

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

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<b>B.M., Appellant</b> )		
)		
<b>and</b> )		<b>Docket No. 22-0410</b>
)		<b>Issued: November 29, 2023</b>
<b>DEPARTMENT OF THE TREASURY,</b> )		
<b>INTERNAL REVENUE SERVICE,</b> )		
<b>Fresno, CA, Employer</b> )		
_____ )		

*Appearances:* *Case Submitted on the Record*  
*Alan J. Shapiro, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

**DECISION AND ORDER**

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

**JURISDICTION**

On January 26, 2022 appellant filed a timely appeal from a December 16, 2021 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 over the merits of this case.<sup>3</sup>

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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 an 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.*

<sup>3</sup> The Board notes that, following the December 16, 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.*

## **ISSUE**

The issue is whether appellant has met her burden of proof to establish a recurrence of disability commencing February 25, 2021 causally related to her accepted June 18, 2018 employment injury.

## **FACTUAL HISTORY**

On June 19, 2018 appellant, then a 53-year-old image control team (ICT) clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured her neck and arms on June 18, 2018 due to repetitive movements of the hand while in the performance duty. She stopped work on June 19, 2018. On August 24, 2018 appellant filed a claim for a traumatic injury (Form CA-1) alleging that on June 18, 2018 she sustained tendinitis syndrome in both hands and arms due to inputting data in a computer. On October 9, 2018 OWCP accepted the claim for right trigger thumb, left shoulder bicipital tendinitis, and right forearm calcific tendinitis. On October 29, 2019 it expanded the acceptance of the claim to include unspecified rotator cuff tear or rupture of right shoulder, not specified as traumatic. OWCP paid appellant wage-loss compensation on the supplemental rolls for intermittent periods of disability.

On September 11, 2020 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a series of questions to Dr. Charles Xeller, a Board-certified orthopedic surgeon, to obtain a rationalized second opinion report to determine whether the accepted employment-related injuries had resolved, the extent of appellant's work capacity, and the etiology of her continuing condition.

In an October 20, 2020 report, Dr. Xeller reviewed the medical record and SOAF. On physical examination, he noted pain in the intervertebral border of the scapula during neck rotation to the right, well-healed surgical scars at the right shoulder and upper arm, slight pain with impingement testing of the right shoulder and over the acromioclavicular (AC) joint, and greater pain about the coracoid process. Examination of the elbows and wrists revealed slight pain over the bilateral epicondylar areas laterally but was otherwise normal. Dr. Xeller also documented a nodule and stiffness over the base of the right thumb at the A1 pulley, and that appellant may require an injection in the future. He diagnosed rotator cuff impingement/bursitis/cuff tear treated by decompression, cuff debridement and biceps tenodesis; resolved bilateral epicondylitis, stable right thumb trigger pathology with stiffness; and preexisting cervical spondylosis and disc degeneration with radiculitis. Dr. Xeller opined that appellant could return to work without restrictions as related to the accepted June 18, 2018 employment injuries. He recommended restrictions for lifting less than 25 pounds and avoiding overhead work due to her nonwork-related cervical conditions.

In a report dated January 7, 2021, Dr. Michael Azevedo, a Board-certified physiatrist, indicated that appellant related complaints of pain in the right shoulder, arm, and hand and numbness and tingling in the right hand with decreased grip strength. On examination, he documented tenderness to palpation of the posterior and lateral shoulder area with reduced strength and diffuse tenderness and reduced grip strength of the right hand and wrist. Dr. Azevedo diagnosed tenderness of the right forearm, impingement syndrome of right shoulder, right rotator cuff tear, right lateral epicondylitis, and a history of orthopedic surgery. He requested

authorization to prescribe narcotic pain medication to appellant and reiterated that her work restrictions were permanent.

