

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

R.T., Appellant)	
)	
and)	Docket No. 21-0475
)	Issued: October 19, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Hixton, WI, Employer)	

Appearances:
Alan J. Shapiro, Esq., 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 February 8 2021 appellant, through counsel, filed a timely appeal from January 11 and October 23, 2021 merit decisions 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.³

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.*

³ The Board notes that, following the January 11, 2021 decision, OWCP received additional evidence. 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a right shoulder condition causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On November 19, 2019 appellant, then a 59-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed pain and stiffness in her right shoulder, which had worsened over the past two years, leading to increased pain and weakness, due to factors of her federal employment. She noted that she first became aware of her condition on March 1, 2019, and first realized it was caused or aggravated by factors of her federal employment on October 16, 2019. Appellant did not stop work.

In a medical report dated October 25, 2019, Dr. Brent D. Carlson, a Board-certified orthopedic surgeon, noted that appellant related a history of right shoulder pain over the last two years which was not preceded by any particular injury. On physical examination of the shoulders, he documented pain and reduced range of motion and strength on the right compared to the left, as well as clinical signs of bicipital and labral pathology on the right. Dr. Carlson diagnosed tears of the right biceps and rotator cuff at the subscapularis; mild-to-moderate glenohumeral arthritis; and right shoulder arthrofibrosis. He recommended she undergo an arthrogram of the right shoulder.

A report of a right shoulder arthrogram dated October 31, 2019 interpreted by Dr. Karl Stein, a diagnostic radiologist, indicated a history of chronic increasing right shoulder pain and repetitive motion at work. The study revealed: a high-grade tear involving all of the deep fibers of the subscapularis tendon with associated medial subluxation of the long head of the biceps tendon out of the bicipital groove; moderate-to-high-grade partial-thickness tearing involving the articular and intrasubstance fibers of the supraspinatus tendon; mild-to-moderate tearing and fraying involving the proximal long head of the biceps tendon; a complex tear of the superior labrum; and mild degenerative change at the acromioclavicular (AC) joint.

In a follow up visit on November 5, 2019, Dr. Carlson reviewed the arthrogram and noted that appellant clarified her history, relating that she experienced achy pain in her right shoulder on March 1, 2019, and a sharp, stabbing pain after lifting a package at work on August 30, 2019. His physical examination remained unchanged, and he diagnosed tears of the supraspinatus and subscapularis tendons, biceps instability/dislocation from the groove, severe biceps tendinopathy, impingement, and AC joint primary arthritis. Dr. Carlson recommended a steroid injection, followed by shoulder surgery.

In a development letter dated November 25, 2019, OWCP informed appellant of the deficiencies of her claim. It asked her to complete a questionnaire to provide further details regarding the circumstances of her claimed injury and requested a narrative medical report from her treating physician, which contained a detailed description of findings and diagnoses, explaining how her work activities caused, contributed to, or aggravated her medical condition. OWCP afforded appellant 30 days to respond.

In a December 6, 2019 response to the development questionnaire, appellant asserted that the work duties that caused pain in her shoulder included: reaching while casing mail; strapping out sack mail into bundles; pulling straps; lifting and carrying mail and parcels; lifting, aiming, and pushing buttons on a scanner; lifting and reaching to open and close mailboxes; and opening and closing her vehicle's door while delivering mail. She denied any activities outside of work which would cause any injury to her right shoulder.

By decision dated January 17, 2020, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish that her diagnosed medical conditions were causally related to the accepted factors of her federal employment.

OWCP continued to receive medical evidence, including a narrative report from Dr. Carlson dated February 10, 2020. Dr. Carlson opined that after reviewing his records and the January 17, 2020 OWCP decision, the August 30, 2019 work-related injury was either a material contributing factor in the development of the tears that he identified and treated during surgery, or that the incident had exacerbated a preexisting condition. He recommended that appellant obtain a second opinion from an occupational medicine specialist.

On May 26, 2020 appellant, through counsel, requested reconsideration of OWCP's January 17, 2020 decision.

OWCP subsequently received a February 10, 2020 follow-up visit note by Dr. Carlson indicating that he had performed right shoulder arthroscopy on January 7, 2020.

In a second narrative report dated May 4, 2020, Dr. Carlson noted that appellant reported a history of achy pain in her right shoulder on March 1, 2019 that worsened on August 30, 2019 when she lifted a large heavy panel at work. He described the arthrogram results and surgery, including debridement of cartilage damage in a chondral flap immediately adjacent to her rotator cuff, repair of the supraspinatus and subscapularis tendons, and clean-up of her biceps tendon stump where she had suffered a complete avulsion. Dr. Carlson opined that appellant's need for shoulder surgery was the result of her work injury, and that the work injury was a significant material contributor to her pain and represented an exacerbation of a preexisting condition. He further explained that she had pain in her shoulder prior to the work injury, and therefore, her condition would either be a work-related exacerbation of a preexisting condition or a completely new injury.

By decision dated June 2, 2020, OWCP denied modification of its March 25, 2020 decision.

Appellant thereafter submitted an undated statement further describing her work duties, including repetitive reaching, lifting, carrying, and pulling with the right arm over the course of 19 years of work with the employing establishment.

On July 21, 2020 appellant, through counsel, requested reconsideration of OWCP's June 2, 2020 decision.

