 2016 report by Dr. Joseph J. Chirayil, Board-certified in emergency medicine, who obtained a computerized tomography (CT) scan of appellant's head demonstrating no acute intracranial hemorrhage. He diagnosed a traumatic head injury.

Dr. Spain provided periodic reports from December 9, 2016 through January 24, 2017 noting a history of the November 23, 2016 employment incident. On examination, he observed hyperlordosis of the upper cervical spine, hyperkyphosis of the lower cervical spine, left paracervical spasm, and subacromial and acromioclavicular tenderness of the left shoulder. Dr. Spain diagnosed left shoulder pain, calcific tendinopathy of the left shoulder, a probable full-thickness left rotator cuff tear, left acromioclavicular arthropathy, subacromial impingement of the left shoulder, cervical degenerative joint disease, left upper extremity radiculopathy, and a probable herniated nucleus pulposus. He held appellant off from work.

By decision dated February 2, 2017, OWCP accepted that the November 23, 2016 employment incident occurred as alleged, but denied appellant's claim as causal relationship was not established.

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

In a letter postmarked February 14, 2017, appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, held on August 2, 2017. She submitted additional medical evidence.

In reports from December 27, 2016 through March 8, 2017, Dr. Spain opined that the striking force of the falling parcel and the excessive loading force of bracing herself as she fell forward were competent to cause cervical radiculopathy, herniated cervical discs, a left rotator cuff tear, and aggravation of preexisting arthritic changes in her left shoulder and cervical spine.<sup>4</sup>

On April 20, 2017 Dr. Charles Ruotolo, a Board-certified orthopedic surgeon, performed a left shoulder arthroscopy with rotator cuff repair and subacromial decompression. He provided periodic progress reports indicating his support for casual relationship.

In an August 20, 2017 report, Dr. Spain opined that the November 23, 2016 employment incident caused an overload to appellant's left shoulder, weakening the tendons and resulting in a left rotator cuff tear. He explained that disc bulges and herniations caused nerve root impingement resulting in left upper extremity radiculopathy.

By decision dated September 19, 2017, an OWCP hearing representative affirmed the February 2, 2017 decision.

On September 18, 2018 appellant, through her representative, requested reconsideration. Appellant submitted additional evidence.

In a September 18, 2018 report, Dr. Spain opined that the November 23, 2016 employment incident caused the diagnosed cervical disc herniations, left rotator cuff tear, and cervical radiculopathy.

In a September 20, 2018 report, Dr. Spain opined that when the package struck the back of appellant's head during the November 23, 2016 employment incident, this caused her "neck muscles and discs to go forward rapidly," creating a whiplash effect which injured the cervical discs and the associated nerves from levels C2-3 through C6-7, resulting in radiculopathy into the left upper extremity. He also explained that the impact of the falling package and the stresses of bracing herself to avoid the fall had aggravated preexisting osteoarthritis of the left shoulder, resulting in a cascade of cartilage degeneration, inflammation, bursitis, and subacromial impingement. Dr. Spain reiterated that the impact of the falling package was competent to cause the diagnosed rotator cuff tear.

By decision dated December 17, 2018, OWCP denied modification of the September 19, 2017 decision.

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<sup>4</sup> A February 20, 2017 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated multilevel disc bulges and abnormalities, most severe at C6-7 on the right with nerve root impingement. A February 20, 2017 MRI scan of the left shoulder demonstrated a full-thickness supraspinatus tear, partial infraspinatus and biceps tendon tears, atrophy of the supraspinatus and infraspinatus muscles, and significant acromioclavicular osteoarthritis and bursitis.

## 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,<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.<sup>8</sup> First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.<sup>9</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>10</sup>

Causal relationship is a medical issue, and rationalized medical opinion evidence is required to establish causal relationship.<sup>11</sup> 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 a diagnosed condition and the specific employment incident identified by the claimant.<sup>12</sup>

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<sup>5</sup> *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>6</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>7</sup> *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).

<sup>8</sup> *R.B.*, Docket No. 17-2014 (issued February 14, 2019); *B.F.*, Docket No. 09-0060 (issued March 17, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

<sup>9</sup> *S.F.*, Docket No. 18-0296 (issued July 26, 2018); *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

<sup>10</sup> *J.J.*, Docket No. 19-0789 (issued November 22, 2019); *A.D.*, Docket No. 17-1855 (issued February 26, 2018); *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008).

<sup>11</sup> *J.J.*, *id.*; *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>12</sup> *See B.J.*, Docket No. 18-1276 (issued February 4, 2019); *Victor J. Woodhams*, 41 ECAB 345 (1989).

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.<sup>13</sup>

### ANALYSIS

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

In support of her claim, appellant submitted a series of reports from Dr. Spain, her attending physician, who consistently opined that the accepted November 23, 2016 employment incident aggravated preexisting osteoarthritis of the left shoulder, and caused cervical disc herniations with radiculopathy. He accurately described the incident in which a heavy parcel fell and struck appellant on the back of her head, causing her to fall forward to the floor. Dr. Spain specified the physiologic effects of the forces generated by the falling parcel, bracing for impact, and falling. He explained the pathophysiologic connection between those forces and the diagnosed herniated cervical discs, left rotator cuff tear, subacromial impingement, and aggravation of preexisting osteoarthritis of the left shoulder and cervical spine.

Accordingly, the Board finds that Dr. Spain provided an affirmative and rationalized opinion on causal relationship. Dr. Spain identified the accepted November 23, 2016 employment incident, identified findings on examination and diagnostic testing, and explained how the identified employment incident would cause the claimed cervical spine and left shoulder conditions. The Board thus finds that Dr. Spain's reports are of sufficient probative quality to require further development of the case record by OWCP.<sup>14</sup> Also, his opinion is uncontroverted in the record, as Dr. Ruotolo, the orthopedic surgeon who performed a left rotator cuff repair on April 20, 2017, also supported causal relationship.

It is well established that proceedings under FECA are not adversarial in nature, and that while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>15</sup> OWCP has an obligation to see that justice is done.<sup>16</sup>

On remand OWCP should refer appellant to an appropriate specialist, along with the case record and a statement of accepted facts. Its referral physician should provide an evaluation and a rationalized medical opinion as to the relation of the claimed cervical spine and left shoulder

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<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

<sup>14</sup> *J.J.*, *supra* note 10; *J.G.*, Docket No. 17-1062 (issued February 13, 2018). *See also John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

<sup>15</sup> *J.J.*, *supra* note 10; *A.P.*, Docket No. 17-0183 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>16</sup> *J.J.*, *supra* note 10; *R.B.*, Docket No. 18-0162 (issued July 24, 2019); *William J. Cantrell*, *id.*

conditions to the accepted November 23, 2016 employment incident. After such further development of the case record as OWCP deems necessary, it shall issue a *de novo* decision.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 17, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 11, 2020  
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