

Federal Employees' Compensation Act³ (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 has met her burden of proof to establish expansion of the acceptance of her claim to include additional conditions and disability from work commencing October 1, 2016 causally related to her accepted June 13, 2016 employment injury.

FACTUAL HISTORY

On June 17, 2016 appellant, then a 60-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on June 13, 2016 she bruised the right side of her body and her left knee when she was struck by a bulk mail container while in the performance of duty. She stopped work on June 13, 2016. OWCP accepted the claim for right shoulder sprain, right knee strain, and left knee contusion. It paid appellant wage-loss compensation for total disability on the supplemental rolls from July 29 through September 30, 2016.

A September 19, 2016 magnetic resonance imaging (MRI) scan of the right shoulder revealed rotator cuff tendinosis, bursitis, a subacromial spur, and a superior labral tear extending to the anterior and posterior. An MRI scan of the left knee of the same date showed patellar cartilage denudation with underlying marrow edema and cystic change.

In an initial evaluation dated September 30, 2016, Dr. Luke S. Austin, a Board-certified orthopedic surgeon, evaluated appellant for right shoulder pain after a June 13, 2016 employment injury. He noted that an MRI scan had shown a small partial-thickness tear of the supraspinatus with fluid in the bursa and a superior labral tear. Dr. Austin diagnosed right shoulder pain and a sprain of the right rotator cuff capsule. He opined that appellant's symptoms resulted from bursitis and a small rotator cuff tear rather than the superior labrum anterior and posterior (SLAP) tear, which he indicated that was a "common wear and tear finding of the shoulder..." Dr. Austin advised that she had no shoulder restrictions. He opined that the diagnosed conditions of bursitis and partial-thickness rotator cuff tear were causally related to appellant's June 13, 2016 employment injury. In a work restriction note of the same date, Dr. Austin indicated that she could resume full-duty work with no restrictions.

On October 18, 2016 appellant filed a claim for compensation (Form CA-7) for disability from October 1 through 14, 2016. She continued to file CA-7 forms requesting wage-loss compensation from October 15, 2016 onward.

In an October 25, 2016 letter, OWCP notified appellant that Dr. Austin had released her to her usual employment effective September 30, 2016 and advised her to arrange to return to work with the employing establishment.

In a development letter dated October 26, 2016, OWCP informed appellant of the type of evidence necessary to establish her claim for disability compensation, including a medical opinion

³ 5 U.S.C. § 8101 *et seq.*

explaining why she was unable to return to work after her physician, Dr. Austin, had released her to return to full duty. It afforded her 30 days to submit the necessary information. No response was received.

By decision dated December 27, 2016, OWCP denied appellant's claim for wage-loss compensation commencing October 1, 2016.

On January 5, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Thereafter, OWCP received an October 20, 2016 report from Dr. Garo Avetian, an osteopath. Dr. Avetian advised that he was treating appellant for injuries sustained in a June 13, 2016 motor vehicle accident. He found that she was unable to work as a result of pain and diagnosed a right shoulder sprain/strain and SLAP tear.

In a report dated November 2, 2016, Dr. Avetian noted that appellant had sustained a SLAP tear and left knee injury on June 13, 2016 when a bulk mail container hit her right side. On examination he found a positive Apley test of the left knee, lower extremity strength of 4/5, positive Neer, Jobes, and Hawkin's tests of the right shoulder, and 3-4/5 strength of the upper extremities. Dr. Avetian diagnosed a right shoulder sprain/strain, a right shoulder SLAP tear, and a left knee sprain/strain with left knee denudation of the patellar cartilage as demonstrated on MRI scan as an underlying factor. He noted that after a brief visit Dr. Austin had informed appellant that she had a tear and offered her an injection which she had declined. Dr. Avetian provided the same diagnoses in a November 23, 2016 report. He asserted that appellant had been disabled from employment beginning June 13, 2016.

Thereafter, OWCP received a November 18, 2016 report from Dr. Lawrence I. Barr, an osteopath. Dr. Barr obtained a history of appellant being struck on the right side by a bulk mail container, resulting in left knee, right shoulder, and neck pain. On examination of the right shoulder, he found impingement and positive O'Brien's and Hawkin's tests. Dr. Barr diagnosed cervical sprain/strain with right radicular symptoms, a right shoulder sprain with impingement and a SLAP tear, and left knee sprain with an exacerbation of patellofemoral degenerative joint disease. He indicated that appellant remained symptomatic after a "work occurrence" and was currently not working.

