United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 20-0146**
	)	**Issued: June 11, 2020**
DEPARTMENT OF NAVY, PUGET SOUND NAVAL SHIPYARD & INTERMEDIATE MAINTENANCE FACILITY, Bremerton, WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 24, 2019 appellant filed a timely appeal from an August 23, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The record provided to the Board includes evidence received after OWCP issued its August 23, 2019 decision. 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 his burden of proof to establish that the acceptance of his claim should be expanded to include additional conditions as causally related to the accepted employment injury.

FACTUAL HISTORY

On April 22, 2019 appellant, then a 66-year-old rigger, filed an occupational disease claim (Form CA-2) alleging that he suffered a strained right shoulder due to factors of his federal employment. He noted that he first became aware of his condition and first realized that it was caused or aggravated by his federal employment on November 15, 2018. Appellant explained that he was "working with a crane and watching the upper limit checks when he felt a pinch or a tweak in his neck and right shoulder." He did not stop work.

In a development letter dated May 3, 2019, OWCP informed appellant that he submitted no evidence to establish that he actually experienced the employment factors alleged to have caused his injury. It advised him of the type of factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion. OWCP also requested a narrative medical report from appellant's physician, providing a firm diagnosis of a condition and a rationalized opinion on how appellant's employment duties caused or aggravated his condition. In a separate development letter of even date, it requested that the employing establishment provide additional information regarding appellant's occupational disease claim, including comments from a knowledgeable supervisor regarding the accuracy of appellant's statements, and a copy of appellant's position description and physical requirements of his position. OWCP afforded both parties 30 days to respond.

In a May 13, 2019 response to OWCP's questionnaire, appellant explained that on November 15, 2018 he heard something pop in his neck and he "got aches" in between his shoulder blades as he was observing the upper limit checks on a service crane. He described a previous 2002 injury in his neck which resulted in a fusion of his cervical spine at C4/5, 5/6, and 6/7.[3] Appellant reported that a few days thereafter he noticed that his right shoulder was becoming sore and he experienced numbness in his arm and tingling radiating to his hand.

In a May 28, 2019 letter and medical report, Dr. Michael McManus, Board-certified in occupational medicine, indicated that appellant presented with pain, numbness, and weakness radiating to his bilateral scapulae and down his right upper extremity. He noted appellant's prior medical history of anterior C5 through C7 discectomies and fusion with residual right upper extremity neurologic deficits and added that appellant experienced worsening of his condition after November 15, 2018. In a diagnostic report of even date, Dr. Arthur Watanabe, a Board-certified radiologist, performed an x-ray of appellant's cervical spine which revealed degenerative disc disease at the superior adjacent segment C3/4 and multilevel cervical facet arthrosis. On evaluation and review of appellant's x-rays, Dr. McManus diagnosed a cervical strain with worsening right C7 radiculopathies, calcific tendinitis of the rotator cuff and bicipital tendinitis in

[3] In OWCP File No. xxxxxx513 OWCP accepted appellant's claim for cervical radiculitis at C6-7 resulting from an employment-related May 22, 2002 traumatic injury.

the right shoulder. He referenced appellant's original cervical strain injury and opined that, in compensating for appellant's right upper extremity deficits, appellant developed rotator cuff and bicipital tendinitis.

In a May 29, 2019 attending physician's report (Form CA-20), Dr. McManus provided diagnoses of a cervical strain, right shoulder calcific tendinitis, cervical radiculopathy, and right shoulder bicipital tendinitis. He checked a box marked "Yes" to indicate his belief that appellant's condition was caused or aggravated by his employment activity and referenced his May 28, 2019 medical evidence in support of his findings.

Appellant also provided a position description and job summary of his duties as a rigger.

By decision dated June 18, 2019, OWCP accepted appellant's occupational disease claim for a sprain of the ligaments of the cervical spine and temporary aggravation of radiculopathy, cervical region.

OWCP continued to receive evidence. In a July 22, 2019 medical report, Dr. McManus noted that appellant had continued complaints of right upper extremity and shoulder pain, with numbness and paresthesia. On evaluation, he diagnosed a cervical strain with aggravation right radiculopathies status post prior anterior C4 through C7 discectomies and fusion, a right shoulder strain with calcific tendinitis, and rotator cuff and bicipital tendinitis.

Appellant provided a physical therapy note of even date with an illegible signature noting he was evaluated and treated for a cervical injury.

