United States Department of Labor
Employees' Compensation Appeals Board

C.W., Appellant	)	
and	)	**Docket No. 20-1582**
	)	**Issued: December 22, 2022**
DEPARTMENT OF AGRICULTURE, U.S. FOREST SERVICE, San Bernardino, CA, Employer	)	

Appearances:
Brett E. Blumstein, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On September 1, 2020 appellant, through counsel, filed a timely appeal from a May 19, 2020 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 a right shoulder condition causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On July 6, 2016 appellant, then a 55-year-old management and program analyst, filed an occupational disease claim (Form CA-2) alleging that she developed right upper extremity conditions due to factors of her federal employment over the course of 40 years, including sitting and entering data without proper chair and workstation support. She noted that she first became aware of her condition and its relation to her federal employment on May 4, 2016. Appellant stopped work on May 4, 2016.

In a development letter dated July 15, 2016, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

Thereafter, appellant submitted work excuse notes, dated May 7 through July 6, 2016, from Dr. Charles Hung-Ping Pai, a Board-certified osteopathic family practitioner.

By decision dated August 24, 2016, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis in connection with the accepted factors of her federal employment. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP subsequently received work excuse notes, dated July 25 through August 10, 2016 from Dr. Darshdeep Gosal, a Board-certified family practitioner, Dr. Swaran Saggu, a Board-certified family practitioner, and Dr. Pai.

In a form report dated August 12, 2016, Dr. Matthew Huey, a Board-certified specialist in physical medicine and rehabilitation, noted that appellant was incapacitated from May 10 through 13, 2016.

In a form report dated August 13, 2016, Dr. Pai noted that appellant was incapacitated from June 13 through July 24, 2016.

Inform reports dated August 19, 2016, Dr. Rodolfo Rojas, a specialist in family medicine, noted that appellant was incapacitated from May 5 through 11 and 16 through 20, 2016.

In an undated form report, Dr. Saggu noted that appellant was incapacitated from July 29 through August 14, 2016.

In an undated form report, Dr. Rojas noted that appellant was incapacitated from August 16 through 21, 2016. He indicated that she could perform modified work from August 22 through 28, 2016.

In an August 22, 2016 insurance form, Dr. Pai diagnosed myofascial pain syndrome and checked a box marked "No" to indicate that appellant's condition did not arise out of her employment. He noted that she was totally disabled from work from May 5 through August 22, 2016.

In an August 25, 2016 statement, appellant noted that on May 4, 2016 she experienced muscle spasms and a sharp pain in her right shoulder extending to her fingertips. She asserted that she had rotator cuff syndrome that was caused by her repetitive, work-related computer entry duties that she performed for 40 years. Appellant also alleged that her nonergonomic workstation caused her right shoulder condition.

On August 29, 2016 appellant responded to OWCP's development questionnaire. She again asserted that her myofascial pain syndrome (rotator cuff syndrome) was caused by her employment duties and workstation. Appellant provided a description of her work activities and noted that her activities exclusively required the use of a computer. She indicated that she worked full time for the past three to four years. Appellant reported that she performed various nonwork-related administrative duties for one hour, one day per week for the past 35 years.

On September 7, 2016 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In an October 4, 2016 insurance form, Dr. Pai diagnosed myalgia and checked a box marked "No" to indicate that appellant's condition did not arise out of her employment. He noted that she was partially disabled from August 29 through October 29, 2016.

In a letter dated March 16, 2017 appellant, through counsel, requested to convert the oral hearing to a review of the written record before a representative of OWCP's Branch of Hearings and Review.

In a letter dated April 11, 2017, the employing establishment controverted appellant's claim, noting that, in insurance forms, dated August 22 and October 4, 2016, Dr. Pai checked boxes marked "No" to indicate that appellant's conditions were not related to her employment.

By decision dated May 15, 2017, OWCP's hearing representative affirmed the August 24, 2016 decision.

On May 19, 2017 appellant, through counsel, requested reconsideration.

In support of her request, appellant submitted an April 11, 2017 report from Dr. Jacob Tauber, a Board-certified orthopedic surgeon, who examined her and indicated that she had pain on cervical motion and shoulder motion and decreased sensation in her right hand. He reviewed appellant's medical record and diagnosed right shoulder supraspinatus tear and probable brachial plexopathy. Dr. Tauber noted that she had performed extensive repetitive motion duties in a nonergonomic workstation for over 25 years. He opined that appellant's condition was caused and permanently aggravated by her work duties, which led to "wear and tear" on her rotator cuff resulting in her condition.

