

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

_____)
K.K., Appellant)

and)

U.S. POSTAL SERVICE, BARNEGAT POST)
OFFICE, Barnegat, NJ, Employer)
_____)

**Docket No. 22-0909
Issued: April 4, 2023**

Appearances:
Robert D. Campbell, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 26, 2022 appellant, through counsel, filed a timely appeal from a March 11, 2022 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish a right shoulder condition causally related to the accepted December 10, 2015 employment incident.

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.*

FACTUAL HISTORY

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

On March 1, 2016 appellant, then a 57-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 10, 2015 she sustained a right rotator cuff tear when she slipped and stumbled on a rocky walkway while in the performance of duty. She indicated that the injury occurred when she returned to her long-life vehicle (LLV) and that, when her shoulder jerked to break her fall, she felt immediate severe pain. Appellant did not stop work.

In a December 11, 2015 report, Dr. Nagalakshmi Shetty, Board-certified in rheumatology and internal medicine, related that on December 7, 2015 appellant experienced a sudden jerking movement to her right shoulder. This pain resolved with icing the right shoulder. Dr. Shetty further reported that appellant experienced another "jerky jolt" to her right shoulder on December 10, 2015 when, while delivering mail, she stumbled on rocks and caught herself from falling. This time the pain was severe. Dr. Shetty diagnosed right shoulder degenerative arthritis, right shoulder pain, and primary osteoarthritis of both first carpometacarpal joints.

In reports dated December 14, 2015 and February 2, 2016, Dr. Rosemarie DeSantis, a Board-certified rheumatologist, noted a history of appellant's December 10, 2015 employment incident and diagnosed primary osteoarthritis of the right shoulder and primary osteoarthritis of the hands. In her February 2, 2016 report, she also diagnosed a tear of the right rotator cuff.

In a February 22, 2016 report, Dr. Nicholas Jarmon, a Board-certified orthopedic surgeon, related that appellant had immediate onset of right shoulder pain while at work on December 10, 2015 when she fell and caught herself. He provided an assessment of full-thickness rotator cuff tear and recommended surgery. Dr. Jarmon indicated that the tear appeared to be acute in nature as there was no significant muscle atrophy and appellant denied a history of prior trauma. In a March 7, 2016 report, he opined that the tear was causally related to her work as it had occurred at work. In an attending physician's report (Form CA-20) of even date, Dr. Jarmon checked a box marked "Yes," indicating that appellant's rotator cuff tear was causally related to the December 10, 2015 employment incident.

On March 17, 2016 Dr. Jarmon performed a right shoulder arthroscopic labral debridement, biceps tenotomy, and arthroscopic supraspinatus repair. Postsurgical progress reports and duty status reports (Form CA-17) from Dr. Jarmon were also received.

In a development letter dated May 9, 2016, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of additional medical evidence needed and afforded her 30 days to respond.

³ Docket No. 18-1209 (issued March 7, 2019); Docket No. 20-1394 (issued July 26, 2021).

In response, OWCP received appellant's May 26, 2016 statement wherein she reiterated the details of the claimed December 10, 2015 employment incident. It also received additional treatment notes and Form CA-17 reports from Dr. Jarmon.

By decision dated June 15, 2016, OWCP denied appellant's claim, finding that the medical evidence submitted did not contain a comprehensive medical opinion which established that the diagnosed conditions were causally related to the accepted December 10, 2015 employment incident.

On July 12, 2016 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

OWCP thereafter received a June 29, 2016 report wherein Dr. Jarmon noted that on December 10, 2015 appellant was returning to her LLV after delivering parcels when she stumbled on a rocky path and caught her balance with her right arm. Appellant experienced an immediate onset of pain, but continued on her route, relying on her left shoulder. She denied a history of prior injury to the right shoulder. Dr. Jarmon indicated that appellant's February 10, 2016 right shoulder magnetic resonance imaging (MRI) scan revealed a full-thickness tear of the supraspinatus, for which the March 17, 2016 surgery was performed. Regarding medical causality, he opined that the mechanism of injury described by her could cause a full-thickness rotator cuff tear. Dr. Jarmon explained that the timing of appellant's symptoms coincided with the timing of the injury. Also, the fact that there was no significant muscle atrophy appreciable on the MRI scan suggested that it was an acute, not a chronic, tear.

By decision dated December 5, 2016, the hearing representative affirmed the June 15, 2016 decision denying appellant's claim.

On May 23, 2017 appellant, through counsel, requested reconsideration.

Additional reports were submitted to OWCP. In a January 16, 2017 report, Dr. Jarmon related appellant's description of the employment incident. He related that as she was walking back to her vehicle she lost her balance and was able to regain her balance by moving her arms around and catching herself in mid-air, without grabbing onto anything, which is when her pain began. Dr. Jarmon concluded that this was a reasonable mechanism to cause a full-thickness cuff tear. In a February 16, 2017 report, he related that, when appellant moved her arms around to regain her balance, the movement caused or increased sudden stress at the tendon-bone interface of the rotator cuff attachment. Dr. Jarmon concluded that, if enough force was seen at that interface, it could potentially cause a tear based on the strength of the contracture of the rotator cuff. In a March 27, 2017 report, Dr. Jarmon continued to opine that the injury was related to the mechanism of injury appellant described.

