

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

J.A., Appellant)	
)	
and)	Docket No. 13-229
)	Issued: April 23, 2013
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF INVESTIGATION,)	
Philadelphia, PA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 9, 2012 appellant filed a timely appeal from a May 22, 2012 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 this case.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on August 10, 2010.

On appeal appellant asserts that the opinion of his attending physician is sufficient to establish that the claimed condition is employment related.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On July 26, 2011 appellant, then a criminal investigator, submitted a traumatic injury claim alleging that he sustained a left shoulder injury on August 10, 2010 while performing pull-ups as part of physical training in preparation for a Special Weapons and Tactics (SWAT) physical fitness test. On the claim form, a witness, Lucas Rothaar, attested that he was aware that appellant sustained a left shoulder injury on or about the date noted.

By letter dated August 18, 2011, OWCP informed appellant of the type of evidence needed to support his claim. In a September 6, 2011 statement, appellant repeated that he injured his shoulder on or about August 10, 2010 while preparing for SWAT tryouts. He stated that after the incident he experienced intense pain, limited mobility, and loss of function to his left shoulder, arm and back and ceased training. Appellant indicated that he applied ice and heat and took over-the-counter medication for two to three weeks but the shoulder did not get better and that he first went to his primary care physician, Dr. Lawrence D. Barr, a Board-certified internist, on September 14, 2010 and that Dr. Barr referred him to an orthopedic surgeon.

Appellant stated that on September 29, 2010 he began temporary duty in San Diego, California, and on September 30, 2010 saw Dr. William Previte, a Board-certified orthopedist, who diagnosed a possible superior labral tear from anterior to posterior (SLAP) of the left shoulder, which was confirmed by an October 12, 2010 magnetic resonance imaging (MRI) scan. He indicated that Dr. Previte recommended surgery but that he decided to wait until his temporary-duty assignment ended and he returned home to Philadelphia, Pennsylvania, before having the surgery. Appellant continued that, following his return to Philadelphia, on January 4, 2011, he saw Dr. Michael G. Ciccotti, Board-certified in orthopedic surgery, who reviewed the MRI scan study and agreed that appellant needed surgery, which was performed by Dr. Ciccotti on February 4, 2011. He then described his follow-up care.

Appellant submitted supportive medical evidence including a September 14, 2010 form report in which Dr. Barr noted a history that appellant was doing weighted pull-ups, followed by four weeks of left shoulder pain. Dr. Barr provided physical examination findings and diagnosed a possible left rotator cuff tear. An October 12, 2010 MRI scan study of the left shoulder demonstrated mild rotator cuff tendinosis; a SLAP 2 lesion, possibly chronic; and moderate acromioclavicular joint arthrosis and hypertrophy. In reports dated January 4, 2011, Dr. Ciccotti noted appellant's report that in August 2010 he felt a sharp pain in his left shoulder while doing pull-ups and had continued pain. He described physical examination findings and advised that appellant's examination and the MRI scan study were consistent with a SLAP tear and that appellant was a candidate for left shoulder arthroscopic repair. In reports dated February 15, March 22, and May 10, 2011, Dr. Ciccotti described appellant's postoperative care. On July 26, 2011 he indicated that appellant was doing well and could begin full resistance training.²

By decision dated October 30, 2011, OWCP found that the medical evidence did not establish that the claimed condition was related to an established work-related event.

² Appellant also submitted a medical report that predated the claimed injury and a progress note by a therapist regarding durable medical equipment.

On February 22, 2012 appellant requested reconsideration. He provided a copy of a February 4, 2011 operative report in which Dr. Ciccotti stated that the indications for surgery included a history of persistent left shoulder pain and weakness with difficulty with overhead activity and that examination and MRI scan findings were consistent with a SLAP tear. The postoperative diagnosis was left shoulder SLAP tear with anterior labral fraying. In a February 17, 2012 report, Dr. Ciccotti indicated that appellant was under his care for a left shoulder condition. He stated that a labrum tear was a detachment of the cartilage in the shoulder that caused pain, instability and weakness, and that it could occur with repetitive stress, like weight training or throwing, or from an acute injury, such as falling. Dr. Ciccotti noted that appellant reported that he felt pain as he was performing weighted pull-ups on or around August 10, 2010 and, according to medical evidence, it was possible that appellant's labrum injury could have been a direct result of performing weighted pull-ups on August 10, 2010.

In a merit decision dated May 22, 2012, OWCP denied modification of the prior decision. It noted that Dr. Ciccotti's February 17, 2012 was couched in speculative terms and was insufficient to establish appellant's claim.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing 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 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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.³

OWCP regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.⁴ To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed. An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.⁵

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁶ The opinion of the physician must be

³ *Gary J. Watling*, 52 ECAB 278 (2001).

⁴ 20 C.F.R. § 10.5(ee) (1999, 2011); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁵ *Gary J. Watling*, *supra* note 3.

⁶ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

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 employee.⁷ Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.⁸

ANALYSIS

OWCP found, and the Board agrees, that the August 10, 2010 employment incident occurred as alleged. The Board, however, finds that the medical evidence of record is insufficient to establish that appellant sustained an injury or medical condition caused by this incident.

The October 12, 2010 left shoulder MRI scan did not include an opinion as to the cause of any diagnosed condition. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.⁹

In a September 14, 2010 report, Dr. Barr merely noted appellant's report that he had a four-week history of left shoulder pain following weighted pull-ups. He diagnosed possible left rotator cuff tear. As Dr. Barr did not provide a definitive diagnosis or any explanation of a mechanism of injury, his opinion is not sufficient to establish that appellant sustained a left shoulder injury on August 10, 2010.¹⁰

Dr. Ciccotti performed left shoulder arthroscopic repair on a February 4, 2011. His postoperative diagnosis was left shoulder SLAP tear with anterior labral fraying. In a February 17, 2012 report, Dr. Ciccotti described a labrum tear as a detachment of the cartilage in the shoulder causing pain, instability and weakness which could occur with repetitive stress, such as weight training or throwing, or from an acute injury, such as falling. He indicated that appellant felt pain as he was performing weighted pull-ups on or around August 10, 2010 and, according to medical evidence, it was possible that appellant's labrum injury could have been a direct result of performing weighted pull-ups on August 10, 2010.

The Board has long held that an opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.¹¹ Furthermore, medical opinions that are

⁷ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

⁸ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

⁹ *Willie M. Miller*, 53 ECAB 697 (2002).

¹⁰ *See T.H.*, 59 ECAB 388 (2008).

¹¹ *Patricia J. Glenn*, 53 ECAB 159 (2001).

speculative or equivocal in character are of diminished probative value.¹² The opinion should be expressed in terms of a reasonable degree of medical certainty.¹³ Dr. Ciccotti merely indicated that it was possible that appellant's SLAP lesion could have been a result of the August 10, 2010 incident. His report is therefore speculative in nature and insufficient to meet appellant's burden of proof.

As appellant did not submit sufficient medical evidence to establish that he sustained a diagnosed condition caused by the August 10, 2010 employment incident, he did not meet his burden of proof.

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 he sustained an injury causally related to the August 10, 2010 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹² *D.D.*, 57 ECAB 734 (2006).

¹³ *Ricky S. Storms*, 52 ECAB 349 (2001).