

File Number:  
HR10-D-H

RECEIVED DEC 07 2017

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS  
PO BOX 8300 DISTRICT 50  
LONDON, KY 40742-8300  
Phone: (202) 693-0045

Date of Injury:  
Employee:

Dear

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on . As a result of such hearing, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Your case file has been returned to the Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR  
OFFICE OF WORKERS' COMP PROGRAMS  
PO BOX 8300 DISTRICT 6 JAC  
LONDON, KY 40742-8300

Sincerely,

*Electronically Signed*

Hearing Representative

PAUL H FELSER  
FELER LAW FIRM P.C.  
7393 HODGON MEMORIAL DRIVE  
SUITE 102  
SAVANNAH, GA 31406

***If you have a disability (a substantially limiting physical or mental impairment), please contact our office/claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations and modifications.***

Washington DC, December 04, 2017

**U.S. DEPARTMENT OF LABOR**  
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

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In the matter of the claim for compensation under Title 5, U.S. Code 8101 *et seq.*  
of \_\_\_\_\_ claimant; Employed by the \_\_\_\_\_  
; Case no. \_\_\_\_\_

Hearing was held via telephone on \_\_\_\_\_ As a result, the decision  
of the Office dated \_\_\_\_\_ is hereby set aside, and the case is  
remanded for additional actions, for the reasons set forth below:

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The issue for determination is whether the evidence is sufficient to establish a  
work-related injury in the performance of duty, in the manner alleged.

The claimant is an employee of the \_\_\_\_\_ where she works as a  
\_\_\_\_\_. She filed form CA-2 "Notice of Occupational Disease" on  
\_\_\_\_\_, alleging that she reached behind for a bundle while sitting in  
a car and felt a sharp pain in her shoulder and down her arm, with continued pain  
after that. She indicated she first became aware of this condition on  
\_\_\_\_\_ and first realized it was work-related on \_\_\_\_\_.

Medical evidence received to the record within the allowed period included the  
following documents:

- \_\_\_\_\_ office notes from Dr. \_\_\_\_\_
- \_\_\_\_\_ office notes from Dr. \_\_\_\_\_
- \_\_\_\_\_ MRI report, right shoulder.
- \_\_\_\_\_ letter from Dr. \_\_\_\_\_
- \_\_\_\_\_ work excuse from Dr. \_\_\_\_\_
- \_\_\_\_\_ letter from Dr. \_\_\_\_\_

Office notes from Dr. \_\_\_\_\_ on \_\_\_\_\_ indicated the claimant was  
seen for persistent right shoulder pain. She had surgery in \_\_\_\_\_. Pain was  
worse 1.5 weeks ago after reaching behind to pick up mail on the job.

Office notes from Dr. \_\_\_\_\_ on \_\_\_\_\_ indicated the claimant's right  
shoulder was injured while reaching for mail on the job on \_\_\_\_\_. She  
was still working full time. She had rotator cuff surgery and subsequent biceps

surgery. It hurt even to pick up coffee in the morning. The last MRI was in . The claimant was still having difficulty at work, taking lots of ibuprofen to cope. Dr. indicated an MRI was warranted for further evaluation of the right shoulder.

In her letter of , Dr. indicated the claimant had been a patient for years due to right shoulder pain for an injury that resulted in a right rotator cuff repair in . She continued to experience pain in the right shoulder. The most recent MRI on showed previous surgical changes and a full-thickness tear involving two of the rotator cuff muscles with concomitant muscular atrophy. The humeral head was experiencing subluxation as well. The radiologist described the tear as chronic. Dr. opined it was an acute injury. Timing of the new MRI findings when compared to the : MRI was unknown.

In her letter of , Dr. indicated she had been seeing the claimant for years due to ongoing right rotator cuff and shoulder pain for years after surgery in 2012. She saw the claimant in the office on . At that time, it was documented the claimant reinjured her left shoulder while on the job about 10 days prior when she reached behind her to pick up mail.

In a formal Notice of Decision dated , the District Office denied the claim based on failure to establish causal relationship. The Office explained that, although medical reports had been received from Dr. , these were insufficient to establish a work-related injury in the manner alleged. Dr. had indicated in her reports that the claimant suffered for years with continuous right shoulder pain, with surgery in 2012. She did not relate any diagnosed right shoulder conditions to the claimed work incident of .

