



## ISSUES

The issues are: (1) whether appellant has established that his right elbow condition is causally related to the September 9, 2013 employment incident; and (2) whether OWCP properly denied appellant's April 7, 2015 request for reconsideration under 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

On September 10, 2013 appellant, then a 53-year-old deckhand, filed a traumatic injury claim (Form CA-1) alleging that on September 9, 2013 he sustained a contusion to the right elbow when he bumped his right elbow against the bulkhead of the vessel while painting on the main deck.<sup>3</sup> He did not stop work. The employing establishment asserted that appellant was not injured in the performance of duty because the alleged elbow injury occurred three weeks prior, but was never reported to management.<sup>4</sup>

On September 10, 2013 the ship's assistant master, Joseph E. Schafer, completed an OWCP (Form CA-16) authorizing medical treatment by the Padgett Family and Occupational Clinic for a period of 60 days. He also indicated that there was doubt that appellant's condition was caused by an injury sustained in the performance of duty.

Appellant submitted a September 10, 2013 work status note and physician's record by Dr. Philip G. Padgett, a Board-certified family practitioner, who noted a date of injury of September 9, 2013 and related that appellant hit his right elbow on metal at work. Dr. Padgett authorized appellant to return to work on September 11, 2013 with restrictions of no lifting, pulling, pushing, or carrying over 10 pounds and limited standing and walking.

In September 19 and 26, 2013 work authorization forms and physician records, Dr. Padgett diagnosed right elbow pain. He authorized appellant to return to work on September 19, 2013 and to work his usual and ordinary activities as tolerated.

Appellant stopped work on November 21, 2013.

Appellant submitted a handwritten February 15, 2014 statement by Ellery Johnson, appellant's former coworker, who stated that appellant told him that he fell and hurt his shoulder and elbows and had reported this to his supervisor. Mr. Johnson noted that he discussed this with appellant shortly after the incident, but Mr. Johnson provided no date.

In a decision dated June 17, 2014, OWCP denied appellant's claim based on fact of injury. It determined that the factual evidence was insufficient to establish that the September 9, 2013 incident occurred as described and the medical evidence failed to demonstrate that he sustained a diagnosed condition causally related to the alleged incident.

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<sup>3</sup> The record reveals that appellant had two previously accepted traumatic injury claims. (File Nos. xxxxxx178 & xxxxxx786), for injuries sustained on November 18, 2007 and September 6, 2009. Appellant also has a denied claim for injury on August 25, 2013 (File No. xxxxxx827).

<sup>4</sup> OWCP initially accepted appellant's claim as a minor injury, but reopened it to consider the merits when he continued to seek medical care.

On September 11, 2014 appellant was examined by Dr. James R. Kerbs, a Board-certified orthopedic surgeon, who reported that appellant worked as a deckhand on a barge when he slipped and hit his elbow about a year ago. Dr. Kerbs noted that appellant was initially examined in Louisiana and had recently moved. He described appellant's complaints of continued pain and difficulty in the elbows with any gripping, pulling, or twisting activities. Upon examination Dr. Kerbs observed full wrist range of motion and fair grip strength. He noted pain to palpation over the lateral epicondyles on both elbows. Sensory examination was intact in both upper extremities and all dermatomes. Dr. Kerbs related that diagnostic studies of both elbows showed no gross arthritic changes, no fracture, and no effusion. He diagnosed bilateral lateral epicondylitis. Dr. Kerbs recommended physical therapy and a follow-up examination in three months.

OWCP received appellant's request for reconsideration on September 29, 2014. Appellant explained that he was injured on August 21, 2013 when he was painting and fell backward onto his elbows. He noted that he told his shipmate, David Houtane, and that his coworker, Mr. Johnson, witnessed him telling Mr. Houtane. Appellant reported that he returned to work and was in a lot of pain. He related that on September 9, 2013 he reinjured his right elbow. Appellant informed Captain Schafer of his reinjury.

Appellant submitted various physical therapy progress records dated September 20 to November 24, 2014.

