

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

V.W., Appellant	)	
	)	
and	)	<b>Docket No. 19-1537</b>
	)	<b>Issued: May 13, 2020</b>
DEPARTMENT OF VETERANS AFFAIRS,	)	
TUSCALOOSA VETERANS	)	
ADMINISTRATION MEDICAL CENTER,	)	
Tuscaloosa, AL, Employer	)	
	)	

*Appearances:* *Case Submitted on the Record*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 11, 2019 appellant, through counsel, filed a timely appeal from a June 5, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</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> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the June 5, 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 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 or neck condition causally related to the accepted August 31, 2018 employment incident.

## FACTUAL HISTORY

On September 4, 2018 appellant, then a 56-year-old security clerk, filed a traumatic injury claim (Form CA-1) alleging that on August 31, 2018 she injured her right arm while in the performance of duty. She alleged that she was in a verbal altercation with her colleague L.M. when T.S. got in front of L.M. and Chief W. grabbed and jerked appellant's right arm, pulling her backward and then releasing her arm as he slipped and fell backward. On the reverse side of the claim form, the employing establishment acknowledged that appellant was injured in the performance of duty, but noted that she was the aggressor and that her statement describing the incident was false.

An August 20, 2018 medical report signed by Dr. Eugene Mangieri, an anesthesiologist, indicated that appellant was following up for left shoulder and right wrist pain. He noted that appellant's cervical rotation had decreased due to pain. Appellant's medical history included bilateral rotator cuff surgeries in 2006. Dr. Mangieri conducted a physical examination which revealed normal results aside from pulse deficits and diagnosed joint pain in her shoulder region, carpal tunnel syndrome, malaise and fatigue, chronic postoperative pain, and complex regional pain syndrome. Dr. Mangieri prescribed appellant pain medication.

In a May 3, 2018 development letter, OWCP advised appellant that the documentation received to date was insufficient to support her compensation claim. It explained that it had not received any medical evidence. Accordingly, it afforded appellant 30 days to submit a narrative medical report from a qualified physician that included a diagnosis and an explanation as to how the claimed work incident either caused or aggravated a medical condition.

September 1, 2018 emergency room documents signed by Dr. Inkil Hwangpo, an internal medicine specialist, indicated that appellant presented with pain in her right arm and in the right side of her neck. Dr. Hwangpo reported that appellant noted that she was in a verbal argument with a coworker when another coworker pulled her right arm and shoulder. Appellant further noted that it was painful at the time of injury and worse the next day, and that it was very painful for her to lift her right arm. She noted that she had surgery on her right shoulder several years ago. A physical examination revealed that appellant's neck was tender and her right shoulder had a limited range of motion due to pain.

An x-ray of appellant's right shoulder interpreted by Dr. Chris Sneckenberger, a radiologist, showed no acute osseous abnormality. An x-ray of her cervical spine also interpreted by Dr. Sneckenberger revealed that the bony neural foramina were widely patent and the degenerative disease on C6-7 has progressed since her prior study on February 19, 2009 due to disc space narrowing and an anterior osteophyte. He diagnosed a sprained right shoulder and a strained neck. Appellant was treated with a right shoulder sling and medication.

September 4, 2018 progress notes signed by Cynthia Buford, a licensed practical nurse (LPN) at an employee health outpatient center, indicated that appellant related that on August 31, 2018 she was in an altercation with a coworker when Chief W. and T.S stepped in between them.

Appellant told Chief W. to let go of her arm and then jerked it loose, causing Chief W. to fall. She noted that her arm did not hurt immediately after this incident, but that when she woke up the next day she went to the emergency room with pain. Appellant presented a return to work excuse note indicating that she could return to work on light duty on September 3, 2018.

A September 4, 2018 magnetic resonance imaging (MRI) scan of appellant's right shoulder without contrast, interpreted by Dr. J. Alexander Lushington, Jr., a radiologist, indicated that there was a large amount of metallic artifact from a previous surgery. Dr. Lushington noted that this significantly compromised the detail of the MRI scan. The MRI scan also revealed an edema and arthropathy in the acromioclavicular joint, and fluid within the shoulder joint and the subacromial subdeltoid bursa were suggestive of at least a partial tear of the rotator cuff. A September 4, 2018 MRI scan of appellant's neck, also interpreted by Dr. Lushington, indicated mild cervical spondylosis. Dr. Lushington's impression was that no significant disc bulge or disc herniation causing neural impingement was noted.

A September 25, 2018 medical report by Dr. Mangieri indicated that appellant was following up on bilateral shoulder pain. He recounted the August 31, 2018 employment incident and the medical care she received after the incident. Dr. Mangieri noted that appellant's September 4, 2018 right shoulder MRI scan revealed a rotator cuff tear with an effusion. He also noted that her past medical history included right rotator cuff surgery in 2006. A physical examination revealed normal results aside from pulse deficits, and Dr. Mangieri prescribed pain medication to appellant.

