

ISSUE

The issue is whether appellant has established a condition causally related to factors of his federal employment.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 10, 2014 appellant, then a 45-year-old supervisory federal air marshal, filed an occupational disease claim (Form CA-2) alleging right shoulder pain that radiated to his right arm while participating in squad training on April 7 and 8, 2014. He did not immediately stop work; however, he was later off work intermittently and then stopped work completely on June 1, 2014.

By decision dated July 8, 2014, OWCP denied the claim finding that the evidence of record was insufficient to establish that the events occurred as alleged and, therefore, the requirements had not been met to establish an injury as defined by FECA.

On July 22, 2014 appellant requested a hearing before an OWCP hearing representative, held on February 12, 2015. He testified that he was required to participate in squad training for 40 hours per quarter, and during squad training on April 7, 2014, he experienced shoulder pain after striking a heavy bag. Appellant further testified that, while performing pull-ups on April 8, 2014, he felt a "pop" and significant pain in his shoulder and then experienced pain which radiated from his shoulder to his hand. He noted that his physicians found that his complaints could be related to a cervical condition, and after diagnostic testing, he underwent a C5-6 cervical fusion surgery in December 2014. Subsequent to the hearing, appellant submitted a number of medical reports to the record.

By decision dated April 14, 2015, OWCP's hearing representative found that the employment events occurred as alleged, but denied the claim finding that the medical evidence of record was insufficient to establish that the accepted events caused appellant's right shoulder or cervical conditions.

On May 12, 2015 appellant, through counsel, appealed to the Board. By decision dated October 1, 2015, the Board found that he had not met his burden of proof to establish that his right shoulder and cervical conditions were causally related to the accepted factors of his federal employment.⁴

On September 1, 2016 requested reconsideration and submitted new evidence.

³ Docket No. 15-1233 (issued October 1, 2015).

⁴ *Id.*

In a January 18, 2016 report, Dr. Ali Moshirfar, a Board-certified orthopedic surgeon, noted that appellant had been under his care for his cervical condition since 2014. He advised that appellant was referred to him by his orthopedic shoulder specialist, Dr. Michael Kavanagh, a Board-certified orthopedic surgeon. Dr. Moshirfar explained that appellant had participated in a work training activity on April 7, 2014 and that after two to three days of consecutive training, appellant began experiencing right shoulder pain as well as radicular pain to the right shoulder scapular area, right arm, and forearm. He indicated that appellant also saw Dr. Kavanagh, who obtained magnetic resonance imaging (MRI) scans of the shoulder and cervical spine on April 22, 2014. Dr. Moshirfar indicated that the neck MRI scan reflected spondylosis with disc osteophytic complexes causing foraminal narrowing from C3-7. Furthermore, he indicated that, at C5-6, a severe right-sided herniation and stenosis was noted consistent with appellant's radicular pain pattern of pain into the right shoulder and arm which presented after his work training in April 2014. Dr. Moshirfar explained that the additional stress of doing pull-ups and further training may have exacerbated his underlying degenerative condition in addition to the herniation at C5-6. He also indicated that a cervical fusion was performed on appellant on December 1, 2014. Dr. Moshirfar noted that, while appellant improved, he continued to have persistent neck pain and radiculopathy. He related that he had a chance to read appellant's description of events and opined: "It is my opinion to a reasonable degree of medical certainty as a Board-certified spine surgeon that the events of April 2014 relating to [appellant's] work training and striking a heavy bag during training with subsequent pull-ups lead to the contribution of the C5 disc herniation with persistent right arm radiculopathy as well as exacerbation of his underlying degenerative disease. This, I believe to be the proximate cause of his worsening condition which lead to the surgery, the cervical fusion." Dr. Moshirfar also indicated that appellant remained unable to perform his prescribed work duties.

By decision dated November 21, 2016, OWCP denied modification of its April 14, 2015 decision.

On August 28, 2017 counsel requested reconsideration and submitted new evidence.