Through her attorney, the claimant requested an appeal in the form of an Oral Hearing before the Branch of Hearings and Review. A Hearing was held by telephone on . The claimant did not attend the Hearing; however, Mr. Paul Felser, the attorney of record, offered argument on the record on behalf of the claimant. There was a representative from the employing agency also present, to observe the proceedings.

Attorney Felser noted there is an accepted prior claim for right shoulder injury that occurred on under OWCP file number . It was noted the claimant was working as a and pulled on a bundle of mail, injuring the right upper extremity. A schedule award was issued under the file. Attorney Felser suggested that file should be doubled with the current file, as these are both claims for right shoulder injury.

Attorney Felser indicated the claimant had returned to full duty after suffering the prior shoulder injury, but was still continuing to experience difficulties. She experienced what she understood was an aggravation of the pre-existing condition, but involving new work circumstances, which prompted her to file a new claim. Although the claimant had described a traumatic injury event, it was suggested to her that a CA-2 form was appropriate to file in her circumstances, and so she selected that form.

Attorney Felser noted the claimant described a specific incident as the cause of the new shoulder injury. She would be providing a written statement with further explanation of her injury that would be submitted after the Hearing.

Attorney Felser argued it was a fairly straightforward situation. The claimant has an extensive history of work-related injury to her right shoulder. She was back at work, but never free from pain. She was performing her duties. She described a situation when she reached back with her arm to pick up mail, a bundle of advertisements, much like a crane, trying to pick up a weight that was too much for the joint. She had a damaged joint, with an awkward motion, causing a further tear.

Attorney Felser also indicated that he was expecting to submit additional medical evidence from Dr. Dr. had already provided medical reports indicating the claimant had ongoing right shoulder issues with two surgeries on the right shoulder. He stated that, in September of the past year, she was reaching in the back seat when she felt a pop, reinjuring the right shoulder. She had pain and disability since then. She was evaluated and he commented on the MRI. This showed a large rotator cuff tear with retraction of the supraspinatus to the level of the glenoid. He noted evidence of prior biceps tenodesis, which appeared intact. There were anchors in the greater tuberosity, with evidence of bone cyst formations. The muscle quality appeared good for supraspinatus and infraspinatus. X-rays were likely consistent with prior anchor fixation. There was mild inferior osteophyte formation, no fracture, subluxation or dislocation.

Attorney Felser argued that Dr. was clearly describing an acute recurrent tear in the same location as the prior injury. His description of events and circumstances was consistent with what he described in prior statements scattered through the file, and in the summary statement that he would be submitting. Surgery was performed on , as he indicated.

Attorney Felser asked that the record remain open for 30 days to allow for the submission of additional evidence for the appeal, including a written statement form the claimant and additional medical documentation. The request was granted, and the record held open.

Following the conclusion of the Hearing, copies of the transcript were released to the claimant and the employer, and their comments were invited. No additional comments on the transcript were received.

The claimant's provided a written statement dated \_\_\_\_\_ discussing her prior accepted work-related injury, the newly claimed work incident and her medical treatment, as was discussed by Attorney Felser at the Hearing.

The following additional medical documents were received to the record on appeal:

- \_\_\_\_\_ office notes by Dr. \_\_\_\_\_, orthopedic surgeon.
- \_\_\_\_\_ operative report, revision rotator cuff repair, debridement anterior and posterior glenohumeral joint/scar releases, revision subacromial decompression, removal several large foreign bodies, old sutures and knots.
- \_\_\_\_\_ post-operative office notes by Dr. \_\_\_\_\_.
- \_\_\_\_\_ post-operative office notes by Dr. \_\_\_\_\_.
- \_\_\_\_\_ post-operative office notes by Dr. \_\_\_\_\_.
- \_\_\_\_\_ office notes from Dr. \_\_\_\_\_.
- Handwritten note from Dr. \_\_\_\_\_ dated \_\_\_\_\_.

In his office notes dated \_\_\_\_\_, Dr. \_\_\_\_\_ indicated he saw the claimant for ongoing shoulder issues after two surgeries on the right shoulder, first for a torn rotator cuff that was repaired, second for a biceps tenodesis as well as subacromial decompression and distal clavicle resection. The claimant reported that in \_\_\_\_\_ she was reaching in the back seat when she reinjured the right shoulder and felt a pop. She had pain and disability since then. She had an MRI previously. Dr. \_\_\_\_\_ discussed the x-ray and MRI findings. Dr. \_\_\_\_\_ diagnosed a recurrent right rotator cuff tear, and retraction of the tear. Treatment plan included right shoulder arthroscopy. A Handwritten note from Dr. \_\_\_\_\_ dated \_\_\_\_\_ advised that the claimant re-injured her shoulder in \_\_\_\_\_ reaching into her back seat, as per his notes.

