

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

L.P., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
ALED E. LUTZ VA MEDICAL CENTER,
Saginaw, MI, Employer**

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**Docket No. 23-1134
Issued: February 22, 2024**

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 1, 2023 appellant, through counsel, filed a timely appeal from a July 25, 2023 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.

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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish back and neck conditions causally related to the accepted May 3, 2021 employment incident.

FACTUAL HISTORY

On November 20, 2021 appellant, then a 60-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on May 3, 2021 she sustained back and neck pain when she lifted a blanket warmer machine off a trapped coworker while in the performance of duty. She indicated that she stopped work on May 5, 2021 and returned on May 10, 2021.³

In a statement dated November 23, 2021, appellant's supervisor contended that appellant initially attributed her arm pain to effects from a COVID-19 vaccine, but recently attributed it instead to a May 3, 2021 incident. On November 24, 2021 the employing establishment further challenged appellant's claim.

In a development letter dated December 13, 2021, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and afforded her 30 days to respond.

By decision dated January 20, 2022, OWCP denied appellant's claim, finding that she had not submitted any medical evidence containing a medical diagnosis in connection with the accepted May 3, 2021 employment incident.

On January 25, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a return to work note dated May 5, 2021, Dr. Kim C. Hendrick, a family medicine specialist, advised that appellant could return to work on May 10, 2021.

In a return to work note dated September 1, 2021, Dr. Hendrick advised that appellant was unable to work from September 1 through 9, 2021, due to illness and arm weakness in reaction to the COVID-19 vaccine, and that she could return to work on September 10, 2021. On September 13, 2021 he extended her inability to work through September 27, 2021. In return-to-work notes dated October 11 and 18, 2021, Dr. Hendrick advised that appellant was unable to work from October 11 through 31, 2021 due to illness, and could return to work on November 1, 2021.

In a report dated December 16, 2021, Dr. James Heming, an osteopathic physician specializing in orthopedic surgery, evaluated appellant for complaints of left shoulder pain. Appellant told him that she believed that the pain may have started when she lifted a blanket

³ On October 3, 2021 appellant filed a Form CA-1 alleging that on August 30, 2021 she sustained a COVID-19 vaccine-related injury to her left arm and shoulder leading to increased pain and weakness. By decision dated May 2, 2023, OWCP accepted an adverse effect of the viral vaccine as work related. However, it further noted that the acceptance applied only from August 30, 2021 through May 2, 2023, as it had resolved, and was discontinued thereafter. By decision of the same date, it denied her claim for a chronic condition related to the COVID-19 vaccination, discontinuing the acceptance of her claim effective May 2, 2023.

warmer machine at work, and that it may have been compounded by her COVID-19 vaccination. On physical examination, Dr. Heming observed a significant amount of guarding, limiting any objective information. He noted that there were significant limitations in measuring range of motion due to appellant's unwillingness to cooperate. Dr. Heming further observed that there did not appear to be any strength deficit with her elbow at her side when testing internal and external rotation, but that she complained of pain. He diagnosed subjective left shoulder pain with no objective findings on clinical examination. An attached electromyogram nerve conduction velocity study obtained on October 21, 2021 demonstrated normal results.

A magnetic resonance imaging (MRI) scan report dated December 27, 2021, demonstrated a combination of significant tendinosis and a partial-thickness tear involving the cranial-subscapularis tendon, with tendinosis of the supraspinatus. The report noted no full thickness retracted rotator cuff tendon tear.

In an attending physician's report (Form CA-20) dated January 19, 2022, Dr. Hendrick diagnosed a left partial rotator cuff tear and tendinosis. He checked a box indicating that the condition was caused or aggravated by an employment activity. The employment activity was not described. Dr. Heming recommended work restrictions of no reaching, pushing, pulling, lifting, carrying, or repetitive motion using the left arm.

A hearing was held on April 11, 2022. The hearing representative kept the case record open for 30 days for the submission of additional evidence.

In a letter dated April 27, 2022, the employing establishment contended that the medical evidence of record was insufficient to establish causal relationship between appellant's diagnosed partial left rotator cuff tear with tendinosis and the accepted May 3, 2021 incident.

By decision dated June 27, 2022, the hearing representative modified the January 20, 2022 decision to find that appellant had established a medical diagnosis in connection with the accepted May 3, 2021 employment incident. However, the claim remained denied as the medical evidence of record was insufficient to establish causal relationship between diagnosed conditions and the accepted incident.

On October 13, 2022 appellant, through counsel, requested reconsideration of OWCP's June 27, 2022 decision. Attached was an October 3, 2022 report from Dr. Sami E. Moufawad, Board-certified in pain medicine. He described the accepted incident of May 3, 2021. Dr. Moufawad noted that the MRI scan of appellant's left shoulder obtained on December 27, 2021 demonstrated tendinosis and partial tearing of the rotator cuff. On physical examination of the left shoulder, he observed that the left shoulder rode further than the right due to muscle spasms around the upper trapezius. Dr. Moufawad further observed multiple trigger points around the shoulder blade and upper trapezius, tenderness on palpation of the subacromial area, impingement without instability, and mild atrophy of the supraspinatus and infraspinatus. He diagnosed left rotator cuff tendinosis and partial thickness tear, cervical disc bulge, left cervical radiculitis in the C7 distribution, and myofascial pain at the base of the neck and around the shoulder blade. Dr. Moufawad further opined that the partial tear of the rotator cuff and aggravation of the findings on the left shoulder as well as radicular symptoms to the upper limb were causally related to the accepted May 3, 2021 incident. He explained the anatomy of the shoulder and cervical spine,

