

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

S.L., Appellant)	
)	
and)	Docket No. 24-0312
)	Issued: May 14, 2024
DEPARTMENT OF JUSTICE, U.S. MARSHALS)	
SERVICE, Oklahoma City, OK, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 7, 2024 appellant filed a timely appeal from a January 5, 2024 merit decision and a January 31, 2024 nonmerit 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.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to expand the acceptance of her claim to include thoracic spine degenerative disc disease, a right shoulder labrum tear, and/or a right shoulder rotator cuff tear as causally related to her accepted February 8, 2021 employment injury; and (2) whether OWCP properly denied appellant's request for a review of the written record, pursuant to 5 U.S.C. § 8124(b).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 16, 2021 appellant, then a 53-year-old general inspection, investigation and compliance employee, filed a traumatic injury claim (Form CA-1) alleging that on February 8, 2021 she sustained injury to her right hand, wrist, shoulder, back, and knees when she slipped and fell on ice while in the performance of duty. OWCP initially accepted the claim for right and left knee medial meniscus tears, left knee sprain, lumbar sprain, and right and left shoulder sprains. It subsequently expanded the acceptance of the claim to include right wrist impingement, lumbar degenerative disc disease, lumbar radiculopathy, bilateral shoulder impingement syndrome, left shoulder impingement syndrome, and thoracic spine radiculopathy. Appellant worked in a full-time, light-duty capacity until she voluntarily retired from the employing establishment on June 24, 2022.

In January 3 and February 28, 2022 reports, Dr. John W. Ellis, Board-certified in family medicine, requested that appellant's claim be expanded to include thoracic spine degenerative disc disease, right shoulder labrum tear, and right shoulder rotator cuff tear.

OWCP subsequently referred appellant, along with the case record and a statement of accepted facts (SOAF), to Dr. Christopher Jordan a Board-certified orthopedic surgeon, for a second opinion regarding the status of appellant's work-related conditions.

In a May 3, 2022 report, Dr. Jordan serving as a second opinion physician, noted his review of a June 23, 2021 SOAF and the medical record. He set forth examination findings. Regarding the expansion issue, Dr. Jordan indicated that the right shoulder magnetic resonance imaging (MRI) scan from March 18, 2021 showed some partial infraspinatus tendon tearing, but did not show any evidence of a right shoulder sprain.

In August 29 and September 26, 2022 reports, Dr. Ellis requested that appellant's claim be expanded to include thoracic spine degenerative disc disease, right shoulder labrum tear, and right shoulder rotator cuff tear. He recounted the history of her February 8, 2021 employment injury and her medical course. Dr. Ellis noted appellant's accepted conditions and opined, based on his examination of her, review of the medical and other records, that her employment factors and work duties contributed to, aggravated and/or caused her additional diagnosed conditions of thoracic spine degenerative disc disease, right shoulder labrum tear, and right shoulder rotator cuff tear. He explained that the initial imaging indicated that she had a tear in her right shoulder, which was confirmed by Dr. Jordan on MRI scan and by Dr. Keley Booth, a Board-certified anesthesiologist, on ultrasound. Therefore, Dr. Ellis concluded that appellant's claim should be expanded to reflect the labrum and rotator cuff tears which resulted from the February 2021 initial injury. He provided copies of March 18, 2021 and December 20, 2021 MRI scan studies.

On November 4, 2022 OWCP requested that Dr. Jordan clarify his opinion regarding expansion of the claim.

In a February 4, 2023 supplemental report, Dr. Jordan clarified that there was no evidence of a thoracic disc degeneration, noting that there was no record of an MRI scan of the thoracic spine, and he did not find any evidence of a thoracic spine radiculopathy.

By decision dated March 9, 2023, OWCP denied the expansion of the claim to include thoracic spine degenerative disc disease, right shoulder labrum tear, and right shoulder rotator cuff tear as causally related to the February 8, 2021 work injury. The weight of the medical evidence was accorded to Dr. Jordan's reports.

