United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	
U.S. POSTAL SERVICE, NEW JERSEY INTERNATIONAL & NATIONAL DISTRIBUTION CENTER, Jersey City, NJ, Employer	)	**Docket No. 20-1095** **Issued: March 29, 2022**

Appearances:
James D. Muirhead, 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 April 29, 2020 appellant, through counsel, filed a timely appeal from a December 18, 2019 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 right shoulder condition causally related to the accepted March 31, 2014 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 are incorporated herein by reference. The relevant facts are as follows.

On March 31, 2014 appellant, then a 48-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right shoulder when picking up a foot locker while in the performance of duty. He stopped work on the date of injury.

In an April 1, 2014 report, Dr. Norman Penera, a Board-certified internist, diagnosed right shoulder strain and advised that appellant was unable to work in any capacity at that time.

An April 4, 2014 right shoulder magnetic resonance imaging (MRI) scan demonstrated degenerative changes of the acromioclavicular (AC) joint, extensive thickening, and abnormal signal within the supraspinatus, subscapularis, and biceps tendons. It also revealed probable focal full-thickness tear of the distal supraspinous tendon.

In an April 9, 2014 referral order, Dr. Penera diagnosed a full-thickness supraspinatus rotator cuff tear.

In an April 22, 2014 medical report, Dr. Faisal Mahmood, an attending Board-certified orthopedic surgeon, noted findings on his physical examination and advised that appellant suffered from a right shoulder full-thickness supraspinatus rotator cuff tear with subacromial impingement. He also diagnosed bursitis, AC joint hypertrophy/arthritis, biceps tendinitis, and labial fraying. Based on these findings, Dr. Mahmood recommended arthroscopic surgery. In a note of even date, he requested that appellant be excused from work until June 22, 2014.

By decision dated May 28, 2014, OWCP accepted that the March 31, 2014 employment incident occurred, as alleged. However, it denied appellant's claim, finding that the medical evidence of record was insufficient to establish that his diagnosed right shoulder conditions were causally related to the accepted March 31, 2014 employment incident.

OWCP subsequently received additional reports dated April 1 and 9, 2014 from Dr. Penera who continued to treat appellant. Dr. Penera diagnosed right shoulder strain of the rotator cuff capsule and reiterated his prior diagnosis of right shoulder full-thickness rotator cuff tear.

On June 6, 2014 appellant requested a review of the written record by a representative of OWCP's Branch and Hearings Review. He also provided a June 2, 2014 letter from Dr. Mahmood who noted a history of his treatment of appellant's injury. Dr. Mahmood reiterated his prior

[3] Docket No. 19-0587 (issued July 22, 2019).

diagnoses and opined that appellant's injury pattern was consistent with an injury sustained while lifting an overhead object or repetitive use of the rotator cuff musculature leading to a full-thickness tear and, as such, he concluded that the injury appellant sustained was causally related to the employment incident on March 31, 2014.

OWCP subsequently received an attending physician's report (Form CA-20) dated May 20, 2014 in which Dr. Mahmood again noted a history of appellant's accepted March 31, 2014 injury. Dr. Mahmood reiterated his diagnoses and checked a box marked "Yes," indicating that these conditions had been caused or aggravated by an employment activity of lifting overhead.

By decision dated August 19, 2015, an OWCP hearing representative affirmed the May 28, 2014 decision.

On November 5, 2015 appellant, through counsel, requested reconsideration of the August 19, 2015 decision and submitted a November 3, 2015 letter from Dr. Mahmood, who noted that appellant reported that lifting a foot locker weighing approximately 65 to 70 pounds at work on March 31, 2014 led to his inability to fully abduct his shoulder. Dr. Mahmood further noted that appellant related that, prior to this incident, he had full range of motion of the shoulder. He explained that that, while MRI scan findings demonstrated some degenerative signs consistent with regular use, including AC joint arthropathy, appellant also had a full-thickness tear of the rotator cuff muscle, which was not a preexisting condition as he was able to abduct his shoulder prior to the work-related incident. Because appellant could no longer abduct his shoulder since the accepted March 31, 2014 incident, Dr. Mahmood concluded that appellant's full-thickness rotator cuff tear was consistent with a traumatic injury sustained during the accepted employment incident.

By decision dated May 13, 2016, OWCP denied modification of the August 19, 2015 decision.

On July 5, 2016 appellant, through counsel, requested reconsideration and submitted a June 14, 2016 letter from Dr. Mahmood, who continued to opine that appellant sustained a work-related right shoulder condition and that there was a causal relationship between his condition and the accepted March 31, 2014 employment incident.

By decision dated March 7, 2017, OWCP denied modification of its prior decision.

On September 13, 2017 appellant, through counsel, requested reconsideration.

By decision dated December 11, 2017, OWCP denied modification of its prior decision.

