

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

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| C.H., Appellant |) | |
| |) | |
| and |) | Docket No. 20-0228 |
| |) | Issued: October 7, 2020 |
| U.S. POSTAL SERVICE, ORANGE PARK |) | |
| MAIN POST OFFICE, Orange Park, FL, |) | |
| Employer |) | |
| |) | |

Appearances:
Joanne Wright, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 7, 2019 appellant, through her representative, filed a timely appeal from a September 30, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).²

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 The record also contains a June 6, 2019 OWCP decision which awarded appellant a schedule award for 12 percent permanent impairment of the right arm. On appeal, neither appellant nor her representative contested such decision. As such, the Board will not review the June 6, 2019 decision in this decision. *See* 20 C.F.R. § 501.3.

Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether appellant has met her burden of proof to expand acceptance of her claim to include a left shoulder condition as a consequence of her accepted July 1, 2016 employment injury.

FACTUAL HISTORY

On August 22, 2016 appellant, then a 48-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging a right shoulder condition due to factors of her federal employment, including repetitive use of her right arm and shoulder. She first became aware of her condition on July 1, 2016 and of its relationship to her federal employment on July 15, 2016. OWCP accepted the claim for full-thickness supraspinatus tear of right shoulder. Appellant stopped work on May 22, 2017 and underwent OWCP-authorized right shoulder arthroscopy and rotator cuff debridement with subacromial decompression and acromioclavicular (AC) joint resection on May 23, 2017. OWCP paid her wage-loss compensation from May 23 until July 23, 2017. Appellant resumed full-duty work on July 24, 2017.

In a March 19, 2018 treatment note, Dr. Alberto Castiel, a Board-certified family practitioner, indicated that since December 2017 appellant had been experiencing severe pain in her left shoulder. He requested that the acceptance of the claim be expanded to include her left shoulder injury. Dr. Castiel concluded that appellant had a consequential left shoulder injury that was subsequent and the direct result of over compensation of her left shoulder.

On April 16, 2018 appellant requested that her claim be expanded to include a left shoulder consequential injury.

In an April 30, 2018 development letter, OWCP advised appellant that the evidence of record was insufficient to establish a possible consequential left shoulder condition. It noted the type of evidence necessary to establish her claim, including a comprehensive, narrative medical report from a qualified physician that included a diagnosis of the consequential condition and an opinion, supported by medical rationale, addressing how the claimed condition was related to the July 1, 2016 employment injury or the accepted medical condition. OWCP afforded appellant 30 days to submit the necessary evidence. No additional evidence was received.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the September 30, 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 additional evidence for the first time on appeal. *Id.*

By decision dated May 31, 2018, OWCP denied expansion of the acceptance of appellant's claim to include a consequential injury of the left shoulder.

OWCP continued to receive evidence. In a May 21, 2018 letter, Dr. Castiel indicated that appellant had left shoulder joint pain and osteoarthritis, identified through positive orthopedic testing. He indicated that appellant's assigned duties required a great deal of lifting, pushing and pulling up to 70 pounds as well as a great deal of repetitive motions and overhead reaching. Dr. Castiel opined that the performance of her assigned duties led to the overuse of her left shoulder while using her arm to perform her letter carrier duties. He explained that employment injuries sustained are repetitive stress injuries related to occupational overuse or cumulative trauma injuries. Dr. Castiel opined that appellant's left shoulder injury arose out of and was causally related to her right shoulder injury. He explained that having injured her right shoulder, appellant was forced to use her left arm/shoulder and that such compensation led to the current left shoulder complaints and injury to her left shoulder.

In a May 29, 2018 statement, appellant advised that prior to her July 1, 2016 injury she did not have any left shoulder problem or pain. She indicated that, while awaiting surgery for her right shoulder (almost 10 months), she began experiencing problems and pain in her left shoulder. Appellant advised that due to her right shoulder injury, she utilized her left arm to perform her letter carrier duties which involved repetitive motion, overhead reaching, and lifting, casing and carrying up to 75 pounds.

On June 12, 2018 appellant requested reconsideration.

By decision dated September 6, 2018, OWCP denied modification of its May 31, 2018 decision. It found that the evidence submitted was insufficient to establish that appellant's left shoulder condition was the direct and natural result of the July 1, 2016 employment injury and not due to an independent nonindustrial cause.

On October 12, 2018 appellant requested reconsideration.

In an October 12, 2018 report, Dr. Castiel noted that appellant previously worked as a server for 30 years at a small facility that utilized plastic containers. He indicated that the weight of the objects used were de minimus compared to the weight requirements involved in the lifting and carrying of mail parcels. Dr. Castiel also noted that appellant had no hobbies which required the repetitive use of her left arm. He opined that as a result of the right shoulder injury and the delay in surgical intervention, appellant was required to overuse her left arm while performing her letter carrier duties which led to her left shoulder injury. Dr. Castiel concluded that appellant's left shoulder injury was caused by her letter carrier duties and not a nonindustrial cause.