A September 25, 2018 medical report by Dr. Bryan King, an orthopedic surgery specialist, indicated that appellant complained of right shoulder and right upper arm aching intermittent pain which had worsened since its onset. Appellant indicated that lifting and reaching overhead exacerbated her pain, and she also reported weakness. Dr. King noted that her symptoms had improved with physical therapy and an injection. Appellant's orthopedic surgical history included bilateral shoulder arthroscopies and rotator cuff repairs. Dr. King conducted a physical examination of appellant's right shoulder which revealed a limited range of motion and a positive impingement sign at 90 degrees. The anterior was tender to palpation and it also had a positive Hawkins sign. Dr. King noted that appellant's MRI scan was skewed, but likely showed a new rotator cuff tear. He diagnosed an unspecified rotator cuff tear or rupture of the right shoulder, right shoulder impingement syndrome, and other injury of muscles and tendons of the rotator cuff of an unspecified shoulder. Dr. King noted that appellant's previous rotator cuff repair was stressed following an altercation at work where her arm was pulled, and she experienced pain from that point on. He opined that appellant's condition was "likely a recurrent" rotator cuff pathology that was "exacerbated by incident involving" having her shoulder pulled during a work altercation, which "likely caused new pathology." Dr. King indicated that appellant would "likely need surgery" if his suspicions were confirmed by diagnostic testing.

In a September 25, 2018 progress report form, Dr. King checked a box marked "yes" indicating that appellant's injury was work related. He further indicated that she could return to work immediately on light duty.

A September 28, 2018 duty status report (Form CA-17) by Dr. King indicated that appellant's right arm was injured when it was grabbed and jerked while being pulled backwards, and that she likely had recurrent rotator cuff pathology that was exacerbated by the incident where

her arm was pulled, which likely caused new pathology. Dr. King noted that appellant was advised to resume light-duty work on September 25, 2018.

An October 4, 2018 MRI scan of appellant's right shoulder with contrast was interpreted by Dr. Bernard Veillon, a Board-certified diagnostic radiologist, as displaying a tear of the infraspinatus at the 12:00 position and mild hypertrophic changes of acromioclavicular joint. Metallic artifact from a prior surgery caused moderate limitation of the examination.

An October 11, 2018 medical report by Dr. King noted that appellant's symptoms had not improved since her prior visit. He conducted a right shoulder examination which revealed decreased range of motion, and he indicated that appellant's MRI scan likely indicated a partial tear. Dr. King repeated the same diagnoses and impression as in his prior medical report and noted that appellant received injections in her right shoulder. He additionally recommended physical therapy. An October 11, 2018 therapy request form signed by Dr. King requested shoulder rehabilitation to treat appellant's diagnosed conditions.

By decision dated October 26, 2018, OWCP denied appellant's traumatic injury claim, finding that the evidence of record failed to establish that appellant's diagnosed conditions were causally related to the August 31, 2018 accepted employment incident.

On November 19, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

A September 24, 2018 medical report by Dr. Mangieri indicated that appellant noted left shoulder and right wrist pain.

An October 22, 2018 medical report by Dr. Mangieri indicated that appellant complained of ongoing bilateral shoulder pain. A physical examination revealed normal results aside from pulse deficits, and Dr. Mangieri repeated his prior diagnoses and prescribed pain medication.

A November 13, 2018 medical report by Dr. Mangieri noted that appellant had bilateral rotator cuff repairs which prevented her from engaging in any prolonged activity, including typing, due to bilateral pain radiating into her upper extremities. He indicated that these limitations were a direct result of the work-related reinjuries appellant sustained during the course of her occupational duties. Dr. Mangieri repeated appellant's medical history and conducted a physical examination which revealed normal results aside from pulse deficits. He also prescribed pain medication.

A January 9, 2019 medical report by Dr. Mangieri noted that in November 2018 appellant experienced right lumbar radicular pain with some edema. Dr. Mangieri noted that appellant was working full time and repeated her medical history. A physical examination revealed normal results aside from pulse defects. Dr. Mangieri prescribed pain medication.

During the March 21, 2019 oral hearing appellant testified that the August 31, 2018 accepted employment incident reinjured her right rotator cuff. She repeated the details of the incident and her subsequent medical care. Appellant stated that Dr. King supported that her previous rotator cuff repair was stressed when her arm was pulled during the August 31, 2018 accepted employment incident. She further indicated that he had stated that she had pain and worsening symptoms from that point on, and that diagnostic imaging tests confirmed she

experienced some dislocation of the hardware in her shoulder. Appellant also stated that she was only absent from work for a couple of days due to this injury.

