

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

R.R., Appellant)	
)	
and)	Docket No. 17-1355
)	Issued: December 14, 2018
DEPARTMENT OF THE NAVY, NAVAL AIR)	
SYSTEMS COMMAND, Lakehurst, NJ,)	
Employer)	
)	

Appearances:
Thomas R. Uliase, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 9, 2017 appellant, through counsel, filed a timely appeal from a May 15, 2017 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 has met his burden of proof to establish a recurrence of disability, commencing January 1, 2016, causally related to his accepted January 26, 2000 employment injury.

FACTUAL HISTORY

On February 1, 2000 appellant, then a 38-year-old material handler, filed a traumatic injury claim (Form CA-1) alleging that his “right arm pulled out” on January 26, 2000 while picking up a pallet not knowing it was frozen to the ground. OWCP accepted the claim for right acromioclavicular (AC) sprain and adhesive capsulitis of shoulder. It also accepted appellant’s claims for recurrences of total disability on December 3, 2002 and March 15 and 22, 2010. Appellant returned to full-time, full-duty work at this date-of-injury position, effective August 25, 2010.³ On February 4, 2016 counsel submitted a letter indicating that appellant’s right elbow condition had worsened and attached a January 12, 2016 report from Dr. Brian M. Katt, a Board-certified orthopedic surgeon, who indicated that appellant started having posterior elbow discomfort and that a magnetic resonance imaging (MRI) scan from October 2014 showed a partial triceps tendon tear.

In an April 26, 2016 letter, counsel claimed that appellant had sustained a recurrence of his medical condition and submitted a March 17, 2016 report from Dr. Carrie Edelman, a Board-certified rheumatologist, who diagnosed palindromic rheumatism and gout. Dr. Edelman further indicated that appellant had pain, swelling, and decreased range of motion in his dominant limb and that he could no longer use his right elbow to do this job due to the inflammation and tissue damage that precluded lifting and moving.

By letter dated May 10, 2016, OWCP advised counsel that appellant’s case was inactive and a notice of recurrence (Form CA-2a) could be submitted for case status review.

In a letter dated May 18, 2016, counsel requested additional right elbow surgery and resubmitted his previous submitted letter of February 4, 2016, Dr. Katt’s January 12, 2016 report, and a surgical report indicating that appellant had undergone a right elbow arthrotomy and repair of triceps tendon on April 28, 2010.

By letter dated May 24, 2016, OWCP again advised counsel that appellant’s case had an inactive status and a notice of recurrence could be submitted for case status review.

On April 7, 2016 appellant filed a notice of recurrence (Form CA-2a) alleging that on January 1, 2016 he sustained a recurrence of his January 26, 2000 employment injury. He stated that, since his initial operation, his elbow was never 100 percent and it was “ok until stress was placed on area that was operated on was vacuuming a dirty area.” Appellant checked the box on the form that he was claiming “time loss from work.” The reverse side of the CA-2a revealed that

³ OWCP granted appellant a schedule award for 18 percent permanent impairment of the right upper extremity. The award ran for 56.16 weeks for the period April 16, 2012 to May 14, 2013.

appellant stopped work on January 5, 2016. Appellant's supervisor indicated that appellant was scheduled to return to work on January 16, 2016.

In a September 6, 2016 development letter, OWCP advised appellant of the deficiencies of his recurrence claim and afforded him 30 days to submit additional medical evidence and respond to its inquiries.

In response, counsel submitted a letter dated September 21, 2016 and appellant submitted a narrative statement reiterating the factual history of the claim.

By decision dated October 7, 2016, OWCP denied appellant's recurrence claim because the medical evidence of record failed to establish a recurrence of disability commencing January 1, 2016 causally related to his accepted January 26, 2000 employment injury. It explained that appellant did not establish that he was "disabled/further disabled due to a material change/worsening of your accepted work-related conditions."

Appellant submitted a right elbow MRI scan dated October 9, 2014, which demonstrated lateral triceps insertional tendinopathy with partial tear and underlying marrow edema, minimal olecranon bursitis, and mild chronic arthritis of the ulnar trochlear joint.

In an October 17, 2016 letter, counsel reiterated appellant's claim for a recurrence and submitted a September 30, 2016 report from Dr. Edelman who reiterated her medical diagnoses and continued to opine that appellant was unable to perform any core or noncore duties.

