United States Department of Labor
Employees' Compensation Appeals Board

M.R., Appellant	)	
and	)	**Docket No. 17-0671**
	)	**Issued: June 27, 2018**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Minneapolis, MN, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 3, 2017 appellant, through counsel, filed a timely appeal from a December 15, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 that her right shoulder condition is causally related to the accepted September 6, 2014 employment incident.

FACTUAL HISTORY

On November 9, 2015 appellant, a 45-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right shoulder injury on September 6, 2014 in the performance of duty. She stated that she was helping a patient sit on his bed and felt a pop in her right shoulder. Appellant did not stop work.

In a November 23, 2015 development letter, OWCP advised appellant of the deficiencies of her claim and afforded her 30 days to submit additional evidence and respond to its inquiries.

In response, appellant submitted a November 4, 2015 report from an unidentifiable healthcare provider who noted that the date of injury was September 1, 2014 and diagnosed work-related upper back pain and right hand paresthesias.

Appellant also submitted December 7, 2015 reports from Dr. Claire A. Saad, a Board-certified family practitioner, who diagnosed a work-related right shoulder injury and ordered a magnetic resonance imaging (MRI) scan. Dr. Saad noted that appellant presented for a follow-up of a September 6, 2014 injury sustained while she was helping a patient at work. She reported that appellant's pain had improved and then restarted again in September 2015 after she started helping patients who were in need complete care. Dr. Saad reported that appellant's pain radiated to her right arm and she experienced occasional numbness in the arm, as well.

By decision dated December 28, 2015, OWCP denied the claim, finding that the medical evidence of record failed to establish that the claimed incident occurred as alleged.

On February 2, 2016 appellant requested an oral hearing by a representative of OWCP's Branch of Hearings and Review. She submitted a January 28, 2016 narrative statement and a partial MRI scan report dated February 8, 2016 in support of her claim. Appellant further submitted a December 21, 2015 attending physician's report (Form CA-20) from Dr. Saad who reiterated her diagnosis of right shoulder injury and checked a box marked "yes" indicating her opinion that appellant's condition was causally related to a September 6, 2014 employment incident. On February 9, 2016 Dr. Saad opined that appellant was capable of working with no lifting until she was seen by orthopedics.

In a February 10, 2016 report, Dr. Patrick O'Keefe, a Board-certified orthopedic surgeon, diagnosed right shoulder rotator cuff tear and advised appellant to avoid painful activities and referred her to physical therapy.

On February 10, 2016 appellant requested a review of the written record in lieu of an oral hearing.

By decision dated February 24, 2016, OWCP denied appellant's request for an oral hearing because it was untimely filed. It further indicated that it had exercised its discretion and further

denied her request for the reason that the relevant issue of the case could be equally addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

On March 10, 2016 appellant again requested reconsideration and submitted physical therapy reports dated February 18 and March 1, 10, 17, 24, and 31, 2016. She also submitted a hospital report dated March 7, 2016 regarding an urgent care visit for a right leg injury.

By decision dated June 8, 2016, OWCP accepted that the September 6, 2014 employment incident occurred as alleged, but denied the claim because the medical evidence of record failed to establish causal relationship between appellant's diagnosed condition and the accepted September 6, 2014 work incident.

On June 27, 2016 appellant requested reconsideration and resubmitted a December 21, 2015 attending physician's report (Form CA-20) from Dr. Saad who further indicated that appellant had a right rotator cuff tear due to a work-related injury while helping a patient on September 6, 2014. She further submitted a complete version of the February 8, 2016 MRI scan report which demonstrated a right shoulder rotator cuff tear.

By decision dated July 11, 2016, OWCP denied modification of its prior decision.

On September 23, 2016 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In a December 5, 2014 report, Dr. Steven Kirkhorn, a Board-certified occupational medicine specialist, diagnosed work-related right shoulder pain. He opined that appellant's pain was mostly likely a simple supraspinatus muscle strain without a source of acute injury. A physical examination revealed no evidence of right shoulder impingement, tendinopathy, rotator cuff impairment, or instability. There was no clinical evidence of rotator cuff tear, bicipital subluxation, or acromioclavicular strain. Dr. Kirkhorn released appellant to work without restrictions that same day or next shift.

On November 4, 2015 a physician assistant asserted that appellant was seen for a follow-up for a work injury dated October 1, 2014 when she was trying to help a patient sit on the bed and diagnosed back strain and right hand paresthesia.

In two reports dated June 24, 2016, Dr. Karyn Leniek, a Board-certified occupational and preventative medicine specialist, diagnosed right supraspinatus tendon tear and chronic right shoulder pain. She noted that appellant sustained a right shoulder injury in August 2014 at work when she was helping an overweight patient. The patient was unable to sit on his own and, as appellant was assisting him, she outstretched her right arm and he pulled down on it. Appellant felt a pop, but did not experience an immediate onset of pain. A "couple of months" later she started having pain in her right shoulder. Appellant went back to work in a telemetry unit for approximately three months and her pain went away. When she returned to her regular unit, which required more patient handling, she started having right shoulder pain again in September 2015. Appellant reported caring for two patients who were total care and indicated her belief that this may have aggravated her shoulder. Upon physical examination, Dr. Leniek found no swelling, full passive range of motion, and negative Neers and Hawkins signs. She reviewed appellant's medical records and opined that her right shoulder injury was "more likely than not related to

work." Dr. Leniek explained to appellant that she did not see the need for permanent reassignment and provided work restrictions.

