United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant **and** **DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Flint, MI, Employer**	)))))))))	**Docket No. 18-0594** **Issued: March 5, 2020**

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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
JANICE B. ASKIN, Judge

JURISDICTION

On January 26, 2018 appellant, through counsel, filed a timely appeal from a December 11, 2017 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.

[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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish additional conditions causally related to his accepted February 10, 2009 employment injury.

FACTUAL HISTORY

On December 8, 2015 appellant, then a 56-year-old revenue agent, filed a traumatic injury claim (Form CA-1) alleging that on February 10, 2009 he injured his right hand and left shoulder when he slipped on ice in a parking lot and fell backwards while in the performance of duty.[3]

In a December 10, 2015 claim development letter, OWCP advised appellant of the deficiencies with his claim and advised him of the factual and medical evidence necessary to establish his claim. It attached a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

Appellant submitted a December 4, 2015 report from Allen T. Lindsey, a physician assistant who noted that he had restricted use of his left arm and could not return to work until evaluated by an orthopedic surgeon.

In a report dated January 7, 2016, Dr. Elmahdi Saeed, Board-certified in internal medicine, diagnosed a supraspinatus tendon rupture of the left shoulder. He noted that appellant had an accepted work injury in 2009 in which he sustained a fracture of his left wrist. Dr. Saeed noted that since his 2009 injury appellant had complaints of pain with range of motion and arthritis. He indicated that he underwent a magnetic resonance imaging (MRI) scan which revealed a partial thickness tear with tendinosis of the supraspinatus tendon, partial thickness tear and or tendinitis of the subscapularis and long head of the biceps, degenerative changes at the acromial articular and glenohumeral joints, and adhesive capsulitis.

By decision dated January 11, 2016, OWCP denied appellant's claim finding that it was untimely filed in accordance with 5 U.S.C. § 8122.

On January 30, 2016 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on October 12, 2016. The hearing representative indicated that, appellant's prior claim, OWCP File No. xxxxxx726, was reviewed and additional medical evidence had been received from that file in support of his current claim.

The evidence reviewed from appellant's prior claim included: medical reports by Dr. Saeed dated April 24, 2012 to January 5, 2016; a medical report by Dr. Aaron J. Stafford, Board-certified in emergency medicine, dated February 10, 2009; medical reports by Dr. Steven C. Haase, a Board-certified plastic surgeon, dated May 27 to September 9, 2009;

[3] Appellant has a previously accepted claim relating to a February10, 2009 employment injury. OWCP assigned that claim OWCP File No. xxxxxx726 and accepted it for the condition of closed fracture of the triquetral (cuneiform) bone of the right wrist. On October 19, 2017 appellant's prior claim was administratively combined by OWCP with OWCP File No. xxxxxx726 which serves as the master file number.

medical reports by Dr. Richard M. Singer, a Board-certified orthopedic surgeon, dated January 11 to October 15, 2010; medical reports by Dr. Diane Czuk-Smith, a Board-certified anesthesiologist, dated January 20 and March 29, 2010; a January 14, 2010 report by Dr. Michael D. Papenfuse, an osteopath Board-certified in anesthesiology; and diagnostic testing including MRI scans dated April 30, 2009, May 19, 2010, and November 23, 2015.

In support of his claim, appellant submitted a January 19, 2016 report by Dr. Perves Yusaf, a Board-certified orthopedic surgeon, who opined that appellant's left shoulder condition was related to the fall at work in 2009. He reported that his injury had resulted in a fractured right wrist and the following day he had experienced persistent pain in the left shoulder. Dr. Yusaf noted findings and diagnosed impingement of the left shoulder with type two acromion, impingement of the acromioclavicular (AC) joint, chronic subacromial bursitis, and possible rotator cuff tear.

In a report dated March 29, 2016, Dr. Yusaf noted that appellant indicated he had persistent left shoulder pain with a positive impingement sign. He diagnosed impingement syndrome and bursitis of the left shoulder and recommended a diagnostic and operative arthroscopy and decompression.

In an operative report dated May 25, 2016, Dr. Yusaf noted that he had performed a diagnostic arthroscopy of the glenohumeral joint followed by acromioplasty, lysis of adhesions and resection of the subdeltoid bursa under the acromion, resection of the outer end of the clavicle, and repair of the rotator cuff. He diagnosed type two acromion with severe impingement at the acromion and AC joint, chronic subacromial bursitis of the left shoulder, and tear of the supraspinatus tendon.

