United States Department of Labor
Employees' Compensation Appeals Board

C.G., Appellant	)	
and	)	**Docket No. 20-0139**
	)	**Issued: June 26, 2020**
DEPARTMENT OF VETERANS AFFAIRS, BROCKTON VETERANS ADMINISTRATION MEDICAL CENTER, Brockton, MA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 22, 2019 appellant, through counsel, filed a timely appeal from an August 19, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 left lateral epicondylitis causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On July 18, 2018 appellant, then a 59-year-old materials handler, filed an occupational disease claim (Form CA-2) alleging that he sustained left lateral epicondylitis (tennis elbow) due to factors of his federal employment, including repeatedly lifting, pushing, pulling, and securing heavy loads "in a company truck." He noted that he first became aware of his condition and realized it was caused or aggravated by his federal employment on June 28, 2017. Appellant stopped work on June 28, 2017 and returned to work on July 3, 2017.

In a June 28, 2017 medical report, Dr. Sucheta J. Doshi, Board-certified in preventative medicine, noted that appellant's injury was related to a previous October 19, 2016 injury.[3] She recommended that he return to work with light-duty restrictions.

In a July 20, 2017 medical report, Dr. Steven Makovitch, Board-certified in physical medicine, evaluated appellant for pain in his left forearm that he began to experience after lifting and unloading a truck as a part of his work duties. Appellant described feeling pain, swelling, and weakening in his left elbow and informed Dr. Makovitch that he never had left-sided tennis elbow. He also noted that he had another work injury in March 2017 and experienced noticeable swelling to the left lateral elbow. Dr. Makovitch noted appellant's medical history of lateral epicondylitis and opined that his left lateral elbow pain was likely secondary to a flare up of chronic lateral epicondylitis. He recommended that appellant undergo a magnetic resonance imaging (MRI) scan for further evaluation.

On August 2, 2017 Caleb McVey, a licensed nurse practitioner, noted a new pain in appellant's right elbow, which appellant related to a 2013[4] employment injury. He recommended that appellant be excused from work for 16 days.

In an August 7, 2017 diagnostic report, Dr. Anupma Juti, a Board-certified diagnostic radiologist, performed a left elbow MRI scan. She found mild tendon thickening and focal increased signal at the origin of the extensor tendon, suggesting lateral epicondylitis.

On August 17, 2017 Dr. Makovitch recorded appellant's complaint of ongoing left elbow pain, as well as pain in the right elbow. He referenced the August 7, 2017 MRI scan of appellant's left elbow, which revealed lateral epicondylitis and suggested that he remain out of work.

In an August 24, 2017 medical report, Dr. Doshi reported that appellant continued to experience intense pain in his left elbow. Appellant informed her that the pain led him to

[3] Appellant previously filed a traumatic injury claim for an October 19, 2016 left arm injury under OWCP File No. xxxxxx874, which OWCP denied.

[4] Appellant previously filed a traumatic injury claim for a January 29, 2013 right arm injury under OWCP File No. xxxxxx614. The Board further notes that appellant's claim was accepted for right lateral epicondylitis.

compensate with his right arm and hand, which had exacerbated his previously-treated tendinitis of the right elbow from 2013. Dr. Doshi assessed left lateral elbow pain related to a previous left common extensor muscle strain,[5] as well as right lateral epicondylitis.

In an August 25, 2017 diagnostic report, Dr. Amy West, Board-certified in physical medicine, conducted an electromyography (EMG) study of appellant's left elbow. She reported that his study returned normal and displayed no electrophysiologic evidence for left ulnar neuropathy.

Dr. Makovitch noted in an August 31, 2017 report that he saw appellant for a follow-up appointment after his EMG study. Upon review of appellant's EMG and MRI studies, he found evidence of epicondylitis in appellant's left elbow and noted that his EMG study was negative for peripheral focal neuropathy. Dr. Makovitch diagnosed left lateral epicondylitis and set up a needle tenotomy of the common extensor tendon of the left elbow to further treat his condition. In a medical report of even date, Dr. Doshi indicated that appellant was seen by Dr. Makovitch to schedule a needle injection and suggested that he remain out of work until September 11, 2017.

