

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

D.P., Appellant)
)
and) **Docket No. 19-0394**
) **Issued: August 2, 2019**
U.S. POSTAL SERVICE, MAIN POST OFFICE,)
Grand Rapids, MI, Employer)
_____)

Appearances: *Case Submitted on the Record*
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 13, 2018 appellant, through counsel, filed a timely appeal from an October 24, 2018 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 a right shoulder condition causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

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

On March 1, 2016 appellant, then a 63-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that on December 30, 2015 she first realized that her right shoulder condition was due to prolonged repetitive use while performing her federal employment duties. She did not stop work.

In support of her claim appellant submitted medical reports Dr. Joseph Yacisen, an osteopath Board-certified in orthopedic surgery, as well as diagnostic testing reports.

By decision dated May 26, 2016, OWCP denied appellant's claim. It found the medical evidence of record was insufficient to establish causal relationship between appellant's diagnosed right shoulder supraspinatus and superior labral tears and the accepted factors of her federal employment.

On July 6, 2016 appellant requested reconsideration. In support of her request she submitted a brief note from Dr. Yacisen.

By decision dated September 29, 2016, OWCP denied modification finding the medical evidence of record did not contain a "firm and rationalized" opinion, supported by objective findings, establishing that appellant's right shoulder condition was causally related to the accepted employment factors.

On October 31, 2016 appellant, through counsel, appealed to the Board.

By decision dated May 18, 2017,⁴ the Board affirmed OWCP's September 29, 2016 decision finding that the evidence of record was insufficient to establish that appellant sustained a right shoulder condition causally related to the accepted factors of her federal employment.

In a December 7, 2016 form report, Dr. Yacisen responded to a series of questions on an OWCP form. He noted appellant's subjective complaints, detailed physical examination findings, and provided findings based upon x-ray review. In response to the question regarding diagnosis, Dr. Yacisen noted status post right shoulder video arthroscopy with anterior labral debridement/

³ Docket No. 17-0148 (issued May 18, 2017).

⁴ *Id.*

subacromial decompression/rotator cuff repair. As to causal relationship, he opined that the diagnosed conditions were caused by the employment activities described by appellant.

On July 17, 2017 appellant, through counsel, requested reconsideration with OWCP.

By decision dated October 19, 2017, OWCP denied modification finding Dr. Yacisen's December 7, 2016 form report failed to contain a rationalized opinion supported by objective findings establishing that the factors of appellant's federal employment caused or contributed to her right shoulder condition.

On September 17, 2018 appellant, through counsel, requested reconsideration. In support of her request, appellant submitted a September 14, 2018 report and forms covering the period February 24, 2012 to June 12, 2018 from Dr. Tamara R. Slusher, a chiropractor.

In the form reports, Dr. Slusher noted appellant's examination findings, medical history, and complaints regarding her neck, right arm/shoulder, lower back and knee conditions. She noted appellant's description of occupational and traumatic injuries in the 2012 report. In the September 14, 2018 report, Dr. Slusher noted that appellant had been a patient since February 2012 and received bimonthly treatment to increase range of motion and reduce pain, inflammation, vertebral subluxation complex, and tenderness. She diagnosed cervical, lumbar, pelvic, and right upper extremity subluxations, ilium internal rotation, osteophytic formation and inflammation, disc involvement, and edema. Dr. Slusher summarized appellant's job duties, which appellant had claimed were the cause of her pain. Dr. Slusher noted the extent of chiropractic treatment provided and opined that appellant's pain was due to her employment activities.

By decision dated October 24, 2018, OWCP denied modification of its October 19, 2017 decision finding that appellant had provided a rationalized medical opinion sufficient to meet her burden of proof to establish that the accepted factors of her federal employment had caused or aggravated her diagnosed right shoulder condition.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact 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 period 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

⁵ *C.B.*, Docket No. 19-0175 (issued May 8, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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 establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;⁸ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;⁹ and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.¹⁰

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.¹⁰ 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 diagnosed condition and the specific employment factors identified by the employee.¹¹ Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹²

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a right shoulder condition causally related to the accepted factors of her federal employment.

OWCP accepted that appellant performed repetitive work as part of her employment as a rural carrier. It denied her claim, however, because the evidence of record failed to establish causal relationship between the accepted factors of her federal employment and her diagnosed right shoulder condition.

Preliminarily, the Board notes that it is unnecessary for it to consider the evidence appellant submitted prior to the issuance of OWCP's September 29, 2016 decision because the Board

⁶ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *C.B.*, *supra* note 5; *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *Michael R. Shaffer*, 55 ECAB 501 (2004).

⁹ *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

¹⁰ *J.G.*, Docket No. 18-1484 (issued June 14, 2019); *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹¹ *L.D.*, *id.*; *see also Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹² *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

considered that evidence in its May 18, 2017 decision and found it insufficient to establish causal relationship. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹³

In support of her claim appellant submitted a December 7, 2016 form report from Dr. Yacisen diagnosing her status post right shoulder video arthroscopy with anterior labral debridement/subacromial decompression/rotator cuff repair. He opined that the diagnosed conditions had been caused by the work activities described by appellant. The Board has held that a mere conclusion without the necessary rationale explaining how work activities could result in the diagnosed conditions is insufficient to meet appellant's burden of proof.¹⁴ Dr. Yacisen's opinion is of limited probative value as it does not contain medical rationale explaining how appellant's job duties physiologically caused the diagnosed shoulder conditions.¹⁵

Appellant also submitted a medical report and a series of form reports from Dr. Slusher, a chiropractor. Section 8101(2) of FECA provides that chiropractors are considered physicians only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation by x-ray to exist and subjection to regulation by the Secretary.¹⁶ As Dr. Slusher did not diagnose a spinal subluxation by x-ray, her reports are not considered medical evidence.¹⁷

As appellant has not submitted rationalized medical evidence to establish a right shoulder condition causally related to the accepted employment factors, she has not met her burden of proof.

On appeal counsel asserts that the claim should have been accepted for subluxations. As discussed above, Dr. Slusher could not be considered a physician under FECA as she failed to diagnose a subluxation by x-ray and there is no other medical evidence sufficient to establish the claim.

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.

¹³ See *M.M.*, Docket No. 18-1366 (issued February 27, 2019); *E.L.*, Docket No. 16-0635 (issued November 7, 2016); *R.L.*, Docket No. 15-1010 (issued July 21, 2015). See also *A.P.*, Docket No. 14-1228 (issued October 15, 2014).

¹⁴ *J.J.*, Docket No. 18-1545 (issued February 22, 2019); *M.G.*, Docket No. 18-0654 (issued October 17, 2018); *L.J.*, Docket No. 17-1993 (issued March 13, 2018); *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹⁵ See *B.H.*, Docket No. 18-1219 (issued January 25, 2019); *A.D.*, Docket No. 17-1136 (issued November 9, 2017).

¹⁶ 5 U.S.C. § 8101(2); see also 20 C.F.R. § 10.311(c) which provides: “[a] chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. OWCP will not necessarily require submittal of the x-ray, or a report of the x-ray, but the report must be available for submittal on request.”

¹⁷ *Id.*

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a right shoulder condition causally related to the accepted factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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