

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

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<b>T.E., Appellant</b> )	)	
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<b>and</b> )	)	<b>Docket No. 22-0429</b>
	)	<b>Issued: September 1, 2023</b>
<b>U.S. POSTAL SERVICE, RIVERSIDE-</b> )	)	
<b>RUBIDOUX POST OFFICE, Riverside, CA,</b> )	)	
<b>Employer</b> )	)	
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*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:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 28, 2022 appellant, through counsel, filed a timely appeal from a January 5, 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 over the merits of this case.<sup>3</sup>

<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.*

<sup>3</sup> The Board notes that following the January 5, 2022 decision, appellant submitted additional evidence to OWCP. 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.*

## **ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish that the acceptance of her claim should be expanded to include additional conditions as causally related to the accepted May 15, 1987 employment injury; and (2) whether OWCP properly denied authorization for left shoulder and cervical surgeries.

## **FACTUAL HISTORY**

On May 27, 1987 appellant, then a 25-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 15, 1987 she sustained injury when the postal vehicle she was operating was rear-ended while in the performance of duty. She did not stop work. OWCP initially accepted appellant's claim for sprain of neck, sprain of the right shoulder/upper arm (acromioclavicular region), lesion of the right ulnar nerve, and adhesive capsulitis of the right shoulder. Appellant later stopped work and OWCP paid her wage-loss compensation on the supplemental rolls, effective November 15, 2011, and on the periodic rolls, effective April 8, 2012. She requested authorization for left shoulder surgery, as well as for cervical surgery in the form of fusion surgery at C-4 and C-5. Appellant also claimed that her accepted conditions should be expanded to include additional cervical and left shoulder conditions she believed were related to the May 15, 1987 employment injury.

On January 3, 2019 OWCP referred appellant and the case record, along with a series of questions and a statement of accepted facts (SOAF), for a second opinion examination and evaluation with Dr. Michael J. Einbund, a Board-certified orthopedic surgeon. It requested that Dr. Einbund provide an opinion regarding whether appellant sustained any medical conditions due to the May 15, 1987 employment injury other than those already accepted, and whether the requested left shoulder and cervical surgeries should be authorized.

In a January 24, 2019 report, Dr. Einbund discussed appellant's factual and medical history and detailed findings of his physical examination. He determined that appellant did not sustain any medical conditions due to the May 15, 1987 employment injury other than those already accepted. Dr. Einbund opined that appellant's claimed work-related left shoulder and degenerative cervical conditions developed too remote in time from the May 15, 1987 employment injury to be related to that injury. He also found that the requested left shoulder and cervical surgeries were not necessitated by the May 15, 1987 employment injury. He explained that the conditions were degenerative in nature as they were "associated with natural aging process." Dr. Einbund pointed out that the degenerative findings were commonly seen in appellant's age demographic.

In August 15 and 28, 2019 reports, Dr. Hamid Rahman, an attending Board-certified orthopedic surgeon, provided an opinion that appellant sustained several neck, and left upper extremity conditions due to the May 15, 1987 employment injury. He diagnosed several conditions he believed were work related, including left shoulder impingement syndrome with bursitis and tendinitis, osteoarthritis of the left acromioclavicular joint, and multi-level disc disease/herniation at C3-4 and C5-6. Dr. Rahman recommended that appellant undergo left shoulder and cervical surgeries to treat these work-related conditions.

In December 2020, OWCP determined that there was a conflict in the medical opinion between Dr. Einbund and Dr. Rahman on the issues of whether appellant sustained any medical conditions due to the May 15, 1987 employment injury other than those already accepted, and

whether the requested left shoulder and cervical surgeries should be authorized. In order to resolve the conflict, it referred appellant, pursuant to section 8123(a) of FECA, to Dr. James M. Fait, a Board-certified orthopedic for an impartial medical examination and evaluation. OWCP provided Dr. Fait with a series of questions and a current SOAF, and requested that he provide an opinion regarding whether appellant sustained any additional medical conditions due to the May 15, 1987 employment injury, and whether the left shoulder and cervical surgeries should be authorized.