In support of the request, appellant submitted a June 26, 2020 evaluation by Dr. Joseph Hebl, an occupational medicine specialist, who noted that she related complaints of right shoulder pain which she attributed to repetitive lifting, pulling, reaching, and carrying at work and a specific

employment incident on August 30, 2019 when she was lifting a 30- to 35-pound package. Dr. Hebl reviewed Dr. Carlson's history of treatment and operative notes and performed a physical examination which revealed paravertebral muscle spasm in the cervical spine, pain with range of motion testing of the right shoulder, and positive impingement signs at the right shoulder. He opined that appellant sustained a work-related injury to the right shoulder secondary to repetitive work activities and a discrete injury on August 30, 2019, resulting in a tear of the supraspinatus and subscapularis tendons, biceps tear, labral tear and impingement syndrome. Dr. Hebl further explained that repetitive reaching out or to the side with the right arm at or above shoulder level is precisely the type of activity that is likely to irritate the rotator cuff, the biceps tendon and the labrum. He recommended that she remain out of work.

In July 21 and August 18, 2020 follow-up reports, Dr. Hebl reiterated appellant's history and treatment. He noted that she had seen Dr. Stephen Andres, a Board-certified anesthesiologist and pain management physician, who performed trigger point injections to her neck and diagnosed post-work injury myofascial pain disorder at the posterior shoulder girdle. Dr. Hebl recommended that appellant remain out of work.

In a September 11, 2020 medical report, Dr. Cory Stewart, a Board-certified orthopedic surgeon, noted that appellant complained of right shoulder pain that had been ongoing for some time and that she had undergone rotator cuff repair surgery in January 2020, but was still symptomatic. He examined appellant and recommended that she continue with home exercises and gradual strengthening of the right shoulder.

In a follow-up report dated September 17, 2020, Dr. Hebl noted his examination and assessments remained unchanged. On October 8, 2020 he released appellant to return to work without restrictions.

By decision dated October 23, 2020, OWCP denied modification of its June 2, 2020 decision.

OWCP continued to receive medical evidence, including a November 19, 2020 follow up report by Dr. Hebl, where he indicated that he received a copy of OWCP's October 23, 2020 decision. Dr. Hebl further noted that she experienced numerous flare-ups of shoulder pain while engaged in her work duties, which were especially irritating to her shoulder in early 2019 when she was repetitively reaching and gripping. He acknowledged that Dr. Carlson found that appellant sustained a traumatic injury on August 30, 2019, but he opined that the repetitive gripping and reaching out or to the side with bundles of mail was precisely the type of activity that is known to irritate the rotator cuff, resulting in weakness of the rotator cuff muscles, and eventual tearing. Dr. Hebl opined that this is precisely what happened in this case.

On December 7, 2020 appellant, through counsel, requested reconsideration of OWCP's October 23, 2020 decision.

In a December 17, 2020 follow-up visit note, Dr. Hebl reiterated appellant's history and his opinions, and noted that she continued to experience shoulder pain, weakness and range of motion, and that she was pacing herself at work.

By decision dated January 11, 2021, OWCP denied modification of its October 23, 2020 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including 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,⁵ 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.⁶ 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.⁷

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.⁸

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁹ The opinion of the physician must be based upon 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 incident.¹⁰

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.¹¹

⁴ *Supra* note 1.

⁵ *F.H.*, Docket No.18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *T.W.*, Docket No. 20-0767 (issued January 13, 2021); *L.D.*, Docket No. 19-1301 (issued January 29, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019).

⁹ *I.J.*, Docket No. 19-1343 (issued February 26, 2020); *T.H.*, 59 ECAB 388 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

¹⁰ *D.C.*, Docket No. 19-1093 (issued June 25, 2020); *see L.B.*, Docket No. 18-0533 (issued August 27, 2018).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

ANALYSIS

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

After undergoing surgery by Dr. Carlson, appellant was seen by occupational medicine specialist Dr. Hebl, who consistently opined throughout his reports that her right shoulder condition was precipitated by repetitive work activities for the past 20 years as well as a discrete injury on August 30, 2019. Dr. Hebl explained that the repetitive reaching out or to the side and repetitive gripping and reaching with bundles of mail was precisely the type of activity that is known to irritate the rotator cuff, resulting in weakness of the rotator cuff muscles, and eventual tearing. He opined that this is precisely what happened in this case.

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 for the development of the evidence and to see that justice is done.¹²

While the Board finds that the reports from Dr. Hebl are not fully rationalized, they are consistent in explaining that appellant's work duties caused, precipitated and/or aggravated her right shoulder condition and are not contradicted by any substantial medical or factual evidence of record.¹³ While his reports do not provide sufficient medical rationale to establish an injury by which her accepted factors of federal employment caused or aggravated her diagnosed conditions, they raise an uncontroverted inference of causal relationship, and thus, they are sufficient to require OWCP to further develop the medical evidence.¹⁴ Further development of appellant's claim is therefore required.¹⁵

The case shall 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.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 those articulated by Dr. Hebl. After this and other such further development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹² See *A.K.*, Docket No. 20-1426 (issued March 8, 2021); *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).

¹³ See *D.G.*, Docket No. 18-0043 (issued May 7, 2019). *J.M.*, Docket No. 20-1230 (issued February 16, 2021).

¹⁴ See *E.J.*, *supra* note 12; *Richard E. Simpson*, 55 ECAB 490, 500 (2004); *John J. Carlone*, *supra* note 12.

¹⁵ *A.G.*, Docket No. 20-0454 (issued October 29, 2020); see *A.K.*, *supra* note 12; *C.G.*, Docket No. 20-1121 (issued February 11, 2021); *J.D.*, Docket No. 18-0279 (issued January 6, 2020); *K.P.*, Docket No. 18-0041 (issued May 24, 2019); *M.K.*, Docket No. 17-1140 (issued October 18, 2017); *G.C.*, Docket No. 16-0666 (issued March 17, 2017); *John J. Carlone*, *supra* note 12; *Horace Langhome*, 29 ECAB 280 (1978).

¹⁶ See *A.K.*, *supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2021 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 19, 2021
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