

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

S.M., Appellant	)	
	)	
and	)	Docket No. 22-1028
	)	Issued: September 8, 2023
U.S. POSTAL SERVICE, POST OFFICE,	)	
Lansing, MI, Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge

**JURISDICTION**

On June 27, 2022 appellant filed a timely appeal from a June 3, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly denied appellant's request for authorization for a walk-in bathtub/shower.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the June 3, 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.*

## **FACTUAL HISTORY**

On May 19, 1998 appellant, then a 50-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that work activities, while on light-duty work following a prior employment injury, had worsened her accepted subluxations of the left shoulder and cervical spine.<sup>3</sup> OWCP accepted the claim for aggravation of a left shoulder subluxation and aggravation of degenerative joint disease of the left shoulder. On July 17, 1998 appellant underwent OWCP-authorized arthroscopy of the left shoulder with intra-articular chondroplasty, debridement, removal of retained staple, and a Mumford procedure.<sup>4</sup> Following a brief return to part-time, light-duty work, she stopped work on February 25, 1999 and did not return. OWCP paid appellant compensation for total disability commencing February 25, 1999. It subsequently expanded the acceptance of her claim to include depressive disorder and conversion disorder.<sup>5</sup>

On January 12, 2017 OWCP referred appellant, a statement of accepted facts (SOAF), the medical record, and a series of questions for a second opinion examination with Dr. Edward C. Sladek, a Board-certified orthopedic surgeon, to determine the nature and extent of the work-related conditions.

In a January 30, 2017 report, Dr. Sladek recounted appellant's history of injury and reviewed the medical record and SOAF. On examination, he observed very limited range of motion of the left shoulder. Dr. Sladek obtained x-rays, which demonstrated an irregularly shaped humeral head on the left, with complete loss of cartilage over both the glenoid and humeral head. He diagnosed degenerative arthrosis of the glenoid humeral joint secondary to the accepted condition and multiple surgeries, and opioid-induced constipation caused by prescription medications. Dr. Sladek opined that the degenerative arthrosis of the left shoulder had "most likely" affected degenerative arthrosis of the right shoulder.

In a March 31, 2017 letter, Dr. Fred Isaacs, a Board-certified internist, opined that a walk-in bathtub/shower was medically necessary as appellant could not pull or push herself up from the sitting position because of bilateral shoulder pain and weakness.

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<sup>3</sup> OWCP assigned the present claim OWCP File No. xxxxxx797. On March 22, 1985 appellant had filed an occupational disease claim (Form CA-2) alleging that she sustained a left shoulder condition while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx600 and accepted it for an anterior subluxation with laxity of the left shoulder, adhesive capsulitis of the left shoulder, and subluxation of the atlas and axis vertebrae. On June 18, 1998, OWCP administratively combined OWCP File Nos. xxxxxx600 and xxxxxx797, with the latter designated as the master claim file.

<sup>4</sup> On December 21, 1984 appellant underwent OWCP-authorized left shoulder arthroscopy, intra-articular partial synovectomy, and Bankhart reconstruction with intra-articular staple. On May 9, 1994 she underwent OWCP-authorized arthroscopic acromioplasty of the left shoulder with intra-articular chondroplasty, debridement, and removal of the retained staple.

<sup>5</sup> By decision dated May 14, 2002, under OWCP File No. xxxxxx600, OWCP terminated authorization for medical benefits for subluxation of the atlas and axis vertebrae. It denied reconsideration by nonmerit decisions dated January 22 and March 5, 2003 and January 6 and 12, 2006. Appellant then appealed to the Board. By decision dated February 28, 2007, the Board affirmed OWCP's January 6 and 12, 2006 nonmerit decisions.

In an April 25, 2017 report, Dr. Patrick H. Noud, a Board-certified orthopedic surgeon, noted that appellant had bilaterally restricted shoulder motion and weakness, which limited her daily activities. He opined that a walk-in bathtub/shower was medically necessary as her bilateral shoulder weakness presented a fall risk as she could not utilize grab bars.

