

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

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| L.K., Appellant |) | |
| |) | |
| and |) | Docket No. 24-0572 |
| |) | Issued: June 17, 2024 |
| DEPARTMENT OF VETERANS AFFAIRS, |) | |
| JOHN J. COCHRAN VA MEDICAL CENTER, |) | |
| St. Louis, MO, Employer |) | |
| _____ |) | |

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

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 7, 2024 appellant, through counsel, filed a timely appeal from an April 23, 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.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 issuance of the April 23, 2024 decision, appellant submitted additional evidence to OWCP. 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 a medical condition causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances set forth in the Board's prior decision is incorporated herein by reference. The relevant facts are as follows.

On June 9, 2017 appellant, then a 50-year-old registered nurse, filed an occupational disease claim (Form CA-2) alleging that she developed left shoulder acromioclavicular (AC) arthritis, biceps tendinitis, impingement syndrome, partial rotator cuff tear, and adhesive capsulitis from years of repetitive strain due to factors of her federal employment, including years of manual patient handling. She noted that she first became aware of her condition on July 15, 2016 and realized their relation to factors of her federal employment on July 22, 2016. Appellant stopped work on November 22, 2016 and returned to work on January 23, 2017.

Appellant was evaluated by Dr. Aaron P. Omotola, a Board-certified orthopedist, on October 14 and 28, 2016, for left shoulder pain. Dr. Omotola diagnosed rotator cuff insufficiency of the left shoulder, AC joint arthritis, and biceps tendinitis of the left shoulder, and complete tear of the left rotator cuff. On November 22, 2016 he performed an unauthorized left shoulder arthroscopic biceps tenodesis, subacromial decompression, distal clavicle excision, and debridement of the rotator cuff partial tear. Dr. Omotola diagnosed left shoulder AC arthritis, biceps tendinitis, impingement syndrome, and partial rotator cuff tear.

An MRI scan of the left shoulder dated October 20, 2016 demonstrated moderate AC joint osteoarthritis with mild impingement upon the supraspinatus muscle, intermediate signal intensity in the distal anterior aspect of the supraspinatus tendon suggestive of tendinopathy/tendinitis without a clearly defined rotator cuff tear seen, and mild joint effusion.⁵

By decision dated August 24, 2017, OWCP denied appellant's claim finding that the medical evidence of record was insufficient to establish causal relationship between her left shoulder condition and the accepted factors of her federal employment.

In a progress note dated November 30, 2017, Dr. Omotola indicated that appellant developed adhesive capsulitis of the left shoulder postoperatively and was receiving aggressive

⁴ Docket No. 21-0147 (issued January 21, 2022).

⁵ Appellant provided a description of her work duties, which included lifting up to 50 pounds, sitting, standing, walking, climbing, kneeling, bending/stooping, twisting, pushing/pulling, simple grasping, fine manipulation, reaching above the shoulder, and operating machinery. She reported caring for bedridden, terminally ill, paraplegic, and quadriplegic patients that required turning and repositioning every two hours. Appellant indicated that psychiatric patients required constant observation for suicidal or homicidal ideation, geriatric patients with dementia and cognitive impairment also required constant monitoring to keep them safe. She performed these activities each shift, typically working six 12-hour shifts and one 8-hour shift in a two-week period. Appellant provided a job description for an emergency department registered nurse.

physical therapy. He diagnosed adhesive capsulitis of the left shoulder and status post subacromial decompression. In a December 1, 2017 report, Dr. Omotola diagnosed chronic left shoulder pain.

On July 19, 2018 appellant requested reconsideration.

By decision dated March 6, 2019, OWCP denied modification of the August 24, 2017 decision.

On December 2, 2019 Dr. Arthur C. Sippo, a Board-certified physiatrist, performed a review of appellant's medical history and indicated that appellant was over three years post original injury in 2016. He opined to a reasonable degree of medical certainty that appellant suffered an acute rotator cuff tear in her left shoulder while applying compression hose to a patient as part of her nursing duties. Dr. Sippo opined that she reached maximum medical improvement (MMI).

On December 9, 2019 appellant requested reconsideration.

By decision dated December 12, 2019, OWCP denied modification of the March 6, 2019 decision.

Appellant submitted a March 2, 2020 report from Dr. Sippo who had examined her and responded to the denial of her claim. He asserted that appellant sustained a left rotator cuff tear and biceps tendinitis on October 16, 2016, while she was fitting compression hose onto a swollen leg of a patient. Dr. Sippo explained that the human shoulder consisted of muscles and supporting structures that operate the movements of the joint and are small with marginal blood supply. He indicated that the shoulder is prone to overuse injuries leading to inflammation in the soft tissues and cumulative trauma to the joint structures stemming from excessive demands. Dr. Sippo noted that the muscles that control the rotation in the shoulder maintain a proper biomechanical relationship between the elements of that joint under stress. He indicated that repetitive lifting, pushing, and pulling of the shoulder led to severe stress in the muscular, bony, ligamentous, and cartilaginous structures in the shoulder joint and were responsible for damage to the anatomic structures therein. Dr. Sippo further opined that the trauma led to soft tissue strains in her shoulders that caused chronic inflammation in her rotator cuff that made those muscles friable and susceptible to injury such as the injury that occurred on October 16, 2016. He advised that appellant's work activities resulted in repetitive chronic and acute injuries to her left rotator cuff, which led to the documented tear.

