

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

K.B., Appellant)	
)	
and)	Docket No. 20-1001
)	Issued: June 23, 2021
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Sioux Falls, SD, Employer)	
)	

Appearances:
John S. Evangelisti, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 28, 2020 appellant, through counsel, filed a timely appeal from a February 12, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 her burden of proof to establish a left shoulder or cervical condition causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On April 14, 2012 appellant, then a 51-year-old former food service worker, filed an occupational disease claim (Form CA-2) alleging injuries to her left shoulder and cervical spine as a result of her federal employment duties. She noted that she first became aware of her claimed conditions on January 12, 2010. On the reverse side of the claim form, the employing establishment indicated that it had removed appellant from employment, effective December 13, 2010. OWCP assigned this claim OWCP File No. xxxxxx782.⁴

Appellant submitted an October 7, 2011 statement describing her work history. She indicated that she began her employment on September 18, 2006 as a food service worker, which included unloading trucks and filling soda machines with ice. According to appellant, she was placed on light duty on September 7, 2007, which included a 20-pound lifting restriction, but she continued to work beyond her restrictions. Appellant stated that she stopped work on October 30, 2007, returned to light-duty work in November 2007, and then underwent cervical surgery on January 9, 2008. She reported that she returned to a light-duty cashier and grill relief position in May 2008 and continued to do most of her regular duties except for filling soda machines and unloading trucks. In May 2009, appellant's work hours were reduced to four hours a day. She underwent left shoulder surgery in June 2009 and returned to light-duty work in December 2009.

In a report dated July 14, 2012, Dr. Jack Rook, a Board-certified physiatrist noted that an October 29, 2007 cervical magnetic resonance imaging (MRI) scan indicated multilevel degenerative disc disease with disc herniations at all levels from C3-4 through C6-7. He stated that appellant's cashier duties included repetitive use of the upper extremities. Dr. Rook also noted appellant's regular job duties and indicated that in September and October 2007 she performed regular duties although recommended work restrictions had been made. His diagnoses included permanent aggravation of cervical degenerative disc disease and acromioclavicular (AC) joint disease. Dr. Rook further stated that, between appellant's return to work in September 2007 and when she was taken off work on October 30, 2007, her job involved multiple activities that stressed

³ *Order Remanding Case*, Docket No. 18-1571 (issued July 29, 2019); *Order Remanding Case*, Docket No. 17-0969 (issued March 13, 2018); Docket No. 16-0203 (issued November 16, 2016); Docket No. 14-0219 (issued November 18, 2014); Docket No. 10-0749 (issued June 20, 2011); Docket No. 10-0525 (issued November 9, 2010).

⁴ The record establishes that appellant had previously filed a traumatic injury claim (Form CA-1) for a March 28, 2007 injury when she lifted a bucket of ice, which was accepted by OWCP for bilateral shoulder strains and degenerative cervical intervertebral discs. OWCP assigned this claim OWCP File No. xxxxxx664. In a November 6, 2009 decision, OWCP found that the accepted bilateral shoulder strains and degenerative cervical intervertebral disc conditions had resolved.

her neck and shoulder structures and further aggravated her condition. Appellant's condition was particularly aggravated by the heavy lifting associated with putting ice into the soda machine. Dr. Rook noted:

“From a pathophysiological perspective, this activity stresses neck and shoulder musculature, and the left shoulder joint. With regards to the left shoulder joint, lifting the arm at and above shoulder level causes the humeral head to rise into the shoulder joint where it comes in contact with the acromion and, in this patient's case, the degenerated [AC] joint. This causes the rotator cuff musculature (which lies on the top of the humerus) to become impinged between the acromion and the humeral head, causing pain and inflammation of the rotator cuff. That activity also stresses the already arthritic [AC] joint. To raise a heavy object to and above shoulder level requires contraction of neck and shoulder musculature, straining and aggravating the underlying cervical and left shoulder myofascial condition.”