In a February 11, 2021 report, Dr. Fait discussed appellant's factual and medical history and detailed findings of his physical examination. He noted that the restricted range of motion of appellant's shoulders appeared to be primarily due to pain rather than an actual objective abnormality. Upon examination of the cervical spine, no spasms were observed, and appellant exhibited 5/5 strength in the major muscle groups of her upper extremities. Dr. Fait diagnosed cubital tunnel syndrome of the right elbow, left shoulder mild acromioclavicular osteoarthritis with tendinitis/bursitis, and cervical spine degenerative disc disease at C2-3 through C6-7. He determined that appellant did not sustain any medical conditions due to the May 15, 1987 employment injury other than those already accepted. Dr. Fait opined that the degenerative processes in appellant's cervical spine and left shoulder were due to her age rather than any work-related cause. He explained that the gradual onset of these conditions was confirmed by the diagnostic testing of record. Dr. Fait also opined that the requested left shoulder and cervical surgeries should not be authorized because they were not necessitated by conditions related to the May 15, 1987 employment injury.

By decision dated April 15, 2021, OWCP denied appellant's request to expand the acceptance of her claim to include additional medical conditions, finding that appellant had not shown that her claimed conditions of left shoulder impingement syndrome with bursitis and tendinitis, osteoarthritis of the acromioclavicular joint of the left shoulder, and disc disease/herniation at C3-4 and C5-6 were related to the May 15, 1987 employment injury. In addition, it denied authorization for left shoulder surgery and cervical fusion surgery at C4 and C5. OWCP determined that the special weight of the medical opinion evidence regarding appellant's expansion claim and her surgery requests rested with the well-rationalized opinion of the impartial medical examiner (IME), Dr. Fait.

By decision dated April 16, 2021, OWCP expanded appellant's accepted conditions to include right cubital tunnel syndrome, myofascial injury to the cervical spine, calcific tendinitis of the right shoulder, impingement syndrome of the right shoulder and right elbow chronic nerve irritation.

On April 21, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review with respect to the April 15, 2021 decision. A hearing was held on July 8, 2021. Appellant submitted a July 9, 2021 report of Dr. Rahman. In this report, Dr. Rahman continued to opine that appellant developed additional left shoulder and cervical conditions causally related to the accepted May 15, 1987 employment injury, and that these conditions necessitated left shoulder and cervical surgeries.

By decision dated September 22, 2021, OWCP's hearing representative affirmed the April 15, 2021 decision denying appellant's request to expand the acceptance of her claim and her request for authorization of left shoulder and cervical surgeries.

On October 11, 2021 appellant, through counsel, requested reconsideration of the September 22, 2021 decision. Appellant resubmitted the July 9, 2021 report of Dr. Rahman.

By decision dated January 5, 2022, OWCP denied modification of the September 22, 2021 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

When 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>4</sup>

The medical evidence required to establish causal relationship between a specific condition, and the employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 identified by the claimant.<sup>5</sup>

The Board has held that when the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working conditions or injuries, such disability is compensable.<sup>6</sup> However, the normal progression of untreated disease cannot be stated to constitute “aggravation” of a condition merely because the performance of normal work duties reveals the underlying condition.<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> For a conflict to arise, the opposing physicians’ opinions must be of virtually equal weight and rationale.<sup>9</sup> In situations where the case is properly referred to an impartial medical specialist 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>

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<sup>4</sup> *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *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>5</sup> *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

<sup>6</sup> *C.H.*, Docket No. 17-0488 (issued September 12, 2017).

<sup>7</sup> *Id.*

<sup>8</sup> 5 U.S.C. § 8123(a); *see E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

<sup>9</sup> *P.R.*, Docket No. 18-0022 (issued April 9, 2018); *see also Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>10</sup> *See D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

## ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include additional conditions as causally related to the accepted May 15, 1987 employment injury.

The special weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Fait, the IME selected to resolve the conflict in the medical opinion.<sup>11</sup> In his report of February 11, 2021, Dr. Fait opined that appellant did not sustain any medical conditions due to the May 15, 1987 employment injury other than those already accepted.

In his February 11, 2021 report, Dr. Fait diagnosed cubital tunnel syndrome of the right elbow, left shoulder mild acromioclavicular osteoarthritis with tendinitis/bursitis, and cervical spine degenerative disc disease at C2-3 through C6-7. He determined that appellant did not sustain any medical conditions due to the May 15, 1987 employment injury other than those already accepted. Dr. Fait opined that the degenerative processes in appellant's cervical spine and left shoulder were due to her age rather than any work-related cause. He explained that the gradual onset of these conditions was confirmed by the diagnostic testing of record.

