

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

<p>R.K., Appellant</p> <p>and</p> <p>U.S. POSTAL SERVICE, POST OFFICE, San Antonio, TX, Employer</p>	<p>)))))))</p>	<p>Docket No. 23-0729</p> <p>Issued: June 10, 2025</p>
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Appearances:

Stephanie Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 25, 2023 appellant, through counsel, filed a timely appeal from a January 26, 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 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 January 26, 2023 decision, OWCP received additional evidence. 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 OWCP properly denied authorization for right shoulder and cervical surgical procedures; and (2) whether OWCP properly denied authorization for continued physical therapy.

FACTUAL HISTORY

On May 18, 2020 appellant, then a 46-year-old postal collection and delivery assistant, filed a traumatic injury claim (Form CA-1) alleging that on May 15, 2020 she sustained right wrist, arm, shoulder, and right side head injuries, when a door she was attempting to open broke off a hinge causing her to fall to the ground, while in the performance of duty. OWCP accepted the claim for thoracic radiculopathy, rib strain, right shoulder rotator cuff tendon and muscle strain, right shoulder joint derangement, neck strain of the fascia and tendon muscles, and cervical disc disorder with myelopathy. It paid appellant wage-loss compensation on the supplemental rolls commencing June 25, 2020, on the periodic rolls commencing August 16, 2020, and again on the supplemental rolls from October 9 through 27, 2022.

In a report dated August 18, 2020, Dr. Russell Jackson, an osteopathic Board-certified orthopedic surgeon, diagnosed right shoulder impingement syndrome. He reviewed a May 27, 2020 magnetic resonance imaging (MRI) scan which reported mild biceps tenosynovitis, intact rotator cuff, and no significant arthritis. Appellant's physical examination revealed tenderness on palpation of the right upper extremity posterior parascapular muscles, positive Neer impingement, and Hawkins; discomfort on rotator cuff -- empty can, negative O'Brien's, and no instability. Dr. Jackson noted treatment options including surgery were discussed with appellant. He recommended that she continue with physical therapy.

On May 21, July 6, August 13, and September 28, 2020, Dr. Thomas E. Martens, an osteopathic physician specializing in family medicine, referred to appellant for physical rehabilitation services.

In reports dated August 13 and September 28, 2020, Dr. Martens noted appellant's history of injury and diagnosed sprain of ribs; thoracic radiculopathy; right shoulder rotator cuff muscle/tendon strain; right shoulder joint derangements; neck muscle, fascia, and tendon strain; and cervical disc disorder without myelopathy. On physical examination he reported decreased cervical and right upper extremity range of motion (ROM) and strength. Under medical rationale for physical rehabilitation, Dr. Martens explained that appellant had responded well to therapy as demonstrated by an increase in strength and ROM since her last examination.

In a report dated August 21, 2020, Dr. Jordan J. Jude, a Board-certified neurosurgeon, noted appellant's May 5, 2020 employment injury, reviewed her medical history, and performed a physical examination. On examination he reported right cervical paraspinous muscle tenderness on palpation, no midline cervical spinous processes tenderness on palpation, limited cervical ROM, full upper extremity ROM, no upper extremity joint dislocations or subluxations, left upper extremity weakness with 4/5 strength, 4+/5 left biceps, and normal upper extremity muscle tone. A review of a May 27, 2020 MRI scan showed C3-4 through C6-7 herniated nucleus pulposus (HNP) and C3-4 through C5-6 anterior cord compression. Dr. Jude also reviewed x-rays dated

August 17, 2020 showing a one-millimeter anterolisthesis of C3 on C4 in flexion. He diagnosed right upper extremity myeloradicular syndrome, which he opined was most likely due to her C6-7 HNP and possible C3-6 herniated discs. Dr. Jude recommended C3-7 anterior cervical discectomy fusion surgery based on examination findings of significant weakness and spinal cord compression.

In a report dated September 4, 2020, Dr. Guy R. Fogel, a Board-certified orthopedic surgeon, noted appellant's medical course, reviewed diagnostic and medical reports, and provided physical examination findings. He diagnosed cervical radiculopathy, cervical stenosis, and acquired cervical spondylolisthesis. Dr. Fogel recommended artificial disc replacement at C6-7 and C5-6 instead of fusion.

