United States Department of Labor
Employees' Compensation Appeals Board

K.C., Appellant	)	
and	)	**Docket No. 22-0466**
	)	**Issued: August 9, 2022**
FEDERAL JUDICIARY, U.S. PROBATION & PRETRIAL SERVICES, Kansas City, MO, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On February 9, 2022 appellant, through counsel, filed a timely appeal from a January 19, 2022 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 to consider 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 right shoulder condition causally related to the accepted February 5, 2018 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 is incorporated herein by reference. The relevant facts are as follows.

On March 5, 2018 appellant, then a 55-year-old support staff employee, filed a traumatic injury claim (Form CA-1) alleging that on February 5, 2018 she pinched a nerve and possibly herniated a disc in her upper back and experienced pain from the center of her back and right shoulder down to her arm and into her hand, and swelling in her arm and hand when she moved large storage bins full of paper while in the performance of duty.[4] OWCP assigned that claim OWCP File No. xxxxxx673.

In support of her claim, appellant submitted factual and medical evidence.

OWCP, by development letter dated March 19, 2018, informed appellant of the deficiencies of her claim. It advised her of the type of medical evidence needed and afforded her 30 days to submit the necessary evidence.

OWCP subsequently received additional medical evidence.

By decision dated May 14, 2018, OWCP accepted that the February 5, 2018 incident occurred as alleged, but denied the claim, finding that the medical evidence of record was insufficient to establish causal relationship between appellant's diagnosed condition and the accepted employment incident.

OWCP continued to receive medical evidence.

On November 28, 2018 appellant, through counsel, requested reconsideration of the May 14, 2018 decision and submitted additional medical evidence.

OWCP received an August 31, 2018 operative report from Dr. David C. Hicks, a Board-certified orthopedic surgeon, who provided preoperative diagnoses of pain, impingement, acromioclavicular (AC) arthritis, partial-thickness rotator cuff tear of the right shoulder. Dr. Hicks again noted impingement and AC arthritis as postoperative diagnoses. He also diagnosed the postoperative diagnoses of full-thickness supraspinatus tendon tear and superior labrum anterior posterior tear with chronic biceps tendinosis of the right shoulder. Dr. Hicks performed right

[3] Docket No. 19-0834 (issued October 28, 2019).

[4] OWCP assigned the present claim OWCP File No. xxxxxx673. Appellant has a prior occupational disease claim (Form CA-2) accepted for right upper limb cubital tunnel syndrome under OWCP File No. xxxxxx841. OWCP has administratively combined OWCP File Nos. xxxxxx841 and xxxxxx673, with the former designated as the master file.

shoulder arthroscopy with extensive synovectomy and debridement of rotator cuff and biceps tenotomy; subacromial decompression with acromioplasty; distal clavicle resection; biceps tenodesis; and rotator cuff repair.

By decision dated February 20, 2019, OWCP denied modification of its May 14, 2018 decision.

On March 12, 2019 appellant, through counsel, appealed to the Board. By decision dated October 28, 2019, the Board affirmed the February 20, 2019 decision, finding that appellant had not met her burden of proof to establish a right shoulder condition causally related to the accepted February 5, 2018 employment incident.[5]

On February 4, 2020 appellant, through counsel, requested reconsideration before OWCP. In support of her request for reconsideration she submitted a January 23, 2020 letter from Dr. W. Steven Pennington, an attending Board-certified orthopedic surgeon. Dr. Pennington noted a history of appellant's medical treatment, commencing on March 13, 2018. He also provided a history of injury that on February 5, 2018 appellant felt severe pain and weakness in her right shoulder and arm, and neck while lifting a box. Dr. Pennington ordered a magnetic resonance imaging (MRI) scan of the right shoulder, which was performed on March 29, 2018. The MRI scan showed a supraspinatus tear with tendinitis, subacromial bursitis, osteoarthritic acromioclavicular (AC) joint changes, and a possible tear of the labrum. Dr. Pennington recounted that based on the MRI scan results, appellant initially received conservative treatment, but subsequently underwent right shoulder surgery. He reported his examination findings. Dr. Pennington opined that, when appellant lifted the box, she used her biceps muscle which are attached to the ring of cartilage called the labrum of the shoulder. He noted that the weight of the box pulled and shredded her biceps tendon, tore the cartilage in her labrum and shoulder, and tore her rotator cuff. Dr. Pennington related that the severity of that work injury resulted in Dr. Hicks cutting the biceps tendon at its point of attachment to the labrum because it was beyond repair. He had to move it and screw it to another area to stabilize it. Dr. Hicks then repaired the torn labrum and supraspinatus tendon. Dr. Pennington opined that the February 5, 2018 employment incident was the proximate cause of appellant's torn and shredded biceps tendon and labral tear and her continued disability.