In an April 27, 2017 report, Dr. Isaacs explained that appellant could not utilize a swivel shower chair as she was unable to “reach out to support herself with grab bars to step over the side of her tub” as she had no range of motion in her shoulders and no upper body strength. Also, appellant could not raise herself to a standing position from a shower chair or utilize a shower head on a hose. Additionally, her orthopedic surgeon had instructed her to soak in a tub for 20 minutes each day. Dr. Isaacs requested that OWCP authorize the walk-in bathtub/shower because of appellant’s “shoulder problems caused from work-related injuries and the multiple surgeries required.”

In a statement dated May 16, 2017, appellant asserted that she injured her right shoulder in 2016 during physical therapy to treat her accepted left shoulder conditions.

On May 24, 2017 OWCP expanded acceptance of appellant’s claim to include other congenital anomalies of the left upper limb and shoulder girdle, and constipation.

On August 4, 2017 OWCP found a conflict in the medical opinion evidence between Dr. Sladek, for the government, and Dr. Isaacs, for appellant, regarding the nature and extent of the accepted conditions, whether she had sustained a consequential injury of the right shoulder and whether she required a walk-in bathtub/shower as a result of her accepted employment conditions. To resolve the conflict, on August 30, 2017 it referred her, the medical record, a SOAF, and a series of questions to Dr. Gregory Uitvlugt, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Uitvlugt provided a September 19, 2017 report of his examination of appellant that day. He reviewed the medical record and SOAF. Dr. Uitvlugt recounted appellant’s bilateral shoulder pain, greater on the left, with difficulty in activities of daily living. On examination he observed crepitus with cervical spine motion, flattening of the cervical lordotic curvature, good range of motion of the right shoulder, some weakness in the right upper extremity, and very limited range of left shoulder motion attributable to pain. Dr. Uitvlugt stated an impression of chronic pain disorder, degenerative arthritis of the cervical spine, bilateral rotator cuff tears, and ankylosis. He opined that appellant’s left shoulder condition remained work related, but that the right rotator cuff tear was not, as no injury had been reported. Dr. Uitvlugt opined that she did not need a walk-in bathtub/shower and that he saw no benefit from its use.

In reports dated September 19, 2017, Dr. J. Michael Wiater, a Board-certified orthopedic surgeon, recounted appellant’s history of injury and treatment. He obtained an electromyography (EMG) study of the right upper extremity, which was within normal limits. Dr. Wiater opined that appellant required a walk-in bathtub/shower due to right shoulder pain.

In a September 25, 2017 statement, appellant asserted that she had been unable to bathe since 2016 after she injured her right shoulder during physical therapy for her left shoulder. She again requested authorization of a walk-in bathtub/shower.<sup>6</sup>

In a December 18, 2017 report, Dr. Isaacs noted crepitus and markedly limited motion in both shoulders. He opined that appellant had developed rotator cuff and degenerative joint disease in the right shoulder from ligament and tendon problems of the left shoulder.

In an August 6, 2018 report, Dr. Ryan O'Connor, Board-certified in physiatry and pain medicine, administered an intra-articular injection to the left shoulder. He diagnosed left shoulder impingement, cervical spondylosis without myelopathy, and ilioinguinal neuropathy. Dr. O'Connor opined that appellant required a walk-in bathtub/shower due to left shoulder impingement.

In a November 6, 2018 report, Dr. O'Connor explained that appellant required a walk-in bathtub/shower secondary to continuing pathology from the accepted employment injuries.

On January 9, 2019 OWCP referred the medical record and an updated SOAF to Dr. Jack L. Miller, a physician Board-certified in physiatry and occupational medicine, serving as an OWCP district medical adviser (DMA), for review and determination as to whether appellant required a walk-in bathtub/shower as medically necessary for her accepted conditions.

OWCP subsequently received a report dated November 20, 2018, wherein Dr. O'Connor opined that a walk-in bathtub/shower was medically necessary for appellant to prevent falls as her bilateral shoulder conditions prevented her from utilizing grab bars to balance herself when getting in or out.