On October 18, 2016 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a February 23, 2017 report, Dr. Lance A. Markbreiter, a Board-certified orthopedic surgeon, diagnosed edema within the posterior margin of the distal humerus, with a fluid collection, a partial tear involving the triceps tendon, bursitis, and marrow edema and tendinopathy associated with the tear. He opined that appellant's current elbow pathology/injury was causally related to the original injury. Dr. Markbreiter concluded that appellant had undergone appropriate surgery, but the injury was permanent, it progressed, and had return. He recommended further intervention, including reconstructive surgery.

A hearing was held before an OWCP hearing representative on February 28, 2017. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

In response, counsel submitted a March 28, 2017 report from Dr. Edelman who reiterated her previous reports and opined that appellant's chronic changes had nothing to do with his gout.

By decision dated May 15, 2017, OWCP's hearing representative affirmed the prior decision.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁴ This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed the employee's established physical limitations.⁵

When an employee who is disabled from the job he or she had when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.⁶ This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the disabling condition is causally related to the employment injury. The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated, or aggravated by the accepted injury.⁷

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁸ 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 supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁹

⁴ 20 C.F.R. § 10.5(x). *See T.S.*, Docket No. 09-1256 (issued April 15, 2010).

⁵ *Id.*

⁶ *See A.M.*, Docket No. 09-1895 (issued April 23, 2010).

⁷ *See L.F.*, Docket No. 14-1817 (issued February 2, 2015); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (January 2013).

⁸ *See I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

⁹ *See I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing January 1, 2016, causally related to his accepted January 26, 2000 employment injury.

In his February 23, 2017 report, Dr. Markbreiter diagnosed edema within the posterior margin of the distal humerus, with a fluid collection, a partial tear involving the triceps tendon, bursitis, and marrow edema and tendinopathy associated with the tear. He opined that appellant's current elbow pathology/injury was causally related to the original injury. Dr. Markbreiter concluded that appellant had undergone appropriate surgery, but the lifting injury was permanent, it progressed, and had return. The Board finds that Dr. Markbreiter failed to provide sufficient medical rationale explaining how appellant's symptoms beginning on January 1, 2016 were causally related to the January 26, 2000 work injury, without an intervening injury or new exposure.¹⁰ More specifically, Dr. Markbreiter failed to explain how the "vacuuming a dirty area" incident appellant described on the claim form was not an intervening injury.¹¹ Thus, the Board finds this evidence insufficient to establish that appellant sustained a recurrence of his accepted medical condition.

In her reports, Dr. Edelman diagnosed palindromic rheumatism and gout and indicated that appellant had pain, swelling, and decreased range of motion in his dominant limb. She opined that he could no longer use his right elbow to do this job due to the inflammation and tissue damage that precluded lifting and moving. Dr. Edelman further opined that appellant's chronic changes had nothing to do with his gout. The Board finds that Dr. Edelman failed to provide sufficient medical rationale explaining how appellant's symptoms beginning on January 1, 2016 were causally related to the January 26, 2000 employment injury, without an intervening injury or new exposure.¹² Similar to Dr. Markbreiter above, Dr. Edelman failed to specifically explain how "vacuuming a dirty area" incident was not an intervening injury. Thus, the Board finds that Dr. Edelman's reports are not sufficient to establish that appellant sustained a recurrence of his accepted medical condition.

The other medical reports of record are of limited probative value on the issue of a recurrence of disability because they do not specifically address whether appellant's disability beginning January 1, 2016 was attributable to his accepted work injury.¹³

The Board finds that the evidence submitted by appellant lacks adequate rationale to establish a causal connection between the alleged recurrence of his medical condition and the accepted employment injury.¹⁴ Appellant had the burden of submitting sufficient medical

¹⁰ *D.C.*, Docket No. 16-1143 (issued February 13, 2017).

¹¹ *L.C.*, Docket No. 17-1788 (issued September 19, 2018).

¹² *Supra* note 10.

¹³ *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁴ *C.W.*, Docket No. 16-1320 (issued March 23, 2017).

evidence to document the need for further medical treatment for his accepted employment-related condition.¹⁵ He did not submit such evidence as required and failed to establish a need for continuing medical treatment.¹⁶

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 met his burden of proof to establish a recurrence of disability commencing January 1, 2016, causally related to his accepted January 26, 2000 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2018
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

¹⁵ *O.H.*, Docket No. 15-0778 (issued June 25, 2015).

¹⁶ *See J.F.*, 58 ECAB 331 (2006).