In a December 11, 2014 report, Dr. Kerbs related that appellant continued to complain of bilateral elbow pain from lifting and pulling activities. Upon examination, he observed pain to deep palpation over both elbows and no gross swelling. Range of motion was full with mild pain with resisted dorsiflexion of the wrist. Dr. Kerbs diagnosed bilateral lateral epicondylitis. He recommended that appellant return in three months for follow up.

On January 8, 2015 Dr. Bailey examined appellant again and reported that his chronic recurrent elbow tendinitis was exacerbated by repetitive use at work.

On January 30, 2015 OWCP received the employing establishment's letter challenging appellant's reconsideration request. Eloise Coleman, a human resource specialist for the employing establishment, asserted that appellant did not provide medical rationale to support that he experienced anything other than a minor injury on September 9, 2013. She pointed out that Dr. Padgett released appellant to full duty and that he was able to work full duty until he resigned on November 21, 2013. Ms. Coleman explained that because appellant had not worked for the employing establishment since November 21, 2013 any problems he may be experiencing could be due to other factors, such as his preexisting lateral epicondylitis. She alleged that he failed to establish causal relationship.

By decision dated March 10, 2015, an OWCP hearing representative affirmed the June 17, 2014 denial decision with modification. She accepted that the September 9, 2013 employment incident occurred as alleged, but denied appellant's claim finding insufficient medical evidence to establish causal relationship between the diagnosed right lateral epicondylitis condition and his elbow bump on September 9, 2013.

On April 7, 2015 OWCP received appellant's reconsideration request. Appellant stated that he had new evidence for OWCP.

In a handwritten statement dated March 23, 2015, Robert J. Herron, a former employee of the employing establishment, noted that he witnessed appellant telling their supervisor that he hurt himself on August 25, 2013.

Appellant continued to be treated by Dr. Kerbs, who noted in a March 26, 2015 report that appellant continued to struggle with both his elbows. Upon examination, Dr. Kerbs observed pain with resisted dorsiflexion and mild pain to deep palpation over the lateral epicondyle. Range of motion was full. Dr. Kerbs diagnosed bilateral lateral epicondylitis. He reported that, after a year of conservative treatment, appellant may need surgical intervention. Dr. Kerbs clarified that appellant's original date of injury when he fell back on his elbows was August 25, 2013 and his second injury was on September 9, 2013 when he struck one of his elbows. Appellant resubmitted Dr. Kerbs' December 11, 2014 report.

In a decision dated June 17, 2015, OWCP denied appellant's request for reconsideration. It found that the March 23, 2015 witness statement was not relevant to causal relationship and that Dr. Kerbs' medical report was repetitive of evidence previously submitted.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA, whether for traumatic injury or occupational disease, has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence.<sup>5</sup>

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. 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.<sup>6</sup> Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>7</sup> 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

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<sup>5</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

<sup>6</sup> 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

<sup>7</sup> *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

Appellant alleged that on September 9, 2013 he sustained a right elbow injury when he bumped his right elbow against the bulkhead of the vessel in the performance of duty. OWCP accepted that the September 9, 2013 incident occurred as alleged and that he was diagnosed with an elbow condition, but it denied the claim finding insufficient medical evidence to establish that his medical condition resulted from the accepted incident. The Board finds that appellant did not meet his burden of proof to establish that his right elbow condition was causally related to the September 9, 2013 incident.

Appellant was treated by Dr. Kerbs who noted in reports dated September 11 and December 11, 2014 that appellant worked as a deckhand on a barge when he slipped and hit his elbow about a year ago. Dr. Kerbs related appellant's complaints of continued pain and difficulty in the elbows with any gripping, pulling, or twisting activities. He noted that appellant was injured on August 25, 2013 and had a second injury on September 9, 2013. Dr. Kerbs conducted an examination and noted pain to palpation over the lateral epicondyles on both elbows. Sensory examination was intact in both upper extremities and dermatomes and range of motion was full with mild pain with resister dorsiflexion of the wrist. Dr. Kerbs diagnosed bilateral lateral epicondylitis. He recommended physical therapy and follow-up examination in three months.

