

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

L.M., Appellant)	
)	
and)	Docket No. 23-0709
)	Issued: January 10, 2024
U.S. POSTAL SERVICE, ASHVILLE POST OFFICE, Ashville, PA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 21, 2023 appellant, through counsel, filed a timely appeal from an April 13, 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.³

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 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.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the April 13, 2023 decision, a 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a medical condition causally related to the accepted November 29, 2019 employment incident.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 16, 2020 appellant, then a 54-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 29, 2019 she sustained neck pain when unloading a heavy parcel while in the performance of duty.

In support of her request, appellant submitted medical evidence signed by various physician assistants.

In a development letter dated June 30, 2020, OWCP informed appellant of the deficiencies of her claim. It explained the type of factual and medical evidence needed and attached a questionnaire for her completion. OWCP afforded appellant 30 days to submit the requested evidence.

In a report dated June 10, 2020, Dr. Dawn Repko, a Board-certified family practitioner, related appellant's history of lifting a heavy box at work on November 29, 2019. Her examination of the cervical spine demonstrated decreased range of motion with tenderness and spasm. Dr. Repko noted that appellant's pain was out of proportion to her findings; but that, with distraction, her left upper extremity strength and sensation seemed intact. She diagnosed radicular pain of the upper extremity and neck muscle strain.

Appellant continued to submit medical evidence in support of her claim.

By decision dated August 12, 2020, OWCP denied appellant's traumatic injury claim. It found that she had submitted insufficient medical evidence to establish causal relationship between her diagnosed conditions and the accepted November 29, 2019 employment incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury or condition under FECA.

On August 21, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 12, 2020. OWCP continued to receive medical evidence.

In a report dated July 23, 2020, Dr. Gregory Bailey, an osteopath specializing in orthopedic surgery, related appellant's history of injury and diagnosed cervical pain and cervical radiculopathy. In a report dated September 3, 2020, he followed up with appellant for continued weakness in the left hand and pain in the neck and left arm.

⁴ Docket No. 22-0667 (issued November 1, 2022).

In progress notes dated September 10, 2020, Dr. Christopher Aaron, an osteopath specializing in neurology, noted that appellant's neck pain had progressively worsened since November 2019. He diagnosed radicular pain of the upper extremity and strain of the neck muscle.

In progress notes dated October 9, 2020, Dr. Repko diagnosed neck muscle strain, radicular pain of the upper extremity, and acquired hyperthyroidism.

In a letter dated October 25, 2020, Dr. Patrick Lenz, a Board-certified family practitioner, recounted appellant's history of injury and treatment and opined that it was difficult to say with a reasonable degree of medical certainty that her current symptoms were caused or aggravated by conditions of her employment.

By decision dated January 6, 2021, OWCP's hearing representative affirmed the August 12, 2020 decision.

In progress notes dated February 11, 2021, Dr. Joseph Mitchell, an osteopath specializing in orthopedic surgery, diagnosed Raynaud's phenomenon without gangrene, a strain of the neck muscle, and radicular pain of the upper extremity. In a letter dated February 14, 2021, he opined that, due to the persistence of her symptoms since the November 29, 2019 employment incident, appellant's condition would not improve or resolve for the foreseeable future.

In a report dated April 5, 2021, Dr. James Burke, a Board-certified orthopedic surgeon, related that appellant's symptoms began on November 29, 2019 after pulling a package at work. He diagnosed left shoulder pain, sprain of the ligaments and joints of the neck, cervical disc displacement, cervical stenosis, and cervical spondylosis.

In a report dated April 8, 2021, Dr. Cameron Murphy, a Board-certified family practitioner, examined appellant for left shoulder pain related to a work incident on November 29, 2019 when she lifted a 50-pound package at work from her vehicle. He diagnosed left shoulder pain, shoulder impingement, tendinitis of the left rotator cuff, and chronic shoulder bursitis.

In reports dated April 15 through August 30, 2021, Dr. Nicholas Kinback, a pain medicine specialist, diagnosed cervical spondylosis without myelopathy, cervicgia, cervical dystonia, and left rotator cuff disorder. Between June 30 and August 23, 2021, he performed diagnostic modalities.

