United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 16-1552**
	)	**Issued: July 5, 2017**
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, Employer	)	

Appearances:
Sean Berry, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 28, 2016 appellant, through counsel, filed a timely appeal from March 31 and June 23, 2016 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish an injury causally related to an accepted August 23, 2015 employment incident.

[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.*

FACTUAL HISTORY

On September 14, 2015 appellant, then a 57-year-old laborer custodian, filed a traumatic injury claim (Form CA-1) alleging that on August 23, 2015 he injured his left shoulder while moving furniture at work. He stopped work on September 4, 2015. On the back of the claim form the employing establishment checked a box marked "No," indicating that appellant's injury did not occur in the performance of duty because witness statements noted that appellant complained about his shoulder before work started.

In an August 28, 2015 telephone message memorandum, Sarah Brinkmann, a registered nurse, indicated that appellant had called because the cortisone injection, which had been administered, had not given him significant relief for his shoulder pain. She related that a prescription for Valium was sent to appellant's pharmacy.

Appellant underwent a left shoulder magnetic resonance imaging (MRI) scan by Dr. David Wu, a Board-certified radiologist, who indicated in a September 3, 2015 report that appellant had a complete tear in the supraspinatus tendon associated with approximately two centimeter (cm) tendon retraction, full-thickness tear involving the anterior half of the distal infraspinatus tendon without tendon retraction, and acromioclavicular (AC) joint osteoarthritis with undersurface hypertrophy resulting in mild compression on the distal supraspinatus muscle belly.

Dr. Dennis A. Dusek, a Board-certified orthopedic surgeon, provided work status notes dated September 3 and 8, 2015, which requested that appellant be excused from work from September 2 to 22, 2015. He related that appellant had been under his care for a left shoulder condition. Dr. Dusek explained that appellant had a rotator cuff tear and was scheduled for surgery on September 22, 2015. He opined that appellant could likely return to work in five to six months pending rehabilitation.

In a September 8, 2015 telephone message memorandum, Meghan Flynn, a certified physician assistant, noted that appellant was informed that a left shoulder MRI scan showed a full-thickness tear of the supraspinatus with a two cm retraction and a focal full-thickness tear of the anterior infraspinatus. She related that appellant worked as a custodian and had significant difficulty raising his arm. Ms. Flynn indicated that a work status note was issued to excuse appellant from work from September 5, 2015 until surgery on September 22, 2015.

In an undated, handwritten statement, K.S., appellant's coworker, reported that every day he worked with appellant, appellant complained that his arm, shoulder, or knees hurt. He also noted that he never advised appellant to work the furniture dolly alone, but recommended that they take turns.

S.H., appellant's coworker, also provided a handwritten September 10, 2015 statement, in which she explained that when she was training appellant and R.R. on the same assignment, appellant did not complain, but when the supervisor assigned appellant a route by himself he began to complain about his neck, shoulder, and back pain. Appellant claimed that the mopping was too much for him to do. S.H. indicated that appellant had previously worked for MSD, a private sewer company, and had sustained a neck injury when he was rear-ended in a company truck.

In a September 10, 2015 e-mail, M.B., appellant's supervisor, controverted appellant's claim. He related that on August 23, 2015 appellant and another coworker were moving furniture with a moving dolly. Appellant returned to work the next day and continued to work until September 2, 2015 when appellant called his office and left a message that his shoulder was hurting. He related that on September 4, 2015 appellant informed him that his doctor informed him to not go to work. M.B. reported that on September 7, 2015 appellant informed him of his injury. He alleged that, during appellant's statement, he indicated that he had bursitis in his shoulder and was unable to lift his arm. M.B. related that appellant was able to reach into his back pocket. He also asserted that K.S. stated that appellant was always complaining about his shoulder. M.B. reported that appellant had advised other custodians that he was getting full disability benefits from some other entity. He further noted that appellant was terminated from the transportation department of the employing establishment around 2010 or 2011 for failure to maintain his work schedule and he currently had an Equal Employment Opportunity (EEO) Commission case against J.F., the manager of that department, for not rehiring him.

C.G., a human resource specialist for the employing establishment, also controverted appellant's claim in a September 16, 2015 letter. She alleged that appellant's disability was not caused by a traumatic injury while in the performance of duty and that he had not provided sufficient medical evidence to establish a causal relationship between appellant's diagnosed condition and the implicated factors of the injury. C.G. noted that a September 8, 2015 medical report demonstrated that appellant was scheduled for surgery on September 22, 2015, which indicated that appellant had a preexisting condition. She asserted that appellant fabricated his injury in an attempt to be paid for time off work and for surgery at the employing establishment's expense.

In a September 17, 2015 telephone message memorandum, Nurse Brinkmann related that she left a voicemail regarding which medications appellant should discontinue prior to his upcoming surgery.