By decision dated November 1, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim. It found that the evidence received did not include new and relevant evidence and was repetitious in nature.⁵

⁵ On May 1, 2019 appellant filed a Form CA-7 claim for a schedule award. By decision dated June 6, 2019, OWCP awarded her 12 percent permanent impairment of the right upper extremity.

In an August 13, 2019 report, Dr. Joseph Thomas, a Board-certified occupational medicine specialist, reported that appellant has worked as a letter carrier for 12 years casing mail, driving, loading carts and lifting/moving packages and that she experienced right shoulder symptoms in July 2016 and underwent surgery in May 2017. He noted that appellant returned to regular work but she compensated for her right shoulder condition with increased use of the left shoulder. Dr. Thomas reported that a December 28, 2018 left shoulder MRI scan showed supraspinatus tendinitis, labrum tear, and mild effusion. He diagnosed probable left shoulder impingement. Dr. Thomas opined that appellant's reported neck and left shoulder pain complaints were directly related to the July 1, 2016 employment-related incident as she had no prior complaints prior to the July 1, 2016 employment-related injury and performed no other physical activities which might account for the symptoms noted.

On September 5, 2019 appellant, through her representative, requested reconsideration. OWCP subsequently received an October 19, 2018 functional capacity evaluation report. Also received was a November 8, 2018 letter from appellant's representative, wherein she asked that OWCP review Dr. Castiel's October 12, 2018 report, previously of record.

OWCP also received an August 19, 2019 acupuncture examination report and an August 21, 2019 physical therapy report and physical therapy treatment plan.

In a September 3, 2019 statement, appellant explained that she had worked as a waitress at a restaurant for 30 years, where she carried trays of drinks, lightweight dishes and plastic cups. Appellant noted that she had not worked at the restaurant since 2017. OWCP also received witness statements from appellant's coworkers at the employing establishment and the restaurant. In an August 25, 2015 statement, C.C., an employing establishment supervisor, noted that appellant had informed her that she carried her trays in her left hand when waitressing. In an undated statement from R.R., the restaurant's general manager, noted that appellant had work part time and indicated that light weight dinnerware plates and plastic cups were used at the restaurant.

A December 28, 2018 MRI scan of appellant's left shoulder revealed tendinosis/tendinitis; narrowing of subacromial space which can cause impingement, and superior labrum anterior and posterior (SLAP) type I tear of the superior labrum.

In an undated note, Dr. Castiel indicated that, since her right shoulder injury, appellant has consequentially developed left shoulder/arm/elbow pain due to overcompensation. He explained that due to the repetitive nature of her occupation (lifting, pushing, pulling with upper extremities) and the significant left arm pain, there was clear evidence of overuse and adjusted use. Dr. Castiel indicated that since appellant sustained the right shoulder injury and subsequently overcompensated with her left arm, she modified her activities of daily living. He further explained that it was impossible for someone with her current level of left shoulder dysfunction to carry out these duties without making the necessary adjustments in shoulder position and function. Dr. Castiel concluded that appellant's left shoulder issues are causally related to her right shoulder injury.

By decision dated September 30, 2019, OWCP denied modification of the September 6, 2018 decision.

LEGAL PRECEDENT

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant's own intentional misconduct.⁶ Thus, a subsequent injury, be it an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.⁷

The claimant bears the burden of proof to establish a claim for a consequential injury.⁸ As part of this burden, the claimant must present rationalized medical opinion evidence, based on a complete factual and medical background, establishing causal relationship. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.⁹ 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 appellant has not met her burden of proof to expand the acceptance of her claim to include a left shoulder condition as a consequence of her accepted July 1, 2016 employment injury.

In support of her claim appellant submitted a series of reports from Dr. Castiel. In his March 19 and October 12, 2018 reports and his undated report, Dr. Castiel related that appellant's left shoulder pain was due to overcompensation following her July 1, 2016 right shoulder injury. However, pain is a symptom and not a diagnosis.¹¹ The Board has also held that a medical report lacking a rationalized medical opinion regarding causal relationship is of no probative value.¹² Therefore, these reports are insufficient to establish appellant's claim.¹³

In his report dated May 21, 2018, Dr. Castiel diagnosed left shoulder osteoarthritis. He explained that as a result of the right shoulder injury and the delay in surgical intervention, appellant was required to overuse her left arm while performing her letter carrier duties which led

⁶ Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* § 3.05 (2014); see *I.S.*, Docket No. 19-1461 (issued April 30, 2020); see *Charles W. Downey*, 54 ECAB 421 (2003).