In a December 28, 2016 progress report, Dr. Avetian advised that he was treating appellant for a June 13, 2016 employment injury to her right shoulder and left knee. He found some restriction of the right shoulder on Neer and Jobes testing and some improvement on the Hawkin's test. Dr. Avetian noted that appellant was wearing a left knee brace. He diagnosed a sprain/strain of the right shoulder and left knee and a right shoulder SLAP tear. Dr. Avetian opined that appellant was "currently out of work and unable to work at this time, pending further treatment."

In an attending physician's report (Form CA-20) dated January 11, 2017, Dr. Avetian diagnosed a right shoulder tear and left knee condition. He checked a box marked "Yes" that the diagnosed conditions were caused or aggravated by an employment activity. Dr. Avetian found that appellant was totally disabled from June 22, 2016 to the present.

In an unsigned report dated January 4, 2017, Dr. Avetian and Dr. Gerald Vernon, an osteopath, evaluated appellant for right shoulder pain. Examination findings included a positive Neer's sign, positive Hawkin's sign, a positive empty can test, and anterior and posterior laxity without swelling or effusion. Dr. Vernon and Dr. Avetian diagnosed a right shoulder SLAP tear, inflammation with underlying osteoarthritis of the glenohumeral and acromioclavicular (AC) joint, and rotator cuff tendinosis with subacromial bursitis. The physicians noted that appellant had declined their recommendation of right shoulder surgery.

On January 16, 2017 Dr. Vernon discussed appellant's continued complaints of left knee pain. On examination he found a small effusion at the suprapatellar area and a positive patella grind without laxity. Dr. Vernon diagnosed left knee patellofemoral syndrome, patella tendinosis, effusion, and a ganglion at the anterior cruciate ligament of the knee.

In a February 15, 2017 duty status report (Form CA-17), Dr. Avetian diagnosed a left knee and right shoulder condition and a SLAP tear and opined that appellant was disabled from employment.⁴

On March 1, 2017 OWCP referred appellant to Dr. Noubar Didizian, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the extent and degree of any employment-related disability.

By decision dated April 6, 2017, OWCP suspended appellant's entitlement to wage-loss compensation and medical benefits effective April 7, 2017, pursuant to 5 U.S.C. § 8123(d), as she had failed to attend the scheduled medical examination with Dr. Didizian or provide a reason for her nonattendance.

In a report dated April 24, 2017, Dr. Avetian discussed the history of appellant's June 13, 2016 employment injury and noted that she had sustained an injury-related labral tear confirmed by MRI scan as well as left knee trauma. He indicated that she had positive findings on examination of the knee, including positive Neer, Jobes, and Hawkin's signs, and a positive Apley test. Dr. Avetian advised that appellant had underlying osteoarthritis "as a complicating factor." He diagnosed a right SLAP lesion causally related to the accepted employment injury and found that she was disabled from employment.

On June 28, 2017 Dr. Avetian provided examination findings and the same diagnoses as in his April 24, 2017 report. He found that appellant was unable to work.

By decision dated August 15, 2017, OWCP's hearing representative set aside the December 27, 2016 and April 6, 2017 decisions. He determined that appellant had shown good cause for failing to attend the scheduled appointment with Dr. Didizian. The hearing representative further found that her physicians had diagnosed conditions not accepted by OWCP, but OWCP had failed to adjudicate whether her claim should be expanded. He further noted that OWCP had relied on one inadequately rationalized report from Dr. Austin in finding that appellant could resume work even though her attending physicians had found that she was disabled. The hearing representative instructed OWCP, on remand, to refer her for a second opinion examination to

⁴ In March 15 and April 12, 2017 CA-17 forms, Dr. Avetian found appellant disabled from work.

determine whether her claim should be expanded to include additional employment-related conditions and whether she was capable of performing her usual employment beginning October 1, 2016 and continuing.

On August 24, 2017 OWCP referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated September 8, 2017, Dr. Askin reviewed the history of injury and the medical reports of record. On examination of the right shoulder, he found negative Neer and Hawkins's tests. Dr. Askin further found no laxity and retropatellar crepitus on motion of the knees bilaterally. He diagnosed a right shoulder sprain, a right knee strain, and a left knee contusion due to the accepted employment injury. Dr. Askin opined that appellant had "age-appropriate degenerative changes which are seemingly the true explanation for [appellant's] current complaints, not precipitated by or aggravated by her injury." He found no disability due to the employment injury and opined that her total disability had ceased on the date of his examination, September 8, 2017.

