

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

_____)
K.D., Appellant)

and)

**U.S. POSTAL SERVICE, PATERSON POST
OFFICE, Paterson, NJ, Employer**)
_____)

Docket No. 25-0411

Issued: April 17, 2025

Appearances:

Paul Kalker, Esq., for the appellant¹

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

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 24, 2025 appellant, through counsel, filed a timely appeal from a March 5, 2025 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 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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish disability from work for the period October 24, 2018 through May 3, 2021, causally related to his September 8, 2018 accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 8, 2018 appellant, then a 77-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his right shoulder when he fell as he pushed two trash cans while in the performance of duty. He stopped work on September 9, 2018 and has not returned to work.

By decision dated November 20, 2018, OWCP accepted that the September 8, 2018 incident occurred as alleged. However, it denied the claim, finding that the medical evidence of record was insufficient to establish a diagnosed medical condition in connection with the accepted employment incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

Thereafter, OWCP received additional medical evidence.

On October 8, 2019 appellant requested reconsideration of the November 20, 2018 decision and submitted medical and factual evidence.

By decision dated January 2, 2020, OWCP modified the November 20, 2018 decision to find that appellant had established a diagnosis of right shoulder rotator cuff tear. However, the claim remained denied as the medical evidence of record was insufficient to establish that appellant's diagnosed condition was causally related to the accepted September 8, 2018 employment incident.

On December 29, 2020 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

By decision dated March 23, 2021, OWCP vacated the January 2, 2020 decision, finding that the medical evidence submitted was sufficient to establish that appellant sustained a right rotator cuff tear causally related to his accepted September 8, 2018 employment incident. By separate decision of even date, it formally accepted his claim for right rotator cuff tear.

Appellant subsequently filed claims for compensation (Form CA-7) for disability from work from September 9, 2018 through May 3, 2021.

³ Docket No. 22-0862 (issued March 30, 2023).

OWCP, by decision dated July 1, 2021, denied appellant's claim for compensation, finding that the medical evidence of record was insufficient to establish disability from work for the period September 9, 2018 through May 3, 2021 causally related to his accepted September 8, 2018 employment injury.

On December 24, 2021 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

By decision dated March 23, 2022, OWCP corrected its earlier July 7, 2021 decision, finding that a July 29, 2021 report from Dr. Stephen J. McIlveen, an attending Board-certified orthopedic surgeon, was insufficient to establish that appellant had employment-related disability from work for the period October 24, 2018 through May 3, 2021.

On May 11, 2022 appellant, through counsel, appealed to the Board. By decision dated March 30, 2023, the Board affirmed the March 23, 2022 decision, finding that appellant had not met his burden of proof to establish disability from work for the period October 24, 2018 through May 3, 2021, causally related to his accepted September 8, 2018 employment injury.⁴

On March 22, 2024 appellant, through counsel, requested reconsideration.

In support thereof, appellant submitted an addendum report dated March 13, 2024 from Dr. McIlveen. Dr. McIlveen noted a history of appellant's accepted September 8, 2018 employment injury. He also noted that prior to his fall on that date, appellant had no right shoulder complaints or symptoms and had normal use of his right shoulder. Dr. McIlveen indicated that following his employment injury, appellant was unable to lift his right arm due to pain. He then noted that a magnetic resonance imaging (MRI) scan performed on October 4, 2018, demonstrated a massive right shoulder rotator cuff tear, which he advised was causally related to the September 8, 2018 employment injury. Dr. McIlveen further advised that appellant's disability was due to his inability to lift his arm more than 90 degrees in a forward elevation plane and to abduct more than 90 degrees on the right which he observed during his December 2020 medical evaluation. He related that there was marked weakness of rotator cuff strength when appellant's motor power was tested, and he had a negative right external rotation strength sign. Dr. McIlveen indicated that his condition with more time can lead to rotator cuff tear arthropathy, advanced osteoarthritis of the right shoulder, worsening weakness, and increasing pain. He opined that appellant's disability from work was causally related to his accepted employment injury as he had no prior symptoms and very good functional use of his right arm prior to his September 8, 2018 fall. Dr. McIlveen noted that this was a common mechanism of injury for a traumatic acute massive rotator cuff tear. Additionally, he noted that this condition not only caused pain with normal activities of daily living, including sleep activities, but also prevented an individual from having any use of the arm above the horizontal level, including reaching upward and outward, and a marked lack of power for any physical work. Based on these findings and his examination findings, Dr. McIlveen opined that appellant was disabled from performing his usual work activity due to his accepted right shoulder condition. He explained that the massive rotator cuff tear produced symptoms of pain, lack of active strength, and marked functional loss of use because the

⁴ *Id.*

rotator cuff was no longer functioning. Dr. McIlveen noted that his physical examination findings, which were mentioned in his previous letters, demonstrated marked weakness of active use, which included elevation of only 80 degrees and marked weakness of external rotation function. He maintained that these were the two most important functional uses of the shoulder, being able to raise it and rotate it into an externally rotated position. Dr. McIlveen further maintained that when this weakness occurred, in addition to performing manual, physical work activity, it often caused difficulty with grooming, hair care, and putting on and taking off clothing, as demonstrated by appellant. Thus, he concluded that the massive tear of the right rotator cuff resulted in appellant's inability to perform his normal work-related activities.

