

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

C.H., Appellant)	
)	
and)	Docket No. 24-0658
)	Issued: July 29, 2024
U.S. POSTAL SERVICE, BARABOO POST)	
OFFICE, Baraboo, WI, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 5, 2024 appellant, through counsel, filed a timely appeal from a May 3, 2024 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 expansion of the acceptance of the claim to include an aggravation of left shoulder glenohumeral arthritis as causally related to the accepted October 26, 2017 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ 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 November 6, 2017 appellant, then a 55-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on October 26, 2017 she strained her left upper back and shoulder when lifting and loading heavy pallets with packages into her postal vehicle while in the performance of duty. She stopped work on November 6, 2017. OWCP accepted the claim for cervical disc disorder with radiculopathy and cervicothoracic region at C8. It paid appellant wage-loss compensation on the supplemental rolls commencing December 21, 2017.⁴

On August 8, 2018 Dr. Bonnie J. Weigert, a Board-certified physiatrist, opined that appellant's employment injury aggravated her preexisting left shoulder arthritis.

In an August 17, 2018 report, Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as OWCP's district medical adviser (DMA), reviewed the medical evidence of record and statement of accepted facts (SOAF). He concluded that the accepted October 26, 2017 employment injury had not caused an aggravation of appellant's preexisting left shoulder osteoarthritis. Dr. Fellars found that her full range of motion and trapezius pain were inconsistent with an aggravation of underlying osteoarthritis. He concluded that, if appellant did have an aggravation of her underlying osteoarthritis, it occurred at a later date, and, thus, was not causally related to the accepted October 26, 2017 employment injury.

On January 23, 2019, OWCP referred appellant, together with the medical record, a series of questions, and a SOAF, to Dr. Paul Cederberg, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Weigert and the DMA, as to whether appellant's preexisting left shoulder arthritis was aggravated by her accepted October 26, 2017 employment injury.

In a March 6, 2019 report, Dr. Cederberg, noted that appellant's physical examination revealed normal right shoulder range of motion, diminished left shoulder range of motion, good rotator cuff musculature, diffuse shoulder tenderness, and brisk and symmetrical triceps, biceps, and brachioradialis reflexes. He opined that the accepted employment injury had not aggravated appellant's preexisting left shoulder glenohumeral arthritis. In support of this conclusion,

³ Docket No. 20-0608 (issued April 5, 2021).

⁴ The Office of Personnel Management (OPM) approved appellant for disability retirement effective September 5, 2019.

Dr. Cederberg explained that appellant's left shoulder glenohumeral joint pain developed weeks and possibly months later. He reported that she had idiopathic left shoulder osteoarthritis, which he determined had not been aggravated or accelerated by her work activities.

By decision dated March 27, 2019, OWCP denied expansion of the acceptance of appellant's claim to include aggravation of left shoulder glenohumeral arthritis. It accorded the special weight of the medical evidence to Dr. Cederberg as the impartial medical examiner (IME).

On April 2, 2019 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

Following a hearing held on July 17, 2019, by decision dated September 27, 2019, OWCP's hearing representative vacated the March 27, 2019 decision, finding that further development was required. On remand, the hearing representative directed OWCP to prepare a new SOAF and obtain a supplemental report from Dr. Cederberg as to whether appellant's left shoulder glenohumeral arthritis was caused, aggravated, accelerated, or precipitated in any way by the accepted employment injury.

In a December 18, 2019 supplemental report, Dr. Cederberg opined that appellant's glenohumeral arthritis of the left shoulder was typically an idiopathic, primary, genetically determined condition, along with loose bodies and the degeneration of the subscapularis tendon with partial tear. He noted that she did not present with left shoulder discomfort for weeks or months after the October 26, 2017 employment injury. Dr. Cederberg opined: "We may conclude that the left shoulder problems were a manifestation of a preexisting degenerative condition and not related to the incident in October 2017."

By decision dated January 2, 2020, OWCP denied expansion of the acceptance of the claim to include aggravation of her preexisting glenohumeral arthritis of the left shoulder. It found that the special weight of the medical opinion evidence rested with Dr. Cederberg's opinion as the IME.

On January 27, 2020 appellant, through counsel, appealed to the Board. By decision dated April 5, 2021, the Board set aside the January 2, 2020 decision with regard to expansion of appellant's claim.⁵ The Board found that the IME, Dr. Cederberg, failed to sufficiently address whether appellant's claim should be expanded to include her left shoulder condition. The Board instructed OWCP to refer appellant to a new IME to resolve the conflict in the medical opinion evidence as to whether appellant sustained an aggravation of her preexisting left shoulder glenohumeral arthritis causally related to the accepted October 26, 2017 employment injury.