Dr. Dusek related in a September 22, 2015 telephone message memorandum that appellant had called on September 21, 2015 to cancel his surgery. He informed appellant of the risk of his tear, which already showed two cm of retraction, progressing into an irreparable tear if he postponed the surgery for too long.

By letter dated September 23, 2015, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested that he respond to the attached questionnaire in order to substantiate the factual elements of his claim and provide additional medical evidence to establish a diagnosed medical condition causally related to the alleged employment incident. Appellant was afforded 30 days to submit this evidence.

On September 30, 2015 appellant filed a claim for wage-loss compensation (Form CA-7) for the period beginning August 23, 2015.

On October 5, 2015 OWCP received appellant's response to its questionnaire. Appellant described that on August 23, 2015 he began his shift at the employing establishment at 2:00 p.m. by moving large file cabinets weighing approximately 300 pounds from the second floor of the facility to the third floor. He noted that he also moved large wooden tables and metal chairs. Appellant explained that at approximately 5:30 p.m. he began to notice a sharp, burning pain in

his left shoulder and neck. He believed that this was a result of lifting and moving the file cabinets. Appellant noted that around 7:00 p.m. he informed his coworker, K.S., that his neck and shoulder were in pain and he did not think he could lift anymore. He related that he continued to work until the conclusion of his shift at 9:00 p.m. Appellant described his symptoms as immediate pain and burning in his left shoulder and neck. He indicated that he made an appointment with Dr. Dusek when he continued to experience ongoing pain, discomfort, and loss of range of motion. Appellant noted that Dr. Dusek scheduled an MRI scan and diagnosed him with a torn rotator cuff. He related that he continued to experience significant pain, discomfort, and loss of range of motion in his left shoulder. Appellant reported that he did not have any similar disabilities or symptoms before the current alleged injury. He explained that in March 2015 he was diagnosed with bursitis of the left shoulder and had sustained a herniated disc in his cervical spine years ago. Appellant reported that he had no witness statements.

On October 9, 2015 OWCP received an October 1, 2015 letter from counsel. Counsel indicated that he was enclosing the complete records of Dr. Dusek.

Counsel submitted January 21 and March 11, 2015 reports from Dr. Dusek for complaints of left shoulder pain. He noted that appellant was currently on disability and had been off work for about four years. Dr. Dusek related that appellant injured his shoulder in 1986 when he worked on a forklift, was treated for left shoulder bursitis in 1997, sustained a ruptured disc in his neck from a car accident in 1999, and was treated by Dr. Mark D. Miller, a Board-certified orthopedic surgeon, for a partial tear of the rotator cuff in 2006. He described that appellant had previously cleaned out gutters and rebuilt a bumper on his car. Appellant indicated that he threw a tennis ball with his right arm and felt a burning pain across the left shoulder. Dr. Dusek reviewed appellant's history and provided physical examination findings. He reported mild-to-moderately positive impingement signs on the left shoulder, but not on the right shoulder. Dr. Dusek also noted pain when rotated anteriorly and anterolaterally, but not over the acromioclavicular (AC) joints. Appellant had full overhead elevation to both shoulders. Dr. Dusek indicated that a left shoulder x-ray examination showed a type 1 acromion on the outlet view. He diagnosed left shoulder bursitis. Dr. Dusek recommended a cortisone injection for appellant's bursitis.

OWCP denied appellant's claim in a decision dated October 30, 2015. It accepted that the August 23, 2015 employment incident occurred as alleged and that appellant sustained a diagnosed shoulder condition, but denied his claim because the medical evidence failed to establish that his left shoulder condition was causally related to the accepted incident.

On December 21, 2015 appellant, through counsel, requested reconsideration. He alleged that he was enclosing a report from Dr. Jerry R. Meyers, a general surgeon, who provided an opinion that the work injury of August 23, 2015 was the prevailing factor in causing appellant to sustain a complete tear of the left rotator cuff tear.

OWCP received a December 13, 2015 report by Dr. Meyers. Dr. Meyers indicated that appellant had worked for the employing establishment for three months from June 15 to September 3, 2015 as a maintenance custodian. He related that on August 23, 2015 appellant was moving heavy file cabinets at work, which weighed up to 300 pounds, from the second to the third floor, when he began to notice a sharp, burning pain in his left shoulder and neck.

Dr. Meyers noted that appellant thought he had just pulled a muscle and continued working until the next week. He reported that when the pain did not improve, appellant made an appointment with Dr. Dusek. Dr. Meyers indicated that a September 3, 2015 left shoulder MRI scan showed a complete tear in appellant's supraspinatus tendon associated with a two cm tendon retraction, a focal full-thickness tear involving the anterior half of the distal infraspinatus tendon without retraction and AC arthritis.