The Board notes that Dr. Kerbs accurately described that appellant hit his elbow while painting at work and provided a medical diagnosis. The Board notes that Dr. Kerbs mentioned both an August 25 and September 9, 2013 incident. The Board has held that medical reports must be based on a complete and accurate factual history to be of probative value.<sup>9</sup> Dr. Kerbs did not clarify which incident may have resulted in appellant's condition. Furthermore, although he mentioned that appellant hit his elbow on a barge and provided a diagnosis, he did not medically relate appellant's right elbow condition to the employment incident. The Board has held that 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.<sup>10</sup> Likewise, in Dr. Padgett's September 10 to 26, 2013 records, he does not provide any opinion on the cause of appellant's right elbow condition. For these reasons, the Board finds that Dr. Kerbs' and Dr. Padgett's medical reports are insufficient to establish appellant's claim.

Appellant was also examined by Dr. Bailey. In a January 8, 2015 note, Dr. Bailey opined that appellant's chronic recurrent elbow tendinitis was exacerbated by repetitive use while at work. Although he provided an opinion on causal relationship, he did not provide any medical

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<sup>8</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

<sup>9</sup> *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

<sup>10</sup> *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

rationale or explanation for how appellant's employment caused his elbow condition. The Board has held that medical evidence that states a conclusion, but does not offer any rationalized medical explanation regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>11</sup> Furthermore, Dr. Bailey does not attribute appellant's right elbow condition to the September 9, 2013 employment incident, the subject of the current appeal, but to repetitive use at work. Accordingly, his report fails to establish appellant's traumatic injury claim.

On appeal, appellant described how he injured his elbows and asserted that his supervisor failed to properly report his injury in the log book. He noted that he provided four witness statements. Appellant also noted that his doctors informed him that he would not be able to work again. The Board finds that, despite appellant's assertions, he has failed to provide sufficient medical evidence to establish that his elbow condition is causally related to the September 9, 2013 employment incident. The issue of causal relationship is a medical question that must be established by probative medical opinion from a physician.<sup>12</sup> As appellant has not submitted such probative medical opinion evidence in this case, he has not met his burden of proof to establish his claim.

The Board notes that the employing establishment issued a Form CA-16 authorization for medical treatment on September 10, 2013. Where an employing establishment properly executes a Form CA-16, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the CA-16 form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a CA-16 form is limited to 60 days from the date of issuance, unless terminated earlier by OWCP.<sup>13</sup> In this case, it is unclear whether OWCP paid for the cost of appellant's examinations. On return of the case record, OWCP should further address the issue.<sup>14</sup>

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.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.<sup>15</sup> OWCP regulations provide that OWCP may

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<sup>11</sup> *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

<sup>12</sup> *W.W.*, Docket No. 09-1619 (issued June 2, 2010); *David Apgar*, 57 ECAB 137 (2005).

<sup>13</sup> *See* 20 C.F.R. § 10.300.

<sup>14</sup> *See A.B.*, Docket No. 15-1002 (issued August 14, 2015).

<sup>15</sup> 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his right through a request to the district office.<sup>16</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>17</sup>

A request for reconsideration must also be received within one year of the date of the OWCP decision for which review is sought.<sup>18</sup> A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>19</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>20</sup>

### **ANALYSIS -- ISSUE 2**

On April 7, 2015 OWCP received appellant's reconsideration request. Appellant submitted a March 26, 2015 report by Dr. Kerbs, which although new, was repetitive of his prior reports. The Board has found that evidence which is duplicative or cumulative or repetitive in nature is insufficient to warrant reopening a claim for merit review.<sup>21</sup> Appellant also submitted a witness statement. As this evidence does not address the issue of causal relationship, it is not relevant and is insufficient to warrant consideration on the merits. Accordingly, the Board finds that OWCP properly denied appellant's April 7, 2015 reconsideration request.

### **CONCLUSION**

The Board finds that appellant failed to establish that his right elbow condition was causally related to the September 9, 2013 employment incident. The Board also finds that OWCP properly denied his April 7, 2015 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

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<sup>16</sup> 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

<sup>17</sup> *Id.* at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>18</sup> *Id.* at § 10.607(a).

<sup>19</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>20</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>21</sup> *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 17 and March 10, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 18, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board