United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 18-1656**
	)	**Issued: October 23, 2020**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Orlando, FL, 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:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 30, 2018 appellant, through counsel, filed a timely appeal from a June 26, 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.

[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 that his left shoulder condition was causally related to the accepted April 27, 2015 employment incident.

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 May 6, 2015 appellant, then a 63-year-old baggage screener, filed a traumatic injury claim (Form CA-1) alleging that on April 27, 2015 he sustained left shoulder pain when he moved a bag from a table to a conveyor belt while in the performance of duty. He indicated that he experienced left shoulder pain. Appellant stopped work following this incident.

In a May 28, 2015 narrative report, Dr. Patrick F. Emerson, a Board-certified orthopedic surgeon, noted that on February 27, 2015 appellant was trying to slide a bag and felt a tearing and popping sensation in his left shoulder at work. Examination of appellant's left shoulder demonstrated significant weakness with resistance to internal rotation on the left side and pain with cross-body adduction. Dr. Emerson diagnosed full-thickness rotator cuff tear with left acromioclavicular (AC) arthritic change and biceps tendinopathy. He continued to treat appellant for his left shoulder symptoms and provided a June 22, 2015 report and work restriction note.

In a June 9, 2015 development letter, OWCP noted that when appellant's claim was received it appeared to be a minor injury that resulted in minimal or no lost time from work and was therefore administratively approved for a payment of a limited amount of medical expenses. It reported that the medical evidence addressing appellant's claim had not been formally considered and that additional factual and medical evidence was necessary to establish his claim. OWCP requested additional factual and medical evidence to establish his claim and also provided a questionnaire for completion. It afforded appellant 30 days to provide the necessary information.

On June 25, 2015 appellant accepted a limited-duty assignment job offer.

By decision dated July 20, 2015, OWCP denied appellant's claim. It accepted that the April 27, 2015 employment incident occurred as alleged and that a left shoulder condition had been diagnosed. However, OWCP found that appellant had failed to establish causal relationship.

On August 10, 2015 appellant, through counsel, requested a telephonic hearing, before an OWCP hearing representative. The hearing was held on March 17, 2016.

OWCP received reports dated May 8 and 26, 2015 by Dr. Jeffrey A. Deren, a Board-certified orthopedic surgeon. Dr. Deren described the April 27, 2015 employment incident and reviewed appellant's history, including diagnostic studies. He conducted an examination and

[3] Docket No. 16-1545 (issued April 26, 2017).

diagnosed a full-thickness tear of the supraspinatus and subscapularis tendons of the left shoulder and partial tearing of the infraspinatus tendon of the left shoulder.

By decision dated May 27, 2016, an OWCP hearing representative affirmed the July 20, 2015 decision. She found that the medical evidence of record was insufficient to establish causal relationship between appellant's diagnosed left shoulder condition and the accepted April 27, 2015 employment incident.

Appellant filed an appeal to the Board.

By decision dated April 26, 2017, the Board affirmed the May 27, 2016 decision. The Board determined that the medical evidence then of record was insufficient to establish that appellant's left shoulder rotator cuff tear was causally related to the accepted April 27, 2015 employment incident.[4] The Board found that none of the medical evidence submitted contained a medical opinion that was sufficiently rationalized to explain whether the accepted employment incident was sufficient to have caused his diagnosed left shoulder medical conditions.

