

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

J.H., Appellant

and

**DEPARTMENT OF THE AIR FORCE, HILL
AIR FORCE BASE, Clearfield, UT, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 19-0513
Issued: September 24, 2019**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 8, 2019 appellant, through counsel, filed a timely appeal from a December 7, 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.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 December 7, 2018 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish that the acceptance of her claim should be expanded to include cervical spine conditions consequential to her accepted November 8, 2005 employment injury.

FACTUAL HISTORY

On November 23, 2005 appellant, then a 33-year-old electrical equipment repairer, filed a traumatic injury claim (Form CA-1) alleging that on November 8, 2005 she injured her right shoulder when pulling the arm of a manual press while in the performance of duty. She stopped work on January 26, 2006. Appellant resigned from her position effective January 27, 2006. OWCP accepted her claim for right shoulder impingement syndrome; right shoulder tendinitis; and right shoulder partial rotator cuff tear. Appellant initially received wage-loss compensation and medical benefits on the supplemental rolls and then received compensation benefits on the periodic rolls as of August 3, 2008.⁴ She returned to private sector employment in September 2009.

Appellant underwent OWCP authorized right shoulder surgeries on June 15, 2006, September 25, 2007, and February 28 and July 31, 2008, which were performed by Dr. Brent Thomas Watson, a Board-certified orthopedic surgeon.

In May 2010, appellant developed severe neck, right shoulder and right arm pain and was diagnosed with cervical disc herniation at C6-7. On June 28, 2010 Dr. Richard I. Zipnick, a Board-certified orthopedic surgeon, performed cervical spine surgery with anterior cervical discectomy and fusion at C6-7. OWCP developed the issue of whether her cervical disc herniation at C6-7 and surgery were causally related to the accepted November 8, 2005 employment injury by either direct cause, aggravation, precipitation, or acceleration. It did not authorize appellant's June 28, 2010 cervical spine surgery or a 2014 left shoulder surgery.

In a May 10, 2011 report, Dr. Aubrey Swartz, a Board-certified orthopedic surgeon and OWCP referral physician, opined that there was no evidence that appellant's cervical disc herniation was causally related to the November 8, 2005 employment injury.

In an October 7, 2014 report, Dr. Michael E. Callahan, another Board-certified orthopedic surgeon and OWCP referral physician, opined that appellant's cervical disc herniation at C6-7 and resultant surgery was not causally related to the November 8, 2005 employment injury. He noted that appellant had a spontaneous onset of right upper extremity radicular pain in 2009 essentially four years from the initial onset of her right shoulder pain with multiple right shoulder surgeries due to the employment injury. Dr. Callahan explained that there was no medical indication of a disc injury prior to 2009 and 2010, as appellant was working under restrictions, and there was no

⁴ By decision dated March 7, 2007, OWCP awarded appellant 16 percent permanent impairment of the right upper extremity. By decision dated October 8, 2009, it reduced her wage-loss compensation effective October 11, 2009 as she had the capacity to earn wages in the position as an office manager. By decision dated May 24, 2011, an OWCP hearing representative affirmed an October 27, 2010 decision that appellant had not established an additional schedule award beyond that already received.

causation for the cervical spine injury. He thus opined that the right shoulder dysfunction did not contribute in any way to the cervical spine C6-7 level disc herniation.

On May 26, 2015 appellant, through counsel, requested that her case be expanded to include adhesive capsulitis and cervical disc herniation at C6-7. In support of her claim, she submitted an April 20, 2015 report from Dr. Michael T. Giovanniello, a Board-certified physiatrist. Dr. Giovanniello opined that, within a reasonable degree of medical certainty, appellant's C6-7 disc herniation and resultant surgery occurred secondary to altered body mechanics from the accepted November 8, 2005 right shoulder injury due to the repetitive increased strain and stress through the cervical spine. He noted that there was specific documentation of right paracervical pain during appellant's first visit in April 2008, she had altered body mechanics as a result of the industrial-related right shoulder injury, and also had documented increased neck symptoms in January 2009 with a moderate disc herniation at C6-7. Dr. Giovanniello explained that her symptoms progressed and worsened in April 2010 secondary to the repetitive increased strain through the cervical spine and resulted in the C6-7 disc herniation. He also opined that the right shoulder injury caused adhesive capsulitis which resulted in significantly restricted range of motion with respect to the right shoulder. Secondary to this reduced range of motion, appellant had increased strain and stress through the cervical spine and the muscles of the cervical spine in order to perform functional activities. Dr. Giovanniello explained that over time, those mechanical changes resulted in increased repetitive strain and stress through the cervical spine and the C6-7 disc herniation.

OWCP again referred appellant for a second opinion examination to determine whether appellant's cervical condition was related to the accepted right shoulder injury. In a September 14, 2017 report, Dr. Terry A. Brown, a Board-certified physiatrist, disagreed with Dr. Giovanniello's opinion that the prominent bulging of C6-7 was related to abnormal mechanics resulting from appellant's initial shoulder injury. He opined that the time frame from the November 2, 2005 shoulder injury to the onset of the neck pain and ultimate discovery of prominent bulging disc at one level was too great for him to attribute, within a reasonable degree of medical certainty, that appellant's employment injury and subsequent surgeries contributed to the cervical disc conditions.

