

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

S.L., Appellant)	
)	
and)	Docket No. 24-0220
)	Issued: May 15, 2024
U.S. POSTAL SERVICE, DELTA CARRIER)	
ANNEX, Lansing, MI, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 28, 2023 appellant filed a timely appeal from a November 16, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the November 16, 2023 decision, appellant submitted additional evidence to OWCP and on appeal. 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 expand the acceptance of her claim to include right shoulder conditions, causally related to, or as a consequence of, her accepted left shoulder employment conditions.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.

On May 19, 1998 appellant, then a 50-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that work activities, while on light-duty work following a prior employment injury, had worsened her accepted subluxations of the left shoulder and cervical spine.⁴ OWCP accepted the claim for aggravation of a left shoulder subluxation and aggravation of degenerative joint disease of the left shoulder. On July 17, 1998 appellant underwent OWCP-authorized arthroscopy of the left shoulder with intra-articular chondroplasty, debridement, removal of retained staple, and a Mumford procedure.⁵ Following a brief return to part-time, light-duty work, she stopped work on February 25, 1999 and did not return. OWCP paid appellant wage-loss compensation for total disability, effective February 25, 1999. It subsequently expanded the acceptance of her claim to include depressive disorder and conversion disorder.⁶

In a report dated December 5, 2016, Dr. Patrick H. Noud, a Board-certified orthopedic surgeon, recounted appellant's history of chronic left shoulder pain and dysfunction due to previous injuries. Appellant asserted that she had developed right shoulder pain when using her right upper extremity to move her left shoulder during assistive passive range of motion exercises. Additionally, she had been performing all activities with her right shoulder as the left shoulder had

³ Docket No. 22-1028 (issued September 8, 2023).

⁴ OWCP assigned the present claim OWCP File No. xxxxxx797. On March 22, 1985 appellant had filed an occupational disease claim (Form CA-2) alleging that she sustained a left shoulder condition causally related to factors of her federal employment. OWCP assigned that claim OWCP File No. xxxxxx600 and accepted it for an anterior subluxation with laxity of the left shoulder, adhesive capsulitis of the left shoulder, and subluxation of the atlas and axis vertebrae. On June 18, 1998 OWCP administratively combined OWCP File Nos. xxxxxx600 and xxxxxx797, with the latter designated as the master file.

⁵ On December 21, 1984 appellant underwent OWCP-authorized left shoulder arthroscopy, intra-articular partial synovectomy, and Bankhart reconstruction with intra-articular staple. On May 4, 1994 she underwent OWCP-authorized arthroscopic acromioplasty of the left shoulder with intra-articular chondroplasty, debridement, and removal of the retained staple.

⁶ By decision dated May 14, 2002, under OWCP File No. xxxxxx600, OWCP terminated authorization for medical benefits for subluxation of the atlas and axis vertebrae. It denied reconsideration by nonmerit decisions dated January 22 and March 5, 2003, and January 6 and 12, 2006. Appellant then appealed to the Board. By decision dated February 28, 2007, the Board affirmed OWCP's January 6 and 12, 2006 nonmerit decisions. *See* Docket No. 06-960 (issued February 28, 2007).

been symptomatic. Dr. Noud attributed appellant's right shoulder symptoms due to the increased workload caused by her left shoulder dysfunction.

In a December 21, 2016 report, Dr. Fred Isaacs, a Board-certified internist, recounted appellant's history of injury and treatment. He diagnosed bilateral shoulder "malfunction from ligamentous and tendon problems on the left side and rotator cuff and degenerative joint disease issues on the right side." Dr. Isaacs opined that appellant developed right shoulder symptoms because of her inability to use her left upper extremity.

On January 12, 2017 OWCP referred appellant, a statement of accepted facts (SOAF), the medical record, and a series of questions for a second opinion examination with Dr. Edward C. Sladek, a Board-certified orthopedic surgeon, to determine the nature and extent of the work-related conditions.

In a January 30, 2017 report, Dr. Sladek recounted appellant's history of injury, reviewed the medical record and SOAF, and noted findings on examination. He diagnosed degenerative arthrosis of the left glenoid humeral joint secondary to the accepted conditions and multiple surgeries. Dr. Sladek opined that the degenerative arthrosis of the left shoulder had "most likely" affected degenerative arthrosis of the right shoulder.

Dr. Sladek submitted April 12, 2017 reports in which he indicated that appellant's right shoulder condition was unrelated to the accepted left shoulder conditions or other factors of her federal employment. He diagnosed minimal degenerative arthrosis of the right shoulder, unrelated to the accepted left shoulder conditions.

In an April 25, 2017 report, Dr. Noud noted that appellant had bilaterally restricted shoulder motion and weakness, which limited her daily activities.

In a statement dated May 16, 2017, appellant asserted that she injured her right shoulder in 2016 during physical therapy to treat her accepted left shoulder conditions.

On May 24, 2017 OWCP expanded the acceptance of appellant's claim to include other congenital anomalies of the left upper limb and shoulder girdle.

