

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

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<b>R.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-0830</b>
	)	<b>Issued: September 20, 2019</b>
<b>DEPARTMENT OF THE NAVY, BUREAU OF</b>	)	
<b>MEDICINE &amp; SURGERY, San Diego, CA,</b>	)	
<b>Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On March 9, 2019 appellant filed a timely appeal from a March 6, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the March 6, 2019 decision, OWCP 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 his burden of proof to establish an injury in the performance of duty, as alleged.

## FACTUAL HISTORY

On January 18, 2019 appellant, then a 46-year-old registered dental hygienist, filed an occupational disease claim (Form CA-2) alleging that due to repetitive motion and position over time he developed a cervical herniated disc while in the performance of duty. He identified December 26, 2018 as the date he first realized that his condition was caused or aggravated by factors of his federal employment. Appellant stopped work on December 26, 2018 and returned to modified work on December 27, 2018.

Appellant submitted a December 26, 2018 work status report from Dr. Avelina Sandoval, a Board-certified family medicine physician, who related that appellant was able to perform modified duty until January 9, 2019.

In a January 7, 2019 report, Dr. Nena M. Rocha, a Board-certified family medicine physician, diagnosed moderate-to-mild cervical degenerative changes based on her review of an x-ray. She noted that appellant worked as a dental hygienist, but that he was currently unable to hold instruments to perform his employment duties. Dr. Rocha expressed concern that his current symptoms might be caused by nerve impingement and recommended he avoid repetitive motion to prevent aggravation of his symptoms.

A January 8, 2019 magnetic resonance imaging scan revealed multilevel cervical degenerative disc disease.

OWCP also received a January 14, 2019 consultation report signed by Annette Ramo-Haggan, a nurse practitioner, cosigned by Dr. Daniel V. White, a Board-certified neurosurgeon, diagnosing C4-5 herniated disc with moderate stenosis and severe bilateral foraminal stenosis and severe C5-6 stenosis and severe bilateral foraminal stenosis.

In a February 1, 2019 development letter, OWCP advised appellant of the factual and medical deficiencies of his claim and instructed him as to the additional information necessary to establish his claim. It also included a questionnaire which inquired as to the work factors which he believed caused him to sustain an occupational disease and asked that he describe the frequency and duration of the identified factors. Appellant was afforded 30 days to submit additional evidence and respond to OWCP's inquiries.

In response to OWCP's request appellant submitted a February 25, 2019 report from Dr. F. Kevin Yoo, a Board-certified neurosurgeon, who provided examination findings, reviewed diagnostic tests and diagnosed subtle evidence of cervical myelopathy, very large C4-5 disc herniation, and severe stenosis from a C5-6 disc osteophyte complex. Dr. Yoo related that appellant believed that his condition had been caused by having his neck in certain positions for extended periods of time as a dental hygienist on December 26, 2018.

By decision dated March 6, 2019, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish that he sustained an injury in the performance of duty, as no clarifying statement regarding the duties he believed caused or aggravated his condition had been submitted. As such, it concluded that the requirements had not been met to establish an injury as defined by FECA.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish 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 of FECA,<sup>4</sup> that an injury was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>6</sup>

OWCP's regulations define an occupational disease as "a condition produced by the work environment over a period longer than a single workday or shift."<sup>7</sup> To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant 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 identified employment factors.<sup>8</sup>

The employee's burden of proof includes the submission of a detailed description of the employment factors or conditions, which he or she believes caused or adversely affected a condition for which compensation is claimed.<sup>9</sup>

### **ANALYSIS**

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty.

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> *T.W.*, Docket No. 18-0788 (issued July 22, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *T.W.*, *id.*; *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>6</sup> *T.W.*, *id.*; *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>7</sup> 20 C.F.R. § 10.5(q).

<sup>8</sup> *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>9</sup> *T.W.*, *supra* note 4; *J.C.*, Docket No. 16-1663 (issued January 18, 2017); *Lori A. Facey*, 55 ECAB 217 (2004).

To establish a claim for compensation in an occupational disease claim, an employee must submit a statement which identifies the factors of employment believed to have caused his or her condition.<sup>10</sup> Appellant failed to provide sufficient detail to establish that, an occupational exposure occurred as alleged because he did not adequately describe the circumstances of his injury, the duties he was performing which caused his injury or the mechanism of injury.<sup>11</sup>

In a February 1, 2019 development letter, OWCP requested that appellant respond to its questionnaire and provide detailed information concerning the job activities he believed contributed to his alleged cervical injury. While it received a February 25, 2019 medical report from Dr. Yoo noting that appellant attributed his condition to repetitive motion from his dental hygienist position, there is no information from appellant describing the specific employment-related activities which he believed contributed to his condition and the amount of time he spent engaging in such activities.<sup>12</sup> Absent this evidence, as was requested in the questionnaire sent to appellant, it cannot be determined whether the history of injury provided in the medical evidence of record corresponds with his alleged injury.

The Board finds that the record lacks sufficient factual evidence to establish the specific details of how the claimed injury occurred. As appellant has not established the factual aspect of his claim, the medical evidence regarding causal relationship need not be addressed.<sup>13</sup>

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 an injury in the performance of duty, as alleged.

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<sup>10</sup> *E.V.*, Docket No. 19-0447 (issued June 25, 2019); *H.O.*, Docket No. 17-1176 (issued November 27, 2018).

<sup>11</sup> *Id.*

<sup>12</sup> *L.W.*, Docket No. 19-0196 (issued July 2, 2019); *D.C.*, Docket No. 18-0082 (issued July 12, 2018).

<sup>13</sup> *L.W.*, *id.*; *V.F.*, 58 ECAB 321 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 2019  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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