On July 31, 2019 OWCP referred appellant to Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). It requested that the DMA review a statement of accepted facts (SOAF) and the evidence of record and provide an opinion as to whether appellant developed calcific tendinitis of the rotator cuff and bicipital tendinitis of the right shoulder as a consequence of the accepted employment injury.

In an August 13, 2019 letter, Dr. McManus described appellant's continuing pain as a result of his employment-related injury. He referenced tenderness of the bicipital groove and an x-ray of appellant's right shoulder that was consistent with calcific tendinitis. Dr. McManus requested that the claim be expanded to include diagnoses of a right shoulder strain, calcific tendinitis of the right shoulder, and right shoulder rotator cuff tendinopathy be included as accepted conditions in appellant's claim.

In an August 21, 2019 medical report, the DMA reviewed the SOAF and the medical evidence of record. On evaluation he explained that appellant's claimed condition is a well-known idiopathic condition not associated with trauma and opined that it was not possible that the condition developed in the short time period from injury to diagnosis. The DMA recommended that appellant's claim not be expanded to include the new conditions.

By decision dated August 23, 2019, OWCP denied the expansion of the acceptance of appellant's claim finding that the medical evidence of record did not demonstrate that the conditions caused by the accepted work-related injury led to an aggravation of the original injury or to a new injury.

LEGAL PRECEDENT

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.[4]

To establish causal relationship, the employee must submit rationalized medical opinion evidence.[5] 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 accepted employment injury.[6] 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.[7]

FECA provides that, if there is disagreement between an OWCP-designated physician and an employee's physician, OWCP shall appoint a third physician who shall make an examination.[8] For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.[9] For the impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist must be sufficiently well-rationalized and based upon a proper factual background.[10]

ANALYSIS

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

In Dr. McManus' May 28, 2019 medical evidence he noted appellant's symptoms of pain, numbness, and weakness in his right upper extremity and reported appellant's prior anterior C5 through C7 discectomies and fusion and history of injury related to appellant's employment duties. He diagnosed a cervical strain with worsening right C7 radiculopathies, calcific tendinitis of the rotator cuff, and bicipital tendinitis in the right shoulder. Dr. McManus explained that, in compensating for appellant's right upper extremity deficits caused by appellant's cervical strain, he developed rotator cuff and bicipital tendinitis.

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

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

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

[7] *Id*.

[8] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[9] *M.G.*, Docket No. 19-1627 (issued April 17, 2020); *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[10] *M.N.*, Docket No. 19-1421 (issued March 5, 2020); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

Further, in medical evidence dated from May 29 to April 13, 2019, Dr. McManus provided additional support for his opinion. He noted appellant's continued right upper extremity and shoulder pain with numbness and paresthesia and opined that his symptoms were a result of his employment-related injury. On evaluation Dr. McManus found tenderness of the bicipital groove and found that an x-ray of his right shoulder was consistent with calcific tendinitis. He requested expansion of the acceptance of appellant's claim to include a right shoulder strain, calcific tendinitis of the right shoulder, and right shoulder rotator cuff tendinopathy.

By contrast, Dr. Hammel, the DMA, indicated in his August 21, 2019 medical report, that he disagreed with Dr. McManus and opined that it was not possible that the additional claimed conditions developed in the short time period from injury to diagnosis. On review of the SOAF and medical evidence of record, he reasoned that appellant's condition is "a well-known idiopathic condition that is not associated with trauma."

Both Drs. McManus and Hammel provided a description of appellant's employment injury and rationale in support of their respective opinions based on their review of the medical evidence and physical findings. The Board, therefore, finds that a conflict in medical opinion has been created between appellant's attending physician and that of the DMA regarding whether appellant's right shoulder strain, calcific tendinitis of the right shoulder, and right shoulder rotator cuff tendinopathy were caused or aggravated by factors of appellant's federal employment.[11] Pursuant to section 8123(a) of FECA, when there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medial specialist to resolve the conflict in the medical evidence.[12]

As there remains an unresolved conflict in medical opinion regarding whether appellant's diagnosed conditions are causally related to, or a consequence of, the accepted employment factors the case shall be remanded to OWCP for creation of an updated SOAF and referral to an appropriate specialist to obtain an impartial medical opinion regarding whether the acceptance of appellant's claim should be expanded to include his additional diagnosed conditions. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[11] *See S.M.*, Docket No. 19-0397 (issued August 7, 2019).

[12] *Supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2019 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: June 11, 2020
Washington, DC

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

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

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