

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

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| L.R., Appellant |) | |
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| and |) | Docket No. 22-0034 |
| |) | Issued: July 18, 2022 |
| U.S. POSTAL SERVICE, POST OFFICE, San Antonio, TX, Employer |) | |
| _____ |) | |

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On October 10, 2021 appellant filed a timely appeal from an October 5, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant has met her burden of proof to expand the acceptance of her claim to include additional conditions as causally related to her accepted employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the October 5, 2021 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.*

FACTUAL HISTORY

On December 12, 2018 appellant, then a 52-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained injuries due to factors of her federal employment.³ She alleged that these work factors caused injury to her neck, right shoulder, and mid and lower back. Appellant stopped work on November 2, 2018.

OWCP accepted the claim for cervical spine, right shoulder, thoracic spine, and lumbar spine sprains, bursitis of the right shoulder, and impingement syndrome of the right shoulder.⁴

In an April 16, 2020 report, Dr. Karen Dickerson, a pain medicine specialist, requested expansion of the acceptance of claim to include cervical disc disorder with radiculopathy, unspecified cervical region, spinal stenosis, cervical region, impingement syndrome of right shoulder, bursitis of right shoulder, unspecified rotator cuff tear, injury of nerve root of lumbar spine, initial encounter, spinal stenosis, lumbar region with neurogenic claudication, other intervertebral disc displacement, lumbar region, bicipital tendinitis, right shoulder, calcific tendinitis unspecified shoulder, and osteophyte. She reviewed appellant's medical record, including diagnostic reports including a November 14, 2018 magnetic resonance imaging (MRI) scan of the lumbar spine and right shoulder, a December 3, 2018 cervical spine MRI scan, and a January 24, 2020 MRI scan of the right shoulder. Dr. Dickerson also provided appellant's physical examination findings.

Dr. Dickerson related that most often appellant worked more than the scheduled eight-hour shift, and that appellant's job as a mail clerk processor required her to work on a machine for priority run, meaning placing rubber pallets weighing approximately 5 pounds, moving in one shift, approximately 1,000 pallets, and moving wire carts full of mail weighing approximately 1,500 pounds, while constantly moving throughout her entire shift, coupled with continuous/intermittent lifting of sacks of parcels weighing approximately 70 pounds on to a 5-foot stack on a truck weighing 1,100 pounds. She noted that in an eight-hour shift, appellant typically carried approximately 24 to 32 sacks of parcels per hour and that the 1,100-pound truck was later pushed approximately 300 feet to a designated area on a repeated basis during the entire shift. Dr. Dickerson related that appellant's job required standing on concrete floors, sitting beside a conveyor belt console, using appellant's right hand and predominantly gliding /directing the mail towards her in order to see the zip code on the parcels, then using a 10-key pad to type the zip code, and removing oversized parcels from the belt and placing them beside the conveyor belt console. She noted that the oversized parcels weighed approximately 50 to 70 pounds and are later picked up (either placing over shoulder or lifting close to the body), walking approximately 4 steps to a designated all-purpose container, using mostly her back to set parcel in the box. Dr. Dickerson

³ Appellant specifically alleged that, for 8 to 12 hours a day, up to 5 to 6 days a week for 3 years, she engaged in repetitive duties such as standing/walking on concrete, up to 13 hours a shift; pushing carts weighing up to 1,500 pounds; and lifting parcels weighing up to 70 pounds, sometimes up to 5 feet. She also indicated that she engaged in repetitive typing, sweeping, walking stairs, and moving up to 1,000 rubber pallets per a shift, while in the performance of duty.

⁴ The Board notes that, while bursitis of the right shoulder and impingement syndrome of the right shoulder are not listed as accepted conditions in the January 28, 2019 formal acceptance decision, the case record supports that right shoulder bursitis and impingement syndrome have also been accepted.

further related that appellant used a manual pallet jack using predominantly her arms, shoulders, and back to jack the pallet. She explained that appellant had been carrying out these work duties 3 to 12 hours a day, 5 to 6 days per week, for the past 3 years, with continuous twisting, turning, bending, lifting, reaching above the shoulder, stooping, and exposure of the body to constant pressure upon feet, knees, shoulder, lumbar, and lower body. Dr. Dickerson also related that, on October 3, 2018 appellant was working as a lead clerk for the parcel running priority mail and as appellant was directing the parcels on the conveyor, pulling the parcels toward her to type in the zip code, she felt sharp pain in her right shoulder.

Regarding causal relationship, Dr. Dickerson concluded that appellant's performance of her normal job duties at the employing establishment led to the diagnosed medical conditions as a direct result of repetitive actions. Motions including repetitive flexing and extending appellant's cervical spine, repetitively reaching out her shoulder and arm to guide parcels towards her, picking up and reaching up and above her shoulder to place parcels on the rack, coupled with repetitively pulling and pushing the nutting cart weighing about 1,100 pounds, led to the diagnosed conditions.

On July 1, 2020 OWCP referred the case to Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon serving as OWCP's district medical adviser (DMA) to opine on the requested expansion of appellant's claim and review Dr. Dickerson's April 16, 2020 report.

