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

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| **D.R., Appellant** | ) | |
| **and** | ) | **Docket No. 20-1104** |
| | ) | **Issued: January 29, 2021** |
| **U.S. POSTAL SERVICE, POST OFFICE, Homewood, IL, 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
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

### ***JURISDICTION***

On May 4, 2020 appellant, through counsel, filed a timely appeal from a February 28, 2020 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 a left shoulder condition causally related to the accepted November 3, 2018 employment incident.

## ***FACTUAL HISTORY***

On November 17, 2018 appellant, then a 46-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 3, 2018 he experienced sharp pain in his left shoulder when he lifted a case of copying paper from his workstation while in the performance of duty. He stopped work on that date. In a handwritten statement, appellant explained that, when he arrived at work, he noticed that a case of copying paper was at his workstation. He recounted that, when he picked it up to move it, he felt pain in his left shoulder.

A November 17, 2018 authorization for examination and/or treatment (Form CA-16) signed by an authorizing official of the employing establishment indicated that appellant received treatment for left shoulder strain and pain.

Appellant was initially treated in a hospital emergency room by Dr. Kristin L. Hughes, a Board-certified emergency medicine specialist. In a November 3, 2018 note, she indicated that he was restricted from moving his left arm until he was evaluated by an orthopedic specialist. An after visit summary report demonstrated that appellant was diagnosed with acute pain of the left shoulder.

In a November 13, 2018 work status note, Dr. Sunil Dedhia, a Board-certified orthopedic surgeon, indicated that appellant would be unable to work until November 19, 2018.

In a letter dated November 21, 2018, D.D., a health and resource management specialist for the employing establishment, controverted appellant's claim. She asserted that he had not submitted sufficient evidence to establish the factual or medical components of fact of injury.

In a November 26, 2018 development letter, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It advised him of the factual and medical evidence necessary and also provided a questionnaire for completion. OWCP afforded appellant 30 days to respond.

OWCP received a November 13, 2018 initial evaluation report by Dr. Dedhia who noted that appellant worked as a mail carrier and was seen in the office for complaints of pain and discomfort in the left shoulder from an injury sustained on November 3, 2018. Upon examination of appellant's left shoulder, Dr. Dedhia observed pain, but no weakness, and positive Neer and Hawkins impingement signs. He noted that left shoulder radiology scans revealed no evidence of fracture, dislocations, or advanced degenerative changes. Dr. Dedhia reported that he had explained to appellant that, based on the mechanism of injury and physical examination findings, appellant may have damaged or torn his rotator cuff tendons.

By decision dated December 28, 2018, OWCP accepted that the November 3, 2018 employment incident occurred as alleged, but denied appellant's traumatic injury claim, finding

that the medical evidence of record did not contain a diagnosis in connection with the accepted employment incident.

On January 17, 2019 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant subsequently submitted letters by Dr. Edwin E. Hollins, a Board-certified internist. In a January 3, 2019 letter, Dr. Hollins requested that appellant be excused from work on that date and explained that appellant had suffered a left shoulder injury. In a January 8, 2019 letter and duty status report (Form CA-17), he indicated that appellant was partially incapacitated and could resume only part-time, modified-duty work beginning January 14, 2019.

A February 12, 2019 left shoulder magnetic resonance imaging (MRI) scan report revealed mild tendinosis of the infraspinatus tendon, inferior hypertrophy from mild acromioclavicular (AC) joint arthrosis, and no partial or full-thickness tears.

On May 10, 2019 a telephonic hearing was held.

By decision dated July 24, 2019, an OWCP hearing representative affirmed the December 28, 2018 decision, with modification, finding that the medical evidence of record had established a diagnosed medical condition. The claim remained denied, however, as the medical evidence of record was insufficient to establish that the diagnosed left shoulder conditions were causally related to the accepted November 3, 2018 employment incident.

On December 19, 2019 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In support of reconsideration, appellant submitted a December 2, 2019 report by Dr. Neil Allen, a Board-certified internist and neurologist, who indicated that he had reviewed appellant's medical records and spoke to appellant *via* telephone. Dr. Allen noted that on November 3, 2018 appellant was working as a letter carrier when he lifted a box of copy paper and experienced left shoulder pain. He noted the medical treatment that appellant received and reported that he had reviewed the February 12, 2019 left shoulder MRI scan report, which revealed mild tendinosis of the infraspinatus. Dr. Allen diagnosed a strain of unspecified muscle, fascia, and tendon at the left shoulder and upper arm and opined that the conditions were work related. He explained:

> "When [appellant] reached outward to lift the box of paper from the counter a downward force, in excess of the strength of the tendons and musculature of the shoulder, was exerted through a fully extended left upper limb. In such a position, the shoulder is protracted, without proper stabilization … [t]he compromised lifting position described by [appellant] combined with exposure to an antagonist force, even minimal, resulted in the overstretching of muscles and tendons, beyond their normal physiologic range resulting in tendinosis, as documented on the claimant's MRI [scan]."

Dr. Allen reported that it was well documented that heavy lifting was one of the most common causes of rotator cuff pathology. He concluded that given appellant's description of the incident and the "clinical presentation documented by appellant's treating physicians," it was

reasonable and expected that appellant's left shoulder strain was directly caused by the accepted November 3, 2018 work-related lifting incident.