Dr. Rook further explained that after appellant returned to work in September 2007 she further aggravated her condition to the point where she subsequently required two operations, was given more stringent restrictions, and eventually lost her job. He concluded that with medical probability appellant's work activities after she returned to work in September 2007 contributed to a permanent aggravation of her cervical degenerative disc disease and her rotator cuff/left shoulder arthritic condition. Dr. Rook noted that appellant's original injury had likely caused or contributed to the left rotator cuff tear as well as a permanent aggravation of her ongoing cervical degenerative disc disease.

By decision dated September 6, 2012, OWCP denied appellant's claim. On September 24, 2012 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated April 4, 2013, the hearing representative affirmed the September 6, 2012 decision.

On September 30, 2013 appellant, through counsel, requested reconsideration. By decision dated October 10, 2013, OWCP denied appellant's request for reconsideration.

On November 12, 2013 appellant, through counsel, filed an appeal to the Board. By decision dated November 18, 2014, the Board found that the issue in the present case was whether appellant has established causal relationship between any diagnosed condition and identified job duties, including work performed in September and October 2007, as well as work from April or May 2008.⁵ The Board noted, appellant had begun working as a food service worker in September 2006 and was working light-duty positions as of September 2007, although the exact work duties were not clear from the record. The Board reviewed the medical evidence, including the July 14, 2012 report from Dr. Rook. The Board found that Dr. Rook did not discuss in detail appellant's work history or clearly explain causal relationship between job duties and the diagnosed aggravation of cervical and left shoulder myofascial conditions. Dr. Rook appeared to be referring to heavy lifting, but the nature and extent of such lifting was not clear from the record. Appellant had indicated, for example, that she did not perform heavy lifting such as lifting of ice

⁵ Docket No. 14-0219 (issued November 18, 2014).

buckets in the light-duty job performed in 2008. The Board affirmed the October 10, 2013 OWCP merit decision denying the occupational disease claim.

In a statement dated March 4, 2015, appellant described her duties from May 2008 through May 2009 working in food service and running a cash register, bagging goods, stocking shelves, preparing food and beverages, and cleaning. She noted that when she worked in a coffee shop, she would use a coffee machine that required reaching above the shoulder to retrieve the coffee and to fill it. Appellant noted that she covered coworkers' duties when they were on break.

In an April 2, 2015 report, Dr. Rook reviewed appellant's March 4, 2015 statement and reported that he had additional information regarding appellant's work activities after she returned to work in September 2007. He described appellant's work duties as food preparation, cooking, serving, pushing carts, loading food and other items, as well as filling soda machines with ice. Dr. Rook noted that she was performing these duties in September and October 2007. He opined that based upon the description of appellant's job duties, he would again state within a reasonable degree of medical certainty that the work activities that appellant performed after she returned to work in September 2007 resulted in a worsening of her neck and left shoulder condition. Dr. Rook further explained that the shoulder and cervical conditions were particularly aggravated by loading the ice machine on a daily basis. He reported that this activity required contraction of the shoulder muscles and the cervical paraspinal muscles. As to cervical degenerative disc disease, Dr. Rook discussed hyperextension movement of the head and stretching of the annular fibers of the cervical discs. With regards to a left rotator cuff tear, he reported that repetitive reaching overhead required contraction of the rotator cuff on a repeated basis. Dr. Rook also opined that repeated impact of the rotator cuff against the AC joint contributed to wear and tear and progressive inflammation of this structure leading to the need for surgical treatment of the symptomatic rotator cuff tear. He indicated that other tasks performed by appellant required repetitive forceful contraction of the rotator cuff, including cleaning industrial kettles, loading dishes into the dishwasher, cleaning large industrial pots and pans, mopping floors using a large industrial mop, and loading and unloading supplies. Dr. Rook noted "that there was no medical evidence of a cuff tear" until appellant was seen on August 5, 2008. If this was correct, then he related it would be his opinion with medical probability that the repetitive work as described above contributed to the development of the rotator cuff tear.

In a letter dated April 29, 2015, OWCP requested that the employing establishment submit comments regarding the reconsideration request. In a May 14, 2015 response, an employing establishment human resources specialist asserted that appellant's description of her light-duty job duties from 2008 to 2009 was inaccurate. A May 11, 2015 statement from a supervisor was submitted. The supervisor asserted that appellant worked as a cashier, sitting by the cash register and conducting transactions.

