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

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| **N.M., Appellant** | ) | |
| **and** | ) | **Docket No. 16-0403** |
| | ) | **Issued: June 6, 2016** |
| **DEPARTMENT OF THE ARMY, WATERVLIET ARSENAL, Watervliet, NY, Employer** | ) | |

*Appearances:*
*Thomas S. Harkins, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On December 30, 2015 appellant, through counsel, filed a timely appeal of a November 12, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit decision in the case.

### ***ISSUE***

The issue is whether appellant has met his burden of proof to establish an occupational disease causally related to factors of his federal employment.

### ***FACTUAL HISTORY***

On November 4, 2014 appellant then a 57-year-old machinist, filed an occupational disease claim (Form CA-2), alleging that he developed a large osteophyte formation about the

[1] 5 U.S.C. § 8101 *et seq.*

proximal femoral epiphysis and osteoarthritis as a result of performing repetitive, strenuous activities at work. He became aware of his condition and realized it was causally related to his employment on October 14, 2014. Appellant stopped work on October 14, 2014.

By letter dated December 12, 2014, OWCP advised appellant of the type of evidence needed to establish his claim, particularly requesting that he submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors.

Appellant submitted a statement dated December 22, 2014 and noted that from 2003 to 2008 he was responsible for cleaning gun tubes which required pushing a ram rod with a ball of rags through the length of the gun tube up to 15 times a day on four to six guns for approximately 2,500 guns tubes. He noted that during this time he noticed worsening pain in his hip. From 2011 to 2014 appellant's duties included making adjustments to a reciprocating grinder by stepping off a platform repeatedly, he manually turned a vertical turret lathe which weigh about 2,000 pounds, and manually turned a malfunctioning tool changer in a milling machine which required repetitive stair climbing.

Appellant underwent a magnetic resonance imaging (MRI) scan of the lower extremities on July 31, 2014 which revealed a large osteophyte formation about the proximal femoral epiphysis, mild osteoarthritic changes in the hip joint, and mild degenerative changes of the left hip. He was treated by Dr. John Juliano, a Board-certified orthopedist, who prepared a certification of health care provider dated October 23, 2014 and noted he had bilateral hip osteoarthritis and low back pain. Appellant opined that repetitive activities required of him at work contributed to this process and he recommended light duty with restrictions. On December 14, 2014 Dr. Juliano treated appellant for lower back pain and bilateral hip pain commencing on October 14, 2014. He noted back tenderness, intact range of motion, and tenderness on the right side. Dr. Juliano diagnosed osteoarthritis of the bilateral hips and opined that appellant continued to be totally disabled as work activity exacerbated his osteoarthritis of both hips.

In an e-mail dated January 14, 2015, Scott Huber, machinist supervisor, noted appellant's description regarding his duties was inaccurate. He advised appellant produced four parts a month on the surface grinder and he would be required to step up and down 10 times per part. Mr. Huber noted the vertical turret lathe functioned as designed and other employees did not have any issue jogging the machine. With regard to the milling machines, he noted that they functioned as designed, but advised that there were occasions when a tool would need to be manually loaded approximately 10 times a day. William Dingmon, chief of manufacturing, noted that most of the tube cleaning description provided by appellant was accurate except that only 1,500 tubes were put through this process. Other machine operators noted that task was not easy, but that there were no injuries. Mr. Dingmon noted the average for pushing a rod was four to five times per tube and the maximum rods pushed was 15. With regard to the milling machines there were intermittent periods of time where you had to change the tools manually.

In a decision dated February 11, 2015, OWCP denied appellant's claim for an occupational disease as the evidence failed to support that the employment duties occurred as alleged. Additionally, it found that he had not submitted any medical evidence "to establish that a diagnosed medical condition is causally related to the work injury or event."

On August 7, 2015 appellant requested reconsideration. He submitted reports dated January 6 to March 24, 2015 from Dr. Michael Cushner, a Board-certified orthopedist, who treated him for right hip and low back pain. Appellant reported working in a factory and falling and bumping his hip a few times on a slippery floor, but did not recall one specific injury. He was assigned to a gun tube project from 2008 to 2011, which required pushing a rod through a gun tube by pushing off his right leg. Appellant noticed a slow development of chronic hip pain. He related working on several types of equipment and different floor surfaces. Dr. Cushner noted that these conditions contributed to appellant's degenerative joint disease and pain. He noted findings of limited range of motion of the lumbar spine and bilateral hips. Dr. Cushner diagnosed lumbar radiculopathy and bilateral hip osteoarthritis. A February 10, 2015 note from a nurse diagnosed low back and hip pain and recommended bursa injections.

Appellant submitted a February 16, 2015 report from Dr. Juliano, who treated appellant for bilateral hip and low back symptoms commencing on October 14, 2014. Dr. Juliano noted that appellant's job exacerbated his hip low back symptoms bilaterally and he diagnosed exacerbation of his bilateral hip osteoarthritis. He noted that appellant remained totally disabled.

Appellant was treated by Dr. Young Don Oh, a Board-certified orthopedist, on June 4, 2015 for bilateral hip pain. He advised Dr. Oh of his work as a machinist where he would repeatedly push off on his left foot with his body weight. Dr. Oh diagnosed chronic bilateral hip pain from work activities with underlying degenerative disc disease.

In a decision dated November 12, 2015, OWCP denied modification of the decision dated February 11, 2015.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim. When an employee claims an injury in the performance of duty, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place, and in the manner alleged. Appellant must also establish that such event, incident, or exposure caused an injury.[2]

Whether an employee actually sustained an injury in the performance of duty begins with an analysis of whether fact of injury has been established.[3] To establish fact of injury in an occupational disease claim, 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.[4]

[2] *See Walter D. Morehead,* 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury). *See generally John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *S.P.*, 59 ECAB 184, 188 (2007).

