

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

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 temporomandibular joint (TMJ) disorder as causally related to the accepted August 19, 2011 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁵ 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 October 5, 2011 appellant, then a 53-year-old temporary full-time lead biological science technician (plant), filed a traumatic injury claim (Form CA-1) alleging that on August 19, 2011 she sustained injuries to her head, neck, left shoulder, arm, elbow, and right little finger when a heavy trap door, which did not have a counter balance weight, fell on her as she was trying to open it while in the performance of duty. She also alleged that she reinjured her shoulder and back on September 21, 2011. OWCP accepted the claim for post-traumatic headache, face, scalp and neck contusions. Appellant stopped work on March 10, 2013 and has not returned. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing March 10, 2013 and on the periodic rolls effective October 20, 2013.

On March 24, 2015 OWCP expanded the acceptance of the claim to include concussion without loss of consciousness; anxiety; and lumbar sprain.

On November 2, 2015 appellant, through counsel, requested that the acceptance of the claim be expanded to include lumbar radiculopathy/sciatica; C5-6 spondylosis; C4-5 disc protrusion; TMJ disorder; and coccydynia.

Following further development, by decision dated December 13, 2017, an OWCP hearing representative affirmed the March 24, 2017 denial of the claim with regard to the conditions of coccydynia and TMJ disorder, but vacated and remanded the case to further develop appellant's request to expand the acceptance of her claim to include lumbar radiculopathy/sciatica, C5-6 spondylosis, and C4-5 disc protrusion.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the July 28, 2021 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.*

⁵ Docket No. 19-1506 (issued November 4, 2020).

By decision dated January 9, 2019, OWCP denied modification of its December 13, 2017 decision.

Appellant, through counsel, filed a timely appeal from the January 9, 2019 decision. By decision dated November 4, 2020, the Board found that appellant had not met her burden of proof to establish that the acceptance of her claim should be expanded to include the condition of coccydynia as causally related to the accepted August 19, 2011 employment injury. The Board further found that the case was not in posture for decision with regard to whether the acceptance of appellant's claim should be expanded to include the additional condition of TMJ disorder.⁶ The Board found that the November 1, 2018 report of Dr. Greg Grillo, DDS, a dentist, who opined that appellant's TMJ disorder and crossbite conditions were caused by the August 19, 2011 employment injury and not from aging, was a qualified medical provider who had rendered a rationalized opinion on the issue of causal relationship, that he had provided a comprehensive understanding of the medical records and case history, and that he had provided a pathophysiological explanation as to how the accepted employment incident could have caused or contributed to a shift in the alignment of appellant's teeth and TMJ. The Board further noted that the reports from Dr. Miranda M. Raiche, a Board-certified family practitioner, provided further support for Dr. Grillo's conclusion that appellant's TMJ disorder was causally related to her accepted employment incident. The Board, thus, remanded the case to OWCP to refer appellant, a statement of accepted facts (SOAF) and the medical record to an appropriate second opinion specialist for a rationalized medical opinion as to whether the diagnosed TMJ and crossbite conditions were causally related to the accepted August 19, 2011 employment injury. The Board instructed that, if the physician opines that the diagnosed conditions are not causally related, he or she must explain, with rationale, how or why the opinion differs from that of Drs. Grillo and Raiche.

On remand OWCP referred appellant for a second opinion examination with Dr. Kai Klass, a dentist. It provided him with a copy of the case record, including a statement of accepted facts (SOAF) and a series of questions. OWCP requested that Dr. Klass evaluate whether the conditions of TMJ and cross bite were causally related to the accepted work injury (as described in the SOAF), and to provide a well-rationalized explanation to confirm or negate a causal relationship between the TMJ and crossbite conditions. It also requested that Dr. Klass provided his reasoned opinion as to whether the employment injury caused, aggravated, accelerated, or precipitated the diagnosed condition(s).

In a March 19, 2021 report, Dr. Klass noted appellant's history of injury, as well as his review of the SOAF and medical records provided. He noted that he did not currently see any obvious TMJ symptoms. Dr. Klass provided examination findings for TMJ, which he reported were normal for incisal opening, left and right excursive movements, muscles of mastication, and no TMJ auscultation, and also set forth findings regarding appellant's overjet and overbite. He indicated that there was "no objective rationale" to explain how any work injury caused, aggravated, accelerated, or precipitated a diagnosed condition of TMJ syndrome or crossbite;

⁶ See *supra* note 5. The Board found that, since OWCP's hearing representative vacated March 24, 2017 decision in part and remanded the case for further development with regard to appellant's request to expand the claim to include lumbar radiculopathy/sciatica, C5-6 spondylosis, and C4-5 disc protrusion, the acceptance of those conditions were in an interlocutory status and not presently before it on appeal.

