

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

G.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Chicago, IL, Employer**

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**Docket No. 11-1985
Issued: May 18, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 29, 2011 appellant filed an appeal from a May 25, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.²

ISSUE

The issue is whether appellant established a left rotator cuff tear causally related to his federal employment.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence for the first time on appeal. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

On appeal appellant contends that OWCP accepted a prior claim for right rotator cuff tear and argued that his current condition is a consequential injury resulting from the prior right rotator cuff tear.

FACTUAL HISTORY

On March 16, 2011 appellant, then 53 years old, filed a claim for an occupational disease. He listed the nature of his disease or illness as left shoulder rotator cuff tear, claiming it was a consequential injury. When asked to explain the relationship to his employment, appellant indicated that he had surgery on his right shoulder rotator cuff and consequently the left rotator cuff now has a tear. In an accompanying statement, he indicated that in November 2010 his right shoulder started to hurt. Appellant saw Dr. James C. Cohen, a Board-certified orthopedic surgeon, who gave him a shot to relieve the pain in December 2010, but after three months the pain was just as intense as before. He stated that a magnetic resonance imaging (MRI) scan showed rotator cuff tear to his left shoulder and that Dr. Cohen decided that the tear had to be repaired. In further support of his claim, appellant submitted a note from Dr. Cohen indicating that he was scheduled for surgery due to a left rotator cuff tear on March 17, 2011 and was to be off work effective March 9, 2011.

By letter dated March 30, 2011, OWCP asked appellant to submit further information. In response, appellant submitted notes and reports from Dr. Cohen dated December 3, 2010 through April 15, 2011. Dr. Cohen indicated in his December 3, 2010 report that he previously performed a right rotator cuff repair on appellant's right shoulder and that his right shoulder was doing great,³ but that for the past few months he has been complaining of pain around the anteriolateral aspect of the left shoulder. At that time he diagnosed impingement syndrome and noted that appellant may or may not have a rotator cuff tear. Dr. Cohen tried a subacromial injection which offered some relief, but appellant's pain returned. In a March 8, 2011 report, he indicated that he reviewed appellant's MRI scan and that appellant had a massive tear with retraction of his supraspinatus to the level of his glenoid. Dr. Cohen also noted degenerative changes of his acromioclavicular joint and a large rotator cuff tear. He completed a report of operation noting that on April 11, 2011 appellant underwent an open left rotator cuff repair and acromioplasty and by report of April 15, 2011, he indicated that appellant was still having pain but overall was doing very well. Dr. Cohen ordered continuous passive motion therapy for home use.

By decision dated May 25, 2011, OWCP denied appellant's claim as it found that the medical evidence did not demonstrate that the claimed condition was related to the established work events.

³ The Board notes that surgery for the right shoulder was performed on March 29, 2008.

LEGAL PRECEDENT

An employee seeking compensation under FECA⁴ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,⁵ including that he is an “employee” within the meaning of FECA⁶ and that he filed his claim within the applicable time limitation.⁷ The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.⁸ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁹

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee 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 employee.¹⁰

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause.¹¹ Once the work-connected character of an injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause. An employee who asserts that a nonemployment-related injury was a consequence of a previous employment-related injury has the burden of proof to establish that such was the fact.¹²

ANALYSIS

OWCP denied appellant’s claim as it found that although he established the claimed employment factors and, although he established that a medical condition had been diagnosed,

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

⁶ *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

⁷ *R.C.*, 59 ECAB 427 (2008); *Kathryn A. O’Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

⁸ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁹ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

¹⁰ *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

¹¹ *K.R.*, Docket No. 11-391 (issued December 21, 2011).

¹² *See Kathy A. Kelley*, 55 ECAB 206 (2004); *Carlos A. Marerro*, 50 ECAB 170 (1998).

he had not submitted medical evidence sufficient to establish that the medical condition was causally related to any accepted work events.

The Board primarily notes that although OWCP indicated that appellant had established an accepted work event, there is no evidence in the record with regard to what factors of federal employment caused his injury. Appellant never describes his work duties nor does he indicate any activities that he alleged caused his injury. Accordingly, his claim failed to provide evidence of a compensable employment factor.

The Board also finds that OWCP properly denied appellant's claim for failing to establish a causal relationship between any factors of his federal employment and his left rotator cuff tear. In support of his claim, appellant submitted medical reports from his treating physician, Dr. Cohen, who noted that he had a large rotator cuff tear in his left shoulder, that on April 11, 2011 he performed a left rotator cuff repair and acromioplasty, and that, as of April 15, 2011, appellant was still having pain but was doing well overall. Dr. Cohen, though, never related this injury to appellant's federal employment. Although he did note that he had previously performed a right rotator cuff repair, he never indicated that appellant's left rotator cuff tear was related to the right rotator cuff repair nor that the previous surgery had been work related. Accordingly, appellant did not submit medical evidence establishing that his left rotator cuff injury was causally related to his federal employment or was a consequential injury.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was caused by his employment or that it was an aggravation of a prior employment injury is sufficient to establish causal relationship.¹³ As appellant has not submitted medical evidence establishing a causal relationship between his federal employment and his left rotator cuff injury, OWCP properly denied his claim.

Appellant contends on appeal that this is a consequential injury related to his prior right shoulder injury. He claims it did not have to occur during his employment to be compensable. As previously noted, appellant provided no medical evidence that OWCP had previously accepted his claim for a right rotator cuff injury. Accordingly, his arguments on appeal are without merit.

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 establish that his left rotator cuff tear was causally related to his federal employment.

¹³ *M.P.*, Docket No. 11-1194 (issued February 23, 2012); *Walter D. Morehead*, 31 ECAB 188 (1986).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 25, 2011 is affirmed, as modified.

Issued: May 18, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board