By decision dated February 28, 2020, OWCP denied modification of the July 24, 2019 decision.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[3] 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,[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]

In order to determine whether a federal employee has sustained a traumatic injury in the performance of duty, OWCP must first determine whether fact of injury has been established.[7] There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.[8] Second, the employee must submit evidence, in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[9]

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.[10] The opinion of the physician must be based on a complete factual and medical background of the employee, 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 factor(s) identified by the employee.[11] The weight of the medical

[3] *Id*.

[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] *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *S.P.*, 59 ECAB 184 (2007).

[8] *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[9] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *David Apgar*, 57 ECAB 137 (2005).

[10] *See S.A.*, Docket No. 18-0399 (issued October 16, 2018); *see also Robert G. Morris*, 48 ECAB 238 (1996).

[11] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

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.[12]

The Board has long 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.[13]

## ***ANALYSIS***

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

In support of his reconsideration request, appellant submitted a December 2, 2019 report by Dr. Allen who indicated that he had reviewed appellant's medical records and spoke to appellant *via* telephone. Dr. Allen accurately described the November 3, 2018 lifting incident at work and noted his review of a February 12, 2019 left shoulder MRI scan report that revealed mild tendinosis of the infraspinatus. He diagnosed a strain of unspecified muscle, fascia, and tendon at the left shoulder and upper arm. Dr. Allen explained the physiologic basis for his causation opinion by noting when a shoulder is protracted without proper stabilization, that a compromised lifting position combined with an antagonist force results in overstretching of muscles and tendons and can result in the conditions diagnosed based upon appellant's MRI scan. He concluded that given appellant's description of the accepted incident and the clinical presentation documented by appellant's treating physicians within the medical record of the case, appellant's left shoulder strain was directly caused by the November 3, 2018 work-related lifting incident.

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 who explained that the mechanism of appellant's traumatic injury supports the diagnoses he had made following review of the medical record including a left shoulder MRI scan. Although his opinion is insufficiently rationalized to establish causal relationship, it does raise an uncontroverted inference regarding causal relationship between the diagnosed condition and the accepted employment incident sufficient to require that OWCP further develop the medical evidence in the claim.[14]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation and OWCP shares responsibility in the development of the evidence to see that justice is done.[15]

The case shall, therefore, be remanded for OWCP to refer appellant to a specialist in the appropriate field of medicine, along with the case record and a statement of accepted facts. Its

[12] *S.S.*, Docket No. 19-1658 (issued November 12, 2020); *C.C.*, Docket No. 17-1158 (issued November 20, 2018); *James Mack*, 43 ECAB 321 (1991).

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

[14] *See E.G.*, Docket No. 19-1296 (issued December 19, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

[15] *See A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

referral physician shall provide a well-rationalized opinion as to whether his diagnosed left shoulder conditions are causally related to the accepted November 3, 2018 employment incident.[16] If the physician opines that the diagnosed conditions are not causally related to the employment incident, he or she must provide a rationalized explanation as to 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.[17]

## ***CONCLUSION***

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

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the February 28, 2020 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 29, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

Alec J. Koromilas, Chief Judge, dissenting,

The majority opinion finds that, although the December 2, 2019 medical report of Dr. Neil Allen was insufficient to meet appellant's burden of proof to establish his claim, it was sufficient

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

[17] The Board notes that the employing establishment issued a Form CA-16, dated November 17, 2018. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

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 Employees' Compensation Act 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 the appellant's physician is providing a causal opinion without seeing or examining the appellant. While arguably considered a treating physician, Dr. Allen never saw nor physically examined appellant. In this case, he premised his opinion both on what he characterized as medical records that he had reviewed, and indicated that the claimant was contacted for a statement *via* telephone on December 2, 2019. The contents of appellant's statement which appeared in Dr. Allen's report described a history of injury of lifting an approximate 50-pound box of paper followed by pain in appellant's left shoulder. Appellant continued working for the remainder of his shift and sought treatment later that evening. Dr. Allen did not affirmatively indicate whether he, in fact, spoke with appellant nor did he reference any questions he may have asked appellant relative to his injury. Arguably, a telephone call at a minimum gives the treating physician an opportunity to discuss the incident with appellant without just relying on medical records alone. However, I conclude that this is still insufficient as I believe a conversation coupled with a visualized examination is minimally required.

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

[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)(4) (September 2010).

[3] *Id*.

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

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 other physicians and an MRI scan. This is the type of injury that lends itself to an examination for the purposes of diagnosis and causation, where the physician is able at a minimum to see the patient, question and receive a first-hand account of the injury and compare same. This remains critical even when the only issue is causation. For example, visualizing the locus of injury is informative to the examining treating physician relative to issues of atrophy, dislocation, contusion, and, congenital malformation which could possibly cause the same symptoms along with other factors that may relate to the finding of causal relationship. I do not agree that words of causation in the ordinary course alone can be separated from some type of 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. 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.

[5] *Id. Melvina Jackson*, 38 ECAB 443 (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).

In this digital age, if Dr. Allen was able to view, speak with, and visually examine the appellant, 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 refer to a second opinion physician to further develop the medical evidence. However, the majority finding in my view, without the benefit of a conversation coupled with a visualized examination effectively shifts the burden of proof to OWCP to disprove the claim based on a medical report that is of questionable probative value.

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