

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

| | | |
|--|---|----------------------------------|
| E.P., Appellant |) | |
| |) | |
| and |) | Docket No. 20-0898 |
| |) | Issued: February 17, 2021 |
| U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Trenton, NJ, Employer |) | |
| |) | |

Appearances:
Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On March 18, 2020 appellant, through counsel, filed a timely appeal from a December 6, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the December 6, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a right shoulder condition causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

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

On September 25, 2016 appellant, then a 65-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging a right shoulder rotator cuff tear causally related to factors of her federal employment. She stated that she "worked manual letters and pitched mail above her shoulders, reached and lifted trays of mail, and reached forward at chest level 40 hours a day 5 days a week." Appellant noted that she first became aware of her condition and its relation to her federal employment on September 23, 2016. She did not stop work.

Appellant submitted reports dated September 23, October 7, November 1 and 10, 2016, and March 23 and May 19, 2017, from Dr. Munir Ahmed, a Board-certified orthopedic surgeon, who noted a history of appellant repetitively sorting and pitching mail with her right arm. He diagnosed impingement syndrome of the right shoulder, cervicgia, incomplete rotator cuff tear of rupture of the right shoulder, not specified as traumatic, and high grade partial tear of the subscapularis tendon near the rotator cuff with mild arthritic changes in the acromioclavicular joint, bursitis of the right shoulder, right carpal tunnel syndrome, incomplete rotator cuff tear or rupture of the left shoulder and sprain of the right rotator cuff capsule.

By decision dated November 18, 2016, OWCP accepted the alleged employment factors. However, it denied the claim finding that the medical evidence of record was insufficient to establish that appellant's diagnosed right shoulder conditions were causally related to the accepted factors of her federal employment.

On December 1, 2016 appellant, through her former counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on June 14, 2017.

In a July 29, 2017 statement, appellant indicated that she pitched mail, which involved carrying a half tray to her workstation for about seven hours a day. She also performed dispatch work, which involved sweeping five cases filled with mail. Appellant would take a half tray and proceed to sweep the cases. She would then place a half tray on a skid for mail dispatch. This was done until all the cases were empty. Appellant then placed the trays on a skid and sent out for dispatch. She also related that she had restrictions of no lifting more than five pounds and no pitching mail over the shoulder. Appellant noted that she was permitted to sweep mail, if she was not in pain, and that she normally swept the mail as they were short-staffed.

By decision dated August 21, 2017, OWCP's hearing representative affirmed the November 18, 2016 decision, finding that the evidence of record was insufficient to establish

⁴ Docket No. 18-0194 (issued September 14, 2018).

causal relationship between appellant's diagnosed shoulder conditions and the accepted employment factors.

Appellant, through her former counsel, appealed to the Board on November 6, 2017. By decision dated September 14, 2018, the Board affirmed OWCP's August 21, 2017 decision.⁵

On January 23, 2019 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In a December 27, 2018 office note, Dr. Ahmed indicated that appellant was being treated for shoulder pain. He noted that pertinent medical conditions include trauma and that the mechanism of injury included direct trauma and lifting at work. Dr. Ahmed provided examination findings and diagnosed pain in right shoulder, incomplete rotator cuff tear or rupture of right shoulder, not specified as traumatic, and cervicalgia.

In an addendum report dated January 5, 2019, Dr. Ahmed opined that appellant's 20 years of work in a job that required repetitive use of the shoulder was the direct and proximate cause of her right rotator cuff tear, biceps tenodesis and impingement syndrome of the right shoulder. He noted that appellant provided a history of being employed as a postal worker since 1993 and that part of her job duties consisted of pitching mail above her shoulders, lifting trays of mail and reached forward chest level. Dr. Ahmed explained that as people age and/or overuse their shoulders, over time the rotator cuff degenerates, especially in people over 40 and those in occupations that require frequent raising and lowering of the arm, such as appellant. He indicated that tiny tears develop in the rotator cuff, which make it weaker and more prone to larger tears, and that it was possible for large tears to occur without any notable trauma. Dr. Ahmed also indicated that right shoulder surgery was medically necessary.

By decision dated April 23, 2019, OWCP denied modification of the September 14, 2018 decision.

On August 20, 2019 appellant, through counsel, again requested reconsideration.

Evidence received included progress reports dated December 6, 2018, and January 10, March 14, and April 18, 2019 from Dr. Laura E. Ross, a Board-certified orthopedic surgeon, who evaluated appellant for cervical spine, left shoulder and right shoulder conditions, which appellant reported were injured on September 23, 2016. Dr. Ross diagnosed exacerbation of cervical spondylosis and degenerative joint disease (DJD) of bilateral shoulders. She recommended arthroscopic surgery for the right shoulder, which she opined was medically necessary and causally related to the September 23, 2016 work-related incident. Dr. Ross also provided cortisone injections to both shoulders.