OWCP subsequently received a March 7, 2023 MRI scans of appellant's shoulders. The right shoulder MRI scan revealed moderate-to-severe hypertrophic acromioclavicular joint osteoarthritis; minimal glenohumeral joint osteoarthritis with tiny joint effusion; free edge blunting posterior labrum; minimal atrophy and grade 1 fatty infiltration rotator cuff musculature; and supraspinatus, infraspinatus, and subscapularis tendinosis without tear.

In a March 31, 2023 letter, Dr. Ellis reviewed Dr. Jordan's May 2, 2022 and February 4, 2023 reports, and disagreed with the denial of case expansion for the conditions of degenerative disc disease of thoracic spine, right shoulder labrum tear and right shoulder rotator cuff tear. He opined that the February 8, 2021 work injury significantly worsened appellant's previous thoracic spine etiology along with her right shoulder findings. Dr. Ellis noted that when Dr. Booth performed the ultrasound on appellant's right shoulder he identified a significant increase in fluid, as documented in his June 9, 2022 note. He explained that while the March 7, 2023 right shoulder MRI scan did not identify a clear-cut labrum or rotator cuff tear, it has been well documented in medical literature that MRI scans were not 100 percent accurate at diagnosing soft tissue injuries and physical examination findings were the most accurate. Therefore, Dr. Ellis opined that, based on the free fluid identified in the shoulder region, along with her examination findings, appellant had additional right shoulder pathology and her right shoulder conditions should be upgraded. He further opined that her initial imaging showed a tear in her right shoulder, which Dr. Booth had confirmed on ultrasound. Dr. Ellis noted that Dr. Jordan also told appellant in the examination room that she had a tear in her shoulder. Copies of the March 7, 2023 MRI scan of appellant's right shoulder was attached.

On May 22, 2023 appellant requested reconsideration.

OWCP also received a March 29, 2022 MRI scan of thoracic spine, which revealed acquired degenerative changes of the thoracic spine without significant central canal or neural foraminal narrowing.

On August 21, 2023 OWCP declared a conflict of medical opinion between Dr. Ellis and Dr. Jordan regarding whether appellant sustained thoracic spine degenerative disc disease, right shoulder labrum tear, and/or right shoulder rotator cuff tear causally related to her February 8, 2021 employment injury. On August 31, 2023 it referred her for an impartial medical examination with Dr. John Estivo, a Board-certified osteopath orthopedic surgeon, to resolve the conflict of medical opinion.

In an October 19, 2023 report, Dr. Estivo, serving as the impartial medical examiner (IME), noted his review of an August 21, 2023 SOAF and appellant's medical record, and he set forth his examination findings. He opined that the February 8, 2021 work injury had temporarily aggravated her preexisting age-related thoracic spine degenerative disc disease, which had now returned to the preinjury status and did not require any medical treatment. Dr. Estivo explained that the aggravation was temporary and had resolved as no structural changes were seen to the

thoracic spine on the x-rays or the MRI scan and thus there had not been any worsening or acceleration of the age-related degenerative disc disease to the thoracic spine as a result of the February 8, 2021 work-related incident. Regarding appellant's right shoulder, he indicated that the March 18, 2021 right shoulder MRI scan did not reveal a rotator cuff tear or a tear to the labrum, but there was soft tissue inflammation consistent with a right shoulder sprain. Dr. Estivo indicated that the March 7, 2023 right shoulder MRI scan did not reveal a rotator cuff tear or a labrum tear. He noted that age-related degenerative changes were seen on x-rays and both of the MRI scans. Thus, Dr. Estivo opined that appellant had experienced a soft tissue sprain to the right shoulder on February 8, 2021 and no further treatment was required for her right shoulder in relation to the February 8, 2021 work injury. He concluded that the claim should not be expanded to include thoracic spine degenerative spine disease, right shoulder labrum tear and right shoulder rotator cuff tear. Dr. Estivo reiterated that appellant had a temporary aggravation to the preexisting thoracic spine degenerative disc disease on February 8, 2021 which did not require any further treatment. He disagreed with Dr. Jordan's opinion that there was a partial thickness tear to the infraspinatus portion of the right rotator cuff, noting that he did not see a rotator cuff tear, but only saw inflammation, on the March 18, 2021 MRI scan. Dr. Estivo explained that while an ultrasound was useful with evaluation of the rotator cuff, MRI scans were the gold standard for evaluating the rotator cuff for rotator cuff tears and neither he nor the radiologist found any evidence of a rotator cuff tear or labral tear on the right shoulder MRI scans of March 18, 2021 or March 7, 2023. He further opined that appellant was at maximum medical improvement in relation to the February 8, 2021 work injury and did not require further medical treatment.

