

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

K.W., Appellant)	
)	
and)	Docket No. 19-1906
)	Issued: April 1, 2020
DEPARTMENT OF VETERANS AFFAIRS,)	
CALVERTON NATIONAL CEMETERY,)	
Calverton, NY, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 17, 2019 appellant, through counsel, filed a timely appeal from a July 23, 2019 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.³

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.*

³ The Board notes that following the July 23, 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 a right shoulder injury causally related to the accepted January 24, 2018 employment incident.

FACTUAL HISTORY

On January 24, 2018 appellant, then a 37-year-old cemetery caretaker, filed a traumatic injury claim (Form CA-1) alleging that on the same date he was tamping dirt around a headstone and experienced radiating right shoulder pain while in the performance of duty. He stopped work on January 24, 2018.

The record contains an authorization for examination and/or treatment (Form CA-16) dated January 24, 2018 from the employing establishment, which related that appellant was authorized to receive treatment for right shoulder pain.

Appellant was treated in the emergency department on January 24, 2018 by Dr. David Lawrence, Board-certified in emergency medicine, for an acute onset of right shoulder pain which occurred at work. He reported being a headstone setter at a cemetery and his job required repetitive motion of the right arm and shoulder to separate headstones and, on "this morning," he felt a pop in the right shoulder and radiating pain down the humerus. An x-ray of the right shoulder revealed no acute fracture or dislocation. Dr. Lawrence diagnosed right shoulder strain.

On February 1, 2018 appellant was treated by Dr. Manish Chadha, a Board-certified internist, for a right shoulder injury that occurred on January 24, 2018. He was placed on light duty until evaluated by an orthopedist.

On February 9, 2018 Dr. Richard M. Savino, a Board-certified orthopedist, treated appellant for right shoulder pain which he noted developed at work on January 24, 2018 while using a tamp. Findings on examination revealed tenderness over the right supraspinatus, reduced strength, instability, positive Hawkins-Kennedy impingement test, and positive Neer impingement test. Dr. Savino diagnosed acute pain of the right shoulder and primary osteoarthritis of the right shoulder. He advised that appellant was partially disabled for four weeks and referred him for physical therapy treatment.

Appellant underwent a magnetic resonance imaging (MRI) scan of the right shoulder on February 20, 2018, which revealed significant narrowing of the glenohumeral joint with posterior subluxation of the humeral head, circumferential labral tear with diffuse biceps tendinopathy, adhesive capsulitis, and AC joint hypertrophy with rotator cuff tendinopathy.

In a February 28, 2018 report, Dr. Savino reviewed the February 20, 2018 MRI scan findings and diagnosed primary osteoarthritis of the right shoulder, acute pain of the right shoulder, and tear of the right glenoid labrum. He opined that appellant's right shoulder was a preexisting condition that was exacerbated by the injury at work. Dr. Savino noted that appellant's work was physical which "could have accelerated the wearing of the shoulder, but did not cause premature wearing of the shoulder." He recommended arthroscopic surgery and advised that appellant was partially disabled for four weeks. On March 28, 2018 Dr. Savino returned appellant to full-duty work.

In a March 30, 2018 development letter, OWCP advised appellant that, when his claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work. The claim was administratively approved to allow payment for limited medical expenses, but the merits of the claim had not been formally adjudicated. OWCP advised that because appellant had requested authorization for surgery, his claim would be formally adjudicated. It requested that he submit factual and medical information, including a comprehensive report from his physician regarding how a specific work incident contributed to his claimed injury. OWCP afforded appellant 30 days to submit the necessary evidence.

Appellant attended physical therapy treatment from March 20 to April 9, 2018.

Appellant was treated in follow-up by Dr. Savino on March 28 and April 25, 2018 and reported improving right shoulder symptoms. Dr. Savino diagnosed tear of the right glenoid labrum, acute pain of the right shoulder, and primary osteoarthritis of the right shoulder. Appellant elected conservative treatment including exercise and physical therapy. Dr. Savino returned appellant to full-duty work.

By decision dated May 10, 2018, OWCP denied appellant's traumatic injury claim finding that the medical evidence of record was insufficient to establish that the medical condition was causally related to the accepted employment incident.