In a September 9, 2019 narrative report, Dr. Ross reported that appellant presented to her office on December 6, 2018 for further evaluation of her neck, bilateral arms and wrists, left leg and back injuries she sustained as a result of her employment as a mail processing clerk. She indicated that appellant's diagnostic testing revealed degenerative disc disease of cervical spine, mild disc osteophyte complexes of spine, high-grade partial tear of the right subscapularis tendon and mild acromioclavicular joint arthrosis, arthritic changes at the acromioclavicular (AC) joint

⁵ *Id.*

and the glenohumeral joint, moderate right carpal tunnel syndrome, and spondylosis of the cervical spine and AC joint arthrosis, bilaterally. Dr. Ross provided an impression of exacerbation of cervical spine degenerative disc disease, high-grade partial tear of the subscapularis tendon of the right shoulder, post-traumatic AC joint arthrosis with impingement syndrome of the bilateral shoulders, and moderate right carpal tunnel syndrome, all of which she opined were causally related to appellant's work duties as a mail processing clerk over a course of 25 years. She indicated that this was based on objective medical evidence, including number diagnostic studies, her physical examination of appellant, and correlated with appellant's employment history. With regard to the shoulders, Dr. Ross opined that appellant sustained high-grade partial tear of the right subscapularis tendon of the right shoulder and post-traumatic AC joint arthrosis and impingement syndrome of the bilateral shoulders. She explained that osteoarthrosis of the AC joints were often caused by repeated movements of the arm, lifting, and overhead activities. Dr. Ross indicated that appellant performed a significant amount of those repetitive duties, including reaching above her shoulders, lifting trays of mail and reaching forward at the chest level on a regular basis, and had expressed symptoms of this injury on a consistent basis. She concluded that appellant developed a post-traumatic exacerbation of bilateral AC joint arthrosis as a direct result of her employment activities and that it was not attributable to the normal aging process. Dr. Ross further indicated that appellant sustained a high-grade partial tear of the subscapularis tendon of the right shoulder. She indicated that she suspected that the AC joint arthrosis had predisposed appellant to further injury in the right shoulder. Dr. Ross explained that while tears of the subscapularis tendon were commonly caused by wearing down of the tendon that occurs slowly over time, repetitive stress, such as repetitive shoulder motions, can stress the rotator cuff muscles and tendons. She indicated this was the case with appellant, who sustained a high-grade partial tear of the subscapularis tendon of the right shoulder as a direct result of the repetitive stress required of her position. Dr. Ross again indicated that arthroscopic surgery was needed.⁶

December 21, 2018 cervical, left shoulder and right shoulder computerized tomography scan reports were also received

⁶ With regards to the cervical spine, Dr. Ross diagnosed appellant with exacerbation of degenerative disc disease. She indicated that, although most people develop some form of disc degeneration as they age, many report no symptoms, which include neck pain with radiating symptoms into one or both upper extremities. Dr. Ross indicated that appellant denied any cervical spine or upper extremity pain prior to the date of the employment incident. She explained that injuries may accelerate and cause the development of degenerative changes in addition to repetitive stress. Dr. Ross opined that this was the case with appellant, who sustained the post-traumatic development of this condition over time as a direct result of her employment. This has been objectively correlated through diagnostic studies and appellant's symptoms were consistent with this diagnosis. Dr. Ross opined that this caused a post-traumatic exacerbation of the degenerative disc disease of the cervical spine, and was not attributed to the normal aging process. She indicated that appellant required further conservative and interventional pain management treatment for her cervical spine. Dr. Ross also opined that appellant's right hand carpal tunnel syndrome was directly attributable to the repetitive hand and wrist motions required during the course of appellant's employment. She explained how carpal tunnel syndrome occurs, noting that symptoms of pain, tingling, numbness and weakness in the hand occurs when the synovial tissue swells, takes up space in the carpal tunnel and places abnormal pressure on the nerve. Dr. Ross also indicated that most cases of carpal tunnel syndrome are caused by a combination of factors, including repetitive hand use and repetitive activities involving flexion or extension of the hand and wrist for a prolonged period of time. She indicated that appellant experienced those symptoms in her right wrist and opined that it was directly related to the repetitive hand and wrist motions required during the course of her employment. Dr. Ross indicated that appellant will likely develop carpal tunnel in her left wrist as a direct result of her duties.