In an addendum dated September 15, 2017, Dr. Askin advised that appellant's claim should not be expanded to include additional conditions as her complaints resulted from age-related degenerative changes. He noted that based on his review of the record it "would have been expected that [appellant] could have resumed her date-of-injury job" as of October 1, 2016.

By decision dated December 11, 2017, OWCP denied expansion of its acceptance of the claim to include additional employment-related conditions. It further found that appellant had not established entitlement to wage-loss compensation for disability commencing October 1, 2016 and continuing.

On December 18, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

On May 11, 2018 Dr. Barr noted that, at the time of his November 18, 2016 evaluation, he had obtained a history of a bulk mail container striking appellant on the right side. He discussed his prior examination findings and diagnoses. Dr. Barr related:

"Based on the mechanism of injury with [appellant] being struck on the right side of her body by a heavy bulk mail container weighing 1600 pounds, this would be consistent with the development of a cervical strain. It is also my opinion that the mechanism would be consistent with the development of a left knee sprain and exacerbation of her degenerative joint disease and a SLAP tear with impingement syndrome to her right shoulder as well as the right shoulder sprain."

Dr. Barr advised that, within a reasonable degree of medical probability, at the time of his September 18, 2016 examination, he had found appellant unable to work.

A hearing was held on May 14, 2018. By decision dated June 14, 2018, OWCP's hearing representative set aside the December 11, 2017 decision. She found that the opinion of Dr. Askin was insufficiently rationalized to constitute the weight of the evidence as he had not explained why appellant's degenerative changes were not caused or aggravated by the accepted employment

injury, and had failed to specifically address the diagnosed conditions of right shoulder impingement syndrome, a right SLAP tear, an exacerbation of left knee patellofemoral syndrome, rotator cuff tendinosis with subacromial bursitis, inflammation with underlying osteoarthritis of the glenohumeral and AC joints, left knee patellofemoral syndrome, left knee effusion, and a left knee ganglion cyst. The hearing representative instructed OWCP, on remand, to provide Dr. Askin with additional medical records and request that he clarify appellant's work capacity, discuss whether the additional diagnosed conditions were employment related, and explain whether the work injury had caused or aggravated a degenerative condition.

On July 20, 2018 OWCP requested that Dr. Askin address whether appellant had sustained a right shoulder SLAP tear, right shoulder impingement syndrome, rotator cuff tendinosis with subacromial bursitis, inflammation with underlying osteoarthritis of the glenohumeral and AC joints, an exacerbation of patellofemoral degenerative disc disease, left knee patellofemoral syndrome, patellar tendinosis and a ganglion of the left ACL due to her June 13, 2016 employment injury. It further requested that he explain whether the work injury had aggravated any degenerative conditions and whether she was capable to working without restrictions on or after October 1, 2016.

In a supplemental report dated July 25, 2018, Dr. Askin opined that a SLAP tear was a common finding in older individuals. He asserted that the SLAP tear demonstrated on MRI scan was an incidental finding and referenced medical literature in support of his conclusion. Dr. Askin further attributed the patellofemoral arthrosis demonstrated on the MRI scan to appellant's age. He noted that there was no "objectively determinable clinical manifestation of any disturbance" of appellant's underlying degenerative processes as a result of her employment injury. Regarding whether she was disabled as of October 1, 2016, Dr. Askin reiterated that he had not performed a contemporaneous examination. He advised that it would not have been unsafe for appellant to resume work, but that she may have experienced discomfort. Dr. Askin found that she would "clearly have been capable of a full range of sedentary employment on a full-time basis again respecting the nature of [appellant's] complaints." He asserted that none of the additional diagnosed conditions were causally related to her June 13, 2016 employment injury and advised that the claim did "not require expansion of any condition related to the subject incident."

By decision dated August 22, 2018, OWCP denied appellant's request to expand acceptance of her claim to include additional conditions causally related to the accepted June 13, 2016 employment injury, and further denied her claim for wage-loss compensation beginning October 1, 2016 causally related to her accepted employment injury.

On August 28, 2018 appellant's counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on January 15, 2019. Counsel asserted that Dr. Askin had failed to provide a reasoned opinion or respond to the specific questions posed. He noted that Dr. Askin cited to medical literature to support that the degenerative findings were age related.