In a report dated July 12, 2016, Dr. Yusaf noted that appellant was doing well postoperatively. He again opined that the workplace fall in 2009 was the causative factor for the left shoulder conditions and operative findings were consistent with that history.

By decision dated December 15, 2016, an OWCP hearing representative found that appellant had not established the fact of a left shoulder injury at the time of the February 2009 injury. The hearing representative concluded that the medical evidence contemporaneous with the accepted employment injury was limited to his right wrist, not a left shoulder condition. She noted that the medical evidence had not documented a shoulder condition until 2012 and at that time appellant had not related his condition to the prior employment injury.

On May 5, 2017 appellant, through counsel, requested reconsideration.

In reports dated February 16 and May 31, 2016, Dr. Yusaf diagnosed bursitis of the left shoulder, hypertension, and impingement syndrome of the left shoulder and opined that it was very difficult to tell at the time of surgery if appellant's shoulder condition had been caused by an old injury because there were so many changes in the joint. He noted that the tear was very small and appellant had degenerative changes at the AC joint with impingement.

In reports dated September 1 and November 15, 2016, Dr. Yusaf diagnosed bursitis and impingement syndrome of the left shoulder. In a report dated March 22, 2017, he noted initially treating appellant on January 19, 2016 when he reported left shoulder pain following a fall in 2009 with symptoms that progressively worsened requiring treatment on March 29, 2016. Dr. Yusaf

noted the arthroscopic surgery he had performed and opined that, based on the surgical findings, appellant's impingement may have preexisted the injury in 2009 and may have worsened as a result of the aging process. He further opined that the rotator cuff condition may be the result of the fall and impingement as the findings were consistent with impingement syndrome and a rotator cuff tear could have persisted since the time of the injury. Dr. Yusaf concluded that it was possible that he sustained a partial tear of the rotator cuff and, with arthritis in the shoulder, AC joint, and the aging process the impingement aggravated his symptoms.

By decision dated December 11, 2017, OWCP denied modification of the December 15, 2016 decision.

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 between a condition and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[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 specific employment factors identified by the claimant.[6]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish additional conditions causally related to his accepted February 10, 2009 employment injury.

The medical records submitted most contemporaneous to the date of the accepted employment injury, are those which had been submitted in OWCP File No. xxxxxx726, including: a medical report by Dr. Stafford dated February 10, 2009; medical reports by Dr. Haase dated May 27 to September 9, 2009; medical reports by Dr. Singer dated January 11 to October 15, 2010; medical reports of Dr. Saeed dated April 24, 2012 to January 5, 2016; medical reports by Dr. Czuk-Smith dated January 20 and March 29, 2010; and a January 14, 2010 report by Dr. Papenfuse. Of these medical reports, only the reports by Dr. Singer specifically make note of appellant's left shoulder, but he did not document a history of a left shoulder injury, diagnose a left shoulder condition, or provide an opinion as to the cause of any diagnosed conditions. A medical opinion should reflect a correct history and offer a medically sound explanation by the

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[4] *See T.E.,* Docket No. 18-1595 (issued March 13, 2019); *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo,* 55 ECAB 200 (2004).

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

[6] *See M.M.,* Docket No. 19-0061 (issued November 21, 2019); *P.M.,* Docket No. 18-0287 (issued October 11, 2018).

physician of how the specific employment incident physiologically caused or aggravated the diagnosed conditions.[7] Therefore, the Board finds that these medical reports are insufficient to establish appellant's claim.

In support of his claim, appellant has also submitted medical treatment and operative reports from Dr. Yusaf. In his January 19, 2016 report, Dr. Yusaf noted that appellant had explained his history of an accepted employment injury in 2009 which resulted in a fractured right wrist, but that on the following day appellant had experienced pain in the left shoulder which was persistent. He diagnosed impingement of the left shoulder with type two acromion, impingement of the AC joint, chronic subacromial bursitis, and possible rotator cuff tear. In an operative report dated May 25, 2016, Dr. Yusaf noted that he had performed a diagnostic arthroscopy of the glenohumeral joint followed by acromioplasty, lysis of adhesions and resection of the subdeltoid bursa under the acromion, resection of the outer end of the clavicle, and repair of the rotator cuff. Based upon surgical observation he diagnosed type two acromion with severe impingement at the acromion and AC joint, chronic subacromial bursitis of the left shoulder, and tear of the supraspinatus tendon. In reports dated September 1 and November 15, 2016, Dr. Yusaf diagnosed bursitis and impingement syndrome of the left shoulder. The Board finds that none of these medical reports by him contain an opinion as to whether the claimed left shoulder conditions are related to the accepted 2009 employment injury. 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. These reports are therefore insufficient to establish the claim.[8]