On June 25, 2015 OWCP received a June 25, 2015 letter from counsel. Counsel argued that work activities in September and October 2007 had worsened appellant's condition. In addition, appellant argued that work activities since April 2008 were corroborated by medical and eyewitness evidence. Counsel resubmitted an August 25, 2015 statement from a coworker asserting that in May 2008 appellant did work as a cashier, but also did other duties such as working the grill.

Appellant requested reconsideration and by decision dated June 25, 2015, OWCP denied modification of its prior decision. It found that her March 4, 2015 statement had, in essence, indicated that work duties from May 2008 to May 2009 had caused her cervical and left shoulder conditions. According to OWCP, Dr. Rook's explanation was "moot," because he discussed the impact of duties performed prior to May 2008.

Appellant requested reconsideration and contended that OWCP had misrepresented her argument, as her claim was also based on job duties performed in 2007. In addition, she indicated that, with respect to job duties from 2008 to 2009, she had provided eyewitness statements corroborating her account of her physical duties at work. By decisions dated October 7 and November 9, 2015, OWCP denied reconsideration.

On November 13, 2015 appellant, through counsel, appealed to the Board. In a November 16, 2016 decision, the Board set aside OWCP's June 25, 2015 decision and remanded the case to OWCP for further development.⁶ The Board noted that appellant had claimed that her federal employment duties through 2007 had contributed to her neck and left shoulder conditions, and as such, discussion of those conditions in Dr. Rook's April 2, 2015 report did not render the report "moot." On remand, the Board ordered that OWCP properly review Dr. Rook's April 2, 2015 report in light of these findings.

In its March 8, 2017 decision, OWCP found that appellant had not submitted sufficient evidence to establish causal relationship between the accepted factors of her federal employment post-2007 and her diagnosed neck and shoulder conditions. It found that Dr. Rook's report was insufficient to modify the June 25, 2015 decision, because Dr. Rook reviewed appellant's federal employment factors from 2006 to 2007.

By order dated March 13, 2018, the Board set aside the March 8, 2017 decision and remanded the case to OWCP for issuance of a merit decision properly reviewing Dr. Rook's April 2, 2015 report as directed by the Board in its November 16, 2016 decision.⁷ The Board found that OWCP had not properly analyzed Dr. Rook's April 2, 2015 report in light of the Board's finding that the accepted factors of appellant's federal employment through 2007 were relevant to appellant's claim. Instead, OWCP had merely repeated its prior finding that Dr. Rook's report was insufficient to modify the June 25, 2015 decision, because Dr. Rook reviewed appellant's federal employment factors from 2006 to 2007.

On remand, OWCP issued an August 3, 2018 decision where it again denied modification, finding that appellant had not established causal relationship. In evaluating Dr. Rook's April 2, 2015 opinion on causal relationship, it noted that he had not discussed other relevant medical evidence, including an October 29, 2007 cervical MRI scan and medical reports dated April 13 and 22, 2009. OWCP identified what it considered to be pertinent findings from the above-noted evidence and explained how this information, and Dr. Rook's failure to consider it, undermined his April 2, 2015 opinion on causal relationship.

⁶ Docket No. 16-0203 (issued November 16, 2016).

⁷ *Order Remanding Case*, Docket No. 17-0969 (issued March 13, 2018).

On August 20, 2018 appellant, through counsel, appealed to the Board. By order dated July 29, 2019, the Board set aside the August 3, 2018 decision and remanded the case to OWCP for further development, including administratively combining the claim files and issuance of a *de novo* decision regarding appellant's entitlement to FECA benefits with respect to her April 14, 2012 occupational disease claim.⁸ The Board found that OWCP had relied upon an October 29, 2007 MRI scan and April 13 and 22, 2009 medical reports in finding Dr. Rook's April 2, 2015 opinion insufficient to establish causal relationship, but these reports were not included in the case record at that time.

