

FACTS

On August 10, 2010 appellant, then a 46-year-old forestry technician, filed an occupational disease claim indicating that his left elbow condition occurred as a result of his job duties, which included using a chain saw. He did not stop work. No evidence was submitted with the claim.

In an October 14, 2010 letter, OWCP advised appellant of the deficiencies in his claim. It requested that he provide factual documentation along with a comprehensive medical report from a physician which included a description of his symptoms and treatment given, examination and test results, diagnosis and an opinion, based on stated medical reasons, regarding whether his claimed condition resulted from factors of his employment.

In response, appellant submitted an October 25, 2010 statement in which he indicated his left elbow condition was due to overuse from chain saw duties on fuel projects. He stated that he had the same condition in the past and it took up to six months to subside. Appellant advised that his current condition was worsening such that he had difficulty gripping with his left hand. He noted using a chain saw for up to eight hours daily for up to one month straight. Also provided was an October 18, 2010 work status report from a nurse and a nurse practitioner that diagnosed lateral epicondylitis and indicated that appellant had no work restrictions.

By decision dated December 28, 2010, OWCP denied appellant's claim. It found that he established that the events occurred as alleged but that there was no medical evidence supporting that work factors caused a medical condition. Appellant was advised that a nurse or nurse practitioner was not a qualified physician.

On January 5, 2011 appellant requested reconsideration. In a January 5, 2011 statement, he indicated that he was submitting a copy of the diagnosis signed by the nurse and cosigned by a physician, Dr. Heiser of Duluth Clinic. An August 23, 2010 x-ray report for the left elbow from Dr. Ningmei Hu, a Board-certified radiologist, and an August 23, 2010 progress note, signed by a nurse practitioner, were provided. The x-ray report noted some soft tissue swelling dorsal to the left elbow. There was no acute fracture, dislocation or significant joint effusion.

By decision dated April 5, 2011, OWCP denied the request for reconsideration finding that the evidence submitted was insufficient to warrant a merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim by the weight of the reliable, probative and substantial evidence.² In a claim for occupational disease, that burden of proof includes: (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

² *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.³

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁴ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the specified employment factors or incident.⁵ 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.⁶

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that an employee's condition surfaced during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.⁷ The mere fact that work activities may produce symptoms revelatory of an underlying condition does not raise an inference of an employment relation. Such a relationship must be shown by rationalized medical evidence of a causal relation based upon a specific and accurate history of employment conditions which are alleged to have caused or exacerbated a disabling condition.⁸

ANALYSIS -- ISSUE 1

OWCP accepted that appellant's employment duties included chain saw duties, but denied the claim on the grounds of insufficient medical evidence demonstrating that his left elbow condition was causally related to the accepted employment factors. The Board affirms OWCP's denial and finds that appellant did not meet his burden of proof to establish his claim.

Appellant did not support any medical evidence in support of his claim prior to OWCP's December 28, 2010 denial of his claim. The October 18, 2010 report from a nurse or nurse

³ *Ernest St. Pierre*, 51 ECAB 623 (2000); *D.U.*, Docket No. 10-144 (issued July 27, 2010).

⁴ *D.I.*, 59 ECAB 158 (2007); *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *W.D.*, Docket No. 09-658 (issued October 22, 2009).

⁵ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ *B.B.*, 59 ECAB 234 (2007); *D.S.*, Docket No. 09-860 (issued November 2, 2009).

⁷ *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁸ *Patricia Bolleter*, 40 ECAB 373 (1988).

practitioner does not constitute competent medical evidence as nurses are not physicians under FECA.⁹ No other medical evidence was provided.

As previously stated, causal relationship is a medical issue and must be resolved by probative medical evidence.¹⁰ Appellant was advised in OWCP's October 14, 2010 letter that a comprehensive medical report explaining how his claimed elbow condition was caused or aggravated by his work activities was needed to support his claim. He failed to provide such medical evidence explaining how his work caused a diagnosed condition. Thus, appellant has not met his burden of proof to establish that he sustained his left elbow condition in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹¹ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹² To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹³ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁴

ANALYSIS -- ISSUE 2

Appellant requested reconsideration on January 5, 2011. At the time of the last merit decision, the critical issue was the lack of medical evidence supporting causal relationship. To be relevant, medical evidence submitted in support of the January 5, 2011 request for reconsideration must address that issue.

In support of his request, appellant submitted an August 23, 2010 radiology report from Dr. Hu. While this report is new and it is from a physician, it is not relevant because Dr. Hu did not support that appellant's employment caused a diagnosed medical condition. Also submitted

⁹ *L.D.*, 59 ECAB 648 (2008). Section 8101(2) of FECA defines the term physician to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2).

¹⁰ *D.I.*, *supra* note 4; *Margaret Carvello*, 54 ECAB 498 (2003).

¹¹ Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

¹² 20 C.F.R. § 10.606(b)(2). *See Susan A. Filkins*, 57 ECAB 630 (2006); *J.M.*, Docket No. 09-218 (issued July 24, 2009).

¹³ *Id.* at § 10.607(a). *See Robert G. Burns*, 57 ECAB 657 (2006); *S.J.*, Docket No. 08-2048 (issued July 9, 2009).

¹⁴ *Id.* at § 10.608(b). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

was an August 23, 2010 report from a nurse practitioner. As noted, nurses are not physicians under FECA.¹⁵ As the underlying issue is medical in nature,¹⁶ reports from laypersons, such as nurses and physician's assistants, are of no relevance to the issue of causal relationship and do not comprise a basis for reopening a case.¹⁷

Appellant has not established that OWCP improperly refused to reopen his claim for a review of the merits under section 8128(a) of FECA. He did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent new evidence not previously considered by OWCP.

On appeal, appellant asserts that he sent in a form cosigned by Dr. Heiser. However, the record contains no document from Dr. Heiser that was submitted to OWCP prior to its April 5, 2011 decision.¹⁸

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 did not meet his burden of proof to establish his claim. The Board further finds that OWCP properly denied appellant's request for reconsideration.

¹⁵ See *supra* note 9; *Richard E. Simpson*, 57 ECAB 668 (2006); *Sedi L. Graham*, 57 ECAB 494 (2006).

¹⁶ *Carol A. Lyles*, 57 ECAB 265 (2005) (causal relationship is a medical issue which must be resolved by competent medical opinion).

¹⁷ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹⁸ Appellant submitted evidence on appeal which he asserted would establish his claim. The Board may not consider evidence for the first time on appeal that was not before OWCP at the time it issued its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2011 and December 28, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 3, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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