In a September 11, 2017 medical report, appellant informed Dr. Doshi that his pain and swelling had continued bilaterally in both elbows, but worse in the left elbow. Dr. Doshi repeated her diagnosis of left lateral elbow pain related to a previous left common extensor muscle strain and right lateral epicondylitis.

On September 19, 2017 Dr. Makovitch performed an ultrasound-guided left lateral elbow common extensor needle tenotomy to treat appellant's lateral epicondylitis.

Dr. Doshi indicated in a September 25, 2017 medical report that she saw appellant after his September 19, 2017 needle tenotomy. She diagnosed left lateral epicondylitis, a strain of the left extensor tendon, and left elbow pain and also updated his work restrictions.

In an October 20, 2017 note, Dr. Andrea Ohldin, Board-certified in internal medicine, checked a box indicating that appellant was cleared for modified duty.

Dr. Makovitch explained in a February 1, 2018 letter that appellant's left lateral epicondylitis began on June 28, 2017 after an injury at work and that he had thereafter been following strict work restrictions and completing occupational therapy to treat his condition. He opined that it was unlikely for appellant's condition to improve one year after the initial injury.

In a June 21, 2018 medical report, Dr. Makovitch found that appellant's left elbow pain related to his lateral epicondylitis had not improved despite conservative treatment. He recommended sending appellant for surgical evaluation in order to treat his condition.

[5] Appellant previously filed a traumatic injury claim for a June 28, 2017 left arm injury under OWCP File No. xxxxxx495. The Board further notes that appellant's claim was accepted for a left common extensor tendon strain.

A June 28, 2018 medical report with an illegible signature detailed the history of appellant's treatment from June 28, 2017 to January 11, 2018 as it related to his left lateral epicondylitis.

Appellant submitted an August 8, 2018 employing establishment work capacity status report with an illegible signature, indicating that he was capable of performing his usual job and that he had reached maximum medical improvement.

Appellant also provided multiple employing establishment duty status reports (Form CA-17), dated from June 28, 2017 to April 13, 2018, which documented his work restrictions.

In a development letter dated September 4, 2018, OWCP advised appellant of the deficiencies of his claim and instructed him as to the type of factual and medical evidence necessary to establish his claim. It asked him to complete a questionnaire to provide further details regarding the circumstances of his claimed injury. OWCP also noted, "It appears this is a duplicate claim [*i.e.*, OWCP File No. xxxxxx770] as you already have a left arm injury under case number xxxxxx495 for the same date of injury. You also have a prior claim for the same injury under case number xxxxxx874 with an injury date of October 19, 2016."[6] It also requested a narrative medical report from appellant's treating physician, which contained a detailed description of findings and diagnoses, explaining how appellant's work activities caused, contributed to, or aggravated his medical conditions. OWCP afforded appellant 30 days to submit the necessary evidence.

In response, appellant submitted a January 4, 2017 medical report form in which Dr. Doshi checked a box indicating that he presented for reevaluation of an October 19, 2016 occupational injury that caused numbness and tingling in his left arm. In a January 4, 2017 narrative report, Dr. Doshi recommended that appellant could return to full duty at work.

In an August 28, 2018 medical report, Dr. Makovitch indicated that appellant had no major improvements to his lateral epicondylitis despite completing occupational therapy, a tenotomy, and use of a counterforce brace bilaterally. He diagnosed bilateral lateral epicondylitis and recommended that appellant return to work with restrictions.

On October 1, 2018 the employing establishment controverted appellant's occupational disease claim arguing that he failed to specify the percentage of time he spent performing his work duties. It also argued that he had not provided medical evidence containing a diagnosis in connection with his claimed injury.

In an October 4, 2018 email, Z.D., a human resource specialist, indicated that appellant informed her that he had a prior shoulder surgery, but he had not specified which shoulder had required treatment.

[6] In addition to his other claims, appellant filed an August 15, 2018 occupational disease claim for a right elbow injury under OWCP File No. xxxxxx884, which was denied as not a consequential injury of the accepted June 28, 2017 left elbow injury under OWCP File No. xxxxxx495.

Appellant also submitted a position description detailing his responsibilities as a materials handler.

