United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 18-1195**
	)	**Issued: January 6, 2020**
U.S. POSTAL SERVICE, POST OFFICE, West Sacramento, CA, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 24, 2018 appellant, through counsel, timely appealed an April 3, 2018 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish a right shoulder condition causally related to the accepted September 2, 2014 employment incident.

[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.*

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 1, 2014 appellant, then a 51-year-old sales and distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on September 2, 2014 he injured his right shoulder while processing undeliverable parcels and stopped work that day.

By decision dated March 3, 2015, OWCP denied appellant's claim, finding that he had not submitted sufficient evidence to support that the September 2, 2014 employment incident occurred at the time, place, and in the manner alleged. It further found that the medical evidence of record was insufficient to establish a diagnosed medical condition causally related to the accepted employment incident.

On March 12, 2015 counsel requested a telephonic hearing before an OWCP hearing representative, which was held on October 5, 2015.

By decision dated December 15, 2015, the hearing representative affirmed the March 3, 2015 decision, finding that appellant was required to perform lifting of parcels of mail in the performance of duty on September 2, 2014, but that he had not provided sufficient medical evidence to establish causal relationship between the diagnosed right acromioclavicular sprain and the accepted September 2, 2014 employment incident.

On February 10, 2016 appellant, through counsel, timely appealed to the Board.

By decision dated February 24, 2017, the Board affirmed the December 15, 2015 decision, finding that the medical evidence of record failed to address how the September 2, 2014 employment incident caused or aggravated a right shoulder condition.

On February 20, 2018 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In a February 13, 2018 report, Dr. Neil Allen, a Board-certified internist and neurologist, noted that he conducted a records review in order to establish whether causal relationship existed between appellant's established right shoulder condition and the accepted work-related trauma sustained on September 2, 2014. He opined that appellant's claim should be expanded to include the diagnosis of sprain/strain of the right shoulder. Dr. Allen noted that appellant denied symptoms to the right shoulder prior to the reported work-related incident on September 2, 2014. He explained that, when appellant reached into the hamper and began to lift the parcel, a downward force was exerted through a fully extended right upper limb. Dr. Allen advised that in such a position the shoulder was elevated and protracted without proper stabilization from the middle and lower trapezius musculature. He indicated that the small muscles of the rotator cuff were not designed to stabilize the joint, but rather perform "power" tasks including lifting. Dr. Allen also indicated that the larger muscles of the middle back and scapular region anchored the shoulder

[3] Docket No. 16-0593 (issued February 24, 2017).

during lifting to prevent rupture, sprain, and tearing of the rotator cuff musculature and associated tendons.

Dr. Allen noted that the "compromised lifting position" described by appellant "combined with exposure to an antagonist force, even minimal, resulted in overstretching of muscles, ligaments, and tendons, beyond their normal physiologic range." He indicated that often individuals would report "popping sensations or sounds at the time of the injury followed by tenderness and painful mobility," as was documented within appellant's medical records. Dr. Allen opined that appellant's injury "directly resulted from the work-related incident of September 2, 2014 [was] both reasonable and expected based upon the mechanism described by [appellant] and findings documented within his medical records."

By decision dated April 3, 2018, OWCP reviewed the merits of the claim, but denied modification. It found that a medical opinion regarding causal relationship must be based upon medical examination findings by the physician offering the opinion. OWCP found that Dr. Allen's medical opinion regarding causal relationship was not based upon his own contemporaneous examination findings and was, therefore, of diminished probative value and insufficient to establish causal relationship.

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 determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury.[7] First, the employee must submit sufficient evidence to establish that the employee actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[8]

[4] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *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.F.*, Docket No. 18-0904 (issued November 27, 2018); *Gary J. Watling*, 52 ECAB 278 (2001).

[8] *S.S.*, Docket No. 17-1106 (issued June 5, 2018); *T.H.*, 59 ECAB 388 (2008).

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 supporting such causal relationship.[9] 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. This medical opinion must include an accurate history of the employee's employment injury and 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]

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's December 15, 2015 decision because the Board considered that evidence in its February 24, 2017 decision and found that it was insufficient to establish his claim. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.[11]

On February 20, 2018 counsel requested reconsideration and submitted a February 13, 2018 report from Dr. Allen. Dr. Allen explained that he reviewed appellant's medical records to determine whether causal relationship existed between his right shoulder condition and the accepted work-related trauma sustained on September 2, 2014. He diagnosed right shoulder strain/sprain. Dr. Allen explained that, when appellant reached into the hamper and lifted a parcel, a downward force was exerted through his fully extended right upper limb. He related that the shoulder, in this position, was elevated and protracted without proper stabilization from the middle and lower trapezius musculature. Dr. Allen related that the compromised lifting position described by appellant, combined with exposure to an antagonist force, resulted in overstretching of muscles, ligaments, and tendons of the rotator cuff musculature and tendons. He concluded that appellant's injury directly resulted from the work-related incident of September 2, 2014 based upon the mechanism described by appellant and findings documented within his medical records.