During the pendency of appellant's appeal, OWCP received a May 13, 2020 report from Dr. John F. Orwin, a treating orthopedic surgeon. Dr. Orwin, based on a review of diagnostic tests and the history of injury, opined that appellant's repetitive lifting and reaching at work and strength training aggravated her preexisting left shoulder glenohumeral arthritis.

⁵ *Id.*

On July 15, 2021 OWCP referred appellant together with the medical record, list of questions, and SOAF to Dr. Mysore S. Shivaram, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding whether appellant's preexisting left shoulder arthritis had been aggravated by her accepted October 26, 2017 employment injury.

In a report dated August 9, 2021, Dr. Shivaram discussed appellant's factual and medical history and reported his findings on physical examination. He noted that the examination of appellant's left shoulder revealed limited range of motion, no swelling or atrophy, mild tenderness over the biceps tendon, no tenderness over the acromioclavicular joint, no scapula winging or scapular dyskinesia, normal motor strength, and no instability. Dr. Shivaram diagnosed preexisting idiopathic left shoulder arthritis and cervical disc disorder with radiculopathy in the C8 cervicothoracic region, which has resolved. He concurred with the opinions of Dr. Cederberg and DMA, Dr. Fellars.

On April 19, 2022 OWCP referred appellant together with the medical record, list of questions, and SOAF to Dr. Stephen E. Robbins, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Shivaram and Dr. Orwin, as to whether appellant's preexisting left shoulder arthritis had been aggravated by her accepted October 26, 2017 employment injury.

In a May 23, 2022 report, Dr. Robbins, serving as the IME, reviewed the medical evidence and SOAF, and concluded that appellant's left shoulder degenerative changes were unrelated to the accepted October 26, 2017 employment injury. He explained that the left shoulder degenerative changes were preexisting and the rehabilitation program/physical therapy for her C8 radiculopathy would not have significantly caused any aggravation or acceleration. Dr. Robbins explained that during appellant's rehabilitation she also experienced complaints of left shoulder pain. Diagnostic studies revealed glenohumeral arthritis. Appellant attributed her shoulder symptoms to her physical therapy. Dr. Robbins concluded that appellant's left shoulder degenerative changes were not related to the claimed industrial injury. Rather, they were preexisting and a rehabilitation program would not have caused significant aggravation or acceleration of her preexisting condition. "Ongoing treatment for left shoulder beyond her plateau in healing issues are reflective of her preexisting condition and are nonwork related."

By decision dated October 7, 2022, OWCP denied expansion of the acceptance of the claim to include aggravation of appellant's preexisting glenohumeral arthritis of the left shoulder. It found that the special weight of the medical opinion evidence rested with Dr. Robbins' opinion as the IME.

On October 20, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated February 6, 2023, OWCP's hearing representative set aside the October 7, 2022 decision, and remanded the case for further development. The hearing representative instructed OWCP to refer appellant back to Dr. Robbins, together with a new SOAF, for a complete physical examination and a rationalized medical opinion as to whether appellant's rehabilitation physical therapy impacted appellant's left shoulder condition.

On April 20, 2023 OWCP referred appellant, along with an updated SOAF, to Dr. Robbins for a complete physical examination.

Dr. Robbins, in a June 26, 2023 supplemental report, recounted the history of appellant's October 26, 2017 employment injury, treatment provided, and noted that she had been on medical retirement since 2019. He provided his review of the medical records and provided findings on examination, including full shoulder range of motion. Appellant related that her left shoulder complaints did not begin immediately following her accepted injury, but rather developed following her rehabilitation. Dr. Robbins explained that review of appellant's treatment regimen did not identify a specific injury while performing physical therapy. He opined that the left shoulder complaints were unrelated to her employment or her accepted employment injury. Dr. Robbins explained that there was no history of any chronic left shoulder complaints from performing her usual employment duties. He opined that her left shoulder symptoms were due to the natural progression of her underlying preexisting degenerative left shoulder arthritis.

On September 19, 2023 OWCP requested clarification from Dr. Robbins regarding whether appellant's participation in rehabilitation accelerated or aggravated her preexisting left shoulder arthritis in any degree.

On December 11, 2023 OWCP received an addendum report from Dr. Robbins wherein he concluded that appellant's left shoulder condition was unrelated to either her accepted employment injury or rehabilitation program. Dr. Robbins explained that the physical therapy program was designed to treat appellant's conditions, and there was no evidence substantiating that an injury occurred. He noted the onset of her left shoulder symptoms were due to normal activities of daily living and were not due to participation in a physical therapy program.

By decision dated January 10, 2024, OWCP denied expansion of the acceptance of the claim to include aggravation of her preexisting glenohumeral arthritis of the left shoulder. It found that the special weight of the medical opinion evidence rested with Dr. Robbins' opinion as the IME.