On June 21, 2017 OWCP referred appellant's case, along with a statement of accepted facts (SOAF), to Dr. William Tontz Jr., a Board-certified orthopedic surgeon serving as the district medical adviser (DMA). In a July 5, 2017 report, Dr. Tontz reviewed the SOAF and medical record. He opined that the objective evidence of record did not support that appellant's right shoulder partial supraspinatus tear and probable brachial plexopathy were causally related to factors of her federal employment. Dr. Tontz disagreed with Dr. Tauber's opinion and noted that objective and diagnostic findings were needed to accurately determine appellant's conditions.

In a July 10, 2017 letter, the employing establishment controverted appellant's claim, noting that Dr. Tauber was not provided with a comprehensive position description. It attached a full position description of a management and program analyst with its letter.

By decision dated July 11, 2017, OWCP denied modification of the May 15, 2017 decision.

On March 16, 2018 appellant, through counsel, requested reconsideration.

In support of her request, appellant submitted a magnetic resonance imaging (MRI) scan report of her right shoulder, dated June 29, 2017, which demonstrated moderate tendinosis of the supraspinatus and infraspinatus tendons, minimal arthrosis of the inferior aspect of the glenohumeral joint, and nonactive adhesive capsulitis. An MRI scan report of her right knee, dated September 5, 2017, demonstrated no evidence of a meniscal tear.

In a January 3, 2018 operative report, Dr. Paul Liu, a Board-certified orthopedic surgeon, described the results of appellant's right shoulder arthroscopic subacromial decompression and arthroscopic subacromial bursectomy procedures. He noted postoperative diagnoses of right shoulder full-thickness rotator cuff tear, impingement, and subacromial bursitis.[3]

In a February 27, 2018 report, Dr. Tauber reviewed electromyography and nerve conduction velocity studies, which indicated that appellant had right cubital tunnel syndrome. He opined that these studies and an MRI scan of her right shoulder showed objective evidence of right rotator cuff syndrome and right cubital tunnel syndrome, resulting from her repetitive work duties. Dr. Tauber further noted that he previously diagnosed a brachial plexus injury, which required a musculoskeletal ultrasound study.

On April 23, 2018 OWCP referred appellant, along with a SOAF, for a second-opinion examination with Dr. Michael J. Einbund, a Board-certified orthopedic surgeon. In a May 10, 2018 report, Dr. Einbund reviewed the SOAF and medical record. He provided physical examination findings and reviewed x-rays of appellant's cervical spine, right shoulder, pelvis, lumbosacral spine, right knee, right foot, and left foot. Dr. Einbund diagnosed cervical spine arthritis, right shoulder impingement, lumbar spine arthritis, right knee pain, and bilateral foot pain. He opined that appellant's conditions were not causally related to factors of her federal employment. Dr. Einbund noted that her cervical and lumbar spine degeneration and arthritic changes were age related. He indicated that appellant had preexisting type II acromion in the right shoulder, which predisposed her to right shoulder impingement. Dr. Einbund opined that her work activities did not correlate with a mechanism of injury, which would result in impingement and

[3] Appellant retired from the employing establishment effective February 24, 2018.

did not include heavy lifting or repetitive overhead reaching. He further noted that appellant's diagnostic and physical examination findings revealed no right knee or bilateral foot conditions. In an accompanying work capacity evaluation (Form OWCP-5c), dated May 17, 2018, Dr. Einbund noted that she was capable of performing her usual job without restrictions.

By decision dated May 21, 2018, OWCP denied modification of the July 11, 2017 decision.

On November 8, 2018 appellant, through counsel, requested reconsideration.

In support of her request, appellant submitted an August 24, 2018 supplemental report from Dr. Tauber who noted that she worked as an administrative officer, carrying out extensive repetitive motion duties with her upper extremities since June 4, 1989. Dr. Tauber indicated that, while aging contributed to her conditions, it was not the sole cause. He opined that appellant's cervical radiculopathy, brachial plexopathy, rotator cuff syndrome, carpal tunnel syndrome, and cubital tunnel syndrome were causally related and/or permanently aggravated by factors of her federal employment.

