

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

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N.U., Appellant	)	
	)	
and	)	
	)	<b>Docket No. 22-1329</b>
	)	<b>Issued: April 18, 2023</b>
U.S. POSTAL SERVICE, LA PUENTE POST	)	
OFFICE, La Puente, CA, Employer	)	
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*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*

*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

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 19, 2022 appellant, through counsel, filed a timely appeal from a July 29, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include right shoulder rotator cuff tear as causally related to the accepted employment injury.

## FACTUAL HISTORY

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

On January 19, 1999 appellant, then a 43-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 14, 1999 he sustained a right arm injury as a result of lifting a heavy tray of flats while in the performance of duty.<sup>4</sup> He did not stop work. OWCP accepted the claim for right elbow strain, right shoulder strain, right biceps tendinitis, and right lateral epicondylitis.

On January 18, 2000 appellant underwent OWCP-authorized exploration of the rotator cuff of the right shoulder, coracoacromial release, and acromioplasty of the right shoulder. He returned to work in a full-time modified city letter carrier position on September 1, 2000.

In medical reports dated September 29 and November 3, 2015, and April 12, 2016, appellant's attending physician, Dr. Charles Herring, a Board-certified orthopedic surgeon, requested that the acceptance of appellant's claim be expanded to include right acromioclavicular (AC) joint arthrosis and right shoulder impingement syndrome with subacromial bursitis. He noted a possible rotator cuff tear and sought authorization for right shoulder arthroscopy.

On April 27, 2016 OWCP referred appellant, along with a statement of accepted facts (SOAF), the medical record, and a series of questions, to Dr. Steven M. Ma, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of the employment injury and disability.

In a June 1, 2016 report, Dr. Ma noted that he had reviewed the SOAF and appellant's medical record. He diagnosed right shoulder impingement syndrome, which had resolved by his January 18, 2000 surgery. Dr. Ma opined that the diagnosed condition was causally related to

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<sup>3</sup> Docket No. 20-1022 (issued January 25, 2022).

<sup>4</sup> OWCP assigned the present claim OWCP File No. xxxxxx890. It administratively combined appellant's August 16, 2000 occupational disease claim under OWCP File No. xxxxxx750, alleging right trigger finger, right carpal tunnel syndrome and right wrist cyst with the current claim on September 20, 2000. He subsequently filed an occupational disease claim (Form CA-2) on March 18, 2013 alleging that he required neck and left shoulder surgeries resulting from his repetitive federal work duties. OWCP assigned that claim OWCP File No. xxxxxx924 and accepted it for left rotator cuff tear, cervical strain, permanent aggravation of cervical degenerative disc disease, multilevel intervertebral disc syndrome, and cervical radiculopathy. On December 22, 2016 appellant filed a Form CA-2 alleging bilateral hip and knee conditions due to his repetitive work duties. OWCP assigned that claim OWCP File No. xxxxxx609. OWCP administratively combined OWCP File Nos. xxxxxx890, xxxxxx609, and xxxxxx924, with the OWCP File No. xxxxxx890 serving as the master file.

appellant's accepted employment injury. He further opined that there was no objective evidence of a right rotator cuff tear and that further surgery was not medically necessary.

On August 16, 2017 OWCP referred appellant, a SOAF, and series of questions for an impartial medical examination with Dr. Thomas Saucedo, a Board-certified orthopedic surgeon, selected as the impartial medical examiner (IME) to resolve the conflict in medical opinion as to whether there was causal relationship between appellant's diagnosed right shoulder conditions and the accepted work-related injury.

In a September 27, 2017 report, Dr. Saucedo reviewed appellant's history of injury, medical records, and the SOAF. He performed a physical examination and determined that appellant had a significant loss of range of motion (ROM) of the shoulder and loss of strength as a result of the chronic nature of the impingement of his right shoulder. Dr. Saucedo opined that there was no radiographic evidence to substantiate the need for a right shoulder rotator cuff repair. He noted that if appellant's symptoms persisted, then he would require further medical treatment. Dr. Saucedo agreed with Dr. Ma's opinion that there was no clinical evidence to substantiate a right rotator cuff tear and no need for surgery related to appellant's original injury. He advised, however, that there were findings indicative of an impingement of the right shoulder relating to the initial injury. Dr. Saucedo indicated that appellant's symptoms and condition had not resolved.

By decision dated September 5, 2019, OWCP denied expansion of the acceptance of appellant's claim to include right shoulder rotator cuff tear and authorization for the requested rotator cuff repair. It found that the opinion of Dr. Saucedo, as the IME, constituted the special weight of the evidence.