Dr. Fogel, in a report dated September 18, 2020 report, noted that appellant related that her neurosurgeon recommended 4 level cervical fusion. He opined that she did not have any foramen compression. Dr. Fogel related that he could treat appellant's foraminal stenosis, which was due to the C5-7 joint hypertrophy, with an artificial disc at two levels, C5-7.

In a report dated November 2, 2020, Dr. Martens reiterated appellant's diagnoses. On physical examination he reported decreased cervical and right upper extremity ROM and strength. Dr. Martens reviewed a May 27, 2020 cervical MRI scan noting disc protrusion with thecal sac impingement, superior subligamentous migration, mild-to-moderate right paracentral stenosis, C3-4 posterior central disc protrusion with thecal sac impingement, C4-5 posterolateral asymmetric disc bulge with mild-to-moderate right foraminal stenosis, and C6-7 right paracentral mild-to-moderate stenosis and mild-to-moderate right foraminal stenosis. Under medical rational for physical rehabilitation, he explained that appellant had responded well to therapy as demonstrated by an increase in strength and ROM since her last examination. Dr. Martens noted that she was waiting for approval for cervical surgery.

Dr. Martens referred appellant for physical rehabilitation services two times per week for six weeks, which included ultrasound, electrical stimulation, therapeutic exercise, kinetic activity, and manual therapy on August 13, September 28, and November 2, 2020.

In follow-up notes dated November 23, 2020 and January 7, 2021, Dr. Jackson provided examination findings and diagnosed right shoulder impingement syndrome. He recommended surgical management due to the failure conservative treatment.

On January 7, 2021 OWCP referred appellant, the case file, a statement of accepted facts (SOAF), and a series of questions to Dr. Charles W. Kennedy, Jr., a Board-certified orthopedic surgeon, for a second opinion examination and opinion regarding appellant's ability to return to work, work tolerance limitations, and treatment plan.

In a report dated February 22, 2021, Dr. Kennedy, based upon a review of the SOAF, and appellant's medical records, and physical examination, opined that her work-related conditions had not resolved. He noted that her current physical examination findings included moderate cervical ROM, negative Homan's and Spurlings, decreased sensation on the lateral aspect of the right arm and fingertips, and no atrophy. A review of diagnostic tests taken in the emergency room following appellant's injury showed cervical multilevel degenerative changes, which he opined

was preexisting. Dr. Kennedy reviewed a shoulder MRI scan which reported biceps tendinitis and a cervical May 27, 2020 MRI scan showing multilevel degenerative changes, which he opined were preexisting. He opined that appellant was not a candidate for cervical or right shoulder surgeries. Dr. Kennedy recommended an active home exercise program with a home pulley and an electromyograph study. He found appellant capable of performing a sedentary job for four hours per day, for the next 120 days with restrictions.

In a report dated April 14, 2021, Dr. Martens reviewed Dr. Kennedy's report and expressed his disagreement with his conclusion that appellant was not a candidate for surgery as cervical surgery had been recommended by two neurosurgeons who had examined her. Specifically, he noted her right upper extremity weakness was not just subjective as deficits were noted in testing used for her rehabilitation, an electromyogram/nerve conduction study (EMG/NCV) showed bilateral C7 and C6 cervical radiculopathy and moderate bilateral wrist medial neuropathy. Dr. Jackson recommended that appellant undergo shoulder surgery because she had not shown improvement with rehabilitation and injections.

In a periodic report of even date, Dr. Martens reiterated findings from prior reports. He found that appellant continued to be totally disabled due to the accepted conditions and recommended continuing with rehabilitation. Dr. Martens also recommended expansion of the acceptance of her claim to include post-traumatic stress disorder (PTSD), anxiety, and panic attacks.

In a report dated February 2, 2022 report, Dr. Kyriakos Tsalamandris, an emergency medical specialist. This report noted that appellant was seen for a follow-up evaluation for her work-related cervical, right shoulder, and upper extremity injuries. Dr. Tsalamandris recommended continuing with rehabilitation twice a week, and expansion of her claim to include PTSD disorder, anxiety and panic attacks. He diagnosed right shoulder joint derangement, cervical intervertebral disc disorder with myelopathy, mood disorder with depressive, sprain of ribs, right shoulder rotator cuff tear, neck strain, thoracic radiculopathy, and cervical disc disorder.

On March 18, 2022 OWCP referred appellant to Dr. Daniel Valdez, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Martens, appellant's treating physician, and Dr. Kennedy, an OWCP second opinion physician, as to whether appellant required further medical treatment, whether she was a candidate for cervical and right shoulder surgeries, whether her accepted conditions were still active or had resolved, and whether she was capable of limited-duty work.