In a report dated January 12, 2019, Dr. Miller, the DMA, indicated that appellant sustained permanent impairment to her left shoulder, but no other work-related injuries. He noted that, while she had undergone left hip arthroplasty in 2016, she had no issues with mobility. Dr. Miller opined that appellant's left shoulder impairment did not warrant a walk-in bathtub/shower.

In an April 24, 2019 report, Dr. O'Connor opined that appellant required a walk-in bathtub/shower secondary to ongoing work-related pathology of the left shoulder. He explained that she could not safely enter a standard bathtub without assistance, and she no longer had help as her husband had passed away a few years earlier.<sup>7</sup>

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<sup>6</sup> OWCP, in an informational letter dated October 16, 2017, advised appellant that Dr. Uitvlugt had opined that she had not sustained a consequential right shoulder condition and that she did not require a walk-in bathtub/shower. It noted that his opinion as impartial medical examiner constituted the special weight of the medical evidence of record. Therefore, OWCP would not expand acceptance of appellant's claim to include a right shoulder condition or authorize a walk-in bathtub.

<sup>7</sup> OWCP, in an informational letter dated October 2, 2019, notified appellant that the medical evidence of record did not indicate that she required a walk-in bathtub/shower due to the effects of the accepted left upper extremity injuries.

In an undated report received by OWCP on May 26, 2020, Dr. Grace Escamilla, a Board-certified internist, noted appellant's longstanding occupational left shoulder conditions. She opined that appellant developed right shoulder pain, weakness, and limited range of motion due to compensation for her left shoulder and from repetitive trauma while at work. Dr. Escamilla recounted that Drs. Isaacs, Noud, O'Connor, and Wiater had all determined that a walk-in bathtub/shower was medically necessary as appellant had extremely limited range of bilateral shoulder motion and a "complete lack of upper body strength." She opined that a walk-in bathtub/shower was medically necessary due to the aforementioned reasons.

On August 25, 2020 OWCP referred appellant, a SOAF, the medical record, and a series of questions for a second opinion examination with Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, to determine the nature and extent of the work-related conditions, and whether a walk-in bathtub/shower was medically warranted as a result of appellant's accepted left shoulder conditions.

In a September 14, 2020 report, Dr. Obianwu recounted appellant's history of injury and reviewed the medical record and SOAF. He noted that she had fallen and sustained a pelvic fracture within the past year. On examination, Dr. Obianwu observed that appellant ambulated with a cane and had a limp. He found limited motion of the left shoulder with significant weakness of the musculature and significant weakness on drop-arm testing. Dr. Obianwu obtained left shoulder x-rays, which demonstrated arthropathy, degenerative changes in the glenohumeral joint, and rotator cuff disease. He diagnosed anterior subluxation with laxity of the left shoulder, capsulitis of the left shoulder, postsurgical status times three, rotator cuff arthropathy, and resolved subluxation of the atlas and axis vertebrae. Dr. Obianwu opined that appellant continued to have residuals of aggravation of left shoulder degenerative disease and rotator cuff arthropathy. He explained that she did not need a walk-in bathtub/shower for arthritis in the left shoulder, as she was right hand dominant and there was no insufficiency in the right shoulder. Dr. Obianwu found appellant capable of sedentary-duty work for four hours a day.

In statements dated February 21 and August 16, 2021, appellant indicated that a representative of a walk-in bathtub/shower company indicated that there was insufficient space in her bathroom to install the selected unit. She, therefore, requested authorization of a different unit.

On February 24, 2021 OWCP found a conflict in the medical opinion evidence between Dr. Obianwu, for the government, and Dr. Escamilla, for appellant, regarding the physical limitations imposed by the accepted conditions, and whether further treatment was indicated. To resolve the conflict, on September 2, 2021 it referred appellant, the medical record, a SOAF, and a series of questions to Dr. Jeffrey Devitt, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion. OWCP noted that he was to utilize the SOAF as the framework for his medical opinion.