By decision dated October 3, 2017, OWCP denied appellant's request that acceptance of her claim should be expanded to include a cervical spine condition. It accorded determinative weight to the opinions of Drs. Brown, Callahan, and Swartz, OWCP's referral physicians.⁵

On October 9, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

In a January 15, 2018 report, Dr. Watson indicated that he was not convinced that appellant's November 8, 2005 employment injury did not involve her neck as well as her shoulder. He noted that from her initial visit she did not have classical shoulder symptoms, but had trapezial pain, rhomboid pain, periscapular pain and neck tightness. Dr. Watson indicated that there was concern on his part as to whether her injury was related to her "index injury" or a more longstanding problem which predated her 2005 claim, but there was nothing in the medical records

⁵ It noted that the claim was accepted for ankyloses of right shoulder joint, right biceps tendon rupture; complete right rotator cuff rupture, disorder of bursae and tendons of right shoulder; pes anserinus tendinitis, and sprain of right shoulder and rotator cuff.

which predated that timeframe. He indicated that causation was a difficult issue as appellant's symptoms were bimodal in their distribution from the beginning and her shoulder symptoms did not resolve completely with shoulder surgery. Dr. Watson opined that appellant had some contribution to her neck conditions due to shoulder weakness and that the compensatory changes to her shoulder would likely have contributed to her increased pain and periscapular pain. With regard to the bulging or herniated discs, he opined that this could have resulted from her "index injury" which had not required treatment or was not significant enough to require surgery until 2009.

Following a preliminary review, in a decision dated February 1, 2018, an OWCP hearing representative set aside OWCP's October 3, 2017 decision. The hearing representative found that a conflict of medical evidence existed between Dr. Giovanniello and the second opinion physicians which necessitated referral to an impartial medical examiner (IME).

In a letter dated March 13, 2018, OWCP advised appellant that a conflict in medical opinion existed between Dr. Brown, OWCP's second opinion examiner, and Dr. Giovanniello, appellant's treating physician, regarding whether her C6-7 disc herniation and subsequent surgery was causally related to her November 8, 2005 employment injury. It referred her, along with the case record, and a statement of accepted facts (SOAF) to Dr. Richard T. Knoebel, a Board-certified orthopedic surgeon, for an impartial medical examination.

OWCP requested that Dr. Knoebel address whether appellant's current cervical condition was caused, aggravated, precipitated, or accelerated by the effects of the accepted shoulder conditions or any treatment of the accepted injury as described in the SOAF. It attached definitions for these terms.

In an April 18, 2018 report, Dr. Knoebel noted the history of injury, his examination of appellant, the SOAFs and the medical records. He concluded that appellant's cervical condition, which manifested itself five years after the original employment injury in 2010 and had associated findings of right C6-7 disc herniation with resultant surgery could not have been reasonably caused, contributed to, aggravated by, accelerated, or precipitated by the November 8, 2005 employment injury. Dr. Giovanniello noted the medical records subsequent to the November 8, 2005 employment incident indicated that appellant had right trapezial pain and right-sided paracervical pain with negative Spurling sign for radiculopathy and with no objective evidence of neurologic abnormalities of the right upper extremity until her severe radicular pain noted in May 2010. Dr. Knoebel opined that Dr. Giovanniello's postulate that appellant's dysfunction and pain of the right shoulder resulted in biomechanical disorders which precipitated a cervical disc herniation was not supported by medical literature. He indicated that degenerative changes were seen frequently in the general population with, more often than not, no particular cause or precipitating event and that this was reasonably indicated for appellant. Dr. Knoebel also noted that there was no scientific literature which indicated an increased incidence of cervical disc herniation associated with shoulder injuries; rather, neck pain and problems were common in the general population. Thus, he concluded that appellant's onset of disc herniation with radiculopathy in May 2010 was reasonably nonindustrial.⁶

⁶ Dr. Knoebel also provided an opinion regarding appellant's onset of left shoulder pain in December 2012 with subsequent left shoulder surgery in January 2014.

By decision dated June 27, 2018, OWCP denied appellant's request to expand the acceptance of her claim to include the additional diagnoses of a cervical spine injury. It found that the special weight of the medical evidence rested with the opinion of Dr. Knoebel, who opined in his April 18, 2018 report that the right C6-7 disc herniation and subsequent surgery could not reasonably have been caused, contributed to, aggravated by, accelerated or precipitated by the November 8, 2005 employment injury.

On July 3, 2018 counsel requested a telephonic hearing before an OWCP hearing representative. A telephonic hearing was held on October 22, 2018.

In an August 20, 2018 letter, Dr. Giovanniello reiterated that appellant's cervical condition was causally related to the November 8, 2005 employment injury. He opined that the cervical condition was precipitated by altered body mechanics which resulted in increased strain and stress on the cervical spine. The increased strain and stress to the cervical spine eventually resulted in pain and ultimately a cervical disc herniation. Dr. Giovanniello also expressed his concern that Dr. Knoebel did not consider the effects of altered biomechanics from the right shoulder injury to the cervical spine.