On June 29, 2016 Dr. O'Keefe continued to diagnose right shoulder rotator cuff tear and recommended surgical intervention.

In a July 21, 2016 progress report, Dr. Saad noted that appellant's right shoulder pain was improving and explained that she could not alter work restrictions provided by occupational medicine.

In progress reports dated July 29, September 23, and October 14, 2016, Dr. Leniek continued to diagnose right shoulder pain with rotator cuff tear on MRI scan and opined that appellant's work contributed to the rotator cuff tear, more specifically that the popping incident at work was the sole cause of the rotator cuff tear. She indicated that, while appellant's symptom of right shoulder pain was delayed "by a couple weeks," she still only had one episode at work that could have caused the tear and continued to do a physically demanding job. Dr. Leniek noted that appellant's numbness and tingling of the hands was more likely due to carpal tunnel syndrome than from the shoulder injury.

By decision dated December 15, 2016, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

A claimant seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.[4]

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[5] The second component is whether the employment incident caused a personal injury.[6] An employee may establish that an injury occurred in the performance of duty as alleged,

[3] *Id.*

[4] 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

[5] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background. *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s). *Id.*

but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[7]

Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA.[8] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that her right shoulder condition is causally related to the accepted September 6, 2014 employment incident.

The February 8, 2016 MRI scan confirmed the diagnosis of right shoulder rotator cuff tear. However, this diagnostic study does not address the etiology of appellant's right shoulder condition. With respect to the November 4, 2015 report diagnosing work-related upper back pain and right hand paresthesias, the Board notes that this report is unsigned and does not specifically address the cause of her conditions. The hospital report dated March 7, 2016 is related to an urgent care visit due to a right leg injury; it does not address appellant's claim for a right shoulder condition. Appellant also submitted evidence from a physician assistant and physical therapists. These documents do not constitute competent medical evidence because neither physician assistants nor physical therapists are considered physicians as defined under FECA.[9] Consequently, the above-noted evidence is insufficient to meet appellant's burden of proof.[10]

In her reports, Dr. Leniek diagnosed right rotator cuff tear and opined that appellant's condition was causally related to helping an overweight patient. She indicated that the patient was unable to sit on his own and, as appellant was assisting him, she outstretched her right arm and he pulled down on it. Appellant felt a pop, but did not experience an immediate onset of pain. She returned to work in a telemetry unit for approximately three months and then reported right shoulder pain again in September 2015 after going back to work in her regular unit, which required more patient handling and total care of two patients in particular. Dr. Leniek noted that, while appellant's symptom of right shoulder pain was delayed by "a couple weeks," she still only had one episode at work that could have caused the tear and continued to do a physically demanding job. She opined that appellant's work contributed to the rotator cuff tear, more specifically that the popping incident at work was the sole cause of the rotator cuff tear. However, the fact that a condition manifests itself during a period of employment is not sufficient to establish causal

[7] *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[8] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[9] 5 U.S.C. § 8101(2); *Sean O'Connell*, 56 ECAB 195 (2004) (physician assistants); *Jennifer L. Sharp*, 48 ECAB 209 (1996) (physical therapists). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

[10] *See supra* notes 3 to 8.

relationship.[11] Temporal relationship alone will not suffice.[12] Dr. Leniek's reports did not include sufficient medical rationale explaining how the September 6, 2014 patient incident either caused or contributed to appellant's diagnosed right rotator cuff tear. For these reasons, the Board finds that her medical opinions are insufficient to establish that appellant's diagnosed right shoulder condition is causally related to the September 6, 2014 work incident.

The earliest report was from Dr. Saad who diagnosed right rotator cuff tear due to a helping a patient at work on September 6, 2014. She indicated that appellant's pain had improved and then restarted again in September 2015 after appellant started helping patients who needed complete care. The Board finds that Dr. Saad failed to provide sufficient medical rationale explaining how helping a patient sit on September 6, 2014 either caused or contributed to appellant's right shoulder condition. A physician's opinion must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).[13] Thus, the Board finds that Dr. Saad's reports are insufficient to establish that appellant sustained an employment-related injury on September 6, 2014.

In his reports, Dr. O'Keefe diagnosed right shoulder rotator cuff tear and recommended surgical intervention. Nevertheless, the Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[14] Therefore, this evidence is insufficient to establish that appellant sustained an employment-related injury.

Dr. Kirkhorn diagnosed work-related right shoulder pain and opined that it was mostly likely a simple supraspinatus muscle strain without a source of acute injury. The Board finds that his report is of limited probative value as it fails to address whether the accepted September 6, 2014 employment incident caused a diagnosed condition.[15] Thus, appellant has not met her burden of proof with this evidence.

As appellant has not submitted rationalized medical evidence sufficient to establish her claim that she sustained a right shoulder injury causally related to the September 6, 2014 employment incident, she has failed to meet her burden of proof to establish entitlement to FECA benefits.

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.

[11] 20 C.F.R. § 10.115(e).

[12] *See D.I.*, 59 ECAB 158, 162 (2007).

[13] *Victor J. Woodhams*, *supra* note 6.

[14] *See C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[15] *See P.S.*, Docket No. 12-1601 (issued January 2, 2013). The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that her right shoulder condition is causally related to the accepted September 6, 2014 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 27, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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