By decision dated January 31, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

By decision dated March 13, 2019, OWCP modified the May 21, 2018 decision, finding that appellant had established a medical diagnosis causally related to the accepted factors of her federal employment. The claim remained denied, however, because the medical evidence of record was insufficient to establish causal relationship between her diagnosed conditions and factors of her federal employment.

On April 30, 2019 appellant, through counsel, requested reconsideration.

In support of her request, appellant submitted an April 2, 2019 report from Dr. John W. Ellis, a Board-certified family practitioner, who reviewed the medical record and recounted her history of injury. Dr. Ellis provided physical examination findings and diagnosed right shoulder rotator cuff tear, right shoulder impingement, right shoulder subacromial bursitis, right shoulder arthrosis of the inferior aspect of the glenohumeral joint, and right brachial plexus impingement. He opined that appellant's employment factors contributed to, aggravated, and/or caused her conditions. Dr. Ellis explained that prolonged typing and using a keyboard caused hypertrophy in the tendons. He noted that appellant's continued sitting with her head facing forward caused stress in her shoulders, which contributed to her right shoulder tendinitis. Dr. Ellis indicated that her continued tendon hypertrophy turned into tendinitis and an inflammatory process. He opined that this inflammatory process caused cells to release chemicals, which deteriorated the tendons in appellant's right shoulder, in particular the supraspinatus and infraspinatus muscles. Dr. Ellis further noted that the continued tightness in her right shoulder muscles due to her typing caused increased strain on her right shoulder, contributing to her right shoulder arthritis. He reported that the tight muscles in appellant's right shoulder impinged the brachial plexus of nerves down her right arm. Dr. Ellis disagreed with Dr. Einbund's May 10, 2018 second-opinion evaluation and indicated that, while she had preexisting conditions, her employment factors were causally related to her diagnosed conditions.

On June 6, 2019 OWCP again referred appellant's case, along with a SOAF, to Dr. Einbund, the second-opinion physician. In a June 27, 2019 report, Dr. Einbund reviewed the SOAF and medical record, including Dr. Ellis' April 2, 2019 report. He provided physical examination findings and diagnosed cervical spine arthritis, right shoulder impingement, lumbar spine arthritis, right knee pain, and bilateral foot pain. Dr. Einbund again opined that appellant's conditions were not causally related to factors of her federal employment. He reiterated his belief that her cervical and lumbar spine degeneration and arthritic changes were caused by age. Dr. Einbund disagreed with Dr. Ellis' assessment that an inflammatory process from appellant's work duties aggravated her right shoulder impingement syndrome. He opined that the greater tuberosity would not impinge against her acromion in this scenario and cause impingement syndrome. Dr. Einbund found that appellant's preexisting type II acromion and underlying diabetes predisposed her to impingement syndrome. He noted that her work activities did not correlate with a mechanism of injury, which would result in impingement and did not include heavy lifting or repetitive overhead reaching.

By decision dated July 22, 2019, OWCP denied modification of the March 13, 2019 decision.

On February 19, 2020 appellant, through counsel, requested reconsideration.

In support of her request, appellant submitted a January 29, 2020 report from Dr. Mark Bernhard, a Board-certified osteopath specializing in physical medicine and rehabilitation. Dr. Bernhard reviewed the medical record and noted her history of injury. He provided physical examination findings and test results involving appellant's shoulders, hands, cervical spine, lumbosacral spine, and legs. Dr. Bernhard diagnosed right shoulder impingement, right shoulder rotator cuff tendinitis, and subacromial bursitis. He opined that appellant's right shoulder impingement and rotator subacromial bursitis were permanently aggravated by her repetitive overhead reaching into lockers, which resulted in the full development and resultant symptomatology of the impingement. Dr. Bernhard indicated that, while her condition was in part preexisting, it would not have resulted in the level of impairment without the casual effect of repetitive overhead lifting. He noted that appellant's bursitis was a mechanical condition caused by the overhead extension of her right arm which resulted in the development of inflammation. Dr. Bernhard listed her work restrictions and reported that he did not find evidence of cervical or brachial plexus injury, cervical spine symptomatic arthritis, lumbar spine arthritis, or lower extremity injuries.

By decision dated May 19, 2020, OWCP denied modification of the July 22, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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

[4] *Id*.