In a separate decision also dated September 5, 2019, OWCP expanded the acceptance of appellant's claim to include right shoulder chronic impingement syndrome, right shoulder strain, right calcium deposit in the tendon and bursa (biceps tenosynovitis/tendinitis), and right lateral epicondylitis.

On September 18, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing took place on January 15, 2020.

OWCP received medical reports, including additional reports dated August 27 and November 19, 2019 by Dr. Herring who noted that appellant had a right shoulder partial-thickness rotator cuff tear as demonstrated by a 2015 MRI scan.

By decision dated March 6, 2020, OWCP's hearing representative affirmed the September 5, 2019 decision. Appellant, through counsel, appealed that decision to the Board. By decision dated January 25, 2022,<sup>5</sup> the Board affirmed the March 6, 2020 decision, finding that appellant had not met his burden of proof to establish that acceptance of his claim should be expanded to include an additional right shoulder as causally related to the accepted employment injury.

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<sup>5</sup> *Supra* note 3.

On May 20, 2022 appellant, through counsel, requested reconsideration. In support of this request, he provided a May 11, 2020 report from Dr. Hosea Brown III, a Board-certified internist, which noted appellant's history of injury and provided findings on physical examination. He diagnosed permanent aggravation of cervical degenerative disc disease, cervical strain, left rotator cuff tear, multilevel cervical intervertebral disc syndrome, and cervical radiculopathy and opined that all the accepted medical conditions arose as a direct result of appellant's employment. Dr. Brown reviewed Dr. Saucedo's report and agreed with his diagnosis of chronic right shoulder impingement syndrome. He opined that appellant was currently a candidate for an additional Mumford procedure to his right shoulder for decompression of the subacromial area with a partial anterior lateral acromioplasty and possible distal clavicular excision, as recommended by Dr. Saucedo.

By decision dated July 29, 2022, OWCP denied modification of its prior decisions.

### **LEGAL PRECEDENT**

Where 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.<sup>6</sup>

The medical evidence required to establish causal relationship between a specific condition, as well as any attendant disability claimed, and the employment injury, is rationalized medical opinion evidence.<sup>7</sup> 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.<sup>8</sup> Additionally, the opinion of the physician 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 the specific employment factor(s) identified by the claimant.<sup>9</sup>

### **ANALYSIS**

The Board finds that appellant has not met his burden of proof to establish that the acceptance of his claim should be expanded to include right shoulder rotator cuff tear as causally related to the accepted employment injury.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's March 6, 2020 merit decision as the Board

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<sup>6</sup> See *M.M.*, Docket No. 22-0037 (issued October 12, 2022); *C.W.*, Docket No. 21-0017 (issued December 28, 2021); *T.B.*, Docket No. 20-0182 (issued April 23, 2021); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>7</sup> *T.B.*, *id.*; *T.C.*, Docket No. 19-1043 (issued November 8, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

<sup>8</sup> *T.B.*, *id.*; *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>9</sup> *T.B.*, *id.*; *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

considered it in its January 25, 2022 decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.<sup>10</sup>

Appellant submitted a report from Dr. Brown dated May 11, 2020. Dr. Brown did not diagnose a right shoulder rotator cuff tear, as previously found by Dr. Herring. Appellant's burden of proof regarding his expansion claim includes the necessity of furnishing an affirmative opinion from a physician who supports his or her conclusion with sound medical reasoning.<sup>11</sup> The Board finds that this report is of no probative value regarding appellant's expansion claim as Dr. Brown did not provide an affirmative opinion regarding the diagnosis of right shoulder rotator cuff tear.<sup>12</sup> Dr. Brown did not provide an opinion on the relevant issue of whether appellant's claim should be expanded to include additional conditions; consequently, this report is of no probative value.<sup>13</sup>

As appellant has not submitted rationalized medical evidence establishing causal relationship between his claimed right shoulder cuff tear and the accepted employment injury, he has not met his burden of proof regarding his expansion claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that the acceptance of his claim should be expanded to include right shoulder rotator cuff tear as causally related to the accepted employment injury.

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<sup>10</sup> *D.A.*, Docket No. 19-1965 (issued February 10, 2021); *G.B.*, Docket No. 19-1448 (issued August 21, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

<sup>11</sup> *D.S.*, Docket No. 22-0323 (issued September 26, 2022); *J.A.*, Docket No. 18-1586 (issued April 9, 2019); *Lillian M. Jones*, 34 ECAB 379, 381 (1982).

<sup>12</sup> *Id.*

<sup>13</sup> *R.B.*, Docket No. 22-0713 (issued July 26, 2022); *R.P.*, Docket No. 20-0891 (issued September 20, 2021); *V.R.*, Docket No. 19-0758 (issued March 16, 2021); *O.M.*, Docket No. 18-1055 (issued April 15, 2020); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 29, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2023  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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