rather, subjectively, only the dentist's notes related approximately three years post injury that TMJ syndrome and crossbite were both affected by injury due to degenerative changes in the TMJ as a result of the 2011 injury. Dr. Klass opined that, as there was no documentation of immediate pain or discrepancy with the TMJ right after the injury, it could not be said, on a more probable than not basis, that the injury caused the degenerative changes noted by Dr. Grillo. He noted that while Dr. Grillo may be correct with his observed diagnosis that the degenerative changes in the mandible caused the mandible or teeth to shift slightly to the right by three millimeters, he could not provide any rationale based on objective evidence, other than based on appellant's current examination. Dr. Klass noted that appellant was a longstanding patient of Dr. Grillo's prior to the injury, Dr. Grillo had confirmed that there were no detailed imaging studies to demonstrate degeneration, that this was a subjective observation, and the medical record was devoid of any documented notes which indicated any effect to the TMJ soon after the injury. He further opined that there was no objective reasoning for Dr. Raiche's recommendation that the claim include TMJ syndrome as a diagnosis. Dr. Klass indicated that Dr. Raiche was a medical doctor, not a dentist, and failed to provide any notes pertaining to TMJ. He further indicated that his examination failed to show any evidence that the injury had aggravated any underlying or preexisting condition. Dr. Klass opined that there were no TMJ or crossbite conditions causally related to the August 19, 2011 work injury, there were no TMJ symptoms present on examination, and appellant was at maximum medical improvement for TMJ and crossbite-related issues. He noted that appellant has a long standing, nonwork-related midline shift of her anterior teeth. Dr. Klass opined that, while she would benefit from use of a dentist-made night guard, this would be to treat possible TMJ issues related to stress only, it was for palliative care only, and was unrelated to any work-related injury.

By decision dated April 23, 2021, OWCP denied the expansion of the acceptance of appellant's claim to include the additional diagnoses of TMJ and crossbite. It found that Dr. Klass' March 19, 2021 report constituted the weight of the medical evidence and provided a copy of the report.

On May 6, 2021 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review. By decision dated July 9, 2021, an OWCP hearing representative performed a preliminary review and set aside OWCP's April 23, 2021 decision as OWCP had offered no findings as to why Dr. Klass' opinion established the weight of the medical opinion evidence. On remand OWCP was instructed to provide appellant with a *de novo* decision, which reviewed the opinions of Dr. Klass and Dr. Grillo and determined whether a conflict existed regarding appellant's TMJ disorder and crossbite conditions.

By decision dated July 28, 2021, OWCP again denied expansion of the acceptance of appellant's claim to include the additional diagnoses of TMJ and crossbite. It found that Dr. Klass' March 19, 2021 report constituted the weight of the medical evidence. OWCP explained that Dr. Klass was an appropriate specialist, his opinion was based on a complete and accurate history of injury and medical treatment since the time of injury, and he provided a well-reasoned medical opinion with a clear explanation of his opinion. Based on those criteria, it found that Dr. Klass' medical opinion constituted the weight of the medical evidence over that of Dr. Grillo and Dr. Raiche.

LEGAL PRECEDENT

When 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

To establish causal relationship between a claimed condition and the employment injury, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.⁸ 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 claimant.⁹ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.¹⁰

Section 8123(a) of FECA provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."¹¹ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹² When there exist opposing reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner (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.¹³

ANALYSIS

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

⁷ See *S.L.*, Docket No. 19-0603 (issued January 28, 2020); *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁸ See *S.L., id.*; *S.A.*, Docket No. 18-0399 (issued October 16, 2018).

⁹ See *M.M.*, Docket No. 19-0061 (issued November 21, 2019); *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

¹⁰ See *P.M., id.*

¹¹ 5 U.S.C. § 8123(a).

¹² *D.H.*, Docket No. 19-0687 (issued March 31, 2021); *T.J.*, Docket No. 20-0721 (issued November 17, 2020).

¹³ *S.T.*, Docket No. 16-1911 (issued September 7, 2017); *G.B.*, widow of *R.B.*, Docket No. 16-1363 (issued March 2, 2017); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

Preliminarily, the Board notes that findings made in its prior decision are *res judicata* absent further review by OWCP under section 8128 of FECA and, therefore, the prior evidence need not be addressed again in this decision.¹⁴

OWCP referred appellant to Dr. Klass who provided a second-opinion evaluation based on the SOAF, the medical record, and appellant's physical examination. In his March 19, 2021 report, Dr. Klass opined that appellant currently had no TMJ or crossbite conditions causally related to the August 19, 2011 work injury. He also indicated Dr. Grillo's opinion that appellant had sustained a TMJ disorder, three years following the accepted employment injury, was based on subjective findings.

The Board finds that a conflict in the medical evidence exists between Dr. Grillo, appellant's treating dentist, and Dr. Klass, OWCP's referral dentist, with respect to whether appellant's TMJ or crossbite conditions were causally related to the August 19, 2011 employment injury.¹⁵ Their reports are of equal probative value.¹⁶ As previously stated, when there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an IME to resolve the conflict in the medical evidence.¹⁷ Consequently, the case must be referred to an IME to resolve the existing conflict in the medical opinion evidence regarding whether appellant's TMJ or crossbite conditions are causally related to the August 19, 2011 employment injury.¹⁸

On remand OWCP shall refer appellant's case, an updated SOAF, and the complete case record to an IME, who is a dentist, for resolution of the conflict in accordance with section 8123(a) of FECA and the implementing regulations.¹⁹ Following this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision regarding her claim for an employment-related dental condition.

CONCLUSION

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

¹⁴ *G.W.*, Docket No. 19-1281 (issued December 4, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹⁵ *See B.T.*, Docket No. 20-1665 (issued July 2, 2021); *D.B.* Docket No. 20-1142 (issued December 31, 2020); *R.P.*, Docket No. 15-1893 (issued February 24, 2016).

¹⁶ *Id.*

¹⁷ *Supra* note 13.

¹⁸ *Id.*; *see also D.B.*, *supra* note 15.

¹⁹ 5 U.S.C. § 8123(a); *id.*

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2021 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 19, 2022
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