On March 4, 2020 appellant requested reconsideration.

By decision dated May 28, 2020, OWCP denied modification of the December 12, 2019 decision.

Appellant appealed to the Board. By decision dated January 21, 2022, the Board set aside the May 28, 2020 decision. The Board found that the report of Dr. Sippo was sufficient to require further development of the medical evidence. The Board instructed OWCP, on remand, to request a report from a second opinion specialist regarding whether appellant has met her burden of proof to establish a medical condition causally related to the accepted factors of her federal employment. The Board directed OWCP, following further development, to issue a *de novo* decision on the merits of appellant's claim.

On June 20, 2022 OWCP referred appellant, the medical record, including a June 14, 2022 statement of accepted facts (SOAF), and a series of questions, to Dr. Michael H. Ralph, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether she sustained a medical condition causally related to the accepted factors of her federal employment.

In a July 12, 2022 report, Dr. Ralph discussed appellant's factual and medical history, reviewed the SOAF and the medical record. On examination, he observed consistent range of motion of the right shoulder, inconsistent range of motion of the left shoulder, and substantial limitation of forward flexion and abduction. Dr. Ralph noted that appellant's symptomology had nothing to do with the subtle abnormalities on the MRI scan but relate to preexisting stiffness of the left shoulder and associated calcific bursitis. He disagreed with Dr. Sippo's diagnosis and course of treatment. Dr. Ralph opined that Dr. Sippo misdiagnosed appellant with a rotator cuff tear and believed that the appropriate treatment for her diagnosed condition would have been an intracapsular injection and not surgery. He further noted that appellant's work activity was unrelated to her complaints and concluded that she did not have a work-related condition.

On August 11, 2022 OWCP requested that Dr. Ralph submit a supplemental report, which clarified his July 12, 2022 report. In an August 30, 2022 report, he stated that he did not believe that any clarification was required based on his original report. Dr. Ralph noted that appellant was diagnosed with adhesive capsulitis, which was minor stiffness in her left shoulder. He indicated that an emergency room nurse did not perform repetitive activity and the position was not considered physically stressful. Dr. Ralph reiterated that he did not consider appellant's current left shoulder complaints to be related to her work activity and opined that appellant did not develop a work-related condition.

By decision dated September 13, 2022, OWCP denied appellant's claim finding that the medical evidence of record was insufficient to establish whether she sustained a medical condition causally related to the accepted factors of her federal employment.

On September 19, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Prior to the hearing, OWCP's hearing representative issued a December 8, 2022 decision vacating the September 13, 2022 decision and remanding the case to OWCP for further development of the evidence.

On March 16, 2023 OWCP referred appellant, the medical record, including a January 5, 2023 updated SOAF, and a series of questions, to Dr. William Kostman, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether she sustained a medical condition causally related to the accepted factors of her federal employment.

In an April 5, 2023 report, Dr. Kostman discussed appellant's factual and medical history, reviewed the SOAF and the medical record. On examination he observed equal and symmetric trapezius and shoulder musculature, healed portal sites involving the left shoulder, no biceps deformity, variable rotator cuff strength on testing, variable range of motion testing with supination on the left, no shoulder instability to anterior-posterior translation, no scapular winging, tenderness to palpation of the left AC joint, and variable testing on strength distally. In response to OWCP questions, Dr. Kostman noted the physical examination findings were variable on strength testing and inconsistent, and her subjective complaints did not correspond with objective findings. He

advised that notably there was no mention of adhesive capsulitis or traumatic lesion in the arthroscopic report. Dr. Kostman noted findings consistent with tendinitis of the biceps tendon and inflammation of the subacromial space and arthritis of the AC joint; however, he opined that these findings did not correlate with the work-related injury. He noted that appellant did not have any evidence of AC joint arthritis on the current radiographs. Dr. Kostman indicated that he did not believe impingement syndrome of the left shoulder was work related, rather, it was related to an anatomic configuration of her acromion, which was addressed by surgical intervention. He noted that the surgeon at the time of the arthroscopy did not note any findings consistent with adhesive capsulitis nor did the MRI scan identify adhesive capsulitis. Dr. Kostman noted that although appellant demonstrated some restriction in passive and active range of motion on examination her compliance with the examination was limited and variable. He concluded that the diagnosed adhesive capsulitis was not related to a work injury and opined that he did not believe that the alleged work activities as described in the SOAF caused, aggravated, accelerated, or precipitated any of the diagnosed conditions. Dr. Kostman further noted that he did not believe appellant had any evidence of aggravation of a preexisting condition as related to work activities. He advised that he did not believe appellant had any work-related condition or identifiable work cause for her shoulder condition preoperatively or postoperatively. Dr. Kostman opined that appellant could return to her occupation as a registered nurse without restrictions and did not require any further treatment.