OWCP determined that Dr. Allen's February 13, 2018 report was insufficient to establish causal relationship because he had not examined appellant and a medical opinion regarding causal relationship "must be based upon medical examination findings by the physician offering the opinion." Its own procedures provide, however, when discussing the factors used in the consideration of the weight provided to a medical record that "generally, greater probative value is given to a medical opinion based on an actual examination." Other factors considered by OWCP in weighing medical reports include whether the opinion is based on a complete, accurate, and

[9] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[10] *G.D.*, Docket No. 19-1175 (issued November 15, 2019); *R.H.*, Docket No. 17-1405 (issued February 7, 2018); *James Mack*, 43 ECAB 321 (1991).

[11] *See J.L.*, Docket No. 17-1460 (issued December 21, 2018).

consistent history covering both the medical and factual aspects of the case; whether the opinion was well reasoned and well rationalized; whether the physician has the expertise and credentials to provide a medical opinion in this case; and whether the medical opinion was speculative or equivocal.[12] There is no requirement that a physician providing an opinion on the limited issue of causal relationship must base his or her opinion on his or her own examination as opposed to the detailed findings of an attending physician's physical examination.

The Board has long held that a physical examination is not required for a physician to provide a probative medical opinion on the limited issue of causal relationship.[13] When a medical diagnosis had already been established by attending physicians, the Board has found that an additional physical examination would be of no consequence and would only result in additional delay and cost.[14] It is unnecessary that the evidence of record in a case be so conclusive as to suggest causal connection beyond all possible doubt. Rather, the evidence required is only that which is necessary to convince the adjudicator that the conclusion drawn is rational, sound, and logical.[15]

The Board finds that, based on well-established criteria for weighing medical reports, the report of Dr. Allen is sufficient to require further development of the medical evidence to see that justice is done.[16] Dr. Allen is a Board-certified physician who is well qualified in his field of medicine to render a rationalized opinion on the limited issue of causal relationship and it is found that he provided a comprehensive review of the medical record and case history. It is further found that he provided a comprehensive and convincing pathophysiological explanation as to how the mechanism of the accepted employment incident was sufficient to cause the diagnosed condition and his opinion was supported by medical literature, the contemporaneous diagnostic testing, and the physical findings of attending physicians.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While it is appellant's burden of proof to establish the claim, OWCP shares responsibility in the development of the evidence.[17] It has the obligation to see that justice is done.[18] The Board will,

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.810.6(a) (September 2010).

[13] *See W.C.*, Docket No. 18-1386 (issued January 22, 2019); *M.M.*, Docket No. 17-0438 (issued March 13, 2018); *C.B.*, Docket No. 17-0726 (issued July 3, 2017); *J.R.*, Docket No. 13-1090 (issued October 28, 2013); *Melvina Jackson*, 38 ECAB 443, 447-52 (1987) (the Board has long held that a physical examination is not required for a physician to provide a medical opinion on the limited issue of causal relationship).

[14] *See Sherry Shreiber*, Docket No. 04-1966 (issued January 24, 2005) (the Board held that the fact that an OWCP-selected second opinion physician had not physically examined the claimant was of no consequence as the diagnosis had already been established, and thus the only question was causal relationship).

[15] *W.M.*, Docket No. 17-1244 (issued November 7, 2017); *E.M.*, Docket No. 11-1106 (issued December 28, 2011); *Kenneth J. Deerman*, 34 ECAB 641, 645 (1983) and cases cited therein).

[16] *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

[17] *C.W.*, Docket No. 19-0231 (issued July 15, 2019); *D.G.*, Docket No. 15-0702 (issued August 27, 2015); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[18] *Id*.

therefore, remand the case to OWCP for further development of the medical evidence. On remand OWCP shall refer appellant, a statement of accepted facts, and the medical evidence of record to an appropriate Board-certified physician. The chosen physician shall provide a rationalized opinion on whether the diagnosed conditions are causally related to the accepted factors of appellant's federal employment. If the physician opines that the diagnosed conditions are not causally related, he or she must explain with rationale how or why his or her opinion differs from that of Dr. Allen. Following this and any other further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 3, 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: January 6, 2020
Washington, DC

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

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

Alec J. Koromilas, dissenting,

The majority opinion finds that, although the medical report of Dr. Neil Allen was insufficient to meet appellant's burden of proof to establish their claim, it was sufficient to require the Office of Workers' Compensation Programs to further develop the medical evidence. I disagree.