By decision dated March 10, 2020, OWCP denied modification of its denial of appellant's traumatic injury claim.

On September 24, 2020 appellant, through counsel, requested reconsideration.

OWCP received a report dated August 11, 2021 from Dr. Pennington who reiterated the history of appellant's medical treatment and February 5, 2018 employment incident. Dr. Pennington noted that on February 21, 2018 appellant was diagnosed as having cubital tunnel syndrome by Dr. Edwin Cunningham, an endocrinologist. He opined that her right cubital tunnel syndrome was employment related. Dr. Pennington noted that working in a small cubital with the elbow frequently rubbing on a tabletop to perform keyboarding and using a mouse resulted in her condition. He related that this was a common cause of this problem. Dr. Pennington reiterated his

[5] *Supra* note 3.

prior opinion that the February 5, 2018 employment incident directly caused appellant's tear of the labrum and biceps tendon in her right shoulder.

By decision dated October 28, 2020, OWCP denied modification of its March 10, 2020 decision, finding that the submitted medical evidence was insufficient to establish a right shoulder condition causally related to the February 5, 2018 employment incident.

On October 24, 2021 appellant requested reconsideration. She contended that her right shoulder condition was a consequential condition caused by her ulnar nerve entrapment and tendinitis resulting from repetitive computer use which was accepted for right cubital tunnel syndrome under OWCP File No. xxxxxx841.

Appellant submitted additional medical evidence. In an April 25, 2019 right shoulder MRI scan report, Dr. Mark H. Monroe, a diagnostic radiologist, provided impressions of tendinopathy at the site of the rotator cuff repair and definitive full-thickness tear not seen, however, there was some tendinous attrition/attenuation; AC hypertrophy; subacromial bursitis; and volume loss of the supraspinatus.

Appellant resubmitted Dr. Hicks' August 31, 2018 operative report and Dr. Pennington's August 11, 2021 letter. She also submitted photographs of her right shoulder and arm following her August 31, 2018 right shoulder surgery, storage bins she moved at work, and her work cubicle.

By decision dated January 19, 2022, OWCP denied modification of its October 28, 2020 decision.

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 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 whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There

[6] *Supra* note 2.

[7] *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).

[8] *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).

[9] *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).

are two components involved in establishing fact of injury. The first component is that the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.[10]

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.[11] 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 specific employment factors identified by the employee.[12]

ANALYSIS

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

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata*, absent further review by OWCP under section 8128 of FECA. It is, therefore, unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's February 20, 2019 decision as the Board considered that evidence in its October 28, 2019 decision.[13]

In letters dated January 23 and August 11, 2020, Dr. Pennington opined that appellant's tear of the labrum and biceps tendon in her right shoulder and disability from work were directly caused by the February 5, 2018 employment incident. He explained that she used her biceps muscle, which are attached to the labrum, to lift a box and the biceps muscle. Dr. Pennington further opined that the weight of the box pulled and shredded appellant's biceps tendon, tore the cartilage in her labrum and shoulder, and tore her rotator cuff. He noted that a March 29, 2018 MRI scan revealed a supraspinatus tear with tendinitis, subacromial bursitis, osteoarthritic AC joint changes, and a possible tear of the labrum, which necessitated the August 31, 2018 right shoulder surgery performed by Dr. Hicks.

[10] *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

[11] *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

[12] *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[13] *M.S.*, Docket No. 20-1095 (issued March 29, 2022); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020).

It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[14]

Dr. Pennington is a Board-certified physician who is qualified in his field of medicine to render rationalized opinions on the issue of causal relationship. The Board finds that, 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 February 5, 2018 employment incident sufficient to require further development of the case record by OWCP.[15]

The Board will, therefore, remand the case for further development of the medical evidence. On remand OWCP shall prepare a statement of accepted facts and obtain a rationalized opinion from a physician in the appropriate field of medicine as to whether the accepted employment incident caused, contributed to, or aggravated the diagnosed right shoulder conditions.[16] If the physician opines that the diagnosed conditions are not causally related, he or she must explain with rationale how or why their opinion differs from that of Dr. Pennington. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[14] *M.S., id.*; *C.R.*, Docket No. 20-1102 (issued January 8, 2021); *K.P.*, Docket No. 18-0041 (issued May 24, 2019).

[15] *See M.S., id.*; *B.F.*, Docket No. 20-0990 (issued January 13, 2021); *Y.D.*, Docket No. 19-1200 (issued April 6, 2020).

[16] *C.G.*, Docket No. 20-1121 (issued February 11, 2021); *A.G.*, Docket No. 20-0454 (issued October 29, 2020).

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2022 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: August 9, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board