

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

M.M., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
NEW YORK HARBOR HEALTHCARE
SYSTEM, Brooklyn, NY, Employer**

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**Docket No. 16-1180
Issued: October 26, 2016**

Appearances:

*Thomas S. Harkins, Esq., for the appellant¹
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 May 11, 2016 appellant, through counsel, filed a timely appeal from a January 7, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met his burden of proof to establish a left elbow injury causally related to the April 3, 2014 employment incident.

On appeal, counsel contends that the medical evidence submitted in support of appellant's request for reconsideration was sufficient to establish that he sustained disabling injuries and conditions causally related to the April 3, 2014 employment incident.

FACTUAL HISTORY

On April 9, 2014 appellant, then a 31-year-old staff pharmacist, filed a traumatic injury claim (Form CA-1) alleging that on April 3, 2014 he had numbness, tingling, pins and needles sensation, and pain in his left elbow down his arm to his hand and up to his shoulder when a pharmacy technician struck his left elbow with a medication cassette container.

In a May 5, 2014 narrative medical report, Dr. Barry G. Fisher, an attending orthopedic surgeon, provided a history that on April 3, 2014 appellant hit his left elbow, which caused numbness and tingling. He provided diagnostic test results and findings on physical examination. Dr. Fisher provided an impression of ulnar radiculopathy at the above site. In an attending physician's request for authorization and carrier's response form also dated May 5, 2014, he noted the date of injury as April 3, 2014. Dr. Fisher requested authorization for an electromyogram (EMG) of the upper extremity to evaluate appellant's pain, numbness, and tingling sensation. In a June 16, 2014 progress note, he reported findings on examination of appellant's left elbow. On June 19, 2014 Dr. Fisher ordered physical therapy to treat appellant's left elbow medial epicondylitis. In reports dated June 30, 2014, he provided a history of the April 3, 2014 incident, reported findings on physical examination, and reviewed nerve conduction velocity (NCV) and EMG test results. Dr. Fisher concluded that his overall examination revealed the presence of left ulnar nerve pathology, most likely due to the direct injury in the left elbow area. In a July 21, 2014 progress note, he reviewed a partially legible NCV/EMG tests performed on that date which showed ulnar pathology of the left elbow.

In a July 16, 2014 left elbow magnetic resonance imaging (MRI) scan report, Dr. Alissa J. Burge, a Board-certified radiologist, provided an impression of mild tendinosis of the common extensor origin. There was edema in the biceps muscle which was nonspecific and could reflect muscle strain. Nonspecific subcutaneous edema was also seen over the posteromedial aspect of the elbow. No fracture was demonstrated.

In reports dated August 16, 27, and 29, 2014, appellant's physical therapists and acupuncturist noted appellant's history, provided findings on examination, and addressed the treatment of his left elbow.

By letter dated September 19, 2014, OWCP indicated that when appellant's claim was received it appeared to be a minor injury that resulted in minimal or no lost time from work and, based on these criteria and because the employing establishment had not controverted the claim, payment of a limited amount of medical expenses was administratively approved. It stated that it

had reopened the claim for consideration because the medical bills had exceeded \$1,500.00. OWCP advised appellant of the type of evidence needed to establish his claim.

In reports dated September 3 to 22, 2014, appellant's physical therapists addressed the treatment of appellant's left elbow pain.

In a report with a partial date of October 6th, Dr. Fisher provided findings on examination of appellant's left elbow.

By decision dated October 23, 2014, OWCP accepted that the April 3, 2014 incident occurred as alleged. However, it denied appellant's traumatic injury claim as the medical evidence was insufficient to establish that he had an injury or a medical condition causally related to the accepted employment incident.

In an October 14, 2014 report, Dr. Itzhak C. Haimovic, a Board-certified neurologist, noted a history of the April 3, 2014 employment incident and appellant's medical, family, and social background. He reported findings on physical and neurological examination. Dr. Haimovic listed an impression of left ulnar neuropathy, slight weakness in the left ulnar nerve, and possible cervical radiculopathy.

On October 12, 2015 appellant, through counsel, requested reconsideration of the October 23, 2014 decision and submitted medical evidence. In an August 31, 2015 report, Dr. Fisher reiterated appellant's history of injury, provided diagnostic test results, and findings on physical examination. He listed an impression of lateral epicondylitis with ulnar radiculopathy. Dr. Fisher concluded that appellant's injury was a direct result of the direct trauma to his elbow, which occurred when it was hit by a medicine cart.