By decision dated February 16, 2018, OWCP denied modification of its December 5, 2016 decision.

On May 29, 2018 appellant, through counsel, filed a timely appeal with the Board. By decision dated March 7, 2019,⁴ the Board affirmed OWCP's February 16, 2018 decision, finding

⁴ Docket No. 18-1209 (issued March 7, 2019).

that she had not met her burden of proof to establish her claim. The Board found that there was no rationalized medical evidence of record to support that the right rotator cuff tear was causally related to the accepted December 10, 2015 employment incident. The Board noted that while Dr. Jarmon had generally supported causal relationship between the accepted December 10, 2015 employment incident and appellant's rotator cuff tear, his opinion was couched in speculative terms.

On March 9, 2020 appellant, through counsel, requested reconsideration. Counsel indicated that reconsideration was based on relevant new evidence.

In a May 20, 2019 report, Dr. David Weiss, an osteopath Board-certified in orthopedic surgery, opined that appellant reached maximum medical improvement on May 20, 2018 and that she had seven percent permanent impairment of the right upper extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*).⁵ He noted the history of the December 10, 2015 employment incident and his review of her medical records. Dr. Weiss noted that, prior to this injury, appellant denied any right shoulder pain or any restrictions in her activities of daily living. With regard to causation, he opined that the cause of her disability was the work-related injury of December 10, 2015.

In an October 9, 2019 report, Dr. Weiss again noted the history of appellant's December 10, 2015 employment incident and his review of appellant's medical records. He reported that her past medical history was unremarkable with no previous right shoulder injury. Dr. Weiss noted that medical literature indicated that the pathophysiology of shoulder tendinopathy, impingement, and rotator cuff tears was multifactorial with both patient and work-related factors acting concomitantly to reproduce shoulder tendinopathy. He also noted that such medical literature revealed that awkward postures revealed strong evidence in terms of occupational risk factors for shoulder tendinopathy and rotator cuff tears. Based on the history provided, Dr. Weiss concluded that the jerking of appellant's right shoulder due to the trip caused the shoulder to be placed in an awkward position which led to the rotator cuff tear and labral injury. He further opined that the claimed December 10, 2015 injury also aggravated the preexisting quiescent osteoarthritis of the right shoulder.

By decision dated March 12, 2020, OWCP found that the March 2, 2020 reconsideration request, which OWCP received on March 9, 2020, was untimely filed and failed to demonstrate clear evidence of error.

Appellant, through counsel, requested that OWCP set aside OWCP's March 12, 2020 decision on procedural grounds as the reconsideration request was timely filed.

In a May 26, 2020 letter, OWCP advised that appellant's reconsideration request, which was received on March 9, 2020, was in fact timely filed. It found that because the one-year period for filing reconsideration of the March 7, 2020 decision had expired on March 8, 2020, a Sunday, she had until March 9, 2020 to timely request reconsideration. Thus, OWCP indicated that OWCP would proceed with a merit review of the case.

⁵ A.M.A., *Guides* (6th ed. 2009).

By decision dated June 2, 2020, OWCP denied modification.

On July 7, 2020 appellant, through counsel, filed a timely appeal with the Board. By decision dated July 26, 2021,⁶ the Board affirmed OWCP's June 2, 2020 decision, finding that she had not met her burden of proof to establish her claim. The Board found that the additional reports from Dr. Weiss were not sufficiently rationalized to establish causal relationship and, thus, were of limited probative value.

On December 28, 2021 appellant, through counsel, requested reconsideration. A November 24, 2021 statement from appellant was submitted along with additional medical evidence from Dr. Weiss.

In a September 2, 2021 report, Dr. Weiss indicated that the office notes from Dr. Shetty and Dr. DeSantis dated December 11 and 14, 2015, respectively, reported that appellant had a past medical history of primary osteoarthritis of the right shoulder and of the first carpometacarpal joint in both hands. He indicated that Dr. Shetty had also reported that appellant's pain from a December 7, 2015 right shoulder injury had resolved with icing and that Dr. DeSantis had reported that appellant heard a popping in the right shoulder after the December 10, 2015 incident. Based on his review of Dr. Shetty and Dr. DeSantis' notes, Dr. Weiss opined that the December 7, 2015 right shoulder injury was minor and had completely resolved. It was not until the December 10, 2015 incident, when appellant heard a pop, that she experienced severe right shoulder pain with inability to sleep and limited range of motion. Thus, he opined that appellant sustained a rotator cuff tear and labral injury due to the work-related injury of December 10, 2015 and sustained direct aggravation of preexisting quiescent osteoarthritis of the right shoulder.