Dr. Meyers reviewed Dr. Dusek's medical reports and appellant's preexisting left shoulder injury. He noted that after Dr. Dusek administered a cortisone injection on March 11, 2015 appellant reported good resolution of his shoulder symptoms until the August 23, 2015 employment injury. Dr. Meyers related that appellant currently complained of constant left shoulder pain, exacerbated with lifting the arm. Upon physical examination of appellant's left shoulder, he reported anterior joint line tenderness, but no crepitus. Dr. Meyers also noted marked loss of active abduction and forward flexion and pain present when reaching the end points of his ranges of motion. He further observed marked weakness with abduction and forward flexion against resistance. Dr. Meyers diagnosed complete left rotator cuff tear and adhesive capsulitis with marked loss of range of shoulder motion in all planes.

Dr. Meyers reported that, although appellant had a history of left shoulder bursitis and a shoulder injury in 2006, he was able to perform all the work duties as a UPS truck driver and a construction worker prior to his August 23, 2015 work injury. He also noted that appellant had passed a functional capacity evaluation (FCE) and DOT examination prior to his work injury. Dr. Meyers related that, after the work injury, appellant experienced persistent pain and marked limitation of function involving his left shoulder, such that he was unable to do custodial work. He explained that there was no evidence that appellant had a significant preexisting rotator cuff injury prior to his August 23, 2015 work injury. Dr. Meyers opined that the August 23, 2015 work injury was the prevailing factor in causing appellant to sustain a complete tear of the left rotator cuff. He indicated that there was no significant preexisting condition causing appellant's symptoms and limitations. Dr. Meyers authorized appellant to work with restrictions.

By decision dated March 31, 2016, OWCP denied modification of the October 30, 2015 denial decision. It found that the medical evidence failed to establish that the August 23, 2015 employment incident caused or contributed to appellant's left shoulder condition.

On April 25, 2016 appellant, through counsel, requested reconsideration. He indicated that he was enclosing Dr. Meyers' December 13, 2015 report and an April 15, 2016 addendum report. Counsel noted that Dr. Meyers had not altered his opinion on causal relationship in the December 13, 2015 report and Dr. Meyers had reviewed all of Dr. Dusek's medical records. He alleged that Dr. Meyers' report explained how the August 23, 2015 employment incident caused appellant to sustain a complete tear of his left rotator cuff and was sufficient to establish appellant's compensation claim. Counsel resubmitted Dr. Meyers' December 13, 2015 report and an April 15, 2016 addendum report.

In the April 15, 2016 report, Dr. Meyers noted that on November 24, 2015 he had examined appellant for a left shoulder injury incurred while at work on August 23, 2015. He related that it was his opinion, based upon review of Dr. Dusek's records, appellant's history, and his examination, that appellant had sustained a "work-related full thickness rotator cuff injury of the left shoulder." Dr. Meyers disagreed with OWCP's denial based on the suggestion

that he had not reviewed all of Dr. Dusek's records and outlined where he had discussed them. He explained that he had reviewed Dr. Dusek's reports, but did not have the opportunity to review Dr. Miller's medical records before completing his previous report. Dr. Meyers related that he had since reviewed Dr. Miller's records and noted that Dr. Miller had treated appellant in 2006 for a July 26, 2006 motor vehicle accident. He reported that a left shoulder MRI scan taken one month after the accident showed a near full thickness or full-thickness tear of the mid-rotator cuff. Dr. Meyers reviewed the medical treatment that Dr. Miller provided. He noted that Dr. Miller assigned five percent permanent impairment of the left shoulder due to partial thickness rotator cuff tear, slight loss of range of motion, and slight loss of strength. Dr. Meyers reported that "[appellant] had sustained a minimal injury to his shoulder based on the physical findings and the rapid response to conservative treatment and the small disability rating." He explained that a review of these records did not alter the opinions expressed about appellant's August 23, 2015 injury in his December 13, 2015 report. Dr. Meyers requested that appellant refer to the discussion of causation in his previous report.

Appellant also submitted a November 5, 2015 work note by Dr. Dusek who related that appellant could return to work with restrictions.

By decision dated June 23, 2016, OWCP denied modification of the March 31, 2016 OWCP decision. It found that the medical evidence of record did not contain sufficient medical rationale explaining how the August 23, 2015 work incident caused or aggravated his left shoulder condition.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence[4] including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether "fact of injury" has been established.[6] There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.[7] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[8] An employee may establish that the

[3] 5 U.S.C. § 8101 *et seq.*

[4] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[5] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[7] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

[8] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

employment incident occurred as alleged, but fail to show that his or her disability or condition relates to the employment incident.[9]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.[10] The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.[11] 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.[12]

ANALYSIS

Appellant alleged that on August 23, 2015 he sustained a left shoulder injury when he moved furniture at work. OWCP accepted that the August 23, 2015 incident occurred as alleged and that he was diagnosed with a left shoulder condition. However, it denied appellant's claim finding insufficient medical evidence to establish that his diagnosed left shoulder condition was causally related to the accepted incident. The Board finds that appellant failed to meet his burden of proof to establish an injury on August 23, 2015 causally related to the accepted incident.