On April 10, 2018 OWCP received appellant's request, through counsel, for reconsideration.[5]

In support of the reconsideration request, OWCP received an April 5, 2018 report by Dr. Neil Allen, a Board-certified internist and neurologist, who indicated that he spoke with appellant *via* telephone. Dr. Allen noted that appellant sustained a left shoulder injury while in the performance of his regular duties as a screener with the employing establishment on April 27, 2015. He reported that appellant reached outward with his left arm to catch a bag, weighing approximately 75 pounds, from falling off a table when he felt a "pull" in his left shoulder. Dr. Allen noted that diagnostic studies confirmed a full-thickness rotator cuff tear in appellant's left shoulder. He opined that appellant's case should be updated to include the additional diagnosed condition of rotator cuff rupture of the left shoulder. Dr. Allen explained that the "compromised lifting position … combined with exposure to an antagonist force, even minimal, resulted in the overstretching of muscles, ligaments, and tendons, beyond their normal physiologic range and subsequent rupture of the rotator cuff muscles and tendons." He concluded that appellant's injury resulted from the April 27, 2015 work-related incident, based upon the mechanism described and objective findings documented within appellant's prior medical records.

By decision dated June 26, 2018, OWCP denied modification of the April 27? (see the above 26th date), 2017 decision. It found that Dr. Allen's April 5, 2018 medical report was insufficient to establish causal relationship between appellant's diagnosed left shoulder condition and the accepted April 27, 2015 employment incident.

[4] *Supra* note 3.

[5] Although counsel claimed to be filing a request for reconsideration from the Board's April 26, 2017 decision, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. 20 C.F.R. § 501.6(d). Although the April 26, 2017 Board decision was the last merit decision, the hearing representative's May 27, 2016 decision is the appropriate subject of possible modification by OWCP.

LEGAL PRECEDENT

An employee seeking benefits under FECA[6] 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,[7] 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.[8] 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.[9]

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.[10] 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.[11] The second component is whether the employment incident caused a personal injury.[12]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[13] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.[14] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).[15]

[6] *Id.*

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

[8] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[9] *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).

[10] *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[11] *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[12] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[13] *T.H.*, *supra* note 10; *Robert G. Morris*, 48 ECAB 238 (1996).

[14] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[15] *Id.*

The Board has previously held that the absence of a physical examination by a physician may affect the weight to be given a medical report, but does not render it incompetent as medical evidence.[16]

ANALYSIS

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

On prior appeal[17] the Board held that the medical evidence then of record did not contain an opinion from a physician on the issue of causal relationship that was sufficiently rationalized to establish the narrow question of whether the accepted employment incident of April 27, 2015 caused the diagnosed conditions.[18] There was no dispute as to whether appellant had a diagnosed medical condition, a need for medical treatment, or a dispute as to the conditions which diagnostic testing had clearly established as a tear of his supraspinatus and subscapularis tendons of the left shoulder and partial tearing of the infraspinatus tendon of the left shoulder. Thus, the sole issue remaining in the case is whether the accepted incident can, physiologically, result in the diagnosed conditions as identified by two attending physicians and memorialized within diagnostic testing results. The Board has held that a physiologic explanation is akin to explaining the mechanism of an injury, *i.e.*, how it was possible for the injury to have actually occurred due to the incident.[19] To answer that physiologically-based question, appellant submitted a medical report from Dr. Allen, an appropriate specialist who is Board-certified in both internal medicine and neurology. The report was specifically obtained to answer that remaining, limited issue by providing a rationalized medical explanation on causation, not for purposes such as recommending further treatment or to diagnose additional conditions.

In an April 5, 2018 report, Dr. Allen noted his review of appellant's medical records and accurately described the history of the accepted employment incident. He indicated that on April 27, 2015 appellant suffered a left shoulder injury while in the performance of his regular duties. Dr. Allen recounted that appellant was pushing a bag weighing 75 pounds from a table to a conveyer belt when he reached out to prevent it from falling. He opined that appellant's diagnosis of a full-thickness rotator cuff tear was directly related to the accepted employment incident. In support of his opinion, Dr. Allen explained that when appellant reached outward to catch the weight of the bag, the downward force was exerted through a fully extended limb. He explained that the compromised lifting position combined with exposure to an antagonist force, even minimal, resulted in the overstretching of muscles, ligaments, and tendons, beyond their normal

[16] *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); *Melvina Jackson*, 38 ECAB 443, 447-52 (1987).

