

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

W.D., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL AIR
STATION, Key West, FL, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 14-2044
Issued: February 18, 2015**

Appearances:
Lenin V. Perez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 25, 2014 appellant, through his representative, filed a timely appeal from a July 23, 2014 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 has established an injury in the performance of duty on August 28, 2013.

FACTUAL HISTORY

On September 4, 2013 appellant, then a 64-year-old security assistant, filed a traumatic injury claim alleging an injury in the performance of duty on August 28, 2013. The claim form reported, that appellant "bent over while sitting in a chair at his desk to move his computer

¹ 5 U.S.C. § 8101 *et seq.*

tower.” The nature of the injury was described as shooting pain from the right hand to right shoulder. A statement from a coworker indicated that he saw appellant bent over his desk and appeared to be grabbing an object or moving something. The witness stated that appellant moaned in pain but stated that he would take himself to a physician because it was an old injury.

By letter dated September 4, 2013, an employing establishment compensation specialist stated that the employing establishment was challenging the claim by appellant. The specialist stated that appellant had an injury on July 9, 2012, and that he was on the periodic rolls until August 26, 2013. According to the employing establishment, appellant had work restrictions that included no bending or pushing and the current claim was based on willful misconduct by him. The specialist stated that appellant knew that he was facing a reduction-in-force and refused to provide emergency room medical reports.

In a (Form CA-16) report dated August 29, 2013, Dr. Samy Bishai, an orthopedic surgeon, diagnosed torn right rotator cuff. He checked a box “yes” that the condition was employment related.

By decision dated October 18, 2013, OWCP denied the claim for compensation. It found that appellant had engaged in willful misconduct by deliberately violating work restrictions.

On November 5, 2013 appellant requested a hearing before an OWCP hearing representative. At the May 8, 2014 hearing, he stated that he had been having problems with his personal computer and a coworker had moved his computer tower under his desk. Appellant stated that he needed to move the tower, that he used his left leg and placed his left arm on the tower, without bending, or stooping.

Appellant submitted an August 29, 2013 narrative report from Dr. Bishai, who provided a history that he had read appellant’s “statement” regarding the incident. Dr. Bishai stated that appellant had an original injury on May 25, 2010 to his right shoulder, hand, and knee, with an injury on July 9, 2012 to his lower back. He provided results on examination, diagnosing permanent aggravation of right rotator cuff syndrome, permanent aggravation of right carpal tunnel syndrome, and status post right shoulder and carpal tunnel surgeries. Dr. Bishai stated that appellant sustained “a sudden pull on his right shoulder” while attempting to move a heavy computer tower. He asserted that the pull on the right shoulder aggravated his preexisting rotator cuff condition. Dr. Bishai also stated that “use of the computer for several hours and pulling on the computer with his right hand” aggravated the preexisting carpal tunnel syndrome.

The record also contains additional reports from Dr. Bishai from November 20, 2013 to February 24, 2014 regarding treatment for the right shoulder. In a report dated March 26, 2014, Dr. Ramon Berenguer, a family practitioner, provided results on examination and diagnosed right rotator cuff syndrome, and aggravation of right carpal tunnel syndrome. In a report dated May 12, 2014, Dr. Richard Blecha, a Board-certified orthopedic surgeon, provided results on examination and diagnosed permanent aggravations of right rotator cuff syndrome and right carpal tunnel syndrome.

By decision dated July 23, 2014, the hearing representative modified the October 18, 2013 decision. She accepted that an incident occurred as alleged by appellant, and did not

constitute willful misconduct. The hearing representative found that the medical evidence was insufficient to establish the claim for compensation.

LEGAL PRECEDENT

FECA provides for the payment of compensation for “the disability or death of an employee resulting from personal injury sustained while in the performance of duty.”² The phrase “sustained while in the performance of duty” in FECA is regarded as the equivalent of the commonly found requisite in workers’ compensation law of “arising out of an in the course of employment.”³ An employee seeking benefits under FECA has the burden of establishing that he or she sustained an injury while in the performance of duty.⁴ In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether “fact of injury” has been established. Generally, “fact of injury” consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the employment incident caused a personal injury, and generally this can be established only by medical evidence.⁵

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty, and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested, and the medical rationale expressed in support of the physician’s opinion.⁶

ANALYSIS

In the present case, appellant filed a traumatic injury claim alleging that he sustained right arm and shoulder injuries when he moved a personal computer tower beneath his desk on August 28, 2013. Although OWCP initially denied the claim on the grounds that his actions constituted willful misconduct,⁷ the hearing representative accepted that the incident occurred as alleged. The incident accepted by the hearing representative was based on appellant’s description of the incident at the May 8, 2014 hearing.

² 5 U.S.C. § 8102(a).

³ *Valerie C. Boward*, 50 ECAB 126 (1998).

⁴ *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

⁵ *See John J. Carlone*, 41 ECAB 354, 357 (1989).

⁶ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

⁷ *See* 5 U.S.C. § 8102(a)(1), which provides compensation is not payable for injury caused by willful misconduct of the employee. The Board has held that willful misconduct is deliberate conduct involving intentional wrongdoing with the knowledge that it is likely to cause serious harm, or conduct that involves reckless disregard of probable injurious consequences. *Albert Adderly, Jr.*, 31 ECAB 1727 (1980).

The issue is whether that there was sufficient medical evidence to establish an injury resulting from the August 28, 2013 incident. Appellant was treated by Dr. Bishai on August 29, 2013. But his report of that date is insufficient to establish the claim. As noted above, a medical report must be based on an accurate history and background.

Dr. Bishai mentions that he read a “statement” from appellant regarding the incident, but does not identify which statement, and the physician is also unclear in his description of the incident. He stated that there was a “sudden pull” on the right shoulder causing an aggravation of appellant’s right shoulder and carpal tunnel syndrome. But the description of the incident by appellant does not correspond to the statements of Dr. Bishai. Appellant indicated at the May 8, 2014 hearing that he put his left foot on the computer tower and placed his left hand on the tower. Dr. Bishai also does not provide any explanation of the nature and extent of any asserted aggravation. The diagnoses provided were a permanent aggravation of right rotator cuff syndrome and right carpal tunnel syndrome. If Dr. Bishai is finding that an employment incident on August 28, 2013 resulted in permanent aggravations, he must support such an opinion with sound medical reasoning. He fails to do so, only suggesting “use of the computer” was aggravating his carpal tunnel syndrome. Appellant did not provide factual information regarding computer use as contributing to his carpal tunnel syndrome. Dr. Bishai does not provide any additional detail or explanation on the issue.

The additional medical reports of record do not discuss the causal relationship issue. The Board finds that the record does not contain a medical report that provides an accurate history of injury, medical background, and an opinion on causal relationship with employment that is supported by sound medical reasoning. Appellant did not meet his burden of proof in this case.

On appeal, appellant argues that the August 29, 2013 report from Dr. Bishai is sufficient to establish the claim. For the reasons noted, the Board finds that Dr. Bishai’s report is of diminished probative value relative to the issue presented.

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 not established an injury in the performance of duty on August 28, 2013.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 23, 2014 is affirmed.

Issued: February 18, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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