By decision dated March 26, 2024, OWCP denied modification of the March 30, 2023 decision, finding that Dr. McIlveen's reports of record, including his March 13, 2024 report, did not contain a rationalized opinion to establish that appellant was totally disabled from work during the claimed period due to his accepted September 8, 2018 employment injury.

On February 19, 2025 appellant, through counsel, requested reconsideration.

In support thereof, appellant submitted an additional addendum report dated January 31, 2025 from Dr. McIlveen. Dr. McIlveen reiterated the history of the September 8, 2018 employment injury, that appellant had no right shoulder complaints, symptoms, or problems prior to the accepted injury, and the results of the October 4, 2018 right shoulder MRI scan. He reported the findings of his recent November 4, 2024 physical and x-ray examination of the right shoulder. Dr. McIlveen noted appellant's description of the custodial duties he performed prior to his accepted employment injury. He opined that appellant had been disabled from work since his employment injury on September 8, 2018, appellant continued to be disabled, and appellant would be disabled for the rest of his life from the effects of his accepted injury. Dr. McIlveen further opined that he was absolutely unable to perform any of his required custodian duties. He noted that his right shoulder pain and weakness had gradually worsened over time, which could develop into rotator cuff tear arthropathy of the right shoulder. There was severe muscle atrophy of the rotator cuff demonstrated on physical examination, a high-riding humeral head demonstrated by x-ray and marked weakness of rotator, and cuff function was completely compatible and supportive of the diagnosis of an acute massive rotator cuff tear which occurred back on September 8, 2018 and had worsened. Dr. McIlveen related that although appellant was undergoing physical therapy, his prognosis for satisfactory right shoulder function was poor. He concluded that appellant was completely disabled from his custodian position.

By decision dated March 5, 2025, OWCP denied modification of the March 26, 2024 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which

⁵ *Supra* note 2.

compensation is claimed is causally related to the employment injury.⁶ Under FECA, the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁷ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.⁸

Whether a particular injury causes an employee to become disabled from work and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical evidence.⁹ The medical evidence required to establish causal relationship between a claimed period of disability and an accepted 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 claimed disability and accepted employment injury.¹⁰

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹¹

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's March 23, 2022 decision because the Board considered that evidence in its March 30, 2023 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹²

In support of his claims for compensation, appellant submitted reports from Dr. McIlveen. In his March 13, 2024 and January 31, 2025 reports, Dr. McIlveen opined that, based on his

⁶ See *C.B.*, Docket No. 20-0629 (issued May 26, 2021); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

⁸ *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

⁹ *A.S.*, Docket No. 20-0406 (issued August 18, 2021); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

¹⁰ *T.L.*, Docket No. 20-0978 (issued August 2, 2021); *V.A.*, Docket No. 19-1123 (issued October 29, 2019).

¹¹ See *C.T.*, Docket No. 20-0786 (issued August 20, 2021); *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

¹² *T.H.*, Docket No. 25-0345 (issued March 20, 2025); *M.V.*, Docket No. 24-0092 (issued March 28, 2024); *R.P.*, Docket No. 23-0638 (issued November 30, 2023); *A.D.*, Docket No. 20-0553 (issued April 19, 2021); *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

findings on physical and diagnostic test examination, appellant was permanently totally disabled from his custodian position commencing September 8, 2018 due to the accepted employment injury which occurred on that same date. In his report dated March 13, 2024, Dr. McIlveen recounted that following his employment injury, appellant was unable to lift his right arm due to pain. He then noted that appellant's magnetic resonance imaging (MRI) scan performed on October 4, 2018, revealed a massive right shoulder rotator cuff tear. Dr. McIlveen further explained that appellant's disability was due to his inability to lift his arm more than 90 degrees in a forward elevation plane and to abduct more than 90 degrees on the right which he observed during his December 2020 medical evaluation. He related that there was marked weakness of rotator cuff strength. Dr. McIlveen explained that his condition not only caused pain with normal activities of daily living, but also prevented any use of the arm above the horizontal level, including reaching upward and outward, and a marked lack of power for any physical work. Based on these findings and his examination findings, he opined that appellant was disabled from performing his usual work activity due to his accepted right shoulder condition.

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 for the development of the evidence and to see that justice is done.¹³

While the Board finds that the reports from Dr. McIlveen are insufficient to establish the claim, they are sufficient to require further development of the medical evidence.¹⁴

The case shall therefore be remanded for OWCP to refer appellant, along with the case record, and a statement of accepted facts, to a specialist in the appropriate field of medicine for an opinion regarding causal relationship. If the physician opines that appellant was not disabled after October 24, 2018 due to his accepted right rotator cuff tear, he or she must provide a rationalized explanation as to why their opinion differs from those articulated by Dr. McIlveen. After this and other such further development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹³ See *A.K.*, Docket No. 20-1426 (issued March 8, 2021); *B.C.*, Docket No. 15-1853 (issued January 19, 2016); *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁴ See *A.G.*, Docket No. 20-0454 (issued October 29, 2020); see *A.K.*, *id.*; *C.G.*, Docket No. 20-1121 (issued February 11, 2021); *J.D.*, Docket No. 18-0279 (issued January 6, 2020); *K.P.*, Docket No. 18-0041 (issued May 24, 2019); *M.K.*, Docket No. 17-1140 (issued October 18, 2017); *G.C.*, Docket No. 16-0666 (issued March 17, 2017); *John J. Carlone*, *id.*; *Horace Langhorne*, 29 ECAB 280 (1978).

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2025 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: April 17, 2025
Washington, DC

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

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

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