By decision dated October 18, 2018, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish that the alleged employment factors occurred as he described. It explained that it was unclear whether he was claiming an aggravation due to the June 28, 2017 traumatic condition previously accepted under File No. xxxxxx495 or whether he was claiming an occupational disease due to the repetitive activities of his job. As such, OWCP concluded that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive evidence. Appellant submitted the signature page from OWCP's questionnaire dated October 23, 2018, without responses to the questions posed.

In a letter of even date, Dr. Makovitch recounted his treatment for appellant's left elbow pain after an injury at work while performing a lifting motion. He opined that appellant's examination and medical history was most consistent with an elbow extensor muscular strain and that it was possible that appellant was already set up with prior common extensor tendinopathy as he had a history of lateral epicondylitis on his right side. Dr. Makovitch then reviewed the diagnostic studies and treatment appellant underwent in relation to his left elbow lateral epicondylitis. He concluded that "it was likely that [appellant] had preexisting lateral epicondylitis, which is known to be brought on with repetitive work-related tasks such as those in [appellant's] job. [Appellant] then had an acute injury at work and has never fully recovered."

On April 19, 2019 appellant, through counsel, requested reconsideration of OWCP's October 18, 2018 decision.[7]

In a letter dated July 8, 2019, the employing establishment again controverted appellant's claim, arguing that the medical evidence of record was insufficient to establish causal relationship between his injury and his employment duties.

By decision dated August 19, 2019, OWCP affirmed in part and modified in part its October 18, 2018 decision. It explained that the evidence of record was sufficient to meet and discharge appellant's burden of proof in establishing the factual component of fact of injury. OWCP also determined, however, that the medical evidence of record did not support that his lateral epicondylitis was causally related to the accepted factors of his federal employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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

[7] The Board notes that appellant, through counsel, also submitted a timely request for a telephonic hearing on November 7, 2018. However, in a letter dated and received on April 19, 2019, counsel withdrew the telephonic hearing request.

time limitation period of FECA,[8] 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.[9] 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.[10]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee must submit the following: (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 employment factors identified by the employee.[11]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[12] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background.[13] 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 factors.[14]

ANALYSIS

The Board finds that the case is not in posture for decision.

OWCP's procedures provide that cases should be administratively combined when correct adjudication of the issues depends on frequent cross-referencing between files.[15] For example, if a new injury case is reported for an employee who previously filed an injury claim for a similar

[8] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[9] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[10] *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).

[11] *R.G.*, Docket No. 19-0233 (issued July 16, 2019). *See also Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

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

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

[14] *Id.*; *Victor J. Woodhams*, *supra* note 11.

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management,* Chapter 2.400.8(c) (February 2000).

condition or the same part of the body, doubling is required.[16] Herein, appellant has an accepted claim for a left extensor tendon strain, assigned OWCP File No. xxxxxx495, and an accepted claim for right lateral epicondylitis, assigned OWCP File No. xxxxxx614. He subsequently filed a traumatic injury claim for a left arm injury on October 19, 2016, assigned OWCP File No. xxxxxx874, an occupational disease claim for a right arm injury on August 15, 2018, assigned OWCP File No. xxxxxx884 and an occupational disease claim for left lateral epicondylitis on July 18, 2018, assigned OWCP File No. xxxxxx770, which is the claim present before the Board. Further, medical evidence from Drs. Doshi and Makovitch opined that appellant's current injury was related to his October 19, 2016 and June 28, 2017 left arm injuries. However, the evidence pertaining to OWCP File Nos. xxxxxx495, xxxxxx614, xxxxxx874 and xxxxxx814, is not part of the case record presently before the Board.

For a full and fair adjudication, the case must be returned to OWCP to administratively combine the current case record with OWCP File Nos. xxxxxx495, xxxxxx614, xxxxxx874 and xxxxxx814 so it can properly determine whether appellant has established that his diagnosed left lateral epicondylitis was causally related to the accepted factors of his federal employment. Following this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

[16] *Id.*; *D.C.*, Docket No. 19-0100 (issued June 3, 2019); *N.M.*, Docket No. 18-0833 (issued April 18, 2019); *K.T.*, Docket No. 17-0432 (issued August 17, 2018).

ORDER

IT IS HEREBY ORDERED THAT the August 19, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: June 26, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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