In an October 29, 2021 report, Dr. Weiss indicated that appellant's February 22, 2016 x-rays of the right shoulder, which revealed acromioclavicular joint arthrosis and a downward sloping of the acromial arch, predisposed appellant to shoulder impingement. He opined that when appellant stumbled on rocks while delivering mail on December 10, 2015 and caught herself from falling, her right shoulder was elevated which put excess pressure on the rotator cuff. This caused the rotator cuff tear. The force on the shoulder from falling on an outstretched arm with appellant trying to catch herself also led to the labrum injury. Dr. Weiss concluded that the quiescent osteoarthritis of the right shoulder, which often has decreased joint space, predisposed appellant to shoulder impingement and subsequent rotator cuff tear. He opined that the December 10, 2015 work-related injury was directly responsible for the rotator cuff tear and labral injury as well as direct aggravation of preexisting quiescent osteoarthritis of the right shoulder.

By decision dated March 11, 2022, OWCP denied modification of the July 26, 2021 decision.⁷

⁶ Docket No. 20-1394 (issued July 26, 2021).

⁷ The July 26, 2021 decision is a Board decision. As such, OWCP has no jurisdiction to review a Board decision. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d). The proper subject of review was OWCP's June 2, 2020 merit decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁸ 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 period 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.⁹ 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 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. 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.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 and accurate 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.¹²

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.¹³

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence that appellant submitted prior to the issuance of OWCP's June 2, 2020 merit decision because the

⁸ *Supra* note 2.

⁹ *C.K.*, Docket No. 18-1286 (issued April 20, 2020); *R.G.*, Docket No. 19-0233 (issued July 16, 2019); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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 *R.G.*, *supra* note 9.

¹³ *P.L.*, Docket No. 19-1750 (issued March 26, 2020); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *see Charles W. Downey*, 54 ECAB 421 (2003).

Board considered that evidence in its July 26, 2021 decision. Findings made in prior Board decisions are *res judicata*, absent any further review by OWCP, under section 8128 of FECA.¹⁴

Following the Board's review of the claim, OWCP received additional reports from Dr. Weiss. In his September 2, 2021 report, Dr. Weiss discussed the medical evidence he had reviewed. He noted that Dr. Shetty and Dr. DeSantis reported that appellant had a past medical history of primary osteoarthritis of the right shoulder. Dr. Weiss further noted that Dr. DeSantis had reported that appellant heard a popping in the right shoulder after the December 10, 2015 incident. Dr. Weiss opined that it was not until the December 10, 2015 incident, when appellant heard a pop, that she experienced severe right shoulder pain with inability to sleep and limited range of motion. Thus, he opined that appellant sustained a rotator cuff tear and labral injury due to the work-related injury of December 10, 2015 and sustained direct aggravation of preexisting quiescent osteoarthritis of the right shoulder.

In his October 29, 2021 report, Dr. Weiss noted his review of appellant's x-rays. He explained that appellant's quiescent osteoarthritis of the right shoulder, which often has decreased joint space, predisposed appellant to shoulder impingement and subsequent rotator cuff tear. Dr. Weiss explained that when appellant caught herself from falling on December 10, 2015, her right shoulder was elevated which put excess pressure on the rotator cuff thereby causing the rotator cuff tear. He also explained that the force of the shoulder from falling on an outstretched arm and trying to catch herself led to the labrum injury.

Accordingly, the Board finds that Dr. Weiss identified and explained the biomechanics of how appellant's stumble and her attempt to catch herself from falling which outstretched arms led to her diagnosed right shoulder conditions. The Board thus finds that Dr. Weiss' opinion is sufficient to require further development of the record.¹⁵

It is well established that, proceedings under FECA are not adversarial in nature, and that while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁶ OWCP has an obligation to see that justice is done.¹⁷

The case will therefore be remanded to OWCP for further development of the medical evidence on the issue of causal relationship, including the preparation of a statement of accepted facts, to be followed by a referral to a specialist in the appropriate field of medicine for consideration of the entire medical record. If the OWCP second opinion physician opines that the diagnosed conditions are not causally related to the accepted December 10, 2015 employment incident, he or she must explain with rationale how or why their opinion differs from that of

¹⁴ *J.S.*, Docket No. 19-0022 (issued November 4, 2020); *J.T.*, Docket No. 18-1757 (issued April 19, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹⁵ *J.J.*, Docket No. 19-0789 (issued November 22, 2019); *R.B.*, Docket No. 18-0162 (issued July 24, 2019); *A.F.*, Docket No. 15-1687 (issued June 9, 2016). See also *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

¹⁶ *J.J.*, *id.*; *A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁷ *R.B.*, *supra* note 15; *B.C.*, Docket No. 15-1853 (issued January 19, 2016).

Dr. Weiss. After this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 11, 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: April 4, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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