On January 18, 2024 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on April 2, 2024.

By decision dated May 3, 2024, OWCP's hearing representative affirmed the January 10, 2024 decision.

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.⁶

⁶ *S.L.*, Docket No. 24-0220 (issued May 15, 2024); *N.U.*, Docket No. 22-1329 (issued April 18, 2023); *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

To establish causal relationship between a condition and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.⁷ The opinion of the physician must be one of reasonable certainty, and must explain the nature of the relationship between the diagnosed condition and the accepted employment injury.⁸

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury. The basic rule is that a subsequent injury, whether 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.⁹

Section 8123(a) provides that, if there is a 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.¹⁰ The implementing regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. 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. In situations where there exist 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.¹¹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish expansion of the acceptance of the claim to include an aggravation of left shoulder glenohumeral osteoarthritis as causally related to her accepted October 26, 2017 employment injury.

OWCP properly referred appellant to Dr. Robbins for an impartial medical examination to resolve the conflict in medical evidence, pursuant to 5 U.S.C. § 8123(a).

⁷ *S.L., id.*; *B.W.*, Docket No. 21-0536 (issued March 6, 2023); *D.E.*, Docket No. 20-0936 (issued June 24, 2021); *S.L.*, Docket No. 19-0603 (issued January 28, 2020).

⁸ *Id.*

⁹ *See L.M.*, Docket No. 23-0605 (issued December 5, 2023); *D.L.*, Docket No. 21-0047 (issued February 22, 2023); *D.H.*, Docket Nos. 20-0041 & 20-0261 (issued February 5, 2021).

¹⁰ 5 U.S.C. § 8123(a); *see C.C.*, Docket No. 20-0151 (issued July 30, 2020); *M.G.*, Docket No. 19-1627 (issued April 17, 2020); *R.C.*, Docket No. 12-0437 (issued October 23, 2012).

¹¹ 20 C.F.R. § 10.321. *See also J.H.*, Docket No. 22-0981 (issued October 30, 2023); *N.D.*, Docket No. 21-1134 (issued July 13, 2022); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

In his May 23, 2022 report, Dr. Robbins opined that appellant's left shoulder degenerative changes were unrelated to the October 26, 2017 employment injury and were preexisting. He also opined that the physical therapy program would not have caused any significant aggravation or acceleration. Dr. Robbins concluded that, "[o]ngoing treatment for left shoulder beyond her plateau in healing issues are reflective of her preexisting condition and are nonwork related."

In a June 26, 2023 supplemental report, Dr. Robbins noted that appellant's left shoulder complaints did not begin immediately following her accepted October 26, 2017 employment injury, but rather developed following her rehabilitation. He explained that review of appellant's treatment regimen did not identify a specific injury while performing physical therapy. Dr. Robbins also explained that there was no history of any chronic left shoulder complaints from performing her usual employment duties. He opined that her left shoulder symptoms were due to the natural progression of her underlying preexisting degenerative left shoulder arthritis.

In an addendum received on December 11, 2023, Dr. Robbins opined that her left shoulder conditions were due to normal activities of daily living and not due to an injury from physical therapy. He explained that the physical therapy program was designed to treat her conditions and there was no evidence substantiating that an injury occurred during physical therapy.

The Board finds that Dr. Robbins performed a thorough physical examination on June 26, 2023 and provided a sufficiently-rationalized opinion regarding whether appellant's left shoulder glenohumeral osteoarthritis was causally related to the accepted employment injury.¹² Dr. Robbins' opinion, as set forth in his May 23, 2022, and June 26 and December 11, 2023 reports, constitutes probative and reliable evidence. The Board, therefore, finds that his opinion is entitled to the special weight of the medical evidence accorded to an IME with regard to expansion of the acceptance of the claim.¹³

As the medical evidence of record is insufficient to establish expansion of the acceptance of the claim to include aggravation of left shoulder glenohumeral arthritis as causally related to the accepted October 26, 2017 employment injury, 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 establish expansion of the acceptance of the claim to include an aggravation of left shoulder glenohumeral osteoarthritis as causally related to the accepted October 26, 2017 employment injury.

¹² See *L.R.*, Docket No. 21-0018 (issued February 17, 2023); *F.A.*, Docket No. 20-1652 (issued May 21, 2021); *R.R.*, Docket No. 19-0086 (issued February 10, 2021); see also *D.S.*, Docket No. 18-0353 (issued February 18, 2020).

¹³ *L.R.*, *F.A.*, *id.*; *W.C.*, Docket No. 19-1740 (issued June 4, 2020); *M.M.*, Docket No. 16-1655 (issued April 4, 2018).

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 29, 2024
Washington, DC

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

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

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