Based on my careful consideration of the evidence of record at this time, I find the case is not in posture for a decision. Additional medical development is warranted before a decision on the claim is made.

In the current case, the claimant filed form CA-2 on [redacted] alleging that she re-injured her right shoulder prior to [redacted] when she reached behind in her car for a bundle of ads. [redacted] office notes from Dr. [redacted] support that the claimant reported this incident to her physician at that time. The claimant and her physicians have also indicated that the claimant experienced ongoing symptoms of right shoulder pain and weakness since her prior surgeries in [redacted] and [redacted] that were performed as the result of a prior accepted work-related injury that occurred on [redacted] when she pulled a bundle of mail. Following recovery from surgery, the claimant had been working in her regular full duty job as a [redacted] until she stopped working on [redacted] and filed the new CA-2 claim. At that time, Dr. [redacted] diagnosed a full-thickness tear of the right shoulder based on MRI studies performed October 25, 2016 and took the claimant off work.

Based on the circumstances of the claim, including the claimant's statements and reports by her physicians, it is not clear whether the claim is more appropriately filed as a form CA-1 "Notice of Traumatic Injury" or CA-2 "Notice of Occupational Disease". As indicated in the Office's procedure manual, it is the duty of the Office to develop a claim based on the facts at hand and not on the basis of the type of claim filed.<sup>1</sup> For example, if a Form CA-1, claim for traumatic injury, is received by the Office and a Form CA-2, claim for occupational disease, is actually required, the Office should not deny the claim on the basis that fact of injury is not established.<sup>2</sup>

It is a medical question that must be addressed by a physician, as to whether the claimant's right shoulder recurrent tear is causally related to her prior accepted work-related injury of [redacted] and prior surgeries in [redacted] and [redacted] causally related to the reported work incident around [redacted] when the claimant reached behind at work to retrieve a bundle; causally related to the claimant's continued repetitive work duties she performed as [redacted] both before and after the alleged incident around [redacted] or some combination of these factors.

On appeal, Dr. [redacted] diagnosed a recurrent right rotator cuff tear, and retraction of the tear. He recommended right shoulder arthroscopy and opined that the claimant re-injured her shoulder in [redacted] reaching into her back seat, as per his notes.

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature, and the Office is not a disinterested arbiter.<sup>3</sup> While the claimant has the burden to establish entitlement to compensation, the Office

<sup>1</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.4 (April 1993).

<sup>2</sup> See FECA Bulletin No. 96-10 (issued May 9, 1996).

<sup>3</sup> *Betty J. Smith*, 54 ECAB \_\_\_ (Docket No. 02-149, issued October 29, 2002).

shares responsibility in the development of the evidence and the Office has an obligation to see that justice is done.<sup>4</sup>

The record now contains a firm diagnosis made in connection with the claimed work incident, which is confirmed by objective testing: MRI studies. Dr. \_\_\_\_\_ is an orthopedic specialist that has provided a medical opinion based on an accurate history of injury supporting that the diagnosed right shoulder conditions and right shoulder surgery on \_\_\_\_\_ are work-related. There is no physician of record that has offered an opinion contrary to that of Dr. \_\_\_\_\_.

Dr. \_\_\_\_\_ has raised an uncontroverted inference of causal relationship between the claimant's federal work the diagnosed medical condition affecting the claimant's right shoulder. His report comprises substantial evidence in support of the claim, which has not been contradicted by any other physician of record. The medical evidence of record is therefore sufficient to require further development of the case record by the Office.<sup>5</sup>

On this basis, the case is remanded for further development of the medical evidence. The Office should compose a Statement of Accepted Facts (SOAF) and refer the claimant to an appropriate medical specialist for a directed "second opinion" examination, to provide a rationalized opinion addressing whether the claimant sustained a work-related injury as alleged.<sup>6</sup> Prior to this referral, the current file \_\_\_\_\_ should be administratively combined, or "doubled", with the file pertaining to the claimant's prior accepted claim for a right shoulder injury \_\_\_\_\_.<sup>7</sup> The SOAF should contain a relevant factual background for both claims, including:

- A description of the mechanism injury of the work incident of \_\_\_\_\_ under file \_\_\_\_\_, identifying the accepted conditions under that claim, approved medical procedures and approved periods of disability.
- A description of the physical requirements and duties of the claimant's regular position of \_\_\_\_\_; and time periods she worked in this position.