By decision dated December 7, 2018, an OWCP hearing representative affirmed the June 27, 2018 decision. The hearing representative found that Dr. Knoebel's opinion carried the special weight of the medical opinion evidence.

LEGAL PRECEDENT

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁷

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁸ 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.⁹ 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).¹⁰

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to a claimant's own intentional misconduct.¹¹ Thus, a subsequent

⁷ *R.J.*, Docket No. 17-1365 (issued May 8, 2019); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

⁸ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

⁹ *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹⁰ *Id.*

¹¹ *See S.M.*, Docket No. 19-0397 (issued August 7, 2019); *Mary Poller*, 55 ECAB 483, 487 (2004); 1 Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation Law* 10-1 (2006).

injury, be it an aggravation of the original injury or a new and distinct injury is compensable if it is the direct and natural result of a compensable primary injury.¹²

Section 8123(a) of FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.¹³ For a conflict to arise the opposing physicians' viewpoints must be of virtually equal weight and rationale.¹⁴ Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.¹⁵

ANALYSIS

The Board finds that this case is not in posture for decision as there remains an unresolved conflict in medical opinion.

OWCP determined that a conflict in the medical opinion evidence was created between Dr. Giovanniello, appellant's treating physician, who opined that acceptance of appellant's claim should be expanded to include diagnosed cervical conditions (a disc herniation at C6-7 and C7 radiculopathy), and Dr. Brown, OWCP's referral physician, who concluded that there was no causal relationship between the November 8, 2005 employment injury and appellant's cervical conditions. Dr. Giovanniello opined that altered body mechanics from the accepted employment injury caused appellant's cervical condition, years after the initial injury, which suggests a consequential injury.

OWCP properly referred appellant to Dr. Knoebel for an impartial medical examination in order to resolve the conflict in medical evidence, pursuant to 5 U.S.C. § 8123(a).¹⁶ In an April 18, 2018 report, Dr. Knoebel noted his review of the SOAF and the medical record and provided examination findings. He concluded that appellant's cervical condition, which manifested itself five years after the original employment injury and had associated findings of right C6-7 disc herniation with resultant surgery could not reasonably been caused, contributed to, aggravated by, accelerated or precipitated by the November 8, 2005 employment injury. Dr. Knoebel noted that the medical records subsequent to the November 8, 2005 employment incident indicated that appellant had right trapezial pain and right-sided paracervical pain with negative Spurling's sign for radiculopathy and with no objective evidence of neurologic abnormalities of the right upper extremity. He related that the medical literature did not support that a right shoulder dysfunction resulted in biomechanical disorders which precipitated a cervical disc herniation. Dr. Knoebel also found that the medical literature did not support an increased incidence of cervical disc

¹² *S.M., id.; Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139, 141 n.7 (2001).

¹³ 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹⁴ *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

¹⁵ *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹⁶ *See K.C.*, Docket No. 18-0378 (issued June 18, 2019).

herniation associated with shoulder injuries. He thus concluded that appellant's onset of disc herniation with radiculopathy in May 2010 was reasonably nonindustrial.

While the Board finds that Dr. Knoebel's report is based on a proper factual background, it lacks the medical reasoning necessary to resolve the existing conflict of medical opinion evidence.¹⁷ He did not explain why appellant's accepted right shoulder conditions would not have caused altered body mechanics and a subsequent cervical condition.¹⁸ Moreover, while Dr. Knoebel referenced medical literature supporting his conclusion regarding causal relationship, he did not sufficiently explain how the medical literature applied to appellant's specific circumstances.¹⁹ To be entitled to the special weight, his opinion must contain clear, persuasive rationale on the critical issue in the claim.²⁰ However, Dr. Knoebel's report does not contain such rationale.

On remand OWCP should obtain a supplemental opinion from Dr. Knoebel regarding causal relationship between the November 8, 2005 employment injury and appellant's cervical conditions and whether she sustained a consequential cervical condition due to the November 8, 2005 employment injury. If Dr. Knoebel is unable or unwilling to elaborate on his conclusion regarding causal relationship, or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed SOAF to a new impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue.²¹ Following this and any other development deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

¹⁷ *D.B.*, Docket No. 17-1845 (issued February 16, 2018).

¹⁸ *See P.J.*, Docket No. 18-1738 (issued May 17, 2019).

¹⁹ *See A.G.*, Docket No. 18-0281 (issued July 12, 2018); *R.O.*, Docket No. 08-1133 (issued October 8, 2008); *William C. Bush*, 40 ECAB 1064, 1075 (1989) (excerpts from publications lack probative value in resolving medical questions unless a physician shows the applicability of the general medical principles discussed in the articles to the specific factual situation in a case).

²⁰ *A.R.*, Docket No. 17-1358 (issued February 1, 2018).

²¹ *See J.W.*, Docket No. 15-0020 (issued August 17, 2016); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: September 24, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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