By decision dated January 5, 2024, OWCP denied modification of its March 9, 2023 decision. It found that the special weight of the medical evidence rested with the October 19, 2023 report of Dr. Estivo, the IME.

On January 29, 2024 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review regarding the January 5, 2024 decision.

By decision dated January 31, 2024, OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record, noting that she had previously requested reconsideration. It explained that, under 5 U.S.C. § 8124(b)(1), she was not entitled to a hearing on the same issue as a matter of right. OWCP also exercised its discretion and considered whether to grant a discretionary hearing and found that the issue could be equally-well addressed by requesting reconsideration and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

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.²

² *L.F.*, Docket No. 20-0359 (issued January 27, 2021); *S.H.*, Docket No. 19-1128 (issued December 2, 2019); *M.M.*, Docket No. 19-0951 (issued October 24, 2019); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

To establish causal relationship between the claimed condition and the employment injury, an employee must submit rationalized medical evidence.³ 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.⁴ The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.⁵

In a case where 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.⁶

Section 8123(a) provides 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 OWCP's 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.⁸ Where a case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant has met her burden of proof to expand the acceptance of her claim to include temporary aggravation of thoracic spine degenerative disc disease.

³ *L.F., id.*; *T.K.*, Docket No. 18-1239 (issued May 29, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

⁴ *D.T.*, Docket No. 20-0234 (issued January 8, 2021); *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *T.K., id.*; *I.J.* 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ *See D.T., id.*; *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

⁶ *M.O.*, Docket No. 18-0229 (issued September 23, 2019); *J.F.*, Docket No. 19-0456 (issued July 12, 2019); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

⁷ 5 U.S.C. § 8123(a).

⁸ 20 C.F.R. § 10.321.

⁹ *A.R.*, Docket No. 18-0441 (issued February 19, 2020); *V.K.*, Docket No. 18-1005 (issued February 1, 2019); *D.M.*, Docket No. 17-1411 (issued June 7, 2018); *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006); *James P. Roberts*, 31 ECAB 1010 (1980).

OWCP properly found a conflict of medical opinion between Dr. Ellis and Dr. Jordan regarding whether appellant sustained thoracic spine degenerative disc disease, right shoulder labrum tear and right shoulder rotator cuff tear as causally related to her February 8, 2021 employment injury. In order to resolve the conflict, it referred her Dr. Estivo for an impartial medical examination to resolve the conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a).

In his October 19, 2023 report, Dr. Estivo opined that appellant's February 8, 2021 work injury had temporarily aggravated her preexisting age-related thoracic spine degenerative disc disease. He explained that the aggravation was temporary and had resolved, and thus there had not been any worsening or acceleration of the age-related degenerative disc disease to the thoracic spine as a result of the February 8, 2021 work-related incident.

The Board finds that Dr. Estivo's October 19, 2023 IME report represents the special weight of the medical evidence as his opinion is based on a proper factual and medical history, and contains a detailed explanation of why the aggravation of thoracic spine degenerative disc disease is causally related to the accepted February 8, 2021 employment injury.¹⁰ As the medical evidence of record is sufficient to expand the acceptance of the claim to include a temporary aggravation of thoracic spine degenerative disc disease, the Board finds that appellant has met her burden of proof in this regard.

The Board further finds, however, that appellant has not met her burden of proof to expand the acceptance of her claim to include right shoulder labrum tear and/or right shoulder rotator cuff tear as causally related to her accepted February 8, 2021 employment injury.