In an undated narrative report received by OWCP on November 8, 2021, Dr. Kinback reviewed appellant's history of injury and diagnosed cervical dystonia and chronic rotator cuff tendinopathy. He noted that appellant's diagnoses were often coexisting and could exacerbate each other. Dr. Kinback opined within a reasonable degree of medical certainty that she initially sustained a high-grade cervical strain and a partial rotator cuff tear related to her work injury.

On December 6, 2021 appellant, through counsel, requested reconsideration of OWCP's January 6, 2021 decision.

OWCP subsequently received a November 5, 2021 report, wherein Dr. Stephanie Grilli, an osteopath specializing in orthopedic surgery, related appellant's history of a work-related injury on November 29, 2019. Dr. Grilli diagnosed left shoulder impingement.

By decision dated March 3, 2022, OWCP denied modification of the January 6, 2021 decision.

On March 30, 2022 appellant, through counsel, appealed to the Board.

By decision dated November 1, 2022, the Board affirmed OWCP's March 3, 2022 decision.⁵

Appellant continued to submit medical evidence. In an August 23, 2021 report, Dr. Kinback diagnosed cervical spondylosis with myelopathy, cervicgia, cervical dystonia, and left rotator cuff disorder.

On November 15, 2022 appellant, through counsel, requested reconsideration. In support of her request, she submitted an October 14, 2022 report from Dr. Scott Eisenhuth, a Board-certified orthopedic surgeon, who related that appellant's left shoulder symptoms began in November 2019 when she pulled and lifted a package at work. Dr. Eisenhuth's examination of the left shoulder revealed fairly severe limitation and weakness of the supraspinatus and infraspinatus, though it was difficult to distinguish between limitation based on strength and pain. He reviewed a left shoulder x-ray taken that day, which revealed no abnormalities. Dr. Eisenhuth diagnosed left shoulder pain. In an October 26, 2022 report, he again related appellant's history of injury and reviewed an October 24, 2022 left shoulder magnetic resonance imaging (MRI) scan, which revealed a high-grade partial-thickness tear at the most anterior aspect of the supraspinatus, as well as some diffuse tendon thinning within the supraspinatus tendon and tearing and thinning of the intra-articular portion of the biceps tendon. Dr. Eisenhuth diagnosed subacromial impingement of left shoulder, nontraumatic incomplete tear of the left rotator cuff, and superior glenoid labrum lesion of the left shoulder and recommended surgical intervention.

On November 30, 2022 Dr. Eisenhuth performed an unauthorized left shoulder arthroscopy with extensive debridement, arthroscopic subacromial decompression, and arthroscopic biceps tenodesis on November 30, 2022.

In a December 9, 2022 report, Dr. Eisenhuth related that appellant was doing fairly well approximately 10 days after surgery. He diagnosed impingement syndrome of left shoulder and aftercare following surgery of the musculoskeletal system.

By decision dated February 6, 2023, OWCP denied modification of its prior decisions.

Appellant, through counsel, requested reconsideration on March 3, 2023. In support of her request, she submitted a February 24, 2023 report from Dr. Eisenhuth, relating that she was doing fairly well three months post-surgery but continued to have left-sided neck pain. Dr. Eisenhuth diagnosed aftercare following surgery of the musculoskeletal system. He noted that appellant stated that her shoulder problem began at work in November 2019 when she pulled a package out of her car and felt sudden, severe pain in her shoulder and neck. Appellant denied previous problems with the shoulder. Dr. Eisenhuth noted that MRI scan and intraoperative findings showed a superior labral tear and partial-thickness rotator cuff tear consistent with the described

⁵ *Id.*

lifting injury. He concluded that while he could not definitively state whether the lifting incident caused appellant's condition, "it is more likely than not that the lifting incident caused these tears."

The employing establishment submitted a March 31, 2023 challenge statement, asserting that it was unclear whether appellant's physician was aware of any activities she engaged in outside of work that could have caused or contributed to her condition.