⁷ *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139, 141 n.7 (2001).

⁸ See *P.P.*, Docket No. 19-1359 (issued April 30, 2020).

⁹ *K.W.*, Docket No. 18-0991 (issued December 11, 2018); *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

¹⁰ *P.M.*, *id.*

¹¹ *J.P.*, Docket No. 20-0381 (issued July 28, 2020).

¹² *Id.*

¹³ *Id.*

to her left shoulder injury. Dr. Castiel noted that the compensation in the performance of her assigned duties, which included repetitive motions such as overhead reaching and lifting, pushing and pulling up to 70 pounds, led to overuse and to the current left shoulder complaints and injuries in her left shoulder. He indicated that repetitive stress injuries related to occupational overuse or cumulative trauma injuries. Dr. Castiel provided an affirmative opinion which generally supported that appellant's left shoulder condition was consequential to her accepted right shoulder condition. However, an employee claiming a consequential injury has the burden to provide rationalized medical evidence showing how the subsequently-acquired medical condition is a consequence of the prior employment injury. Dr. Castiel's opinion regarding a consequential injury is of little probative value because he did not provide adequate medical rationale in support of this opinion. He did not provide specific detail as to how appellant actually compensated for her right arm injury at work or describe the medical process of how such compensation could have caused the left arm osteoarthritis he diagnosed.¹⁴ Dr. Castiel did not explain how physiologically appellant's use of her left arm at work caused her left shoulder osteoarthritis condition.¹⁵ In any 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 physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.¹⁶ Thus, Dr. Castiel's reports therefore lack medical findings and rationale and are insufficient to establish appellant's claim.

In an August 13, 2019 report, Dr. Thomas noted the requirements of appellant's position and that she had right shoulder injury in July 2016 and surgery in May 2017. He indicated that appellant returned to regular work but compensated for her right shoulder condition with increased use of the left shoulder. Dr. Thomas diagnosed probable left shoulder impingement. The Board finds that Dr. Thomas' determination of a "probable" left shoulder impingement is speculative and equivocal and does not constitute a definitive diagnosis.¹⁷ Furthermore, the Board has held that an opinion that a condition is causally related to an employment injury simply because the employee was asymptomatic before the injury is insufficient, without supporting rationale, to support a causal relationship.¹⁸ This report is, therefore, insufficient to establish appellant's claim.

The record also contains a December 28, 2018 MRI scan report; however the Board has held that diagnostic studies, standing alone, lack probative value on the issue of causal relationship as they do not address whether employment caused any of the diagnosed conditions.¹⁹

¹⁴ See *J.T.*, Docket No. 11-0619 (issued November 3, 2011).

¹⁵ See *D.J.*, Docket No. 16-0663 (issued October 20, 2016).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *K.G.*, Docket No. 18-1598 (issued January 7, 2020); *M.S.*, Docket No. 19-0913 (issued November 25, 2019).

¹⁷ See *P.G.*, Docket No. 18-0524 (issued April 18, 2019); *Ricky S. Storms*, 52 ECAB 349, 352 (2001).

¹⁸ See *A.R.*, 19-0465 (issued August 10, 2020). *M.M.*, Docket No. 18-1522 (issued April 22, 2019); *K.P.*, Docket No. 17-1145 (issued November 15, 2017).

¹⁹ *R.J.*, Docket No. 17-1365 (issued May 8, 2019); *E.G.*, Docket No. 17-1955 (issued September 10, 2018).

Appellant also submitted reports from an acupuncturist and a physical therapist. This evidence has no probative value, however, because neither physical therapists nor acupuncturists are considered physicians as defined under FECA.²⁰

The Board thus finds that appellant has not met her burden of proof to establish that the acceptance of her claim should be expanded to include a left shoulder condition as a consequence of her accepted July 1, 2016 employment injury.

On appeal appellant's representative argues that the medical evidence from Dr. Castiel supports that appellant's left shoulder osteoarthritis was due to overuse of her left arm to compensate for her limitations caused by her accepted right arm injury and delay in surgical intervention. For the reasons explained above, however, Dr. Castiel's medical reports are insufficient to establish a consequential injury claim.

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 expand the acceptance of her claim to include a left shoulder condition as a consequence of her accepted July 1, 2016 employment injury.

²⁰ 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). 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.K.*, Docket No. 20-0049 (issued April 10, 2020); *K.L.*, Docket No. 18-1018 (April 10, 2019) (neither physical therapists nor acupuncturists are considered physicians under FECA).

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 7, 2020
Washington, DC

Alec J. Koromilas, 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