

United States Department of Labor
Employees' Compensation Appeals Board

G.R., Appellant

and

**U.S. POSTAL SERVICE, SANTA CRUZ POST
OFFICE, Santa Cruz, CA, Employer**

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Docket No. 22-1163
Issued: April 5, 2023

Appearances:

Alan J. Shapiro, 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 August 3, 2022 appellant, through counsel, filed a timely appeal from a June 23, 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.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 issuance of the June 23, 2022 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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a medical condition causally related to the accepted March 24, 2022 employment incident.

FACTUAL HISTORY

On March 30, 2022 appellant, then a 44-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on March 24, 2022 he sustained a pinched nerve, pulled shoulder blade on the right side, numbness in his right hand, and burning sensation in his right arm when he reached for a package in the back of a vehicle while in the performance of duty.

OWCP, in a development letter dated April 12, 2022, notified appellant of the deficiencies of his claim. It advised him of the type of medical and factual evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP subsequently received medical evidence from Dr. John Kaufmann, an attending Board-certified infectious disease specialist. In notes dated March 28, April 14 and 20, 2022, Dr. Kaufmann requested that appellant be excused from work from March 28 through April 4, 2022 and from April 18 through May 30, 2022 due to an injury/illness. In the April 20, 2022 note, he indicated that appellant had a severe bulging cervical spine disc from a work incident that caused pain, radiculopathy, and weakness. Dr. Kaufman advised that appellant was unable to work until further evaluation by and consultation with a spine surgeon.

In a duty status report (Form CA-17) dated April 14, 2022, Dr. Kaufmann provided a history of injury that on March 24, 2022 appellant injured his right shoulder and arm while reaching and lifting a package out of his vehicle. He diagnosed radiculopathy due to injury and continued to advise that appellant was unable to resume work.

OWCP also received an April 19, 2022 report from Dr. Kevin McHugh, a Board-certified diagnostic radiologist. Dr. McHugh performed a magnetic resonance imaging (MRI) scan of appellant's cervical spine, which demonstrated a large broad-based disc bulge with effacement anterior thecal sac, bilateral moderate-to-severe neuroforaminal narrowing, and no cord impingement at C6-7; and mild disc degenerative changes present primarily around C3-4 and C4-5 with mild reversal of normal cervical lordotic curvatures.

In an April 26, 2022 report, Dr. Steven Ellis, an osteopathic Board-certified family practitioner, noted a history of injury that on March 24, 2022 appellant felt a pop and excruciating pain in his right shoulder when he lifted a box at work. He discussed his findings on physical examination and reviewed the April 19, 2022 cervical spine MRI scan. Dr. Ellis diagnosed biceps tendinitis, cervicgia, right cervical radiculopathy, right shoulder pain, and paresthesia (numbness/tingling) of the arm.

By decision dated May 16, 2022, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish that his diagnosed conditions were causally related to the accepted March 24, 2022 employment incident.

OWCP thereafter received a May 25, 2022 work excuse note from Dr. Michael E. Hebrard, a Board-certified physiatrist, who advised that appellant was temporarily totally disabled from work through July 6, 2022.

On June 15, 2022 appellant requested reconsideration of the May 16, 2022 decision.