By decision dated June 5, 2019, OWCP's hearing representative affirmed OWCP's October 26, 2018 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> 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 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 if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.<sup>8</sup> Fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.<sup>9</sup> The second component is whether the employment incident caused a personal injury.<sup>10</sup>

Rationalized medical opinion evidence is required to establish causal relationship. 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 the diagnosed condition and the specific employment incident.<sup>11</sup>

In a 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

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *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> *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>8</sup> *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

<sup>9</sup> *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>10</sup> *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>11</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.<sup>12</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a right shoulder or neck condition causally related to the accepted August 31, 2018 employment incident.

The September 1, 2018 emergency room records submitted by Dr. Hwangpo mention that appellant's arm was pulled at work on August 31, 2018, appellant's history of a right shoulder injury, and that appellant was diagnosed with a shoulder sprain and a neck strain. Dr. Mangieri's September 25, 2018 medical report also mentions that appellant's arm was pulled at work on August 31, 2018, notes her 2006 right rotator cuff surgery, and indicates that her MRI scan revealed a right rotator cuff with effusion. However, these documents do not specifically address whether the August 31, 2018 employment incident either caused or contributed to appellant's diagnosed conditions. As these records do not contain an opinion on causal relationship, they are insufficient to meet appellant's burden of proof.<sup>13</sup>

The September 4, 2018 progress notes provided by appellant are signed by Cynthia Buford, an LPN. Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA.<sup>14</sup> The nurse's progress notes do not constitute medical evidence and are of no probative value.<sup>15</sup> They are therefore insufficient to establish appellant's claim.

Dr. King noted in his September 25, 2018 medical report that appellant's 2006 right rotator cuff repair was stressed following an altercation at work when her arm was pulled and that she experienced pain from that point on. Also in that report and additionally in his September 28, 2018 duty status report and his October 11, 2018 medical report, Dr. King opined that appellant likely had recurrent rotator cuff pathology which was exacerbated by the accepted August 31, 2018 employment incident where her arm was pulled, likely causing a new pathology. Dr. King's opinion is speculative in nature. The Board has held that medical opinions that are speculative or equivocal are of diminished probative value.<sup>16</sup> An award of compensation may not be based on

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<sup>12</sup> 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).

<sup>13</sup> *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>14</sup> Section 8101(2) of FECA provides that physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (nurse practitioners are not considered physicians under FECA); *K.W.*, 59 ECAB 271, 279 (2007).

<sup>15</sup> *J.J.*, Docket No. 19-1783 (issued March 30, 2020); *A.A.*, Docket No. 19-0957 n.17 (issued October 22, 2019).

<sup>16</sup> *H.A.*, Docket No. 18-1455 (issued August 23, 2019).

surmise, conjecture, speculation or upon appellant's own belief that there is causal relationship between her claimed condition and her employment.<sup>17</sup>

In a September 25, 2018 progress report, Dr. King checked a box marked "yes" indicating that appellant's injury was work related. When a physician's opinion on causal relationship consists only of checking a box "yes" in response to a form question, without explanation or rationale, that opinion has limited probative value and is insufficient to establish a claim.<sup>18</sup>

Dr. Mangieri's October 22, 2018 medical report noted appellant's right rotator cuff tear diagnosis and her 2006 right rotator cuff surgery, but it does not render an opinion on causation. 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.<sup>19</sup>

Dr. Mangieri's November 13, 2018 medical report included appellant's medical history and indicated that appellant had bilateral rotator cuff repairs which prevented her from engaging in prolonged activities due to pain. In the report, he opined that this limitation was a direct result of the work-related reinjuries appellant sustained during the course of her occupational duties. Dr. Mangieri fails to mention the specific August 31, 2018 employment incident alleged to have caused appellant's diagnosed conditions. The Board has held that an opinion of the physician must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment incident.<sup>20</sup>

Dr. Mangieri's January 9, 2019 medical report mentions that appellant experienced right lumbar radicular pain with some edema, but does not indicate what caused this diagnosis. 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.<sup>21</sup>

Appellant also submitted MRI scans and x-rays of her neck and right shoulder. The Board has explained that, standing alone, diagnostic studies lack probative value as they do not address whether the employment incident caused any of the diagnosed conditions.<sup>22</sup>

The Board finds that the record lacks medical evidence establishing causal relationship between appellant's right shoulder and neck conditions and the accepted August 31, 2018 employment incident. Thus, appellant has not met her burden of proof.

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<sup>17</sup> *See id.*

<sup>18</sup> *K.R.*, Docket No. 19-0375 (issued July 3, 2019).

<sup>19</sup> *Supra* note 14.

<sup>20</sup> *D.L.*, Docket No. 19-0900 (issued October 28, 2019); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017); *C.M.*, Docket No. 14-0088 (issued April 18, 2014).

<sup>21</sup> *Supra* note 14.

<sup>22</sup> *N.B.*, Docket No. 19-0221 (issued July 15, 2019).

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 or neck condition causally related to the accepted August 31, 2018 employment incident.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 5, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 13, 2020  
Washington, DC

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

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

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