OWCP also received a March 20, 2023 report from Dr. Burke, relating that appellant's neck and left arm complaints began after pulling a package at work on November 29, 2019 and noting that appellant underwent left shoulder surgery in November 2022. Dr. Burke reviewed a February 3, 2023 cervical spine MRI scan, which revealed reversal of lordosis, C2-3 and C3-4 left-sided foraminal stenosis, and C5-6 right-sided foraminal stenosis with mild spinal stenosis, as well as December 29, 2022 cervical spine x-rays, which demonstrated reversal of cervical lordosis. He diagnosed cervical spondylosis, left shoulder pain, cervical disc displacement at C5-C6 level, and cervical spinal stenosis.

By decision dated April 13, 2023, OWCP denied modification of the February 6, 2023 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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,⁷ 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.⁸ 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.⁹

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. The first component is that the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.¹⁰

⁶ *Supra* note 2.

⁷ *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).

⁸ *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).

⁹ *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).

¹⁰ *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

The medical evidence required to establish a causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.¹¹ 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.¹²

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a medical condition causally related to the accepted November 29, 2019 employment incident.

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 3, 2022 merit decision as the Board considered that evidence in its November 1, 2022 decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.¹³

In a February 24, 2023 report, Dr. Eisenhuth related that appellant's shoulder problem began at work in November 2019 when she pulled a package out of her car and felt sudden, severe pain in her shoulder and neck. He noted that an MRI scan and intraoperative findings demonstrated a superior labral tear and partial-thickness rotator cuff tear consistent with the described lifting injury. Dr. Eisenhuth concluded that while he could not definitively state whether the lifting incident caused appellant's condition, "it is more likely than not that the lifting incident caused these tears." While this report provided an affirmative opinion suggestive of causal relationship, he did not offer medical rationale sufficient to explain why he believed appellant's employment duties could have resulted in, or contributed to, her diagnosed conditions. Without identifying specific employment duties or explaining how they caused or aggravated appellant's conditions, this medical report is of limited probative value, and is insufficient to meet appellant's burden of proof.¹⁴

In October 14 and 26, 2022 reports, Dr. Eisenhuth related that appellant's left shoulder symptoms began in November 2019 when she pulled and lifted a package at work. In the October 14, 2022 report, he diagnosed left shoulder pain, and in the October 26, 2022 report he diagnosed subacromial impingement of left shoulder, nontraumatic incomplete tear of the left rotator cuff, and superior glenoid labrum lesion of the left shoulder. In a March 20, 2023 report, Dr. Burke related that appellant's neck and left arm complaints began after pulling a package at work on November 29, 2019 and noted that appellant underwent left shoulder surgery in November 2022. He diagnosed cervical spondylosis, left shoulder pain, cervical disc displacement at C5-6 level, and cervical spinal stenosis. Although each report suggested a work-related cause

¹¹ 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).

¹² 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).

¹³ 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).

¹⁴ See A.P., Docket No. 19-0224 (issued July 11, 2019).

for appellant's medical condition, none provided a rationalized medical opinion relating the specific diagnosed condition to the November 29, 2019 employment incident. 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.¹⁵ Therefore, these reports are insufficient to establish appellant's traumatic injury claim.

Appellant also submitted an August 23, 2021 report from Dr. Kinback diagnosing cervical spondylosis with myelopathy, cervicgia, cervical dystonia, and left rotator cuff disorder, and a December 9, 2022 report from Dr. Eisenhuth diagnosing impingement syndrome of the left shoulder and aftercare following surgery of the musculoskeletal system. However, neither of these reports contained an opinion regarding the cause of appellant's diagnosed conditions. 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.¹⁶ As such, these reports are insufficient to establish her claim.

As the medical evidence of record is insufficient to establish a medical condition causally related to the accepted November 29, 2019 employment incident, 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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a medical condition causally related to the accepted November 29, 2019 employment incident.

¹⁵ *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

¹⁶ *D.C.*, Docket No. 19-1093 (issued June 25, 2020); *see L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018); *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2024
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board