In a September 21, 2021 report, Dr. Devitt reviewed the medical record and SOAF. On examination he observed restricted left shoulder motion, 4/5 distal left upper extremity strength, and positive impingement and apprehension tests. Dr. Devitt stated an impression of chronic left shoulder pain that was in excess of objective findings. He opined that he did "not believe that under normal circumstances an isolated left shoulder condition would necessitate a walk-in [bathtub/shower]." Dr. Devitt noted that perhaps a walk-in bathtub/shower would be helpful or

beneficial due to appellant's advancing age and other areas of physical dysfunction "including [appellant's] acquired right shoulder problems," which were not thought to be work-related according to the medical record, and possibly her hip condition. However, it was not necessitated by the "discrete work[-]related" left shoulder injury. Dr. Devitt found appellant capable of sedentary work.

In a November 17, 2021 letter, OWCP requested that Dr. Devitt submit a supplemental report setting forth specific diagnoses, the number of hours appellant could work, and whether the accepted conditions of aggravation of left shoulder subluxation, aggravation of left shoulder degenerative joint disease, anterior subluxation with laxity of the left shoulder, adhesive capsulitis of the left shoulder, and subluxation of the atlas and axis vertebrae had ceased.

In a December 11, 2021 addendum report, Dr. Devitt noted that appellant had numerous diagnoses regarding pain and dysfunction in the left shoulder. He opined that, currently, she likely had multifactorial chronic left shoulder pain. Dr. Devitt explained that it was not possible to determine whether work factors had caused the accepted conditions as there was no discrete or specific injury. He noted that there was no physical examination or maneuver that, could accurately determine the number of hours appellant could work, but that if she limited use of the left shoulder, "[appellant] should or would be able to work a more sedentary job for a normal eight[-]hour day."

In letters dated January 24 and February 28, 2022, OWCP requested that Dr. Devitt indicate whether appellant had any current objective left shoulder diagnoses causally related to the accepted conditions. It explained that he was not to refute the acceptance of the work-related conditions, but to opine if those conditions had resolved.

In a March 9, 2022 statement, appellant asserted that she could not wash her hair because of pain, weakness, and frequent dislocations of her left shoulder. She again requested that OWCP authorize a walk-in bathtub/shower. Appellant noted that grab bars could not be installed in her bathroom due to certain aspects of its construction.

OWCP, in an April 7, 2022 letter, again requested that Dr. Devitt submit the requested addendum report.

By decision dated June 3, 2022, OWCP denied authorization of a walk-in bathtub/shower as the medical evidence of record did not support that it was medically necessary to address the effects of the accepted employment conditions, based on Dr. Devitt's opinion as the weight of the medical evidence. It noted that the issue of whether appellant had ongoing residuals of the work-related conditions was still pending as he had not yet submitted the requested addendum report.

### **LEGAL PRECEDENT**

Section 8103(a) of FECA<sup>8</sup> provides that the United States shall furnish to an employee who was injured while in the performance of duty, the services, appliances, and supplies prescribed or

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<sup>8</sup> *Supra* note 1.

recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening in the amount of monthly compensation.<sup>9</sup>

In interpreting section 8103 of FECA, the Board has recognized that OWCP has broad discretion in approving services provided, with the only limitation on OWCP's authority being that of reasonableness.<sup>10</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 to produce a contrary factual conclusion.<sup>11</sup>

When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an independent medical examiner (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>12</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for authorization of a walk-in bathtub/shower.

OWCP selected Dr. Devitt as the IME to provide an opinion regarding the physical limitations caused by the accepted left shoulder conditions and postsurgical status. However, at the time it had not yet found a conflict of medical opinion regarding whether the accepted employment conditions necessitated provision of a walk-in bathtub/shower. As such, the Board finds that Dr. Devitt's opinion on that issue may not be afforded the special weight of an IME and should instead be considered for its own intrinsic value.<sup>13</sup> Dr. Devitt's opinion on the necessity of the walk-in bathtub/shower is, therefore, considered to be that of a second opinion evaluation.<sup>14</sup>

Dr. Devitt, in his September 21, 2021 report, reviewed the medical record and SOAF and noted detailed findings on clinical examination. He opined that an isolated left shoulder condition

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<sup>9</sup> 5 U.S.C. § 8103; *see N.G.*, Docket No. 18-1340 (issued March 6, 2019).