In a report dated April 6, 2022, Dr. Valdez reviewed the medical record, the SOAF, noted appellant's accepted conditions, and conducted a physical examination. On physical examination, he reported no arm, forearm, wrist, or thenar atrophy, negative Spurling's, no cervical radicular signs, normal bilateral shoulder strength, and negative bilateral shoulder anterior and posterior stress tests. Dr. Valdez opined that right shoulder surgery was not warranted. In support of this conclusion, he explained that appellant's May 27, 2020 right MRI scan revealed no muscle atrophy or edema and mild biceps tenosynovitis, which was indicative that no damage had occurred from the accepted May 15, 2020 employment injury, and surgery should not be authorized for subjective complaints alone. Dr. Valdez opined that cervical surgery was not warranted based on his examination findings, and the lack of any findings of an acute injury or anatomic changes in either

the August 17, 2020 cervical x-ray or the September 10, 2020 cervical MRI scan. He also opined that the work-related conditions had resolved due to the lack of any examination findings and his review of the objective tests. Dr. Valdez concluded that appellant was capable of performing her date-of-injury job without restrictions, but advised that she may have limitations due to nonwork-related conditions.

In a letter dated July 19, 2022, OWCP noted it had received a request for physical therapy noting that it had authorized physical therapy commencing September 28, 2020 and continuing. It noted that appellant had received physical therapy for an extended period of time with no increased function or decrease in the level of disability. OWCP informed her that further physical therapy was not authorized until additional medical evidence was submitted describing the specific modalities that were being prescribed and a statement of her progress which could be attributed to the therapy already provided.

Dr. Martens continued to submit reports recommending continued physical therapy as appellant continued to improve following therapy.

By decision dated September 22, 2022, OWCP denied authorization for right shoulder and cervical surgeries.

By a second decision also dated September 22, 2022, OWCP denied authorization for physical therapy.

On October 20, 2022 appellant, through counsel, requested review of the written record by the Branch of Hearings and Review.

By decision dated January 26, 2023, OWCP's hearing representative affirmed the September 22, 2022 decisions.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of FECA⁴ provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed by or 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 the amount of the monthly compensation.⁵ While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.⁶

⁴ 5 U.S.C. § 8103(a).

⁵ *Id.*; see *V.A.*, Docket No. 21-1023 (issued March 6, 2023); *D.S.*, Docket No. 18-0853 (issued May 18, 2020); *L.D.*, 59 ECAB 648 (2008); *Thomas W. Stevens*, 50 ECAB 288 (1999).

⁶ *V.A.*, *id.*; *M.P.*, Docket no. 19-1557 (issued February 24, 2020); *M.B.*, 58 ECAB 588 (2007).

Section 10.310(a) of OWCP's implementing regulations provide that an employee is entitled to receive all medical services, appliances, or supplies which a qualified physician prescribes or recommends and which OWCP considers necessary to treat the work-related injury.⁷

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.⁸ OWCP has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible, in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal.⁹

Abuse of discretion is 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.¹⁰

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 impartial medical examiner (IME) who shall make an examination.¹¹ In situations where the case is properly referred to an 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.¹²

ANALYSIS -- ISSUE 1

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

OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Martens, an attending physician, and Dr. Kennedy, an OWCP second opinion physician, as to whether appellant was a candidate for cervical and right shoulder surgeries to treat her accepted conditions. In order to resolve the conflict, it properly referred appellant pursuant to section 8123(a) of FECA, to Dr. Valdez, for an impartial medical examination and an opinion on the matter. As noted in situations where the case is referred to an IME for the purpose of resolving

⁷ 20 C.F.R. § 10.310(a); *see V.A.*, *id.*; *D.W.*, Docket No. 19-0402 (issued November 13, 2019).

⁸ *V.A.*, *id.*; *B.I.*, Docket No. 18-0988 (issued March 13, 2020); *see also Daniel J. Perea*, 42 ECAB 214, 221 (1990) (Thomas, Alternate Member, dissenting)

⁹ *E.F.*, Docket No. 20-1680 (issued November 10, 2021); *D.S.*, *supra* note 5.

¹⁰ *Id.*; *P.L.*, Docket No. 18-0260 (issued April 14, 2020); *L.W.*, 59 ECAB 471 (2008); *Daniel J. Perea*, *supra* note 8.