By decision dated November 13, 2023, OWCP denied appellant's claim finding that the medical evidence of record was insufficient to establish causal relationship between her left shoulder condition and the accepted factors of her federal employment.

On November 21, 2023 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on February 7, 2024.

OWCP continued to received evidence. A September 30, 2019 electromyogram and nerve conduction velocity (EMG/NCV) study revealed left ulnar nerve entrapment neuropathy across the elbow, evidence of chronic denervation-reinnervation, and no evidence of left cervical radiculopathy.

OWCP received a procedure note for an aspiration of a joint or bursa from 2019 and x-rays of the left shoulder dated December 15, 2020.

In a December 14, 2022 report, Dr. Laura Bird, a Board-certified family practitioner, diagnosed cat bite of the forearm, obstructive sleep apnea, ulnar neuropathy at the elbow of the left upper extremity, migraines, bipolar disorder, cervical spondylosis, and urinary incontinence.

On March 3, 2024 appellant provided a timeline of her left shoulder condition.

By decision dated April 23, 2024, a representative of OWCP's Branch of Hearings and Review affirmed the November 13, 2023 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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 time limitation period of FECA⁷, 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.⁸ These are the essential elements of each and every compensation claim, regardless of whether the claim is based upon a traumatic injury or an occupational disease.⁹

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.¹⁰

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹¹ 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.¹² Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.¹³

ANALYSIS

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

Dr. Sippo, appellant's treating physician, advised that appellant's work activities resulted in repetitive chronic and acute injuries to her left rotator cuff, which led to the documented tear.

⁶ *Supra* note 2.

⁷ *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁸ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁹ 20 C.F.R. § 10.115; *E.S.*, Docket No. 18-1580 (issued January 23, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

¹⁰ *See T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹¹ *J.F.*, Docket No. 18-0492 (issued January 16, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹² *A.M.*, Docket No. 18-0562 (issued January 23, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

¹³ *E.W.*, *supra* note 7; *Gary L. Fowler*, 45 ECAB 365 (1994).

He indicated that repetitive lifting, pushing, and pulling of the shoulder led to severe stress in the muscular, bony, ligamentous, and cartilaginous structures in appellant's shoulder joint, and was responsible for damage to the anatomic structures. Dr. Sippo explained that the human shoulder consisted of muscles and supporting structures that operate the movements of the joint, and is small with marginal blood supply. He indicated that the shoulder is prone to overuse injuries leading to inflammation in the soft tissues and cumulative trauma to the joint structures stemming from excessive demands. Dr. Sippo further opined the trauma led to soft tissue strains in appellant's shoulders that caused chronic inflammation in her rotator cuff that made those muscles friable and susceptible to injury such as the injury that occurred on October 16, 2016. He provided a proper factual and medical history of injury, and directly opined that appellant's repetitive job duties were the competent producing cause of her diagnosed left shoulder rotator cuff tear and left shoulder osteoarthritis.

By contrast, Dr. Kostman, a second opinion physician, opined in his April 5, 2023 report that appellant had no disabling residuals of any condition associated with her current claim. He opined that he did not believe that the alleged work activities as described in the SOAF caused, aggravated, accelerated, or precipitated any of the diagnosed conditions. Dr. Kostman further noted that he did not believe appellant had any evidence of aggravation of a preexisting condition as related to work activities. He advised that he did not believe appellant had any work-related condition or identifiable work cause for her shoulder condition preoperatively or postoperatively. Dr. Kostman opined that appellant could return to her occupation as a registered nurse without restrictions and did not require further treatment.

Dr. Sippo provided a rationalized description of how the accepted work factors caused or contributed to the diagnosed conditions. Dr. Kostman, however, opined that there was no causal relationship between the identified employment factors and appellant's left shoulder condition. The Board, therefore, finds that a conflict in medical opinion exists regarding whether she sustained a left shoulder condition causally related to factors of her federal employment.

OWCP's regulations provide that, if a conflict exists between the medical opinion of the employee's physicians and the medical opinion of a second-opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.¹⁴ The Board will, therefore, remand the case to OWCP for referral to an impartial medical examiner regarding whether appellant has met her burden of proof to establish that she sustained a left shoulder condition due to the factors of her federal employment.¹⁵ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁴ 5 U.S.C. § 8123(a).

¹⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2024 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: June 17, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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