Dr. Estivo opined that the claim should not be expanded to include right shoulder labrum tear or right shoulder rotator cuff tear. He noted that the March 18, 2021 right shoulder MRI scan did not reveal a rotator cuff tear or a tear to the labrum, but there was soft tissue inflammation consistent with a right shoulder sprain. Dr. Estivo indicated that the March 7, 2023 right shoulder MRI scan did not reveal a rotator cuff tear or a labrum tear. He also noted that age-related degenerative changes were seen on x-rays and both of the MRI scans. He disagreed with Dr. Jordan that there was a partial thickness tear to the infraspinatus portion of the right rotator cuff, noting that he did not see a rotator cuff tear, only inflammation, on the March 18, 2021 MRI scan. Dr. Estivo opined that on February 8, 2021 appellant had only experienced a soft tissue sprain to the right shoulder and no further treatment was required for her right shoulder.

As the medical evidence of record is insufficient to establish expansion of the claim to include a right shoulder labrum tear and/or right shoulder rotator cuff tear, the Board finds that appellant has not met her burden of proof in this regard.

¹⁰ See *M.B.*, Docket No. 21-0555 (issued March 4, 2022); *F.A.*, Docket No. 20-1652 (issued May 21, 2021); *K.V.*, Docket No. 18-0947 (issued March 4, 2019); *Michael S. Mina*, 57 ECAB 379 (2006); *Kathryn Haggerty*, 45 ECAB 383 (1994) (the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

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.

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with an OWCP decision shall be afforded an opportunity for either an oral hearing or a review of the written record.¹¹ Section 8124(b) of FECA, concerning a claimant's entitlement to a hearing, states that: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his or her claim before a representative of the Secretary."¹² OWCP's regulations further explain that the claimant must have not previously submitted a reconsideration request (whether or not it was granted) on the same decision.¹³ Although a claimant who has previously sought reconsideration is not, as a matter of right, entitled to a hearing or review of the written record, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing following reconsideration.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for a review of the written record, pursuant to 5 U.S.C. § 8124(b).

On May 22, 2023 appellant requested reconsideration of the March 9, 2023 decision. In its January 5, 2024 decision, OWCP denied modification of its March 9, 2023 decision as the evidence presented was of insufficient probative value. Subsequently, on January 29, 2024 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review. As she had previously requested reconsideration of OWCP's March 9, 2023 merit decision under section 8128 of FECA, she was not entitled to an oral hearing as a matter of right under section 8124(b)(1).¹⁵ OWCP properly exercised its discretion and determined that the issue in the case could be equally-well addressed through a request for reconsideration and the submission of new evidence.¹⁶ Therefore, the Board finds that OWCP, in its January 31, 2024 decision, properly denied appellant's January 29, 2024 request for a review of the written record.

¹¹ 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.615.

¹² *Id.* at § 8124(b)(1).

¹³ *Id.*

¹⁴ *See H.T.*, Docket No. 20-1318 (issued April 27, 2021); *E.S.*, Docket No. 19-1144 (issued August 3, 2020); *J.C.*, Docket No. 19-1293 (issued December 16, 2019); *T.M.*, Docket No. 18-1418 (issued February 7, 2019); *M.W.*, Docket No. 16-1560 (issued May 8, 2017); *D.E.*, 59 ECAB 438 (2008); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

¹⁵ 20 C.F.R. § 10.616(a); *R.B.*, Docket No. 22-0755 (issued October 28, 2022); *H.T.*, *id.*; *J.H.*, Docket No. 17-1796 (issued February 6, 2018).

¹⁶ *Id.*

CONCLUSION

The Board finds appellant has met her burden of proof to expand the acceptance of her claim to include temporary aggravation of thoracic spine degenerative disc disease. The Board further finds, however, that she has not met her burden of proof to expand the acceptance of her claim to include a right shoulder rotator cuff tear and/or labral tear. The Board also finds that OWCP properly denied appellant's request for an oral hearing, pursuant to 5 U.S.C. § 8124(b).

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2024 decision of the Office of Workers' Compensation Programs is reversed in part and affirmed in part. The January 31, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 14, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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