On August 4, 2017 OWCP found a conflict in the medical opinion evidence between Dr. Sladek, for the government, and Dr. Isaacs, for appellant, regarding the nature and extent of the accepted conditions and any continuing disability. To resolve the conflict, on August 30, 2017, it referred her, the medical record, a SOAF, and a series of questions to Dr. Gregory Uitvlugt, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion.

In a September 19, 2017 report, Dr. Uitvlugt, the impartial medical examiner (IME) reviewed the medical record and SOAF and noted findings on examination. He diagnosed chronic pain disorder, degenerative arthritis of the cervical spine, bilateral rotator cuff tears, and ankylosis. Dr. Uitvlugt opined that the right rotator cuff tear was not work related.

In reports dated September 19, 2017, Dr. J. Michael Wiater, a Board-certified orthopedic surgeon, recounted appellant's history of injury and treatment and that she had developed right shoulder pain. He obtained an electromyography (EMG) study of the right upper extremity, which was within normal limits.

In an informational letter dated October 16, 2017, OWCP advised appellant that it would not expand the acceptance of her claim to include a consequential right shoulder condition, based on Dr. Uitvlugt's opinion as the special weight of the medical evidence.

In a December 18, 2017 report, Dr. Isaacs noted crepitus and markedly limited motion in both shoulders. He opined that appellant had developed right rotator cuff and degenerative joint disease due to ligament and tendon problems of the left shoulder.

Thereafter, OWCP received a report dated November 20, 2018, wherein Dr. Ryan O'Connor, Board-certified in physiatry and pain medicine, indicated that appellant had bilateral shoulder conditions.

OWCP obtained a January 12, 2019 report by Dr. Jack L. Miller, a physician Board-certified in physiatry and occupational medicine, serving as an OWCP district medical adviser (DMA). Dr. Miller indicated that appellant sustained permanent impairment to her left shoulder, but no other work-related injuries.

In an undated report received by OWCP on May 26, 2020, Dr. Grace Escamilla, a Board-certified internist, noted appellant's longstanding occupational left shoulder conditions. She opined that appellant developed right shoulder pain, weakness, and limited range of motion due to compensation for her left shoulder and from repetitive trauma while at work.

On August 25, 2020 OWCP referred appellant, a SOAF, the medical record, and a series of questions for a second opinion examination with Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, to determine the nature and extent of the work-related conditions.

In a September 14, 2020 report, Dr. Obianwu recounted appellant's history of injury, reviewed the medical record and SOAF, and noted findings on examination. He diagnosed anterior subluxation with laxity of the left shoulder, capsulitis of the left shoulder, postsurgical status times three, rotator cuff arthropathy and resolved subluxation of the atlas and axis vertebrae. Dr. Obianwu opined that appellant had no insufficiency in the right shoulder.

On February 24, 2021 OWCP found a conflict in the medical opinion evidence between Dr. Obianwu and Dr. Escamilla regarding the nature and extent of the accepted left shoulder conditions and the physical limitations imposed. To resolve the conflict, on September 2, 2021, it referred appellant, the medical record, a SOAF, and a series of questions to Dr. Jeffrey Devitt, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion.

In reports dated September 21 and December 11, 2021, and April 18, 2022, Dr. Devitt, the IME, reviewed the medical record and SOAF. On examination he observed restricted left shoulder motion, 4/5 distal left upper extremity strength, and positive impingement and apprehension tests.

Dr. Devitt opined that appellant's acquired right shoulder problems were not work-related based on the medical evidence of record. He noted that appellant's left shoulder conditions remained chronic and were not expected to resolve.

In a February 9, 2023 work capacity evaluation (Form OWCP-5c), Dr. Escamilla found appellant totally and permanently disabled from work due to degenerative joint disease of the left shoulder with pain, weakness, and severely limited range of motion.

On August 29, 2023 appellant filed a notice of recurrence (Form CA-2a) alleging that she sustained a right shoulder condition due to compensating for her accepted left shoulder conditions. In an associated statement, she explained that she relied solely on her right shoulder as her left shoulder remained permanently dislocated after three failed surgical reconstructions. Appellant advised that she underwent right reverse shoulder replacement on December 21, 2022, and a course of postoperative physical therapy.

Thereafter, OWCP received an August 28, 2023 report by Michael Wille, a physician assistant.

In a development letter dated September 29, 2023, OWCP informed appellant of the deficiencies in her claim. It advised her of the type of additional factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

OWCP received additional medical evidence. In an October 11, 2023 report, Dr. Wiater recounted appellant's history of multiple left shoulder surgeries "caused by a work injury." He noted that appellant had limited use of the left shoulder and depended "on the right shoulder for everything," which "likely led to the right shoulder pain and severe osteoarthritis" with limited mobility, necessitating surgery.

By decision dated November 16, 2023, OWCP denied appellant's request to expand the acceptance of her claim to include right shoulder conditions as causally related to her accepted left shoulder employment conditions.