On August 15 and September 11, 2018 Dr. Savino evaluated appellant for associated locking, catching, and giving way of the right shoulder. He indicated that conservative treatment had not been effective in reducing symptoms. Dr. Savino diagnosed tear of the right glenoid labrum, acute pain of the right shoulder and primary osteoarthritis of the right shoulder. He opined that appellant had a degenerative process in the right shoulder which was preexisting at the time of the injury and was exacerbated by his work injury. Dr. Savino noted that the work injury could have caused a torn labrum; however, labral tears also occur over time with degenerative shoulders and it was "hard to say if the injury caused it."

Appellant was treated by Dr. Eric Keefer, a Board-certified orthopedist, on March 27, 2019 for a right shoulder pain which began at work on January 24, 2018 while he was implanting gravestones. Dr. Keefer noted that the injury was acute and the result of repetitive motion. He noted findings of right shoulder swelling, tenderness of the anterior and lateral shoulder, decreased strength, and positive impingement testing. An x-ray of the right shoulder revealed degenerative changes. Dr. Keefer diagnosed tear of the right glenoid labrum and primary osteoarthritis of the right shoulder. He also noted that appellant had mild asymptomatic shoulder cartilage wear prior to January 24, 2018 and opined that repetitive aggressive use of the shoulder relating to setting headstones caused the tear demonstrated on the February 2018 MRI scan. Appellant was released to work with restrictions.

On April 24, 2019 appellant through counsel, requested reconsideration.

By decision dated July 23, 2019, OWCP denied modification of the May 10, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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 timely filed within the applicable time limitation period of FECA,⁵ and 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.⁶ 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.⁷

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.⁸ There are two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.⁹ The second component is whether the employment incident caused a personal injury.¹⁰

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹¹ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment incident must be based on a complete factual and medical background.¹² 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 incident.¹³

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship, therefore, involves aggravation, acceleration, or precipitation,

⁴ *Supra* note 2.

⁵ *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *S.S.*, Docket No. 18-1488 (issued March 11, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

⁹ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *E.M., id.*; *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *S.S., supra* note 8; *Robert G. Morris*, 48 ECAB 238 (1996).

¹² *C.F.*, Docket No. 18-0791 (issued February 26, 2019); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹³ *Id.*

the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.¹⁴

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a right shoulder condition causally related to the accepted January 24, 2018 employment incident.

Dr. Lawrence treated appellant in the emergency room on January 24, 2018 for an acute onset of right shoulder pain which occurred at work when he was setting a headstone at a cemetery and felt a pop and radiating pain. His notes are insufficient to establish the claim as “pain” is a symptom, not a medical diagnosis.¹⁵ Additionally, Dr. Lawrence did not specifically address whether appellant’s employment was sufficient to have caused or aggravated a diagnosed medical condition.¹⁶

On February 1, 2018 Dr. Chadha treated appellant for an injury sustained to the right shoulder on January 24, 2018 and placed him on light duty. Similarly, on February 9, 2018, Dr. Savino treated appellant for right shoulder pain which developed on January 24, 2018 while at work using a tamp. He diagnosed acute pain of the right shoulder and primary osteoarthritis of the right shoulder. Other reports dated March 28 and April 25, 2018 diagnosed tear of the right glenoid labrum, acute pain of the right shoulder, and primary osteoarthritis of the right shoulder. These reports are insufficient to establish the claim as the physician’s did not specifically address whether appellant’s employment activities had caused or aggravated a diagnosed medical condition. As the Board has held, medical evidence which does not offer an opinion regarding the cause of an employee’s condition is of no probative value on the issue of causal relationship. As such, these reports are of no probative value.¹⁷

In a February 28, 2018 report, Dr. Savino diagnosed primary osteoarthritis of the right shoulder, acute pain of the right shoulder, and tear of the right glenoid labrum. He opined that appellant’s right shoulder condition was preexisting and was exacerbated by the work injury. Dr. Savino noted that appellant’s work was physical and “could have accelerated the wearing of the shoulder,” but did not cause premature wearing of the shoulder. Similarly, in reports dated August 15 and September 11, 2018, Dr. Savino treated appellant for associated locking, catching, and giving way of the right shoulder. He noted diagnoses and opined that appellant had a degenerative process in the right shoulder which was preexisting at the time of the injury and was exacerbated by his work injury. Dr. Savino further opined, with regard to the torn labrum, that these injuries also occur over time with degenerative changes “so it is hard to say if the injury caused it.” The Board notes that these reports provide speculative support for causal relationship.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013). See *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

¹⁵ Findings of pain or discomfort alone do not satisfy the medical aspect of the fact of injury medical determination. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.4a(6) (August 2012).

