

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

<p>L.T., Appellant</p>)	
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)	
and)	Docket No. 19-1100
)	Issued: November 13, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
EDWARD HINES, JR. VETERANS)	
ADMINISTRATION HOSPITAL, Hines, IL,)	
Employer)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
 JANICE B. ASKIN, Judge
 ALEC J. KOROMILAS, Alternate Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 18, 2019 appellant filed a timely appeal from a March 29, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 29, 2019 decision, OWCP and the Board on appeal received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a right shoulder condition causally related to the accepted December 14, 2018 employment incident.

FACTUAL HISTORY

On December 14, 2018 appellant, then a 58-year-old health technician, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right shoulder injury that day after picking up a fire extinguisher while in the performance of duty. She indicated that after a fire alarm was triggered she picked up the fire extinguisher and subsequently felt something snap in her right shoulder. Appellant did not stop working.

In support of her claim, appellant submitted an incident report dated December 17, 2018 which indicated that appellant was working on 2 North at approximately 7:00 a.m. on December 14, 2018 when the fire alarm sounded. She stated that she picked up the fire extinguisher and felt “something snap” in her right shoulder. Appellant stated that she had been experiencing pain in her right shoulder on and off throughout the day since first picking up the fire extinguisher. She notified her supervisor of the incident and was treated at the emergency department before she was discharged and released to work with restrictions of no heavy lifting.

In work status reports dated November 21, 2018 and January 4, 2019, Dr. Tomas E. Nemickas, a Board-certified orthopedic surgeon and sports medicine specialist, diagnosed bilateral knee osteoarthritis and right shoulder injury, possible rotator cuff tear. He provided work restrictions of no use of right shoulder.

A magnetic resonance imaging (MRI) scan of the right shoulder dated December 19, 2018 demonstrated high-grade partial-thickness, partial width bursal surface tearing of the supraspinatus in the setting of moderate tendinosis, moderate subscapularis tendinosis, mild infraspinatus tendinosis, and moderate-to-severe acromioclavicular (AC) joint arthritis with a configuration which predisposed appellant to impingement.

On December 21, 2018 Dr. Nemickas diagnosed right shoulder acute traumatic partial rotator cuff tear with concomitant synovitis/subacromial bursitis/impingement and administered a cortisone injection.

In a January 4, 2019 progress report, Dr. Nemickas asserted that appellant’s right shoulder pain persisted and she had good progress and improvement following her injection, but without functional resolution. He diagnosed moderate AC joint arthropathy and advised that appellant could continue working with his previous restrictions.

In a January 11, 2019 letter, the employing establishment controverted appellant’s claim arguing that appellant had been diagnosed with bilateral knee osteoarthritis and right shoulder injury, possible rotator cuff tear in a medical report dated November 21, 2018, prior to the December 14, 2018 employment incident.

Appellant subsequently submitted a duty status report (Form CA-17) and an attending physician's report (Form CA-20) dated January 21, 2019 from Dr. Nemickas who continued to diagnose right shoulder rotator cuff tear and bursitis and provided work restrictions.

On January 15, 2019 the employing establishment offered appellant a transitional-duty assignment effective January 14, 2019 as a health technician. The physical requirements included primarily sitting with walking or standing for brief periods of time, exerting up to 10 pounds of force occasionally, and negligible amounts of force to lift/carrying/push/pull objects towards them. Appellant accepted the position on January 18, 2019.

In a January 23, 2019 progress report, Dr. Nemickas indicated that appellant was somewhat better, but not fully improved and was taking rescue medications on an as-needed basis.

A workers' compensation work status report signed by Britney Gorman, a physician assistant, on January 23, 2019 reiterated appellant's diagnoses and indicated that she was able to return to work with restrictions of not using the right shoulder.

In a February 21, 2019 development letter, 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 payment of a limited amount of medical expenses was administratively approved. It stated that it had reopened the claim for formal consideration of the merits and requested that appellant provide additional factual and medical information in support of her claim, including a detailed factual statement and a report from her attending physician addressing the causal relationship between any diagnosed condition(s) and the claimed December 14, 2018 work incident. OWCP afforded her 30 days to respond to its request for additional evidence.