By decision dated December 6, 2019, OWCP denied modification of its April 23, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁷ has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,⁸ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁹ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.¹⁰

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.¹¹

Causal relationship is a medical issue, and the evidence required to establish causal relationship is rationalized medical opinion evidence.¹² 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 specific employment factors identified by the employee.¹³

ANALYSIS

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

⁷ *Supra* note 2.

⁸ *J.W.*, Docket No. 18-0678 (issued March 3, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁹ *J.S.*, Docket No. 18-0657 (issued February 26, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

¹⁰ *L.J.*, Docket No. 19-1343 (issued February 26, 2020); *R.R.*, Docket No. 18-0914 (issued February 24, 2020); *Delores C. Ellyett*, 41 ECAB 992 (1990).

¹¹ *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

¹² *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

¹³ *R.G.*, Docket No. 18-0792 (issued March 11, 2020); *D.J.*, Docket No. 19-1301 (issued January 29, 2020); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁴ It is therefore unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's August 21, 2017 decision because the Board considered that evidence in its September 14, 2018 decision.¹⁵

On reconsideration, appellant submitted additional reports from Dr. Ahmed and Dr. Ross. Dr. Ahmed indicated that it was uncontroverted that appellant performed her mail processing job for over 20 years, which required her to reach and lift trays, put mail above her shoulders and reach for it at chest level in repetitive fashion. Appellant also denied any prior neck or right shoulder conditions. Dr. Ahmed related that appellant's right shoulder conditions were caused by her repetitive employment duties. In his January 5, 2019 report, he attributed appellant's repetitive use of the shoulder to be the direct and proximate cause of her right rotator cuff tear, biceps tenodesis and impingement syndrome of the right shoulder. Dr. Ahmed explained that as individuals age and/or overuse their shoulders, the rotator cuff degenerates and tiny tears may develop in the rotator cuff, which make it weaker and more prone to larger tears, which were possible to occur without any notable trauma.

In her September 9, 2019 report, Dr. Ross described appellant's work duties as a mail processing clerk and opined that the significant amount of repetitive work appellant was required to perform was directly related to the high-grade partial tear of the subscapularis tendon of the right shoulder, and post-traumatic AC joint arthrosis with impingement syndrome of the bilateral shoulders.¹⁶ She explained, in relevant part, that osteoarthrosis of the AC joints was often caused by repeated movements of the arm, lifting, and overhead activities. Dr. Ross opined that appellant developed post-traumatic exacerbation of bilateral AC joint arthrosis which was not attributable to the normal aging process. She explained that repetitive stress of repetitive shoulder motions can cause tears of the subscapularis tendon.

The Board notes that both Dr. Ahmed and Dr. Ross offered an affirmative opinion regarding causal relationship and provided a physiological explanation as to how the accepted employment factors could cause or contribute to appellant's right shoulder conditions. While the opinions of Dr. Ahmed and Dr. Ross are insufficiently rationalized to meet appellant's burden of proof, the Board finds that they are sufficient to require further development of the record as to whether appellant's right shoulder conditions are causally related to the accepted factors of her federal employment.¹⁷

¹⁴ *J.T.*, Docket No. 18-1757 (issued April 19, 2019); *S.S.*, Docket No. 17-1106 (issued June 5, 2018); *H.G.*, Docket No. 16-1191 (issued November 25, 2016).

¹⁵ *Id.*, *supra* note 4. This included a review of Dr. Ahmed's reports dated September 23, October 7, and November 10, 2016 and March 23, 2017.

¹⁶ While Dr. Ross also addressed other diagnosed conditions, such as cervical spine degenerative disc disease and right CTS, appellant's counsel indicated that those conditions were being adjudicated under OWCP File No. xxxxxx177.

¹⁷ *V.P.*, Docket No. 20-0415 (issued July 30, 2020); *G.M.*, Docket No. 19-0657 (issued September 13, 2019); *see also John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

It is well established that proceedings under FECA are not adversarial in nature, and that while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. OWCP has an obligation to see that justice is done.¹⁸ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.¹⁹

The case will therefore be remanded to OWCP for further development of the medical evidence and a referral to a specialist in the appropriate field of medicine for an examination and opinion on the issue of whether appellant sustained right shoulder conditions causally related to the accepted factors of her federal employment. If the physician opines that the diagnosed conditions are not causally related to the accepted employment factors, he or she must provide a rationalized explanation as to why their opinion differs from that articulated by Drs. Ahmed and Ross. After this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

¹⁸ *V.P., id.*, S.C., Docket No. 19-0920 (issued September 25, 2019).

¹⁹ 20 C.F.R. § 10.121.

ORDER

IT IS HEREBY ORDERED THAT the December 6, 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 17, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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