noting that appellant must have had some tendinosis prior to the incident, but that, before the incident, she was asymptomatic. Dr. Moufawad stated that, when she leaned forward to lift the oven off of her coworker, she pulled with her larger muscles, but that the weight of the oven pulled against her, leading to the tear seen on MRI scan and aggravation of tendinosis. As to the diagnosis of left cervical radiculitis, he explained the physiology of the nerve root, and observed that appellant had narrowing of the neural foramen, particularly at C4-5. Dr. Moufawad opined that her left C5 cervical radiculopathy was caused by lifting the oven while her shoulders were forward and pulling down by the weight of the oven, as it had led to injury of the nerve root against the narrow neuroforamen. He further opined that this same mechanism explained the injury to the left shoulder, aggravation of the disc bulge in the cervical spine, and the development of left cervical radiculitis.

By letter dated November 8, 2022, the employing establishment challenged appellant's request for reconsideration and request for a second opinion examination.

By decision dated January 11, 2023, OWCP denied modification of its June 27, 2022 decision.

OWCP subsequently received an October 17, 2022 report, wherein Dr. Jolanta Sobotka-Czarnecki, a rheumatologist, noted her examination of appellant for complaints of left shoulder and neck joint pain. On physical examination, she observed diffuse tenderness to palpation of the left upper extremity. With regards to the spine, Dr. Sobotka-Czarnecki observed a decreased range of motion of the cervical and lumbar spine with tenderness to palpation. She diagnosed primary generalized osteoarthritis of the cervical and lumbar areas of the spine with likely left-sided radiculopathy, and left shoulder tendinitis with a partially torn rotator cuff.

In an April 20, 2023 report, Dr. Moufawad diagnosed left rotator cuff tendinosis and partial thickness tear; a cervical disc bulge; left cervical radiculitis in the C7 distribution; and myofascial pain at the base of the neck and around the shoulder blade. He explained that the preexisting conditions found on MRI scan were asymptomatic until the accepted incident of May 3, 2021, aggravating appellant's left shoulder condition and cervical radiculitis. As to the MRI scan obtained on December 27, 2021 Dr. Moufawad noted that some of the findings were chronic with superimposed acute findings related to the May 3, 2021 incident, and stated that her diagnosed partial rotator cuff tear and fluid in the subacromial-subdeltoid bursa were acute complications of her tendinosis. He opined that the initial injury to the left rotator cuff tendon resulted from the accepted incident of May 3, 2021. Dr. Moufawad further opined that while appellant's repeated movement of the neck and shoulder led to aggravation of the cervical disc bulge of the cervical spine, which in turn led to left cervical radiculitis in the C7 distribution.

By decision dated July 25, 2023, OWCP denied modification of its January 11, 2023 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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 limitation of FECA,⁵ 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.⁶ 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.⁷

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. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit sufficient evidence to establish that the accepted employment incident caused an injury.⁸

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.⁹ 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 factors identified by the employee.¹⁰

ANALYSIS

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

On October 3, 2022 Dr. Moufawad opined that the partial tear of appellant's rotator cuff and aggravation of the findings on the left shoulder as well as radicular symptoms to the upper limb were causally related to the accepted May 3, 2021 incident. He explained that, when she

⁴ *Supra* note 2.

⁵ *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).

⁶ *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).

⁷ *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).

⁸ *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019).

⁹ *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).

¹⁰ *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).

leaned forward to lift the oven off of her coworker, she pulled with her larger muscles, but that the weight of the oven pulled against her, leading to the partial rotator cuff tear seen on MRI scan and aggravation of tendinosis. As to the diagnosis of left cervical radiculitis, Dr. Moufawad explained the physiology of the nerve root and observed that appellant had narrowing of the neural foramen, particularly at C4-5. He opined that her left C5 cervical radiculopathy was caused by lifting the oven while her shoulders were forward and pulling down by the weight of the oven, as it had led to injury of the nerve root against the narrow neuroforamen. Dr. Moufawad further opined that this same mechanism explained the injury to the left shoulder, aggravation of the disc bulge in the cervical spine, and the development of left cervical radiculitis. In his April 20, 2023 report, he explained that the preexisting conditions found on MRI scan were asymptomatic until the accepted incident of May 3, 2021, aggravating appellant's left shoulder condition and cervical radiculitis. Dr. Moufawad opined that the initial injury to the left rotator cuff tendon resulted from the accepted incident of May 3, 2021 and that it was aggravated on August 30, 2021. He further opined that while appellant's repeated movement of the neck and shoulder led to aggravation of the cervical disc bulge of the cervical spine, which in turn led to left cervical radiculitis in the C7 distribution.

While Dr. Moufawad's opinion is insufficient to establish the claim, it is sufficient to require further development of the medical evidence.¹¹

It is well established that, proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹² OWCP has an obligation to see that justice is done.¹³

On remand, OWCP shall refer appellant, along with the case record and a statement of accepted facts, to a specialist in the appropriate field of medicine for an examination and a well-rationalized opinion on whether her diagnosed conditions are causally related to the accepted May 3, 2021 employment incident. If the physician opines that the diagnosed conditions are not causally related, he or she must explain with rationale how or why their opinion differs from that of Dr. Moufawad. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹¹ *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983); *John J. Carlone*, 41 ECAB 354 (1989).

¹² *See id.* *See also A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

¹³ *See B.C.*, Docket No. 15-1853 (issued January 19, 2016); *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

ORDER

IT IS HEREBY ORDERED THAT the July 25, 2023 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: February 22, 2024
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