The Board has reviewed the opinion of Dr. Fait and finds that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of whether appellant sustained any additional medical conditions due to the May 15, 1987 employment injury. Dr. Fait provided a thorough factual and medical history and accurately summarized the relevant medical evidence. He provided medical rationale for his opinion by explaining that the neck and left upper extremity conditions that appellant claimed were work related actually were nonwork-related conditions associated with the natural aging process.<sup>12</sup>

After the initial denial of her expansion claim, appellant submitted a July 9, 2021 report of Dr. Rahman. In this report, Dr. Rahman continued to opine that appellant developed additional left shoulder and cervical conditions causally related to the accepted May 15, 1987 employment injury. However, this report is of limited probative value regarding appellant's expansion claim as Dr. Rahman did not provide adequate medical rationale in support of his opinion on causal relationship. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how an employment activity could have caused or aggravated a medical condition.<sup>13</sup> Further, as Dr. Rahman was on one side of the conflict, his subsequent report is insufficient to create a new conflict in medical opinion or to

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<sup>11</sup> See *id.*

<sup>12</sup> See *W.C.*, Docket No. 18-1386 (issued January 22, 2019); *D.W.*, Docket No. 18-0123 (issued October 4, 2018); *Melvina Jackson*, 38 ECAB 443 (1987) (regarding the importance, when assessing medical evidence, of such factors as a physician's knowledge of the facts and medical history, and the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion).

<sup>13</sup> See *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

overcome the special weight properly accorded to the IME.<sup>14</sup> Therefore, this evidence is insufficient to establish appellant's claim.

As the medical evidence of record is insufficient to establish causal relationship, the Board finds that appellant has not met her burden of proof to establish that the acceptance of her claim should be expanded to include additional conditions as causally related to the accepted May 15, 1987 employment injury.

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.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8103(a) of FECA states in pertinent part: "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."<sup>15</sup>

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.<sup>16</sup> The only limitation on OWCP's authority is that of reasonableness.<sup>17</sup> Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>18</sup> In order to be entitled to reimbursement of medical expenses, it must be shown that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.<sup>19</sup> Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.<sup>20</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied authorization for left shoulder and cervical surgeries.

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<sup>14</sup> *A.L.*, Docket No. 20-0658 (issued October 5, 2022); *K.V.*, Docket No. 18-0947 (issued March 4, 2019); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *Michael S. Mina*, 57 ECAB 379 (2006); *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

<sup>15</sup> 5 U.S.C. § 8103.

<sup>16</sup> *R.C.*, Docket No. 18-0612 (issued October 19, 2018); *Vicky C. Randall*, 51 ECAB 357 (2000).

<sup>17</sup> *B.L.*, Docket No. 17-1813 (issued May 23, 2018); *Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

<sup>18</sup> *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *Rosa Lee Jones*, 36 ECAB 679 (1985).

<sup>19</sup> *J.R.*, Docket No. 17-1523 (issued April 3, 2018); *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

<sup>20</sup> *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

The special weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Fait, the IME selected to resolve this conflict in the medical opinion. In his February 11, 2021 report, Dr. Fait opined that appellant's requested left shoulder and cervical surgeries were not necessitated by the May 15, 1987 employment injury.

In his February 11, 2021 report, Dr. Fait determined that appellant did not sustain any additional medical conditions due to the May 15, 1987 employment injury. He opined that the degenerative processes in appellant's cervical spine and left shoulder were due to her age rather than any work-related cause. Dr. Fait concluded, therefore, that the requested left shoulder and cervical surgeries should not be authorized because they were not necessitated by conditions related to the May 15, 1987 employment injury.

The Board has reviewed the opinion of Dr. Fait and finds that he provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Dr. Fait provided medical rationale for his opinion that appellant's left shoulder and cervical surgeries were not necessitated by the May 15, 1987 employment injury by explaining that the medical conditions which the surgeries were designed to address were not work related.

Appellant submitted a July 9, 2021 report in which Dr. Rahman recommended left shoulder and cervical surgeries to treat work-related conditions in these areas. However, this report is of limited probative value on this issue because Dr. Rahman did not provide medical rationale in support of his opinion.<sup>21</sup> Further, as Dr. Rahman was on one side of the conflict, his subsequent report is insufficient to create a new conflict in medical opinion or to overcome the special weight properly accorded to the IME.<sup>22</sup>

As noted above, the Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief, and the Board finds that OWCP has not abused its discretion in the present case.

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 her burden of proof to establish that the acceptance of her claim should be expanded to include additional conditions as causally related to the accepted May 15, 1987 employment injury. The Board further finds that OWCP properly denied authorization for left shoulder and cervical surgeries.

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<sup>21</sup> See *supra* note 13.

<sup>22</sup> *Supra* note 14.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 5, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 1, 2023  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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