Appellant submitted various medical reports from Dr. Meyers. In a December 13, 2015 report, Dr. Meyers described that on August 23, 2015 appellant was moving heavy file cabinets at work and noticed a sharp, burning pain in his left shoulder and neck. He reviewed earlier reports by appellant's previous physician, Dr. Dusek regarding treatment for appellant's preexisting left shoulder injury and noted that, after a cortisone injection on March 11, 2015, his left shoulder symptoms subsided. Dr. Meyers reported that appellant complained of constant left shoulder pain, which worsened when he lifted his arm, and related that a September 3, 2015 left shoulder MRI scan showed a complete tear in appellant's supraspinatus tendon and a full-thickness tear involving the anterior half of the distal infraspinatus tendon without retraction. He conducted an examination of appellant's left shoulder and noted marked loss and weakness of active abduction and forward flexion and pain when reaching the end points of range of motion, and marked weakness. Dr. Meyers diagnosed complete left rotator cuff tear and adhesive capsulitis with marked loss of range of shoulder motion in all planes.

Dr. Meyers reported that appellant had a history of left shoulder bursitis and a 2006 shoulder injury, but there was no evidence of a significant preexisting rotator cuff injury. He noted that appellant was able to perform all the duties of a UPS truck driver and construction worker prior to the August 23, 2015 work incident. Dr. Meyers opined that the August 23, 2015 work incident was the prevailing factor in causing appellant to sustain a complete tear of the left

[9] *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[10] *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

[11] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

[12] *James Mack*, 43 ECAB 321 (1991).

rotator cuff. He indicated that there was no significant preexisting condition causing appellant's symptoms and limitations. In an April 15, 2016 addendum report, Dr. Meyers noted that, after reviewing more medical records, his opinion about appellant's August 23, 2015 injury was not altered.

The Board finds that although Dr. Meyers provided an affirmative opinion which supported causal relationship, he failed to offer any rationalized medical explanation to support his opinion. Medical evidence that states a conclusion, but does not offer any rationalized medical explanation regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[13] The Board notes that rationalized medical opinion evidence is especially needed in this case since appellant has a history of preexisting left shoulder conditions. Although Dr. Meyers emphasized that appellant did not have a preexisting rotator cuff injury, he failed to provide a reasoned opinion explaining how physiologically the August 23, 2015 employment incident caused or contributed to appellant's current left shoulder condition.[14] For these reasons, Dr. Meyers' reports fail to establish appellant's claim.

Appellant also submitted a September 3, 2015 left shoulder MRI scan report by Dr. Wu who noted a complete tear in the supraspinatus tendon, full thickness tear involving the anterior half of the distal infraspinatus tendon, and AC joint osteoarthritis. While Dr. Wu provided various diagnoses for appellant's left shoulder condition, he did not provide any opinion on the cause of appellant's diagnosed conditions. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[15] Similarly, in work status notes dated September 3 and 8, 2015, Dr. Dusek related that appellant had been under his care for a left shoulder rotator cuff tear, but failed to render an opinion on the cause of appellant's left shoulder condition. As these physicians did not offer an opinion on whether appellant's left shoulder condition was causally related to his employment, these reports are insufficient to establish appellant's claim.[16]

The evidence of record also contains telephone memorandum from a registered nurse and physician assistant. Evidence from a physician assistant or nurse does not constitute competent medical evidence under FECA as neither is considered as a physician as defined under section 8102(2) of FECA.[17]

In order to obtain benefits under FECA an employee has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial

[13] *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

[14] *John W. Montoya*, 54 ECAB 306 (2003).

[15] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, *supra* note 13; *A.D.*, *supra* note 13.

[16] *R.E.*, Docket No. 10-679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007).

[17] 5 U.S.C. § 8101(2) provides that a physician includes, surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. *V.C.*, Docket No. 16-0642 (issued April 19, 2016); *L.C.*, Docket No. 16-1717 (issued March 2, 2017) (nurses); *Allen C. Hundley*, 53 ECAB 551, 554 (2002) (physician assistant). *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

evidence.[18] Because appellant has failed to provide such evidence demonstrating that his left shoulder condition was causally related to the accepted August 23, 2015 employment incident, he has failed to meet his burden of proof to establish his claim.

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 his burden of proof to establish an injury causally related to the accepted August 23, 2015 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the June 23 and March 31, 2016 merit decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 5, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[18] *Supra* note 12.