¹¹ 5 U.S.C. § 8123(a); *see A.R.*, Docket No. 21-0907 (issued February 24, 2023); *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).

¹² *See A.R.*, *id.*; *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

a medical conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³

In his April 6, 2022 report, Dr. Valdez noted the accepted conditions, reviewed diagnostic tests, and provided examination findings. He related that appellant's physical examination indicated no cervical radicular signs, normal bilateral shoulder strength, negative bilateral shoulder anterior and posterior stress tests, and negative Spurlings. Dr. Valdez opined that right shoulder surgery was not warranted as her May 27, 2020 MRI scan was indicative that no damage had occurred due to the accepted May 15, 2020 employment injury. Similarly, he opined that cervical surgery was not warranted due to the lack of any findings of anatomic changes or acute injury in the September 10, 2020 MRI scan and August 17, 2020 x-ray. The Board finds that Dr. Valdez provided a well-rationalized medical opinion that cervical and right shoulder surgeries were not necessary to treat appellant's accepted employment conditions, and the special weight of the medical opinion evidence on this matter rests with his opinion.

As the medical evidence of record fails to support that the requested cervical and right shoulder surgeries are medically necessary and causally related to the accepted employment injury, the Board finds that OWCP did not abuse its discretion by denying authorization.¹⁴

LEGAL PRECEDENT -- ISSUE 2

OWCP procedures provide:

“For most orthopedic injuries, PT [physical therapy] services within the first 120 days after a traumatic injury are allowed without any prior authorization required, and it is also customary to automatically authorize PT postoperatively for orthopedic surgeries, usually for a period of 60 days postsurgery. If a request for therapy beyond these time frames is received, OWCP needs to review the file to determine whether further services should be authorized.”¹⁵

To determine whether a claimant requires physical therapy beyond the initial authorization period, OWCP reviews the record to determine whether the need for physical therapy is due to the accepted work injury and whether the additional therapy is expected to yield functional improvement. Additionally, its procedures provide, “To authorize additional physical therapy for pain or to maintain function, OWCP should ensure that the pain is associated with measurable objective findings such as muscle spasm, atrophy and/or radiologic changes in joints, muscles, or bones, or that pain has placed measurable limitations upon the claimant’s physical activities.”¹⁶

¹³ *Id.* See also H.N., Docket No. 18-0501 (issued February 20, 2020).

¹⁴ See *V.A. supra* note 5; D.S., Docket No. 18-0353 (issued May 18, 2020); L.D., 59 ECAB 648 (2008); *Thomas W. Stevens*, 50 ECAB 288 (1999).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Physical Therapy*, Chapter 2.810.19 (September 2010).

¹⁶ *Id.*

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied authorization for continued physical therapy treatments.

As noted above, OWCP properly referred appellant to Dr. Valdez to resolve the conflict in the medical opinion evidence, including whether her accepted conditions were still active and required continued treatment, or had resolved. Dr. Valdez, in his April 6, 2022 report, concluded that her accepted conditions had resolved due to the lack of any examination findings and his review of the objective tests.

In situations where the case is referred to an IME for the purpose of resolving a medical conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁷ Dr. Valdez had full knowledge of the relevant facts and evaluated the course of appellant's condition, and his opinion was based on proper factual and medical history.¹⁸ He accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached a conclusion that no further treatment was needed for the accepted conditions because they had resolved.¹⁹ Dr. Valdez' opinion, is entitled to special weight and establishes that OWCP has not abused its discretion in denying appellant's request for additional physical therapy.²⁰ The Board thus finds that his opinion represents the special weight of the evidence, and OWCP properly relied on his report in denying authorization for the requested physical therapy.

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 OWCP properly denied authorization for right shoulder and cervical surgeries and for continued physical therapy.

¹⁷ *F.R.*, Docket No. 21-0557 (issued January 11, 2022); *H.N.*, Docket No. 18-0501 (issued February 20, 2020).

¹⁸ See 5 U.S.C. § 8123(a); *F.R.*, *id.*; *J.E.*, Docket No. 18-0228 (issued August 8, 2019); *Solomon Polen*, 51 ECAB 341 (2000)

¹⁹ *Id.*

²⁰ See *F.R.*, *supra* note 17; *D.D.*, Docket No. 09-1603 (issued April 8, 2010).

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 10, 2025
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