

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

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| D.D., Appellant |) | |
| |) | |
| and |) | Docket No. 22-0402 |
| |) | Issued: August 4, 2023 |
| DEFENSE LOGISTICS AGENCIES, |) | |
| Richmond, VA, Employer |) | |
| |) | |

Appearances:

Daniel M. Goodkin, Esq., for the appellant¹
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 January 25, 2022 appellant, through counsel, filed a timely appeal from a December 21, 2021 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 expand the acceptance of her claim to include additional conditions as causally related to her accepted June 3, 2018 employment injury.

FACTUAL HISTORY

On June 11, 2018 appellant, then a 47-year-old management and program analyst, filed a traumatic injury claim (Form CA-1) alleging that on June 3, 2018 she injured the left side of her face, neck, shoulders, left arm, neck, and low back when the vehicle she was operating was involved in a motor vehicle accident (MVA) while in the performance of duty. OWCP accepted the claim for headache, cervical sprain, left eye traumatic iridocyclitis, and a sprain of the left shoulder joint. It subsequently expanded its acceptance of the claim to include bilateral primary iridocyclitis, right eye primary iridocyclitis, lumbar sprain, a sprain of the right shoulder joint, post-concussion syndrome, cervical radiculopathy, and sciatica. Appellant stopped work on June 3, 2018 and returned to part-time employment on September 12, 2018.

On February 11, 2019 OWCP referred appellant to Dr. Fadil A. Yunis, a Board-certified physiatrist, for a second opinion examination. It requested that he provide the diagnoses due to the accepted employment injury and discuss whether she had continued residuals of her employment injury.

On February 19, 2019 Dr. Marion Herring, a Board-certified orthopedic surgeon, discussed appellant's history of an MVA on June 3, 2018 and subsequent "conservative treatments to the shoulders including injections and physical therapy." He advised that a magnetic resonance imaging (MRI) scan of the left shoulder obtained on February 5, 2019 revealed mild degeneration of the acromioclavicular joint with minimal subacromial spurring and that a right shoulder MRI scan of even date revealed a full-thickness tear of the anterior supraspinatus tendon and rotator cuff tendinopathy. Dr. Herring diagnosed left subacromial impingement and a complete tear of the right rotator cuff.

In a report dated February 22, 2019, Dr. Yunis diagnosed cervical sprain, shoulder sprain, low back strain, post-concussion syndrome, and iridocyclitis causally related to the accepted employment injury. On examination, he found no signs of impingement of the shoulders. Dr. Yunis advised that appellant could continue working 32 hours per week, and could resume full-time employment on April 1, 2019. In a work capacity evaluation, he provided restrictions of lifting, pushing, and pulling no more than 20 pounds for five hours per day and noted that she should be allowed to change positions. Dr. Yunis advised that the diagnosed conditions of cervical and low back sprain, low back strain, post-concussion syndrome, and iridocyclitis of the left eye had resolved.

On March 20, 2019 Dr. Joelle Makon, Board-certified in physical medicine and rehabilitation opined that appellant had developed an adjustment disorder with mixed emotional features, generalized anxiety disorder, and dyssomnia due to appellant's employment injury. She further noted that appellant had been diagnosed with left subacromial impingement and a complete tear of the right rotator cuff. Dr. Makon diagnosed post-concussion syndrome, and adjustment

disorder with mixed emotional features, a generalized anxiety disorder, dyssomnia, a complete tear of the right rotator cuff, and left subacromial impingement due to the accepted employment injury.

On April 1, 2019 appellant returned to her date-of-injury job without restrictions.

On April 4, 2019 Dr. Herring performed an arthroscopic repair of the right rotator cuff and a right subacromial decompression. In the operative report, he noted appellant's history of a June 3, 2018 MVA. Dr. Herring found significant degeneration in the subacromial space and chronic impingement syndrome with no acute sign of injury.

In a development letter dated April 24, 2019, OWCP requested that appellant submit a rationalized report from her attending physician addressing how the diagnosed conditions of an adjustment disorder, right rotator cuff tear, left shoulder impingement, and dyssomnia were causally related to or a consequence of her employment injury. It afforded her 30 days to submit the requested information.

In a response dated May 22, 2019, appellant submitted a May 9, 2019 report from Dr. Pamela J. MacMillian, a psychologist. She further submitted a May 13, 2019 report from Dr. Makon, who attributed appellant's right rotator cuff to trauma from the impact of an MVA. Appellant noted that she had complained of bilateral shoulder pain since the time of the accident. Dr. Makon disagreed with Dr. Yunis' finding of no impingement. She noted that appellant was currently not working due to her shoulder surgery.

On August 1, 2019 OWCP referred appellant to Dr. Louis Duchin, a Board-certified psychiatrist, for a second opinion examination. In a report dated September 14, 2019, Dr. Duchin advised that she had sustained post-traumatic stress disorder (PTSD) due to her accepted employment injury.

OWCP determined that a conflict arose between Dr. Makon and Dr. Yunis regarding whether appellant's accepted employment injury had resolved and whether there were any additional employment-related conditions. It referred her to Dr. Richard H. Conant, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated October 28, 2019, Dr. Conant, serving as the impartial medical examiner (IME) discussed appellant's history of injury and provided his review of the medical evidence. On examination, he found some tenderness of the right shoulder and sensitivity to palpation of the low back. Dr. Conant opined that appellant had "reached maximum medical improvement [MMI] regarding [appellant's] reported accident of June 3, 2018, with no work-related conditions that required any future treatment or any occupational restrictions." He opined that she was no longer totally disabled after August 2, 2018 and had no further residuals or occupational restrictions due to her injury.

On November 6, 2019 OWCP expanded its acceptance of the claim to include PTSD.