Appellant submitted a May 25, 2022 progress note from Dr. Hebrard. Dr. Hebrard noted that appellant presented with right neck and shoulder conditions secondary to an industrially related-injury and a recent nonindustrial slip and fall at home which caused a separated left shoulder. He noted a history of appellant's injury on March 24, 2022⁴ and his medical treatment. Dr. Hebrard also reviewed medical records, including the April 19, 2022 cervical spine MRI scan. He noted that appellant had been diagnosed with right cervical radiculopathy and right biceps tendinitis. Dr. Hebrard then reported his findings on physical examination and diagnosed cervical radiculopathy, and adhesive capsulitis and internal derangement of the right shoulder. He provided an assessment that appellant sustained a work-related right shoulder injury and a nonemployment-related left shoulder injury when he slipped and fell at home. Dr. Hebrard opined that it was more probable than not that reaching to pull a box from his long-life vehicle (LLV) stressed the cervicospinal region which caused flexion of the cervical spine that led to a posterior migration of the intervertebral discs which compressed the adjacent nerve region that caused numbness in the right arm. He further opined that it was more probable than not that the mechanism of injury was consistent with appellant's subjective complaints, including an audible pop in the right cervicospinal region, his objective findings, and direct trauma to the cervicospinal region of the right shoulder that resulted in aggravation of cervical spine and right shoulder conditions. Dr. Hebrard indicated that the April 19, 2022 MRI scan of the cervical spine reported a disc bulge that was more likely than not aggravated by the actions resulting in appellant's injury, which led to sensory changes and weakness in the right upper extremity. He maintained that these findings were consistent with cervical radiculopathy and internal derangement of the right shoulder. Dr. Hebrard related that there was an unfortunate complexity of a contralateral nonindustrial injury and separation of the left shoulder that presented with restricted range of motion and pain on his examination. He noted that appellant had been favoring the right shoulder and overusing the left shoulder, and currently appellant had the tendency to favor the left and overuse the right in a ping-ponging situation which complicated the clinical picture. Dr. Hebrard recommended that he remain off work because restricted range of motion, weakness, and pain in both shoulders compromised his ability to even return to work, even part-time or sedentary work.

By decision dated June 23, 2022, OWCP denied modification of its May 16, 2022 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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

⁴ The Board notes that it appears that Dr. Hebrard inadvertently listed the date of injury as March 4, 2022 rather than March 24, 2022 in his May 25, 2022 visit note but he accurately described the incident, which was previously accepted as work related by OWCP.

⁵ *Supra* note 2.

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 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. 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.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 incident identified by the employee.¹¹

ANALYSIS

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

In support of his claim, appellant submitted a May 25, 2022 visit note from Dr. Hebrard. Dr. Hebrard opined that it was more probable than not that the March 24, 2022 employment incident caused appellant's cervical radiculopathy, adhesive capsulitis, and internal derangement of the right shoulder. He explained that the mechanism of injury was the reaching to pull a box from the LLV which stressed the cervicospinal region, and caused flexion of the cervical spine that led to a posterior migration of the intervertebral discs compressing the adjacent nerve region that caused numbness in the right arm. Dr. Hebrard further opined that it was more probable than not that the mechanism of injury was consistent with appellant's subjective cervical spine complaints; his objective findings including the April 19, 2022 cervical spine MRI scan that

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).

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).

confirmed cervical radiculopathy and right biceps tendinitis; and direct trauma to the cervicoscapular region of the right shoulder that resulted in aggravation of cervical spine and right shoulder conditions.

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.¹²

The Board finds that, while Dr. Hebrard's opinion on causal relationship is not fully rationalized, he provided a physiologic medical explanation as to how the mechanism of the March 24, 2022 employment incident was sufficient to cause appellant's cervical radiculopathy, adhesive capsulitis, and internal derangement of the right shoulder. Although the opinion is insufficient to meet appellant's burden of proof to establish the claim, it raises an uncontroverted inference between appellant's diagnosed cervical and right shoulder conditions and March 24, 2022 employment incident and, thus, it is sufficient to require OWCP to further develop the medical evidence.¹³

The Board will, therefore, remand the case to OWCP for further development of the medical evidence. On remand, OWCP shall refer appellant, a statement of accepted facts, and the medical evidence of record to a physician in the appropriate field of medicine. The chosen physician shall provide a rationalized opinion on whether appellant has a diagnosed condition causally related to the accepted March 24, 2022 employment incident. If the physician opines that appellant does not have a diagnosed condition causally related to the accepted employment incident, he or she must explain with rationale how or why his or her opinion differs from that of Dr. Hebrard. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim.

CONCLUSION

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

¹² See *P.C.*, Docket No. 22-0428 (issued July 22, 2022); *M.S.*, Docket No. 20-1095 (issued March 29, 2022); *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).

¹³ *P.C., id.*; *C.B.*, Docket No. 21-1291 (issued April 28, 2022); *C.G.*, Docket No. 20-1121 (issued February 11, 2021); *A.G.*, Docket No. 20-0454 (issued October 29, 2020); *Frederick J. Hudak*, 03-949 (issued June 4, 2003).

ORDER

IT IS HEREBY ORDERED THAT the June 23, 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 5, 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