In a memorandum dated December 4, 2019, OWCP noted that it had administratively combined appellant's case files under OWCP File Nos. xxxxxx782 and xxxxxx664.

An October 29, 2007 cervical MRI scan demonstrated multilevel degenerative disc disease with disc herniation at all levels from C3-C4 through C6-C7. The C5-C6 and C6-C7 herniations compressed the ventral cord and contributed to mild canal stenosis at C5-C6 and mild-to-moderate canal stenosis at C6-C7.

In a report dated April 13, 2009, Dr. Thomas Ripperda, Board-certified in physical medicine and rehabilitation, examined appellant subsequent to a left shoulder MRI scan. He noted that the MRI scan demonstrated degenerative findings with AC joint supporting of the tuberosity and a full-thickness tear of the supraspinatus with abnormal signal in the infraspinatus and subscapularis. On physical examination of the left shoulder, Dr. Ripperda observed positive Hawkins and supraspinatus tests with positive painful arc. He diagnosed left rotator cuff full-thickness tear and myofascial pain within appellant's scapular stabilizing musculature.

In a report dated April 22, 2009, Dr. Jeffrey S. Kalo, an osteopath and orthopedic surgery specialist, examined appellant's left shoulder on referral from Dr. Ripperda. He noted that she was injured at the employing establishment in March 2007 when lifting a heavy bucket of ice with her left shoulder and feeling something "pop" in her shoulder. Dr. Kalo related appellant's physical examination findings regarding the left shoulder; mild paresthesias in her right arm with lesser parasthesias in her left arm; and reduced reflexes at the biceps and triceps. He also observed soft tissue swelling, a positive lift-off sign, and a positive hyper crossover test. Dr. Kalo noted that everything seemed to hurt her shoulder, "maybe a bit out of proportion to her physical findings." Reviewing an MRI scan of the left shoulder, he noted a damaged labrum with fraying, a substantial cuff tear of both the supraspinatus and infraspinatus tendons, cuff arthropathy, and edema of the AC joint. Dr. Kalo diagnosed mild AC joint arthrosis and significant cuff tearing of the left shoulder and a significant history of cervical spine pain status post cervical spine fusion. He observed that it appeared she had a cuff tear from the initial injury that had possibly been missed, or "as part of the cervical spine process at this point being fully addressed."

On February 12, 2020 OWCP again denied modification, finding that appellant had not established causal relationship. It found that Dr. Rook's April 2, 2015 report was not well-reasoned as it did not provide discussion of objective findings to support that the change in her underlying degenerative cervical condition was brought on by the performance of her federal duties. OWCP further found that Dr. Rook had not described how and why the performance of

⁸ *Order Remanding Case*, Docket No. 18-1571 (issued July 29, 2019).

her federal duties leading to her current left shoulder symptoms materially changed the underlying progression of her preexisting degenerative shoulder conditions. It noted that Dr. Rook's opinion in his April 2, 2015 report was in conflict with his previous opinion dated July 14, 2012.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁹ 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, 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.¹⁰ 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.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.¹¹

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹² 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 factors.¹³

ANALYSIS

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

The issue in the present case is whether appellant has established causal relationship between any diagnosed condition and the identified job duties, including work performed in September and October 2007 and thereafter. In his April 2, 2015 report, Dr. Rook reviewed appellant's March 4, 2015 statement and reported that he had additional information regarding appellant's work activities after she returned to work in September 2007. He described appellant's

⁹ *Id.*

¹⁰ *C.K.*, Docket No. 19-1549 (issued June 30, 2020); *R.G.*, Docket No. 19-0233 (issued July 16, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹¹ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹² *I.J.*, Docket No. 19-1343 (issued February 26, 2020); *T.H.*, 59 ECAB 388 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

¹³ *L.C.*, *supra* note 11.