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<sup>4</sup> See *Phillip L. Barnes*, 55 ECAB \_\_\_\_ (Docket No. 02-1441, issued March 31, 2004); *Lourdes Davila*, 45 ECAB 139 (1993).

<sup>5</sup> *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

<sup>6</sup> *Robert J. Pitchford* ECAB Docket 03-1415, Issued August 8, 2003.

<sup>7</sup> OWCP procedures provide that cases should be combined when correct adjudication of the issues depends on frequent cross-reference between files. If a new injury case is reported for an employee who previously filed an injury claim for a similar condition or the same part of the body, doubling is required. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400 8(c) (February 2000); *T.D.*, Docket No. 07-2331 (issued June 19, 2008).

- A description of the physical requirements and any modified positions held by the claimant; and the time periods she worked in these positions.
- A description of the alleged work event on or around that is the subject of the current claim.

A copy of the SOAF and prior medical records should be provided to the second opinion physician to use as a background for his medical opinion regarding the claimed work injury.

The second opinion physician should discuss the history of injury according to the SOAF and available records. He or she should conduct a thorough examination; provide his or her own detailed subjective and objective examination findings; discuss the objective test results; and provide a firm diagnosis for medical conditions affecting the claimant's right shoulder.

The second opinion physician should provide a rationalized medical opinion explaining whether any of the diagnosed right shoulder conditions and/or surgery performed on \_\_\_\_\_ are causally related to any of the following factors:

- The prior accepted work injury of \_\_\_\_\_
- The approved surgeries of \_\_\_\_\_
- The claimant's repetitive, ongoing physical work activities as a \_\_\_\_\_
- The reported work incident on or around \_\_\_\_\_

As part of this discussion, the second opinion physician should explain whether the work factors as described in the SOAF caused or contributed to any diagnosed medical condition; whether by direct causation, aggravation, precipitation, acceleration, or otherwise. The second opinion physician should discuss the mechanism of injury, if applicable; provide medical reasoning to support his or her medical opinions; and provide a detailed discussion of any supportive evidence.

The second opinion physician should be reminded that, under the FECA, it is not necessary to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relation. If the medical evidence reveals that an employment factor contributes in any way to the employee's condition, such condition would be considered employment related for purposes of compensation under the Act.<sup>8</sup> Where the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working

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<sup>8</sup> *Arnold Gustafson*, 41 ECAB \_\_\_\_ (Docket No. 89-0438 issued October 30, 1989).



conditions or injuries, such disability is compensable.<sup>9</sup> However, the normal progression of untreated disease cannot be stated to constitute aggravation of a condition merely because the performance of normal work duties reveals the underlying condition.<sup>10</sup>

If the second opinion physician believes a pre-existing condition was in some way aggravated, accelerated or in any other way affected by the work incident, the rationalized medical opinion must include a discussion of the nature of the underlying conditions; their natural or traditional course; how the underlying conditions may have been affected by federal work duties as determined by medical records covering the period of employment; whether such affects, if any, caused material changes in the underlying conditions; or, if no material changes occurred, would the symptoms or changes indicative of a temporary aggravation have subsided or resolved immediately upon appellant's removal from the employment environment; or if not, at what point would such symptoms or changes have resolved. The physician should explain whether work-related aggravation of underlying conditions caused disability from work during any time period.<sup>11</sup>

Once the second opinion physician's report is received, the Office should undertake any additional development of the evidence such as it finds warranted, and issue a *de novo* decision on the issue of whether the evidence is sufficient to establish a work-related injury, as alleged, under the current file  
The Office should also make a formal finding as to whether right shoulder surgery performed \_\_\_\_\_ should be authorized under file \_\_\_\_\_ or \_\_\_\_\_

For the reasons set forth above, the decision dated \_\_\_\_\_ is hereby set aside, and the case is remanded to the District Office for actions consistent with this decision.

Issued:  
Washington, D.C.

*Electronically Signed*

\_\_\_\_\_  
Hearing Representative  
for  
Director, Office of Workers'  
Compensation Programs

<sup>9</sup> *A.C.*, Docket No. 08-1453 (issued November 18, 2008).

<sup>10</sup> *Glenn C. Chasteen*, 42 ECAB 493 (1991).

<sup>11</sup> *Newton Ky Chung*, 39 ECAB \_\_\_\_ (1988).