By decision dated March 20, 2019, an OWCP hearing representative affirmed the August 22, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁶ Where 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

Under FECA, the term disability means an incapacity because of an employment injury, to earn the wages the employee was receiving at the time of the injury.⁸ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.⁹ Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.¹⁰ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.¹¹

The medical evidence required to establish causal relationship is rationalized medical opinion evidence. 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 claimed disability and the accepted employment injury.¹²

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, OWCP shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹³ This is called a referee examination and OWCP will select a

⁵ *Supra* note 3.

⁶ *Y.D.*, Docket No. 20-0097 (issued August 25, 2020); *D.P.*, Docket No. 18-1439 (issued April 30, 2020); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

⁷ *K.T.*, Docket No. 19-1718 (issued April 7, 2020); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁸ 20 C.F.R. § 10.5(f); *see J.T.*, Docket No. 19-1813 (issued April 14, 2020); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁹ *Id.*; *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

¹⁰ 20 C.F.R. § 10.5(f); *M.A.*, Docket No. 19-0905 (issued January 26, 2021); *J.M.*, Docket No. 18-0763 (issued April 29, 2020).

¹¹ *Id.*

¹² *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996); *see also T.T.*, Docket No. 18-1054 (issued April 8, 2020).

¹³ 5 U.S.C. § 8123(a); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *M.S.*, 58 ECAB 328 (2007).

physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁴

ANALYSIS

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

On November 2, 2016 Dr. Avetian opined that appellant had sustained a SLAP tear of the right shoulder and a left knee injury when she was struck by a bulk mail container on June 13, 2016. In a report dated January 4, 2017, Dr. Avetian and Dr. Vernon diagnosed a right shoulder SLAP tear, inflammation with underlying osteoarthritis of the glenohumeral and AC joint, and rotator cuff tendinosis with subacromial bursitis. On April 24, 2017 Dr. Avetian reviewed appellant's history of a June 13, 2016 employment injury. He diagnosed a SLAP tear of the right shoulder confirmed by MRI scan causally related to the accepted employment injury and left knee trauma. Dr. Avetian found positive clinical findings on examination of the left knee and noted that appellant's symptoms were complicated by underlying osteoarthritis. On May 11, 2018 Dr. Barr discussed his November 18, 2016 evaluation of appellant and her history of being struck by a bulk mail container. He found that the mechanism of injury was consistent with left knee sprain and exacerbation of degenerative joint disease, cervical strain, and a sprain, SLAP tear, and impingement syndrome of the right shoulder. Appellant's treating physicians opined that she was disabled from work.

OWCP referred appellant to Dr. Askin for a second opinion examination. In a September 8, 2017 report, Dr. Askin diagnosed a right shoulder sprain, right knee sprain, and a left knee contusion. He found age-related degenerative changes unrelated to the accepted employment injury. On September 15, 2017 Dr. Askin advised that appellant's claim should not be expanded as the additional diagnosed conditions resulted from age-related degenerative changes. In a July 25, 2018 supplemental report, he maintained that the SLAP tear on MRI scan finding was incidental and that the patellofemoral arthrosis of the knee were age related. Dr. Askin found that the additional diagnosed conditions were not employment related. He concluded, therefore, that appellant could return to work.

As noted above, if there is a disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint an impartial medical specialist who shall make an examination.¹⁵ The Board therefore finds that a conflict exists between Dr. Askin and Drs. Avetian and Barr regarding expansion of appellant's claim to include additional conditions and disability commencing October 1, 2016 causally related to the accepted June 13, 2016 employment injury.

The case must therefore be remanded to OWCP for referral of appellant to an impartial medical specialist for resolution of the conflict in medical opinion evidence in accordance with 5

¹⁴ 20 C.F.R. § 10.321; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *R.C.*, 58 ECAB 238 (2006).

¹⁵ *See S.S.*, Docket No. 19-1658 (issued November 12, 2020); *C.S.*, Docket No. 19-0731 (issued August 22, 2019).

U.S.C. § 8123(a).¹⁶ The issue of whether the acceptance of her claim should be expanded to include additional conditions must be resolved prior to determining whether she has met her burden of proof to establish that she was disabled from work commencing October 1, 2016 causally related to her accepted June 13, 2016 employment injury. After this and other such further development as OWCP deems necessary, it shall issue *a de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2019 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: February 25, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

¹⁶ *S.M.*, Docket No. 19-0397 (issued August 7, 2019).