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 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) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.[8]

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

In a case in which a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.[11]

Section 8123(a) of FECA provides, in pertinent part, that 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 (known as a referee physician or impartial medical specialist) who shall make an examination.[12] This is called a referee examination, and OWCP will

[5] *A.D.*, Docket No. 20-0758 (issued January 11, 2021); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *V.P.*, Docket No. 20-0415 (issued July 30, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] 20 C.F.R. § 10.115; *S.A.*, Docket No. 20-0458 (issued July 23, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *See B.H.*, Docket No. 18-1693 (issued July 20, 2020); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[9] *L.S.*, Docket No. 19-1769 (issued July 10, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[10] *B.C.*, Docket No. 20-0221 (issued July 10, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013). *See C.F.*, Docket No. 20-0222 (issued December 21, 2020).

[12] 5 U.S.C. § 8123(a); *see D.B.*, Docket No. 20-1142 (issued December 31, 2020); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[13]

ANALYSIS

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

In an April 2, 2019 report, Dr. Ellis provided a description of appellant's employment duties and history of injury. He noted her physical examination findings and diagnosed right shoulder rotator cuff tear, right shoulder impingement, right shoulder subacromial bursitis, right shoulder arthrosis of the inferior aspect of the glenohumeral joint, and right brachial plexus impingement. Dr. Ellis opined that appellant's employment factors contributed to, aggravated and caused her conditions. He explained that her prolonged typing and use of a keyboard caused hypertrophy in her tendons. Dr. Ellis noted that appellant's continued sitting with her head facing forward caused stress in her shoulders which contributed to her right shoulder tendinitis. He reported that her continued tendon hypertrophy turned into tendinitis and an inflammatory process. Dr. Ellis explained that this inflammatory process caused cells to release chemicals, which deteriorated the tendons in appellant's supraspinatus and infraspinatus muscles. He opined that the continued tightness in her right shoulder muscles, due to her typing, caused increased strain on her right shoulder and contributed to her right shoulder arthritis. Dr. Ellis noted that the tight muscles in appellant's right shoulder impinged the brachial plexus of nerves down her right arm. He indicated that, while appellant had preexisting conditions, her lack of symptomatology in her left shoulder showed that her right shoulder conditions were not solely due to the aging process.

In a January 29, 2020 report, Dr. Bernhard provided physical examination findings and test results involving appellant's shoulders, hands, cervical spine, lumbosacral spine, and legs. He diagnosed right shoulder impingement, right shoulder rotator cuff tendinitis, and subacromial bursitis. Dr. Bernhard opined that appellant's right shoulder impingement and rotator subacromial bursitis were permanently aggravated by her repetitive overhead reaching into lockers, which resulted in the full development and resultant symptomatology of the impingement. He further indicated that, while her condition was in part preexisting, it would not have resulted in the level of impairment without the casual effect of repetitive overhead lifting. Dr. Bernhard noted that appellant's bursitis was a mechanical condition caused by the overhead extension of her right arm, which resulted in the development of inflammation.

The Board finds that the reports of Drs. Ellis and Bernhard are in conflict with the reports of Dr. Einbund, OWCP's second-opinion physician.

In a June 27, 2019 report, Dr. Einbund reviewed the SOAF, medical record, and appellant's history of injury. He provided physical examination findings and diagnosed cervical spine arthritis, right shoulder impingement, lumbar spine arthritis, right knee pain, and bilateral foot pain. Dr. Einbund opined that appellant's cervical and lumbar spine degeneration and arthritic changes were caused by age. He disagreed with Dr. Ellis' assessment that an inflammatory process from her work duties aggravated her right shoulder impingement syndrome. Dr. Einbund opined that greater tuberosity would not impinge against appellant's acromion and cause impingement

[13] 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

syndrome. He found that her preexisting acromion and underlying diabetes predisposed her to impingement syndrome. Dr. Einbund noted that appellant's work activities did not correlate with a mechanism of injury which would result in impingement and did not include heavy lifting or repetitive overhead reaching.

As noted above, if there is a disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint a referee physician or impartial medical specialist who shall make an examination.[14] The Board finds that there is a conflict in the medical opinions between Drs. Ellis, Bernhard, and Einbund regarding whether appellant's accepted employment factors caused, contributed to, or aggravated her right shoulder conditions. Consequently, the case must be referred to an impartial medical specialist for resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).

On remand, OWCP shall refer appellant, along with the case file and a SOAF, to a specialist in an appropriate field of medicine for an impartial medical evaluation and a report including a rationalized opinion as to whether appellant's diagnosed right shoulder conditions are causally related to her accepted employment factors. Following this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[14] *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2020 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: December 22, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board