In a report dated February 16, 2021, Dr. Azevedo noted that appellant related that her position was no longer available, that her department did not have a position that met her permanent work restrictions without accommodations, and that her accommodations were expected to continue for several months due to COVID-19. He noted that she requested to be placed off-duty. Appellant related complaints of pain in the lateral right shoulder, radiating down the arm. He reiterated that she had permanent restrictions of no more than occasional reaching above shoulder height, keyboard/mouse use, repetitive right-hand motions, or gripping/grasping with the right hand; no lifting, carrying, pushing, or pulling more than 10 pounds with the right arm; and that she may use voice recognition software in place of keyboard input.

In a report dated February 19, 2021, Dr. Azevedo modified appellant's restrictions to include that she must use dictation software in place of keyboard input.

In a report dated February 24, 2021, Dr. Azevedo indicated that appellant related that she had returned to work, but that the employing establishment had not yet provided her with a headset. He noted that she related that after 10 minutes of typing, she experienced an increase in pain radiating up her arm, which traveled to her neck by the end of the workday. Dr. Azevedo recommended that appellant be off from work during the afternoon and evening hours from February 26 through March 27, 2021.

On February 27, 2021 appellant began filing claims for wage-loss compensation (Form CA-7) for disability from work beginning February 14, 2021.

In a work status report dated March 2, 2021, Dr. Azevedo noted that he disagreed with the Dr. Xeller's examination findings with respect to appellant's work capabilities. He recommended that she remain out of work through March 27, 2021, and then return to work effective March 28, 2021 with restrictions of no more than occasional reaching above shoulder height, keyboard/mouse use, repetitive right-hand motions, or gripping/grasping with the right hand; no lifting, carrying, pushing, or pulling more than 25 pounds with the right arm; and that she must use dictation software in place of keyboard input.

On March 5, 2021 OWCP declared a conflict in medical opinion between Drs. Azevedo and Xeller regarding whether appellant could return to work without restrictions due to the accepted June 18, 2018 employment injury.

In reports dated March 24, 2021, Jennifer Minassian, a physician assistant, recommended that appellant remain out of work until April 23, 2021.

In a March 30, 2021 development letter, OWCP advised appellant that the evidence it had received was insufficient to establish her recurrence claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

On March 31, 2021 OWCP referred appellant, the medical record, SOAF, and a list of questions to Dr. Brian Solberg, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the ongoing conflict in the medical opinion evidence.

In an April 5, 2021 response to OWCP's recurrence development questionnaire, appellant indicated that she returned to work on February 23, 2021, but was unable to perform her work duties because the dictation equipment was not available.

In a report of telephone encounter dated April 29, 2021, Ms. Minassian recommended that appellant remain out of work until May 28, 2021.

By decision dated June 11, 2021, OWCP denied appellant's claim for recurrence of disability commencing February 25, 2021. It found that the evidence was insufficient to establish that appellant was totally disabled due to a material change/worsening of her accepted June 18, 2018 work-related conditions.

On June 22, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a report dated June 23, 2021, Dr. Solberg, serving as the impartial medical examiner (IME), reviewed the medical record and SOAF. On examination of the cervical spine, he documented reduced range of motion in flexion, extension, lateral bending, and rotation and a mildly positive Spurling's test. Examination of the right upper extremity revealed normal sensation and motor strength throughout, with the exception of mild deficits in forward elevation and abduction and a minimally positive empty can test. Dr. Solberg noted a right wrist nodule over appellant's deep flexor tendon associated with the flexor pulley adjacent to the metacarpophalangeal joint of her thumb without triggering or tenderness. He diagnosed a partial tear and tendinitis of the right biceps and a right rotator cuff tear; right trigger thumb; right lateral epicondylitis; and calcific tendinitis of the left shoulder. Dr. Solberg opined that appellant had permanent residual impairment in the right shoulder, but that she was capable of returning to work without restrictions as it related to her right elbow, right thumb, right shoulder, and left shoulder. He also diagnosed cervical spondylosis with radiculopathy, which he opined was unrelated to the accepted June 18, 2018 employment injury.