In his July 12, 2016 report, Dr. Yusaf opined that the workplace fall in 2009 was the causative factor for the left shoulder conditions and operative findings were consistent with the history of injury. However, in reports dated February 16 and May 31, 2016, he had opined that it was very difficult to tell at the time of surgery if appellant's shoulder condition had been caused by an old injury because there were so many changes in the joint. Dr. Yusaf noted that the tear was very small and appellant had degenerative changes at the AC joint with impingement. In his report dated March 22, 2017, he opined that appellant's impingement "may have" preexisted the injury in 2009 and "may have" worsened as a result of the aging process. Dr. Yusaf further opined that the rotator cuff condition may be the result of the fall and impingement as the findings were consistent with impingement syndrome and a rotator cuff tear could have persisted since the time of the injury. He concluded that it was "possible" that appellant sustained a partial tear of the rotator cuff and, with arthritis in the shoulder, AC joint and the aging process the impingement aggravated his symptoms. The Board finds that while these reports provide opinions on the issue of causal relationship, they are speculative and lack the necessary rationale. The Board has held that a report is of limited probative value regarding causal relationship if it contains a conclusion on causal relationship regarding causal relationship which is unsupported by medical rationale explaining how a given medical condition was related to an employment incident or injury.[9] Although Dr. Yusaf provided his opinion on the cause of appellant's left shoulder conditions, he

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[7] *J.M.*, Docket No. 17-1002 (issued August 22, 2017).

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

[9] *See 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).

merely explained that the 2009 employment injury "may have" or "possibly" been the cause. Thus these reports are of limited probative value on the relevant issue in this case because he did not provide a clear opinion, supported by medical rationale, that appellant sustained a left shoulder injury as a condition of the accepted 2009 employment injury.[10]

In a January 7, 2016 report, Dr. Saeed diagnosed supraspinatus tendon rupture of the left shoulder. He noted that appellant provided a history of sustaining a left wrist fracture at work in 2009 resulting in pain on range of motion and arthritis. However, Dr. Saeed failed to provide an opinion on the issue of causal relationship. Therefore, this report lacks probative value and is insufficient to establish the claim.[11]

Appellant was treated by Mr. Lindsey, a physician assistant, on December 4, 2015.[12] The Board has held, however, that a report from a physician assistant is not considered medical evidence as such a provider is not considered a physician as defined under FECA and is not competent to render a medical opinion.[13] Thus, this evidence is insufficient to meet appellant's burden of proof.

MRI scans of the right wrist and left upper extremity lack probative value as they fail to provide a physician's opinion on a causal relationship between appellant's work incident and his diagnosed left shoulder condition.[14]

Therefore, the Board finds that appellant has not submitted sufficient medical evidence to meet his burden of proof to establish additional left shoulder conditions causally related to the accepted February 10, 2009 employment injury.

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.

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[10] *D.R.,* Docket No. 16-0528 (issued August 24, 2016).

[11] *Supra* note 8.

[12] *See S.E.*, Docket No. 08-2214 (issued May 6, 2009) (reports of a physician assistant have no probative value as medical evidence).

[13] 5 U.S.C. § 8101(2). *B.K.*, Docket No. 19-0829 (issued September 25, 2019) (physician assistant); *T.C.*, Docket No. 19-0227 (issued July 11, 2019); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (under FECA the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by the applicable state law). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

[14] *J.P.,* Docket No. 19-0216 (issued December 13, 2019); *A.B.,* Docket No. 17-0301 (issued May 19, 2017).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish additional conditions causally related to his accepted February 10, 2009 employment injury.[15]

ORDER

IT IS HEREBY ORDERED THAT the December 11, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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[15] The Board notes that the record as transmitted to the Board includes medical evidence relating to another claimant, including a December 7, 2015 report of a podiatrist. Upon return of the case record this extraneous documentation should be removed and assembled in the appropriate case record.