[4] *R.R.*, Docket No. 08-2010 (issued April 3, 2009); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005).

An employee's statement that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[5] Moreover, an injury does not have to be confirmed by eyewitnesses. The employee's statement, however, must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. An employee has not met his or her burden in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Circumstances such as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast doubt on an employee's statement in determining whether a *prima facie* case has been established.[6]

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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.[7]

## ***ANALYSIS***

OWCP denied appellant's claim because he failed to establish the work factors as alleged. In the present case, the evidence supports that appellant cleaned gun tubes, made adjustments to a reciprocating grinder by stepping off a platform repeatedly, manually turned a vertical turret lathe which weigh about 2,000 pounds, and manually turned a malfunctioning tool changer in a milling machine which required repetitive stair climbing. Specifically, in his statement, Mr. Dingmon, chief of manufacturing, noted that most of the tube cleaning description provided by appellant was accurate except that only 1,500 tubes were put through this process. Appellant was required to push a rod four to five times per tube and manually change the tools. Although there were discrepancies over the number of gun tubes cleaned, the Board finds that his statements are consistent with the surrounding facts and circumstances and thus he has established that he performed repetitive, strenuous activities at work.

The Board finds, however, that there is no medical evidence in the record at the time of OWCP's November 12, 2015 decision which establishes that repetitive work duties performed by appellant caused or aggravated a lumbar and bilateral hip injury.

Appellant was treated by Dr. Juliano who prepared a certification of health care provider on October 23, 2014 and noted that appellant had bilateral hip osteoarthritis and low back pain. He opined that repetitive activities at work contributed to his condition. On December 14, 2014

[5] *R.T.*, Docket No. 08-408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 277 (2005).

[6] *Betty J. Smith*, 54 ECAB 174 (2002).

[7] *Solomon Polen*, 51 ECAB 341 (2000).

Dr. Juliano treated appellant for lower back pain and bilateral hip pain commencing on October 14, 2014. He diagnosed osteoarthritis of the bilateral hips. Dr. Juliano opined that appellant's work activity exacerbated his osteoarthritis of the hips and opined that appellant was totally disabled. Similarly, in a February 16, 2015 report, he noted that appellant's job exacerbated his hip symptoms bilaterally as well as his low back. Dr. Juliano diagnosed low back pain with exacerbation of bilateral hip osteoarthritis. Although he supported causal relationship, he did not provide sufficient medical rationale explaining the basis of his opinion regarding the causal relationship between appellant's diagnosed conditions and his repetitive work duties.[8] Dr. Juliano did not explain how cleaning gun tubes, pushing a ram rod with a ball of rags through the length of the gun tube, stepping off a platform of a reciprocating grinder, turning a vertical turret lathe and repetitive stair climbing would cause or aggravate the diagnosed conditions, especially in light of the preexisting degenerative changes. Therefore, this evidence is insufficient to meet appellant's burden of proof.[9]

Appellant submitted reports dated January 6 to March 24, 2015 from Dr. Cushner who treated him for right hip and low back pain. He noted working on a gun tube project from 2008 to 2011, where he was required to push a rod through a gun tube by pushing off his right leg. Appellant noticed a slow development of chronic hip pain. Dr. Cushner diagnosed lumbar radiculopathy and bilateral hip osteoarthritis. He noted that these duties contributed to appellant's degenerative joint disease and pain. The Board finds that, although Dr. Cushner noted that appellant was injured at work, he did not provide medical rationale explaining the basis of his conclusory opinion regarding the causal relationship between appellant's lumbar and hip conditions and the factors of employment.[10] Specifically, Dr. Cushner did not discuss how the mechanism of his employment duties resulted in an injury. Therefore, these reports are insufficient to meet appellant's burden of proof.

Appellant was treated by Dr. Oh on June 4, 2015 for bilateral hip pain. Dr. Oh diagnosed chronic bilateral hip pain from work activities with underlying degenerative disc disease. However, he failed to provide a rationalized opinion regarding the causal relationship between appellant's bilateral hip and low back conditions and the factors of employment believed to have caused or contributed to such condition.[11]

[8] *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

[9] *See L.D.*, Docket No. 09-1503 (issued April 15, 2010) (the fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two).

[10] *See T.M.*, Docket No. 08-975 (issued February 6, 2009) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

[11] *Jimmie H. Duckett, supra* note 8.

Other evidence submitted by appellant included a February 10, 2015 treatment note signed by a nurse. The Board has held that treatment notes signed by a nurse are not considered medical evidence as these providers are not a physician under FECA.[12]

The remainder of the medical evidence, including an MRI scan of the lower extremities fail to provide an opinion on the causal relationship between appellant's job and his diagnosed lumbar and hip conditions. For this reason, this evidence is insufficient to meet appellant's burden of proof.[13]

On appeal appellant's counsel asserts that OWCP improperly denied the claim and that the submitted medical evidence is sufficient evidence to establish that appellant developed bilateral hip and low back conditions as a result of performing repetitive duties at work. As noted above, the medical evidence does not establish that his diagnosed conditions are causally related to his employment duties. Appellant has not submitted a physician's report, based on an accurate history, which explains how his work activities caused or aggravated lumbar or bilateral hip conditions.

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 meet his burden of proof to establish that an occupational disease causally related to factors of his federal employment.

[12] *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

[13] *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 12, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 6, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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