In a report dated July 22, 2021, Dr. Azevedo noted that appellant had eventually received her headset and was working with it, but then accepted a buyout because her facility was closing. He noted her examination findings were unchanged and indicated that she had permanent modified-duty restrictions. In a follow-up report dated August 3, 2021, Dr. Azevedo indicated that appellant's restrictions remained unchanged.

A hearing was held on October 6, 2021.

By decision dated December 16, 2021, OWCP's hearing representative affirmed the June 11, 2021 decision, finding that the reports of Dr. Solberg constituted the special weight of the medical evidence.

#### **LEGAL PRECEDENT**

OWCP's implementing regulations define a recurrence of disability as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition,

which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment.<sup>4</sup>

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.<sup>5</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>6</sup>

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.<sup>7</sup>

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or IME) who shall make an examination.<sup>8</sup> This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>9</sup> When a 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 background, must be given special weight.<sup>10</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability commencing February 25, 2021 causally related to her accepted June 18, 2018 employment injury.

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<sup>4</sup> 20 C.F.R. § 10.5(x).

<sup>5</sup> *See J.S.*, Docket No. 19-1035 (issued January 24, 2020).

<sup>6</sup> *Id.*

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *D.T.*, Docket No. 19-1064 (issued February 20, 2020).

<sup>8</sup> 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

<sup>9</sup> 20 C.F.R. § 10.321.

<sup>10</sup> *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *J.W.*, Docket No. 19-1271 (issued February 14, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

OWCP properly found a conflict in medical opinion between Dr. Azevedo and Dr. Xeller regarding whether appellant sustained a recurrence of disability for the periods commencing February 25, 2021. In order to resolve the conflict, it referred her to Dr. Solberg for an impartial medical examination to resolve the conflict in medical opinion pursuant to 5 U.S.C. § 8123(a).<sup>11</sup>

In his June 23, 2021 report, Dr. Solberg reviewed the medical record and SOAF and documented his physical examination findings for the cervical spine, upper extremities, right hand, and right wrist. He diagnosed a partial tear and tendinitis of the right biceps and a right rotator cuff tear; right trigger thumb; right lateral epicondylitis; and calcific tendinitis of the left shoulder. Dr. Solberg opined that appellant had permanent residual impairment in the right shoulder, but that she was capable of returning to work without restrictions as it related to the accepted injuries to her right elbow, right thumb, right shoulder, and left shoulder. He explained that, based upon his physical examination, her right elbow and thumb conditions had resolved and, although her shoulders were mildly symptomatic, such limitations did not prevent her from performing her work duties. Dr. Solberg also acknowledged cervical conditions, but opined that they were unrelated to the accepted June 18, 2018 employment injury.

The Board finds that Dr. Solberg provided a thorough factual and medical history, and provided medical rationale for his opinion by explaining that the findings of record did not support disability commencing February 25, 2021 causally related to the June 18, 2018 employment injury.<sup>12</sup>

Appellant subsequently submitted reports from Dr. Azevedo dated July 22 and August 3, 2021. However, he did not provide an opinion on disability commencing February 25, 2021 causally related to the accepted employment injury. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.<sup>13</sup> These reports, therefore, are insufficient to establish appellant's claim.

Accordingly, OWCP properly accorded the special weight of the medical evidence to the IME, Dr. Solberg. As the medical evidence of record is insufficient to establish a recurrence of disability commencing February 25, 2021, causally related to her accepted June 18, 2018 employment injury, the Board finds that appellant has not met her burden of proof.

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.

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<sup>11</sup> See *R.N.*, Docket No. 19-0994 (issued November 7, 2019); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>12</sup> See *W.C.*, Docket No. 18-1386 (issued January 22, 2019); *Melvina Jackson*, 38 ECAB 443 (1987).

<sup>13</sup> See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability commencing February 25, 2021 causally related to her accepted June 18, 2018 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 16, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 29, 2023  
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