In a September 2, 2015 report, Dr. Charlene M. Scheim, a neurologist, provided a history of the April 3, 2014 work incident and examination findings. She listed an impression of status post left elbow trauma with left ulnar traumatic mononeuropathy. Dr. Scheim opined that appellant's left elbow and left ulnar nerve injuries were causally related to the April 3, 2014 work-related incident. She concluded that he was permanently and partially disabled as a result of his injuries.

By decision dated January 7, 2016, OWCP denied modification of the October 23, 2014 decision. It found that the medical evidence submitted did not contain a rationalized medical opinion to establish a causal relationship between appellant's diagnosed conditions and the accepted April 3, 2014 employment incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence³ including that he or she sustained an injury in the performance of duty and that any

³ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁴

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.⁵ There are two components involved in establishing the fact of injury. 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.⁶

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.⁷ The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.⁸ The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.⁹

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a traumatic injury caused by the April 3, 2014 employment incident. Appellant failed to submit sufficient medical evidence to establish that he had a left elbow condition causally related to the accepted employment incident.

Appellant submitted a series of reports from Dr. Fisher. In his August 31, 2015 report, Dr. Fisher opined that appellant sustained lateral epicondylitis with ulnar radiculopathy as a direct result of the accepted April 3, 2014 employment incident. His report is unsupported by rationale and is thus conclusory. Medical opinions which contain no rationale or explanation are of little probative value.¹⁰ Dr. Fisher included June 30, 2014 reports and a July 21, 2014 progress note in which he found that appellant had left ulnar nerve pathology. In the June 30, 2014 report, he provided a history of the accepted April 3, 2014 employment incident, reported findings on physical examination, and reviewed NCV/EMG test results. Dr. Fisher opined that appellant's left ulnar nerve pathology was most likely due to the established work incident. The

⁴ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

⁶ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

⁷ *John J. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

⁸ *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

⁹ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

¹⁰ *F.T.*, Docket No. 09-919 (issued December 7, 2009) (medical opinions not fortified by rationale are of diminished probative value); *Sedi L. Graham*, 57 ECAB 494 (2006) (medical form reports and narrative statements merely asserting causal relationship generally do not discharge a claimant's burden of proof).

Board notes that this opinion is speculative in nature.¹¹ Dr. Fisher did not explain how being hit in the left elbow by a medication cassette container at work on April 3, 2014 caused or aggravated the diagnosed condition.

Other reports from Dr. Fisher either did not provide a firm medical diagnosis or an opinion supporting that the diagnosed conditions were caused or aggravated by the established April 3, 2014 work incident. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value.¹²

Dr. Scheim's September 2, 2015 report found that appellant was status post left elbow trauma with left ulnar traumatic mononeuropathy. She provided a history of the April 3, 2014 employment incident and findings on physical examination. Dr. Scheim opined that appellant's left elbow and left ulnar nerve injuries were causally related to the April 3, 2014 work-related incident. She further opined that he was permanently and partially disabled as a result of his injuries. While Dr. Scheim provided an opinion supporting causal relationship, she provided no medical rationale explaining how the diagnosed left elbow conditions were caused or aggravated by the accepted employment incident.¹³

Dr. Haimovic's October 14, 2014 report listed an impression of left ulnar neuropathy, slight weakness in the left ulnar nerve, and possible cervical radiculopathy. While Dr. Haimovic noted appellant's history of injury, he did not specifically relate the diagnosed conditions to the April 3, 2014 employment incident.¹⁴

Similarly, Dr. Burge's July 16, 2014 diagnostic test results which addressed appellant's left elbow conditions, did not specifically relate the diagnosed conditions to the established employment incident.¹⁵

The remaining reports of record are of no probative value on the issue of causal relationship. The reports dated August 16 to September 22, 2014 from appellant's physical therapists and acupuncturist have no probative medical value as neither a physical therapist nor an acupuncturist is considered a physician as defined under FECA.¹⁶

¹¹ *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

¹² See *K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

¹³ *F.T.*, *supra* note 10.

¹⁴ See cases cited, *supra* note 12.

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 8101(2); *C.K.*, Docket No. 14-1235 (issued September 11, 2014) (acupuncturists); *A.C.*, Docket No. 08-1453 (issued November 18, 2008) (physical therapists). See also *Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

The Board finds that appellant has failed to submit any rationalized probative medical evidence to establish a left elbow injury causally related to the April 3, 2014 employment incident. Appellant therefore did not meet his burden of proof.

On appeal, counsel contends that the medical evidence submitted in support of appellant's request for reconsideration was sufficient to establish that he sustained disabling injuries and conditions causally related to the April 3, 2014 employment incident. For the reasons stated above, the Board finds that the medical evidence is insufficient to establish appellant's claim.

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 failed to meet his burden of proof to establish a left elbow injury causally related to the April 3, 2014 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 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