On July 18, 2018 appellant, through counsel, requested reconsideration and submitted an addendum note dated July 11, 2018 from Dr. Mahmood, who reiterated his prior opinion that appellant's right shoulder injuries were work related.

By decision dated October 16, 2018, OWCP denied modification of its December 11, 2017 decision.

On January 17, 2019 appellant, through counsel, appealed to the Board. By decision dated July 22, 2019, the Board affirmed OWCP's October 16, 2018 decision, finding that appellant had not met his burden of proof to establish a right shoulder condition causally related to the accepted Match 31, 2014 employment incident.[4]

On December 5, 2019 appellant, through counsel, requested reconsideration and submitted an October 28, 2019 medical report from Dr. David Weiss, a Board-certified orthopedic surgeon, who examined appellant and reviewed his history of treatment and diagnostic studies. Dr. Weiss conducted a physical examination and diagnosed a post-traumatic full-thickness rotator cuff tear to the right shoulder, post-traumatic impingement syndrome to the right shoulder, and an aggravation of preexisting quiescent age-related acromioclavicular joint arthropathy to the right shoulder. He explained that an impingement syndrome occurred when one raised his or her arm to shoulder height and above, and the space between the acromion and the rotator cuff narrowed. Dr. Weiss indicated that the acromion could then rub against or impinge the tendon in the rotator cuff causing irritation and pain. He further explained that this compression could cause attenuation on the tendon and predispose appellant to tearing of the rotator cuff. Dr. Weiss noted that for a person with aged-related osteoarthritis of the acromioclavicular joint or osteoarthritis due to repetitive use had even less space in the area and that shoulder elevation would cause a greater impingement and a greater probability of shoulder tendinopathy. He noted that the MRI scan revealed that appellant had degenerative changes of the acromioclavicular joint predisposing him to an impingement syndrome. Dr. Weiss opined that lifting a 65- to70-pound heavy plastic footlocker from the ground above the shoulder at the time of the accepted March 31, 2014 employment incident led to significant impingement and caused the full thickness rotator cuff tear of the supraspinatus tendon. He noted that, when evaluating occupational risk factors with shoulder tendinopathy, impingement, and rotator cuff tears, there was strong evidence that awkward postures like sustained shoulder postures with more than 60 degrees of flexion and abduction could lead to the diagnosed pathology. Dr. Weiss concluded that the accepted March 31, 2014 employment incident was the dominant-producing cause of appellant's injury.

By decision dated December 18, 2019, OWCP denied modification of the prior decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] 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,[6] 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

[4] Docket No. 19-0587 (issued July 22, 2019).

[5] *Supra* note 2.

[6] *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).

employment injury.[7] 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.[8]

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 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 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.[9]

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

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 October 16, 2018 decision as the Board considered that evidence in its July 22, 2019 decision.[12]

In support of his request for reconsideration, appellant submitted an October 28, 2019 medical report from Dr. Weiss who diagnosed a post-traumatic full-thickness rotator cuff tear to the right shoulder, post-traumatic impingement syndrome to the right shoulder, and an aggravation of preexisting quiescent age-related AC joint arthropathy to the right shoulder. Dr. Weiss explained that an impingement syndrome occurred when one raised his or her arm to shoulder height and above, and the space between the acromion and the rotator cuff narrowed. He related that the acromion could then rub against or impinge the tendon in the rotator cuff causing irritation

[7] *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).

[8] *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).

[9] *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).

[10] *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).

[11] *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).

[12] *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020).

and pain. Dr. Weiss noted that this compression could cause attenuation on the tendon and predispose appellant to tearing of the rotator cuff. He further explained that for a person with aged-related osteoarthritis of the acromioclavicular joint or osteoarthritis due to repetitive use had even less space in the area and that shoulder elevation would cause a greater impingement and a greater probability of shoulder tendinopathy. Dr. Weiss noted that the MRI scan revealed that appellant had degenerative changes of the acromioclavicular joint predisposing him to an impingement syndrome. He opined that lifting a 65- to70-pound heavy plastic footlocker from the ground to above the shoulder led to significant impingement and caused the full thickness rotator cuff tear of the supraspinatus tendon. Dr. Weiss explained that, when evaluating occupational risk factors with shoulder tendinopathy, impingement, and rotator cuff tears, there was strong evidence that awkward postures like sustained shoulder postures with more than 60 degrees of flexion and abduction led to the diagnosed pathology.

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.[13]

Dr. Weiss 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 conditions and the accepted March 31, 2014 employment incident sufficient to require further development of the case record by OWCP.[14] Thus, the Board finds that Dr. Weiss' opinion is sufficient to require further development of the 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. Weiss. 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.

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

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

[15] *See A.D.*, Docket No. 20-0758 (issued January 11, 2021); *C.R.*, Docket No. 20-0366 (issued December 11, 2020); *John J. Carlone, supra* note 9; *Horace Langhorne*, 29 ECAB 820 (1978).

[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 December 18, 2019 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: March 29, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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