work duties as food preparation, cooking, serving, pushing carts, loading food and other items, as well as filling soda machines with ice. Dr. Rook noted that she was performing these duties in September and October 2007. He opined that, based upon the description of appellant's job duties, he would again state within a reasonable degree of medical certainty that the work activities that appellant performed after she returned to work in September 2007 resulted in a worsening of her neck and left shoulder condition. Dr. Rook further explained that the shoulder and cervical condition were particularly aggravated by loading the ice machine on a daily basis. He reported this activity required contraction of the shoulder muscles and the cervical paraspinal muscles. As to cervical degenerative disc disease, Dr. Rook discussed hyperextension movement of the head and stretching of the annular fibers of the cervical discs. With regard to a left rotator cuff tear, he reported that repetitive reaching overhead required contraction of the rotator cuff on a repeated basis. Dr. Rook also opined that repeated impact of the rotator cuff against the AC joint contributed to wear and tear and progressive inflammation of this structure leading to the need for surgical treatment of the symptomatic rotator cuff tear. He indicated that other tasks performed by appellant required repetitive forceful contraction of the rotator cuff, including cleaning industrial kettles, loading dishes into the dishwasher, cleaning large industrial pots and pans, mopping floors using a large industrial mop, and loading and unloading supplies. Dr. Rook stated that while Dr. Dowdle had determined that appellant's rotator cuff condition was unrelated to the accepted March 28, 2007 traumatic incident, he believed that the rotator cuff condition was related to repetitive work duties after that incident.

The Board finds that Dr. Rook's April 2, 2015 report is sufficient to require further development of the medical evidence. The physician is a Board-certified physiatrist and is qualified in his field of medicine to render rationalized opinions on the issue of causal relationship. He provided a comprehensive understanding of the medical record and case history. Dr. Rook, in his report, provided a pathophysiological explanation as to how appellant's work duties resulted in aggravation of her left shoulder and cervical conditions. In contrast to his July 14, 2012 report, his April 2, 2015 report discussed appellant's work history in detail and provided a complete and accurate background demonstrating his awareness of the duties of her federal employment. Dr. Rook's omission of analysis of the April 13 and 22, 2009 reports of Dr. Ripperda and Dr. Kalo, as well as the October 29, 2007 MRI scan results, in his April 2, 2015 report do not render his otherwise well-rationalized opinion insufficient to require further development.¹⁴ Similarly, his statement in his July 14, 2012 report that appellant's conditions were related in part to her March 28, 2007 work injury does not conflict with the opinion in his April 2, 2015 report that work activities after September 2007 resulted in a worsening or aggravation of her degenerative neck and left shoulder conditions.

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. Rather, the evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound, and logical.¹⁵ Dr. Rook's April 2, 2015 report provided an opinion explaining that duties

¹⁴ Dr. Rook's July 14, 2012 report referred to the October 29, 2007 MRI scan.

¹⁵ *B.H.* Docket No. 20-0734 (issued November 13, 2020); *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) and cases cited therein.

of appellant's employment subsequent to her return to work in September 2007 had resulted in her left shoulder and cervical conditions. Although the April 2, 2015 report of Dr. Rook is insufficient to meet her burden of proof to establish her claim, it raises an uncontroverted inference between her diagnosed left shoulder and cervical conditions and the accepted factors of her federal employment. Accordingly, Dr. Rook's medical opinion is sufficiently well-rationalized to require further development of appellant's claim.¹⁶

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.¹⁷ OWCP has an obligation to see that justice is done.¹⁸

On remand, OWCP shall refer appellant to a physician in the appropriate field of medicine, along with the case record and a statement of accepted facts, for an examination and a rationalized medical opinion as to whether the accepted employment factors either caused or aggravated her diagnosed conditions.¹⁹ If the second opinion disagrees with the explanations provided by Dr. Rook, he or she must provide a fully-rationalized explanation explaining why the accepted employment factors were insufficient to have caused or aggravated her diagnosed left shoulder and cervical conditions. After this and other such development of the case record as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁶ *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).

¹⁷ *See id.* *See also A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

¹⁸ *See B.C.*, Docket No. 15-1853 (issued January 19, 2016); *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *C.C.*, Docket No. 19-1631 (issued February 12, 2020).

ORDER

IT IS HEREBY ORDERED THAT the February 12, 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: June 23, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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