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 condition and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and

⁷ *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).

medical background, supporting such a causal relationship.⁸ 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.⁹

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.¹⁰

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.¹¹ 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.¹²

ANALYSIS

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include right shoulder conditions, causally related to, or as a consequence of, her accepted left shoulder employment conditions.

As previously noted, to establish a consequential injury the medical evidence must establish that the consequentially claimed condition was a direct and natural result of a compensable primary injury.¹³ Initially, OWCP found a conflict of medical opinion between Dr. Isaacs, for appellant, and Dr. Sladek, a second opinion physician, on the issue of continuing

⁸ *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).

⁹ *Id.*

¹⁰ *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).

¹¹ 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).

¹² 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).

¹³ *See supra* note 10; *see also K.S.*, Docket No. 17-1583 (issued May 10, 2018).

disability from work. Additionally, Dr. Isaacs opined in a December 21, 2016 report that appellant sustained right shoulder conditions due to overuse while compensating for her left shoulder, while Dr. Sladek opined in April 12, 2017 reports that appellant's right shoulder conditions were not work related. OWCP then selected Dr. Uitvlugt as an IME on the issue of the nature and extent of the injury-related conditions and the degree of associated disability.

In his September 19, 2017 report, Dr. Uitvlugt opined that appellant's right rotator cuff tear was unrelated to the accepted left shoulder conditions. OWCP accorded his opinion the special weight of the medical evidence on the issue of a consequential right shoulder condition. The Board notes that, contrary to OWCP's October 16, 2017 informational letter, there was no conflict of medical opinion at the time of OWCP's referral to Dr. Uitvlugt regarding expansion of the claim to include right shoulder conditions. Even though his opinion is, therefore, not entitled to the special weight afforded to the opinion of an IME resolving a conflict in medical opinion, his reports can still be considered for their own intrinsic value and can constitute the weight of the medical evidence.¹⁴

Thereafter, Dr. Escamilla opined in a May 26, 2020 report that appellant developed right shoulder pain, weakness, and restricted motion due to compensating for employment-related left shoulder dysfunction. OWCP obtained a September 14, 2020 second opinion report by Dr. Obianwu, who found no dysfunction of the right shoulder. It then found a conflict of medical opinion between Dr. Escamilla and Dr. Obianwu regarding the nature and extent of the accepted conditions and appellant's work capacity, and selected Dr. Devitt as an IME to resolve it.¹⁵ Dr. Devitt, in reports dated September 21 and December 11, 2021, and April 18, 2022, opined that appellant's right shoulder conditions were not work related.

Dr. Wiater, in his October 11, 2023 report, opined that appellant's use of her right upper extremity to compensate for left shoulder dysfunction likely led to right shoulder osteoarthritis requiring surgery. While he opined that the accepted left shoulder conditions caused consequential right shoulder osteoarthritis, he did not provide sufficient rationale to meet appellant's burden of proof.¹⁶ The Board has held that medical opinions that suggests a condition was likely or possibly caused by work factors are speculative and equivocal, and have limited probative value.¹⁷

OWCP also received an August 28, 2023 report by Mr. Wille, a physician assistant. The Board has held that medical reports signed solely by a physician assistant, nurse practitioner, or medical assistant are of no probative value as such healthcare providers are not considered

¹⁴ *S.B.*, Docket No. 22-1067 (issued April 20, 2023). See also *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996); *Rosa Whitfield Swain*, 38 ECAB 368 (1987) (a physician was improperly designated as an IME, but his opinion nonetheless constituted the weight of the medical evidence).

¹⁵ The Board notes that Dr. Devitt was not requested to resolve a conflict of medical opinion regarding expansion of the claim to include right shoulder conditions.

¹⁶ See *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

¹⁷ *K.M.*, Docket No. 23-1029 (issued December 26, 2023); *B.B.*, Docket No. 21-0284 (issued October 5, 2022); *J.W.*, Docket No. 18-0678 (issued March 3, 2020).

physicians as defined under FECA and are, therefore, not competent to provide medical opinions.¹⁸ Consequently, their medical findings and/or opinions will not suffice for the purpose of establishing entitlement to FECA benefits.

As the medical evidence of record is insufficient to establish causal relationship, the Board finds that he has not met her burden of proof to establish consequential right shoulder conditions as causally related to the accepted left shoulder conditions.

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 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 right shoulder conditions, causally related to, or as a consequence of, her accepted left shoulder employment conditions.

¹⁸ Section 8101(2) of FECA provides that physician “includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law.” 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *see B.A.*, Docket No. 23-0422 (issued November 29, 2023) (physician assistants are not considered physicians as defined by FECA); *X.M.*, Docket No. 22-0271 (issued February 28, 2023) (physician assistants are not considered physicians as defined under FECA); *S.S.*, Docket No. 21-1140 (issued June 29, 2022) (physician assistants are not considered physicians under FECA and are not competent to provide medical opinions); *George H. Clark*, 56 ECAB 162 (2004) (physician assistants are not considered physicians under FECA); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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