¹⁶ *A.D.*, 58 ECAB 149 (2006); Docket No. 06-1183 (issued November 14, 2006) (medical evidence which does not offer an opinion regarding the cause of an employee’s condition is of limited probative value on the issue of causal relationship).

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

Dr. Savino provided no medical reasoning explaining how appellant's work as a cemetery caretaker would cause or aggravate the diagnosed condition. The need for rationalized medical opinion evidence was particularly important because appellant had preexisting osteoarthritis of the right shoulder as noted on an MRI scan report dated February 20, 2018. Furthermore, Dr. Savino failed to differentiate between the effects of the work-related injury and appellant's preexisting condition.¹⁸ This report is, therefore, insufficient to establish the claim.

A March 27, 2019 report from Dr. Keefer noted a history of right shoulder pain which began at work on January 24, 2018 while he was implanting gravestones. He diagnosed tear of the right glenoid labrum and primary osteoarthritis of the right shoulder. Dr. Keefer noted that appellant had mild asymptomatic shoulder cartilage wear prior to January 24, 2018 and opined that repetitive aggressive use of the shoulder relating to setting headstones caused the tear demonstrated on the MRI scan in February 2018. While he provided affirmative opinions which supported causal relationship, he did not provide a pathophysiological explanation as to how the accepted incident either caused or contributed to his diagnosed conditions.¹⁹ The Board has consistently held that complete medical rationalization is particularly necessary when there are preexisting conditions involving the same body part,²⁰ and has required medical rationale differentiating between the effects of the work-related injury and the preexisting condition in such cases.²¹ Thus, the Board finds that this report from Dr. Keefer is also insufficient to establish causal relationship.

OWCP received an MRI scan of the right shoulder dated February 20, 2018, as well as x-ray reports of the right shoulder. The Board has held, however, that reports of diagnostic tests lack probative value as they do not provide an opinion on causal relationship between an employment incident and a diagnosed condition.²²

Appellant also submitted reports from a physical therapist. Certain healthcare providers such as physical therapists, however, are not considered "physician[s]" as defined under FECA.²³

¹⁸ See Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.805.3e (January 2013).

¹⁹ *Victor J. Woodhams*, 41 ECAB 345 (1989). Federal (FECA) Procedure Manual, *id.* at Chapter 2.805.3e (January 2013). See *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

²⁰ *K.R.*, Docket No. 18-1388 (issued January 9, 2019).

²¹ 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).

²² See *J.M.*, Docket No. 17-1688 (issued December 13, 2018).

²³ 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t); *C.W.*, Docket No. 19-1555 (issued February 24, 2020) (physical therapists are not physicians under FECA); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.805.3a(1) (January 2013)..

Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.²⁴

As appellant has not submitted rationalized medical evidence establishing causal relationship between his right shoulder condition and the accepted January 24, 2018 employment incident, the Board finds that he has not met his burden of proof to establish his claim.²⁵

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 right shoulder injury causally related to the accepted January 24, 2018 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 1, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

²⁴ *V.W.*, Docket No. 16-1444 (issued March 14, 2017) (where the Board found that physical therapy reports do not constitute competent medical evidence because physical therapists are not considered physicians as defined under FECA) .

²⁵ The record contains page one of an authorization for examination and/or treatment (Form CA-16) dated January 24, 2018 from the employing establishment, which related that appellant was authorized to receive treatment for a right shoulder pain. A properly completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *Tracy P. Spillane*, 54 ECAB 608 (2003). *J.G.*, Docket No. 17-1062 (issued February 13, 2018).