As a standard proposition, the Board has long held that the weight of medical opinion is determined by the opportunity for thoroughness of examination, the accuracy, and completeness

of the physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested, and the medical rationale expressed in support of stated conclusions.[1]

The Federal (FECA) Procedural Manual also sets out parameters for the weighing of medical evidence.[2] It describes a comprehensive report as one which reflects that all testing and analysis necessary to support the physician's final conclusions were performed. OWCP's procedures provide that, in general, greater probative value is given to a medical opinion based on an actual examination. An opinion based on a cursory or incomplete examination will have less value compared to an opinion based on a more complete evaluation.[3]

The case at bar raises a novel constellation of facts where appellant's physician is providing a causal opinion without examining appellant. While arguably considered a treating physician, Dr. Allen never saw in person nor physically examined appellant. He premised his opinion solely on what he characterized as medical records that he had reviewed. Dr. Allen did not, however, identify the records provided for his review nor describe the reports on which he relied.

It is an important distinction that the medical report of Dr. Allen in this case is being used to remand the case for further development.[4] The majority finds that, although his opinion contains insufficient medical rationale to establish the claim, it is sufficient to remand for OWCP to further develop the claim. This is effectuated by the 30-year-old Board-created standard, which provides that "when there is sufficient evidence to establish that the incident occurred, as alleged, but the medical evidence was insufficiently developed to establish the component of fact of injury, evidence submitted by appellant, which contains a history of injury, an absence of any other noted trauma, and an opinion that the condition found was consistent with the original injury is sufficient, given the absence of any opposing medical evidence, to require further development of the record."[5] It could be characterized as a reduced subjective standard, which effectively shifts the burden of proof to OWCP. This case was previously denied by OWCP based on in-person physical examination(s), which were found to be insufficient under the same reduced standard.

Especially in this posture, I believe certain basic medical examination parameters must be met. Dr. Allen espoused an opinion on causal relationship without the benefit of direct physical examination or observations and based his findings on the second-hand opinion(s) of what we believe to be other physicians. This is the type of injury that lends itself to physical examination for the purposes of diagnosis and causation, where the physician is able to palpate the patient, question and receive a first-hand account of the injury and compare same. This remains critical

[1] *R.C.*, Docket No 14-1964 (issued January 22, 2015); *Anna C. Leanza*, 48 ECAB 115 (1996).

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.810.6(a) (September 2010).

[3] *Id*.

[4] *R.H.*, Docket No. 17-1966 (issued March 6, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[5] *Id*.

even when the only issue is causation. I do not agree that words of causation in the ordinary course alone can be separated from an examination of appellant by appellant's physician.

Of course, there are occasions where a physical examination cannot be conducted, such as when appellant is deceased. In that situation, record reviews are required and the weight of medical reports in the first instance are weighed using the above-mentioned criteria. But those circumstances are rare and that is inapplicable in the present case.

One could argue that this type of situation is similar to the use by OWCP of a district medical adviser (DMA). The Board has found that the unique status of the DMA, which allows for an advisory medical opinion without a physical examination, can be of sufficient probative value in certain circumstances.[6] I believe that there is an important distinction between a DMA as described in *Jackson* and a treating physician such as Dr. Allen in this case. A treating physician and DMA do not share the same status. DMAs have a much more defined and narrow purpose. They are generally charged with the computations of schedule awards, the medical necessity of requested surgeries, and other such issues that do not require an in-person examination. As well, they operate under parameters that ensure appropriate review of the evidence, as they have the benefit of the complete OWCP record, as well as a statement of accepted facts created by OWCP, which they must follow for the purposes of history, knowledge, and analysis. In Dr. Allen's situation, there are no such safeguards.

If Dr. Allen had physically examined appellant, noted an in-person history, reviewed the entire record, and made his own conclusions, I would be inclined to perhaps be satisfied with his knowledge and understanding of the matter and agree with the majority that his opinion would be sufficient to remand for OWCP to pay for a second opinion physician to further develop the medical evidence. However, the majority finding in my view, without the benefit of in-person physical examination, effectively shifts the burden of proof to OWCP to disprove the claim based on a medical report that is of questionable probative value, leading to what I fear will be the advent of mail order medicine.

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

[6] *Melvina Jackson*, 38 ECAB 443, 447-52 (1987) (regarding the importance, when assessing medical evidence, of such factors as a physician's knowledge of the facts and medical history, and the care of analysis manifested and the medical rationale expressed in support of the physician's opinion).