On January 11, 2020 appellant requested that OWCP expand acceptance of her claim to include a complete tear of the right rotator cuff and left shoulder subacromial impingement.

In a supplemental report dated September 23, 2020, the IME, Dr. Conant, reviewed the findings from the MRI scans of appellant's shoulders. He advised that based on his examination and record review, "[appellant's] clinical presentation subsequent to this event was inconsistent with trauma of sufficient magnitude to have either caused or to have aggravated these preexisting MRI [scan] findings." Dr. Conant again found that appellant had reached MMI and had "no work-related conditions that will require any future treatment or any occupational restrictions."

By decision dated September 30, 2020, OWCP denied appellant's request to expand the acceptance of her claim to include a complete tear of the right rotator cuff and left subacromial impingement.

In a report dated November 17, 2020, Dr. Makon discussed appellant's history of injury and provided the employment-related diagnoses, including a complete right rotator cuff tear and left subacromial impingement. She further diagnosed bilateral sacroiliitis causally related to the June 3, 2018 employment injury.

On September 22, 2021 Dr. Makon asserted that appellant's MVA had caused bilateral shoulder injuries. She maintained that Dr. Conant's conclusion that appellant had no bilateral shoulder deficits was not supported by his own findings on examination. Dr. Makon noted that appellant had complained of bilateral shoulder pain within two weeks of her injury and advised that symptoms from trauma could present within days to weeks afterward. She reviewed appellant's history of treatment for her shoulder condition and the results of February 2019 MRI scans of the bilateral shoulders. Dr. Makon further discussed appellant's history of a right rotator repair and subacromial decompression on April 4, 2019. She related, "Based on my objective findings and within reasonable medical certainty, it is my medical opinion that the bilateral shoulder injuries were sustained as a result of the MVA that [appellant] sustained on June 3, 2018 while performing work duties."

On September 23, 2021 appellant, through counsel, requested reconsideration. Counsel asserted that Dr. Conant had failed to address whether she sustained a shoulder injury. He maintained that Dr. Makon provided a reasoned report explaining why appellant's shoulder conditions were causally related to her accepted MVA.

By decision dated December 21, 2021, OWCP denied modification of its September 30, 2021 decision. It found that the report of Dr. Conant, the IME, constituted the weight of the evidence.

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.³

³ *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁴ 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.⁵ 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 employment injury.⁶

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 who shall make an examination.⁷ 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.⁸ When there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an 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.⁹

ANALYSIS

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include additional conditions as causally related to her accepted June 3, 2018 employment injury.

OWCP properly determined that a conflict existed between Dr. Makon, appellant's treating physician, and Dr. Yunis, OWCP's second opinion physician, regarding whether appellant's accepted conditions had resolved, and whether her claim should be expanded to include a right or left shoulder condition. It referred her to Dr. Conant, a Board-certified orthopedic surgeon, for an impartial medical examination in accordance with 5 U.S.C. § 8123(a).

On October 28, 2019 Dr. Conant reviewed appellant's history of injury and the medical evidence of record. He provided findings on examination of tenderness in the right shoulder and sensitivity to palpation of the low back. Dr. Conant determined that appellant had no further conditions due to her employment injury that caused either disability, or required continued medical treatment. He opined that she had no further residuals or disability due to her June 3, 2018 employment injury. In a September 23, 2020 supplemental report, Dr. Conant further opined that

⁴ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

⁵ *F.A.*, Docket No. 20-1652 (issued May 21, 2021); *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁶ *Id.*

⁷ 5 U.S.C. § 8123(a).

⁸ 20 C.F.R. § 10.321.

⁹ *See L.R.*, Docket No. 21-0018 (issued February 17, 2023); *Y.I.*, Docket No. 20-0263 (issued November 30, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

the findings of the MRI scan of appellant's left and right shoulder were not caused or aggravated by the accepted employment injury. He provided as rationale for his opinion that the clinical findings after the employment injury were not consistent with trauma sufficient to cause the findings on MRI scan of the shoulders. Dr. Conant accurately described the accepted employment injury and performed a thorough clinical examination with detailed examination findings. The Board, therefore, finds that Dr. Conant's opinion is entitled to the special weight of the evidence with regarding to the issue of whether acceptance of appellant's claim should be expanded to include additional conditions.¹⁰

In a report dated November 17, 2020, Dr. Makon provided diagnoses due to the accepted employment injury, including a right rotator cuff tear and left subacromial impingement. She further opined that appellant had sustained bilateral sacroiliitis causally related to the accepted June 3, 2018 employment injury. On September 22, 2021 Dr. Makon asserted that appellant's MVA had caused her bilateral shoulder injuries. She maintained that Dr. Conant's conclusion that appellant had no bilateral shoulder deficits were inconsistent with his examination findings. Dr. Makon asserted that appellant had complained of pain in her shoulders within two weeks of injury. She attributed appellant's bilateral shoulder condition to her June 3, 2018 MVA. However, Dr. Makon failed to provide a reasoned opinion relating the diagnosed shoulder conditions to the accepted employment injury. Further, she was on one side of the conflict resolved by Dr. Conant. The Board has held that reports from a physician who was on one side of a medical conflict are generally insufficient to overcome the special weight accorded to the IME or to create a new conflict.¹¹

As the medical evidence or record is insufficient to establish expansion of the acceptance of the claim, the Board finds that appellant has not met her burden of proof.

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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include additional conditions as causally related to her accepted June 3, 2018 employment injury.

¹⁰ *Id.*

¹¹ *P.T.*, Docket No. 22-0841 (issued January 26, 2023); *N.U.*, Docket No. 20-1022 (issued January 25, 2022); *W.C.*, Docket No. 19-1740 (issued June 4, 2020).

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 4, 2023
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