[17] Preliminarily, the Board notes that it is unnecessary to consider the evidence that was previously considered in its April 26, 2017 decision. Findings made in prior Board decisions are *res judicata*, absent any further review by OWCP under section 8128 of FECA (5 U.S.C. § 8128(a)). *See C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020).

[18] *Supra* note 3.

[19] *See D.B.* Docket No. 19-1543 (issued March 6, 2020); *R.B.*, Docket No. 16-0691 (issued July 20, 2016); *William J. Shall*, Docket No. 03-1973 (issued December 8, 2003).

physiologic range and subsequent rupture of the rotator cuff muscles and tendons. Dr. Allen noted that often individuals will report "pulling" sensations or sounds at the time of the injury as documented in the appellant's medical records. He concluded that appellant's injury resulted from the April 27, 2015 work-related incident, based upon the mechanism described and objective findings documented within his medical records.

The Board finds that the April 5, 2018 report of Dr. Allen is sufficient for appellant to meet his burden of proof to establish a *prima facie* case, which is the standard long-articulated by both the Board and OWCP regulations as necessary to require further development of the medical evidence to see that justice is done within the nonadversarial FECA program.[20] Dr. Allen is a Board-certified physician who is qualified in his field of medicine to render rationalized opinions on the issue of causal relationship and he provided a comprehensive and convincing review of the medical record and case history. The Board further finds that he provided a comprehensive and convincing pathophysiological explanation as to how the mechanism of the accepted employment incident was sufficient to cause the undisputed diagnosed left shoulder conditions.[21] The explanation provided by Dr. Allen is based upon his medical training and expertise on the limited medical issue of causal relationship, not his own observations of appellant because no such observations were relevant or necessary in rendering his opinion. There is no other evidence of record contradicting his opinion on causation.

The Board has long held that it is unnecessary that the evidence of record in a case be so conclusive as to suggest causal connection beyond all possible doubt.[22] Rather, the Board has held that the evidence required of an appellant is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound, and logical.[23] Following review of Dr. Allen's April 5, 2018 report, the Board finds that his medical opinion contained therein is well rationalized and logical and is thus sufficient to require further development of appellant's claim.[24]

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[20] *Id.*; *see also 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); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.8.c (June 2011).

[21] While the dissent finds that Dr. Allen's report is *per se* insufficient or altogether lacking probative value, minus "a conversation coupled with a visualized examination" as a new "minimal requirement", it fails to articulate what Dr. Allen would have actually examined upon meeting face-to-face with appellant prior to issuing his causation opinion. The majority is not convinced that requiring Dr. Allen, in the regular course, to observe appellant's bare shoulder would add anything of value to his ability to articulate a rationalized explanation as to whether the undisputed employment incident was sufficient to have physiologically caused the diagnosed conditions. Further, Dr. Allen indicated his review of the diagnostic testing reports which, in fact, provide the best possible "illustration" of the internal damage within appellant's left shoulder. Further, the majority clearly is not equating the role of Dr. Allen for appellant with the specialized role of an OWCP district medical adviser (DMA) within the nonadversarial process of developing the medical evidence in a disputed claim.

[22] *Id*.

[23] *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).

[24] The majority notes that the future potential cost of further medical development in a claim is of no consideration to the Board in weighing the sufficiency of the evidence submitted by appellant.

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[25]

On remand OWCP shall refer appellant to a specialist in the appropriate field of medicine, along with the case record and a statement of accepted facts. Its referral physician shall provide a well-rationalized opinion as to whether appellant's diagnosed left shoulder conditions are causally related to the accepted April 27, 2015 employment incident. If the physician opines that the diagnosed conditions are not causally related to the employment incident, he or she must explain with rationale how or why their opinion differs from that articulated by Dr. Allen. 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.

[25] *See supra* note 12. *See also A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

ORDER

IT IS HEREBY ORDERED THAT the June 26, 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: October 23, 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