In a work status report dated February 20, 2019, Dr. Nemickas reiterated his diagnoses and work restrictions.

In a February 20, 2019 progress report, Dr. Nemickas diagnosed status post work injury with partial versus small full-thickness rotator cuff tear. He also continued to diagnose bursitis, impingement, and AC joint arthropathy. Dr. Nemickas noted that appellant had not been able to engage in therapy and was trying to be compliant with a home exercise program. He opined that if she failed to make adequate and appropriate progress, she would more likely than not require surgical intervention and treatment.

By decision dated March 29, 2019, OWCP found that appellant had established the occurrence of the December 14, 2018 employment incident. It determined, however, that the medical evidence of record was insufficient to establish that she sustained a medical condition causally related to the accepted work incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial

³ *Supra* note 1.

evidence, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴ These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

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. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.⁶ Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.⁷

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁸ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.⁹ Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).¹⁰

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a right shoulder condition causally related to the accepted December 14, 2018 employment incident.

In support of her claim appellant submitted a November 21, 2018 work status report by Dr. Nemickas. Dr. Nemickas had previously diagnosed a right shoulder injury, possible rotator cuff tear, on November 21, 2018, which predates the December 14, 2018 employment incident. However, this report has no probative on the issue of causal relationship to the accepted employment incident.

⁴ *K.V.*, Docket No. 18-0947 (issued March 4, 2019); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

⁵ *K.V.* and *M.E.*, *id.*; *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ *G.C.*, Docket No. 18-0506 (issued August 15, 2018).

⁷ *Id.*

⁸ *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

⁹ *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

¹⁰ *Id.*; *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

Appellant also submitted a series of additional medical reports from Dr. Nemickas. However, Dr. Nemickas' reports did not provide a full and complete factual and medical background of her injury or a detailed explanation on causal relationship. Although he identified the specific employment incident alleged by appellant, he did not provide a pathophysiological explanation as to how the accepted employment incident either caused or contributed to a diagnosed condition.¹¹

Appellant also submitted reports from Dr. Nemickas dated The Board has consistently held that complete medical rationalization is particularly necessary when there are preexisting conditions involving the same body part,¹² and has required medical rationale differentiating between the effects of the work-related injury and the preexisting condition in such cases.¹³ The Board has also held that neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.¹⁴ Dr. Nemickas' opinion therefore lacks the specificity and detail needed to establish appellant's claim.¹⁵

Appellant also submitted evidence from a physician assistant. The Board has held that medical reports signed solely by a physician assistant are of no probative value as such health care providers are not considered physicians as defined under FECA and are therefore not competent to provide medical opinions.¹⁶ Consequently, this evidence is also insufficient to establish appellant's claim.

Appellant submitted diagnostic imaging studies in the form of an MRI scan dated December 19, 2018 in support of her claim. The Board has held that diagnostic studies lack probative value as they do not provide an opinion on causal relationship between the employment incident and appellant's diagnosed conditions.¹⁷ Therefore, this report is also insufficient to establish appellant's claim.

¹¹ *Supra* note 10.

¹² *E.g.*, *K.R.*, Docket No. 18-1388 (issued January 9, 2019).

¹³ *See, e.g.*, *A.J.*, Docket No. 18-1116 (issued January 23, 2019); *M.F.*, Docket No. 17-1973 (issued December 31, 2018); *J.B.*, Docket No. 17-1870 (issued April 11, 2018); *E.D.*, Docket No. 16-1854 (issued March 3, 2017); *P.O.*, Docket No. 14-1675 (issued December 3, 2015).

¹⁴ *See J.L.*, Docket No. 18-1804 (issued April 12, 2019).

¹⁵ *Id.*

¹⁶ *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). *E.T.*, Docket No. 17-0265 (issued May 25, 2018) (physician assistants are not considered physicians under FECA); *J.M.*, 58 ECAB 448 (2007) (physical therapists are not considered physicians under FECA).

¹⁷ *I.C.*, Docket No. 19-0804 (issued August 23, 2019).

As appellant has not submitted rationalized medical evidence sufficient to establish an injury causally related to the accepted employment incident, she has not met her burden of proof.

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 her burden of proof to establish a right shoulder condition causally related to the accepted December 14, 2018 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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