

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

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**H.C., Appellant**

**and**

**DEPARTMENT OF THE ARMY, ARMY CORP  
OF ENGINEERS, Clewiston, FL, Employer**

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**Docket No. 13-477  
Issued: April 17, 2013**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 26, 2012 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs (OWCP) dated November 14, 2012. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 sustained a right shoulder or cervical injury in the performance of duty on August 25, 2009.

**FACTUAL HISTORY**

This is the third appeal before the Board. Appellant filed a claim for traumatic injury on August 27, 2009, alleging that he sustained an injury to his right shoulder on August 25, 2009 while climbing a ladder in a boat basin. By decision dated December 7, 2009, OWCP denied the

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

claim, finding that he failed to submit medical evidence sufficient to establish that he sustained a right shoulder or neck injury in the performance of duty on August 25, 2009. By decision dated March 1, 2010, it denied his request for a hearing as untimely. By decision dated December 17, 2010, OWCP denied appellant's request for reconsideration without a merit review, finding that the request was untimely and that he had not established clear evidence of error. In an October 5, 2011 decision,<sup>2</sup> the Board set aside OWCP's December 17, 2010 decision, finding that OWCP erred in finding appellant's reconsideration request untimely. The Board remanded the case to OWCP to further review appellant's December 17, 2010 reconsideration request in accordance with its regulations and procedures.

On July 16, 2011 appellant requested reconsideration and submitted additional medical evidence. By decision dated November 4, 2011, OWCP denied modification of the March 31, 2011 decision. In a decision dated July 2, 2012,<sup>3</sup> the Board affirmed OWCP's November 4, 2011 decision. The complete facts of this case are set forth in the Board's July 2, 2012 decision and are herein incorporated by reference.

By letter dated October 30, 2012, appellant, through his attorney, requested reconsideration.

In a report dated October 9, 2012, received by OWCP on November 5, 2012, Dr. James P. Weiner, Board-certified in orthopedic surgery, noted that appellant had related complaints of left-sided neck pain and stiffness since the August 25, 2009 work incident. He described the history of alleged injury and subsequent treatment and advised that, when he initially saw appellant on February 16, 2010, he had neck and left shoulder pain radiating to the upper trapezius and toward the shoulder. Dr. Weiner stated that appellant was not experiencing any similar kind of pain prior to the August 25, 2009 work incident; he rated appellant's current pain at a six out of ten. He advised that on examination appellant had muscle spasm of the left neck and upper trapezius area. Appellant underwent a magnetic resonance imaging (MRI) scan in February 2010 which showed multilevel degenerative disc disease with multilevel foraminal stenosis, neural foraminal stenosis and central stenosis at C5-6. His neck pain was treated with a transcutaneous electrical nerve stimulator unit and, on February 15, 2012, cervical medial branch blocks. Dr. Weiner last saw appellant on September 12, 2012, at which time he had complaints of left-sided neck pain and lower back pain; the pain was continuous and stabbing, with a tingling sensation in his hands and legs.

By decision dated November 14, 2012, OWCP denied modification of the prior decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> has the burden of establishing that the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable

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<sup>2</sup> Docket No. 11-716 (issued October 5, 2011).

<sup>3</sup> Docket No. 12-404 (issued July 2, 2012).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>5</sup> 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.<sup>6</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. 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.<sup>7</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>8</sup> The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician’s rationalized opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>9</sup>

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.<sup>10</sup>

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant’s condition became apparent during a period of employment nor, the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.<sup>11</sup> Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

### ANALYSIS

OWCP accepted that appellant experienced right shoulder and neck pain while climbing a ladder on August 25, 2009. The question of whether an employment incident caused a personal injury can only be established by probative medical evidence.<sup>12</sup> Appellant has not submitted

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<sup>5</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>6</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>7</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>8</sup> *Id.* For a definition of the term “injury,” see 20 C.F.R. § 10.5(a)(14).

<sup>9</sup> *Id.*

<sup>10</sup> See *Joe T. Williams*, 44 ECAB 518, 521 (1993).

<sup>11</sup> *Id.*

<sup>12</sup> *Carlone*, *supra* note 7.

rationalized, probative medical evidence to establish that the August 25, 2009 employment incident would have been competent to cause the claimed injury.

Following the Board's July 2, 2012 review of the case, appellant submitted Dr. Weiner's October 9, 2012 report. Dr. Weiner stated that appellant was experiencing neck and left shoulder pain and stiffness which radiated to the upper trapezius and left shoulder. He advised that appellant did not have this type of pain prior to the August 25, 2009 work incident; he, however, had related complaints of left-sided neck pain and stiffness since the August 25, 2009 work incident. Dr. Weiner's February 2010 MRI scan revealed multilevel degenerative disc disease with multilevel foraminal stenosis, neural foraminal stenosis and central stenosis at C5-6. On September 12, 2012 appellant complained of continuous and stabbing, left-sided neck pain and lower back pain. Dr. Weiner's report did not contain a probative, rationalized medical opinion establishing that appellant's claimed right shoulder and neck conditions were causally related to the August 25, 2009 employment injury.

The weight of medical opinion evidence is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.<sup>13</sup> While Dr. Weiner's report contained a diagnosis of the claimed conditions, he did not present a rationalized, probative medical opinion attributing his alleged injury to the August 25, 2009 work incident. Accordingly, his opinion on causal relationship is of limited probative value.<sup>14</sup> Dr. Weiner stated in his October 9, 2012 report that appellant had experienced continued symptoms of neck and left shoulder pain since his August 25, 2009 work injury, but he did not describe appellant's accident in any detail or explain how climbing a ladder in a boat basin would have been competent to cause an injury. His opinion is of limited probative value for the further reason that it is generalized in nature and equivocal in that he only noted summarily that appellant's shoulder and neck conditions were causally related to the August 25, 2009 work incident. Further, it is unclear if Dr. Weiner had an accurate history of the August 25, 2009 incident as he repeatedly indicated in his report that appellant was experiencing left shoulder injury as a result of the August 25, 2009 incident, but he offered no specific details relating an accurate understanding of the incident.<sup>15</sup>

OWCP advised appellant of the evidence required to establish his claim; however, appellant failed to submit such evidence. Appellant did not provide a medical opinion which describes or explains the medical process through which climbing a ladder in a boat basin on August 25, 2009 would have caused the claimed injury. Accordingly, he did not establish that he sustained a right shoulder or neck injury in the performance of duty. OWCP properly denied appellant's claim for compensation.

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<sup>13</sup> See *Anna C. Leanza*, 48 ECAB 115 (1996).

<sup>14</sup> *William C. Thomas*, 45 ECAB 591 (1994).

<sup>15</sup> See *Geraldine H. Johnson*, 44 ECAB 745 (1993).

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 failed to establish that he sustained right shoulder or cervical injuries in the performance of duty on August 25, 2009.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 14, 2012 decision<sup>16</sup> of the Office of Workers' Compensation Programs be affirmed.

Issued: April 17, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>16</sup> The Board notes that OWCP erroneously stated in its November 14, 2012 decision that the issue was whether the Board's July 2, 2012 decision should be vacated and concluded that "modification of the July 2, 2012 decision is denied." Pursuant to 20 C.F.R. § 501.6(d) "the decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review except by the Board." The Board finds, however, that any error is harmless. OWCP considered the medical evidence appellant submitted with his request for reconsideration and found that it was not sufficient to modify its previous determinations that appellant did not meet his burden to establish that he sustained a right shoulder or neck injury causally related to the August 25, 2009 work incident.