<sup>10</sup> *See D.C.*, Docket No. 20-0854 (issued July 19, 2021); *C.L.*, Docket No. 17-0230 (issued April 24, 2018); *D.K.*, 59 ECAB 141 (2007).

<sup>11</sup> *See E.F.*, Docket No. 20-1680 (issued November 10, 2021); *J.L.*, Docket No. 18-0503 (issued October 16, 2018).

<sup>12</sup> *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>13</sup> *P.L.*, Docket No. 21-0821 (issued April 15, 2022); *L.G.*, Docket No. 20-0611 (issued February 16, 2021). *See also M.G.*, Docket No. 19-1627 (issued April 17, 2020); *S.M.*, Docket No. 19-0397 (issued August 7, 2019) (at the time of the referral for an impartial medical examination there was no conflict in medical opinion evidence; therefore, the referral was for a second opinion examination); *see also Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (as there was no conflict in medical opinion evidence, the report of the physician designated as the IME was not afforded the special weight of the evidence, but instead considered for its own intrinsic value as he was a second opinion specialist).

<sup>14</sup> *Id.*

would not necessitate a walk-in bathtub/shower under normal circumstances. Dr. Devitt explained that, while a walk-in bathtub/shower could be beneficial due to appellant's advancing age and nonoccupational hip and right shoulder problems, it was not necessitated by the accepted left shoulder injury. As his opinion is well rationalized and based on a proper factual history, the Board finds that it constitutes the weight of the medical evidence on this issue.<sup>15</sup>

Dr. O'Connor, in reports dated August 6 and November 6, 2018 and April 24, 2019, opined that the accepted left shoulder conditions necessitated a walk-in bathtub/shower, but failed to provide a rationalized medical opinion explaining why the requested walk-in bathtub/shower was medically warranted. However, the Board has held that a medical opinion is of limited probative value if it does not contain sufficient medical rationale in support of the physician's opinion.<sup>16</sup> Additionally, in a November 20, 2018 report, Dr. O'Connor explained that the walk-in bathtub/shower was necessary as bilateral shoulder conditions prevented appellant from using grab bars. OWCP, however, has not accepted a right shoulder condition causally related to the accepted employment injury. Its obligation to pay for medical equipment extends only to the treatment of employment-related conditions.<sup>17</sup>

Dr. Isaacs, in reports dated March 31 and April 27, 2017, Dr. Noud, in an April 25, 2017 report, and Dr. Escamilla, in a report received on May 26, 2020, opined that a walk-in bathtub/shower was medically necessary due to bilateral shoulder weakness, pain, and restricted motion. Dr. Wiater, in reports dated September 19, 2017, opined that appellant required a walk-in bathtub/shower due to right shoulder pain. As noted above, OWCP, has not accepted a right shoulder condition causally related to the accepted employment injury.

OWCP has administrative discretion in choosing the means to achieve the goal of recovery from a work-related injury and the only limitation on its authority is that of reasonableness.<sup>18</sup> Appellant has not submitted reasonable medical evidence supporting that she required a walk-in bathtub/shower due to her accepted employment injury. The Board, therefore, finds that OWCP did not abuse its discretion in denying her request for authorization for the requested walk-in bathtub/shower.<sup>19</sup>

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>15</sup> See *M.W.*, Docket No. 20-0111 (issued September 21, 2020).

<sup>16</sup> *O.M.*, Docket No. 20-0640 (issued April 19, 2021).

<sup>17</sup> See *M.B.*, Docket No. 17-1679 (issued February 8, 2018); *D.J.*, Docket No. 13-1637 (issued December 16, 2013).

<sup>18</sup> See *D.K.*, Docket No. 20-0002 (issued August 25, 2020); *A.W.*, Docket No. 16-1812 (issued March 15, 2017).

<sup>19</sup> *M.S.*, Docket No. 17-0105 (issued December 7, 2017); *M.B.*, Docket No. 06-701 (issued December 4, 2006); *Thomas Lee Cox*, 54 ECAB 509 (2003); *Stella M. Bohlig*, 53 ECAB 341 (2002).



**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for authorization of a walk-in bathtub/shower.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 3, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 2023  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board