In a July 15, 2020 report, Dr. Ugokwe, the DMA, indicated that he disagreed with the opinion of Dr. Dickerson, appellant's physician, that appellant developed additional conditions as a result of a work injury. The DMA opined that the diagnostic test results of the shoulder, cervical, and lumbar regions of the spine showed findings consistent with degenerative changes that were seen in the normal aging process, and not from a work injury.

On September 17, 2020 OWCP referred appellant for a second opinion examination with Dr. Thomas DeBerardino, a Board-certified orthopedic surgeon, to determine whether she sustained additional employment-related conditions.

In an October 15, 2020 report, Dr. DeBerardino noted appellant's history of injury and medical treatment. He examined her and opined that the diagnoses of sprain of ligaments of cervical spine, sprain of right shoulder joint, sprain of ligaments of thoracic spine, and sprain of ligaments of lumbar spine were the only conditions caused by her employment injury. Dr. DeBerardino further opined that the additional medical conditions requested by Dr. Dickerson were not supported by the history, physical examination, and tests to be caused by the work-related injury of October 3, 2018. He explained that the objective evidence, including the MRI scan of the cervical, lumbar spine, and right shoulder, showed degenerative changes which were "more likely age-related normal disease of life" and that the findings were "less likely related to the work-related injury of [October 3, 2018]."

By decision dated October 5, 2021, OWCP denied expansion of acceptance of the claim to include additional conditions. It explained that the medical evidence of record was insufficient to demonstrate that the additional conditions were caused by the accepted work-related injury or

illness, or that the accepted work-related injury or illness led to an aggravation of the original injury or to a new injury, as required for coverage under FECA.

LEGAL PRECEDENT

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁵

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁶ A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.⁷ Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's employment injury.⁸ Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁹ The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁰ In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual and medical background, must be given special weight.¹¹

ANALYSIS

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

⁵ *L.N.*, Docket No. 20-1619 (issued December 30, 2021); *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

⁶ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

⁷ *F.A.*, Docket No. 20-1652 (issued May 21, 2021); *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁸ *Id.*

⁹ 5 U.S.C. § 8123(a); *see also G.K.*, Docket No. 16-1119 (issued March 16, 2018).

¹⁰ *See E.C.*, Docket No. 18-0780 (issued October 11, 2018); *P.S.*, Docket No. 17-0802 (issued August 18, 2017).

¹¹ *C.E.*, Docket No. 19-1923 (issued March 30, 2021); *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.C.*, 58 ECAB 238 (2006); *David W. Pickett*, 54 ECAB 272 (2002).

In an April 16, 2020 report, Dr. Dickerson, the treating physician, requested to expand the claim to include cervical disc disorder with radiculopathy, unspecified cervical region, spinal stenosis, cervical region, impingement syndrome of right shoulder, bursitis of right shoulder, unspecified rotator cuff tear; injury of nerve root of lumbar spine, initial encounter, spinal stenosis, lumbar region with neurogenic claudication, other intervertebral disc displacement, lumbar region, bicipital tendinitis, right shoulder, calcific tendinitis unspecified shoulder, and osteophyte, due to weakness or impairment caused by appellant's already accepted work-related injury/illness. She noted appellant's job duties in extensive detail and concluded that motions including repetitive flexing and extending appellant's cervical spine, repetitively reaching out her shoulder and arm to guide parcels towards her, picking up and reaching up and above her shoulder to place parcels on the rack, and coupled with repetitively pulling and pushing the nutting cart weighing about 1,100 pounds, led to the additional diagnosed conditions.

By contrast, Dr. DeBerardino, the second opinion physician, in an October 15, 2020 report, disagreed with Dr. Dickerson. He noted appellant's history of injury and treatment, examined her, and opined that the above-noted medical conditions requested by Dr. Dickerson were not supported by the history, physical examination, and tests to be related to the work injury of October 3, 2018. Dr. DeBerardino opined that the objective evidence revealed degenerative changes which were "more likely age-related normal disease of life" and "less likely related to the work-related injury of [October 3, 2018]." Likewise, in a July 15, 2020 report, Dr. Ugokwe, the DMA, opined that the requested additional conditions were consistent with degenerative changes that were seen in the normal aging process and not caused by a work injury.

The Board finds that a conflict in medical opinion has been created between the opinion of appellant's attending physician, Dr. Dickerson, and the opinions of Dr. DeBerardino, the second opinion physician, and Dr. Ugokwe, the DMA, regarding whether the requested additional conditions were caused by the accepted work injury, or were degenerative changes caused by the aging process.¹²

Section 8123 of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, OWCP shall appoint a third physician who shall make an examination.¹³ As there remains an unresolved conflict in medical opinion regarding appellant's claim, the case shall be remanded to OWCP for creation of an updated statement of accepted facts and referral to an appropriate specialist to obtain an impartial medical opinion regarding whether the acceptance of appellant's claim should be expanded to include additional conditions as causally related to her accepted October 3, 2018 employment injury. 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.

¹² See A.R., Docket No. 18-0441 (issued February 19, 2020); see S.M., Docket No. 19-0397 (issued August 7, 2019).

¹³ 5 U.S.C. § 8123(a); see Y.A., 59 ECAB 701 (2008).

ORDER

IT IS HEREBY ORDERED THAT the October 5, 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: July 18, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board