

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

B.T., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
FACILITIES ENGINEERING COMMAND
SOUTHWEST, San Diego, CA, Employer**

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**Docket No. 16-0866
Issued: August 18, 2016**

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

Before:

CHRISTOPHER J. GODFREY, Chief Judge

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 22, 2016 appellant filed a timely appeal of a January 7, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees'

¹ The Board notes that appellant filed a request for reconsideration dated January 26, 2016 of the January 7, 2016 decision regarding the denial of his claim. Appellant also filed a request for review of the written record with OWCP's Branch of Hearings and Review dated January 20, 2016. Both requests were filed prior to his filing his appeal with the Board. OWCP cannot exercise simultaneous jurisdiction with the Board over the same issue in the same case. See 20 C.F.R. § 501.2(c)(3). Following the docketing of an appeal with the Board, OWCP does not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction. Any decision rendered by OWCP while the Board has jurisdiction on the same issue is null and void. See A.J., Docket No. 10-619 (issued June 29, 2010); Jacqueline S. Harris, 54 ECAB 139 (2002); Douglas E. Billings, 41 ECAB 880 (1990); see also 20 C.F.R. § 501.2(c)(3).

Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.³

ISSUE

The issue is whether appellant met his burden of proof to establish a traumatic injury in the performance of duty on October 21, 2015.

On appeal appellant contends that his right lateral epicondylitis (tennis elbow) is employment related.

FACTUAL HISTORY

On November 19, 2015 appellant, then a 39-year-old painter, filed a traumatic injury claim (Form CA-1) alleging that on October 21, 2015 he sustained right tennis elbow due to painting. He identified “pad 454” as the area he painted that day. Appellant explained that he felt a sharp and constant pain in his right elbow while painting. He did not stop work. Appellant’s supervisor noted on the claim form that the alleged injury occurred in the performance of duty.

An October 20, 2015 mishap report noted a sore right elbow and that appellant described a sharp constant right elbow pain while painting pad 454.

OWCP received an October 20, 2015 report from Dr. Nancy E. Huth, a treating Board-certified internist, who provided examination findings and work restrictions. Dr. Huth noted that appellant was seen for severe right elbow pain which he had experienced for the past two weeks, and that it was worse when he painted. She noted “no injury.” Dr. Huth diagnosed right elbow lateral epicondylitis.

In a health record and dispensary permit dated November 3, 2015, Trudy Boelman, registered nurse (RN), noted that appellant worked as a painter and was on restricted light-duty work until November 14, 2015. Tim Brown, RN, in a November 16, 2015 dispensary permit, noted the date of injury as October 11, 2015. He reported a right elbow injury and that appellant was placed on light-duty work for five days.

By correspondence dated November 23, 2015, OWCP advised appellant that the evidence received thus far was insufficient to support his traumatic injury claim. It afforded him at least 30 days in which to submit additional factual information regarding the alleged employment incident, as well as additional medical evidence regarding his claimed condition. OWCP attached a questionnaire requesting that appellant provide a detailed description of the alleged incident.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the January 7, 2016 decision, additional evidence was received. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

In response to OWCP's request, appellant submitted medical evidence covering the period October 23 through December 28, 2015. OWCP also received a one-page document describing tennis elbow.

An October 23, 2015 report by Dr. Lily Y. Phillips, a Board-certified family practitioner, diagnosed lateral epicondylitis.

In a report dated November 20, 2015, Dr. Jerry W. Hizon, Board-certified in family practice and sports medicine, diagnosed lateral epicondylitis, recommended a magnetic resonance imaging (MRI) scan, and provided work restrictions.

Tiffany Kaufman, a certified physician assistant, in an October 30, 2015 report, diagnosed lateral epicondylitis, and on a November 20, 2015 work excuse note releasing appellant to light-duty work until December 20, 2015.

In a December 22, 2015 MRI scan report, Dr. Frank A. Mangano, a Board-certified radiologist, diagnosed right elbow lateral epicondylitis, with partial tear of the common lateral tendon, and mild joint effusion.

On December 28, 2015 appellant was seen by Dr. Matthew Gargulinski, an osteopathic physician Board-certified in orthopedic surgery; Dr. Rolf Drinhaus, a Board-certified orthopedic surgeon; and Dr. Tal David, a Board-certified orthopedic surgeon, to discuss appellant's right elbow MRI scan, treatment options, and physical therapy.

By decision dated January 7, 2016, OWCP denied appellant's claim. It found that the factual evidence did not support that the injury and/or events occurred as alleged. OWCP specifically noted that appellant did not respond to the questionnaire requesting additional information pertaining to his employment-related activities.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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 filed within the applicable time limitation; that an injury was sustained while 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.⁵ 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.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a fact of injury has been established.⁷

⁴ *Supra* note 2.

⁵ C.S., Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁶ S.P., 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ B.F., Docket No. 09-60 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 5.

First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged.⁸ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁹

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence supporting such a causal relationship.¹⁰ The opinion of the physician must be 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 claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.¹¹

ANALYSIS

OWCP denied appellant's claim by decision dated January 7, 2016 finding that appellant had not established that the alleged incident occurred as alleged, and that the medical evidence of record was insufficient to establish that the diagnosed right elbow condition was causally related to the alleged incident.

The Board finds that there is no dispute in the evidence of record that appellant was a painter, and was painting "pad 454" in the performance of his federal duties on October 21, 2015 when he experienced right elbow pain. Appellant's supervisor did not dispute that the incident occurred as alleged.¹² As appellant's allegation that he sustained right elbow pain while painting on October 21, 2015 is unrefuted, the Board will accept that this incident occurred as alleged.¹³

As OWCP has not yet formally reviewed the medical evidence, the Board, therefore, will set aside the January 7, 2016 merit decision and remand the case for consideration of the medical evidence.

⁸ *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

⁹ *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 5.

¹⁰ See 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

¹¹ *James Mack*, 43 ECAB 321 (1991).

¹² See *R.I.*, Docket No. 15-1205 (issued February 9, 2016).

¹³ See *Sheryl P. Carter*, Docket No. 99-1152 (issued July 3, 2000).

On remand OWCP should review the medical evidence as to whether appellant's right elbow condition is causally related to the accepted October 21, 2015 work incident. After such further development as it deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that he experienced right elbow pain while painting in the performance of duty on October 21, 2015. The Board further finds that the case is not in posture for decision as to whether appellant's right elbow condition resulted from the October 21, 2015 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 7, 2016 is affirmed in part as modified. The case is set aside in part and remanded for further proceedings consistent with this decision of the Board.

Issued: August 18, 2016
Washington, DC

Christopher J. Godfrey, 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