In an August 2, 2017 report, Dr. Kavanagh noted that he first treated appellant on April 22, 2014. He explained that he ordered an MRI scan of appellant's right shoulder and of his cervical spine. Dr. Kavanagh explained that, regarding the right shoulder, appellant had "a SLAP [superior labral tear from anterior to posterior] tear of the superior labrum and tendinitis," and degenerative changes as revealed in the May 23, 2014 MRI scan. He indicated that the degenerative changes most likely made appellant more susceptible to the injury, which caused the diagnosed condition. Dr. Kavanagh indicated that appellant's complaints correlated with the clinical findings. He related that appellant indicated that, on April 7, 2014, while striking a heavy bag, he felt an uncomfortable pain in the back of his right shoulder blade. Dr. Kavanagh opined that it was more than likely the beginning of the diagnosed tear as the tendinitis or inflammation. Furthermore, he explained that, on the following day, while doing pull-ups, additional stress would have been placed on the right shoulder as well as the neck further causing damage to the tear and tendinitis that began from events from the previous day. Dr. Kavanagh also provided an opinion regarding appellant's description of the increased pain upon doing pull-ups and the sensation of electricity from the back of his right shoulder (the site of the tear) running through his right hand. He indicated that performing the pull-ups would cause additional strain on the shoulder which was already damaged to a lesser extent from the previous day, thus causing greater damage.

Dr. Kavanagh further explained that appellant's right shoulder was damaged and unable to absorb the stress of the pull-ups and additional stress would have been placed on the cervical spine. He also noted that an MRI scan of the cervical spine from July 29, 2014, revealed bulging and stenosis at multiple levels. Dr. Kavanagh indicated that he referred appellant to Dr. Moshirfar for evaluation and treatment of the cervical spine. He also noted that provided restrictions in regards to the right shoulder since he first began seeing appellant on April 22, 2014.

By decision dated October 5, 2017, OWCP denied modification of its November 21, 2016 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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,⁶ 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.⁷ 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.⁸

In an occupational disease claim, appellant's burden of proof requires submission of 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.⁹

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.¹⁰ 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

⁵ *Supra* note 2.

⁶ *T.H.*, Docket No. 18-1585 (issued March 22, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

⁸ *T.H.*, *id.*; *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).

⁹ *A.H.*, Docket No. 19-0270 (issued June 25, 2019); *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

¹⁰ *A.H.*, *id.*; *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

relationship between the diagnosed condition and the specific employment factors identified by the employee.¹¹

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence submitted prior to the issuance of OWCP's April 14, 2015 decision. The Board considered that evidence in its October 1, 2015 decision and found that it was insufficient to establish his claim. Findings made in prior the Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹²

In an August 2, 2017 report, Dr. Kavanagh explained that, regarding the right shoulder, appellant had a SLAP tear of the superior labrum and tendinitis and degenerative changes as revealed in the May 23, 2014 MRI scan. He further explained that appellant had degenerative changes which most likely made appellant more susceptible to the injury, which caused the diagnosed condition. Dr. Kavanagh related that appellant advised him that, on April 7, 2014 while striking a heavy bag, he felt an uncomfortable pain in the back of his right shoulder blade. He opined that it was more than likely the beginning of the diagnosed tear. Furthermore, Dr. Kavanagh explained that, on the following day, April 8, 2014, while doing pull-ups, additional stress would have been placed on the right shoulder as well as the neck further causing damage to the tear and tendinitis that began from events from the previous day. He explained that performing the required pull-ups would have caused additional strain on the shoulder which was already damaged to a lesser extent from the previous day, and then would have caused greater damage, as the shoulder was unable to absorb the stress of the pull-ups, and additional stress would have been placed on the cervical spine.

The Board finds that although Dr. Kavanagh's opinion is insufficiently rationalized to meet appellant's burden of proof to establish causal relationship, it is of sufficient probative value to warrant additional development.¹³ Dr. Kavanagh provided discussion of the pathophysiologic mechanism whereby appellant's specific employment events on April 7 and 8, 2014 would have caused the claimed conditions. He opined that the striking of a heavy bag on April 7, 2014 was more than likely the beginning of the diagnosed tear as the tendinitis or inflammation. Dr. Kavanagh explained that, while doing pull-ups on April 8, 2014, additional stress would have been placed on the right shoulder as well as the neck further causing damage to the tear and tendinitis that began from events from the previous day. He indicated that performing the pull-ups would cause additional strain on the shoulder which was already damaged to a lesser extent from the previous day, thus causing greater damage. Dr. Kavanagh further explained that

¹¹ *K.H.*, Docket No. 19-0580 (issued August 23, 2019); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹² *M.L.*, Docket No. 19-0813 (issued November 26, 2019); *see B.R.*, Docket No. 17-0294 (issued May 11, 2018).

¹³ *J.J.*, Docket No. 19-0789 (issued November 22, 2019); *see also John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 280 (1978).

appellant's right shoulder was damaged and unable to absorb the stress of the pull-ups and additional stress would have been placed on the cervical spine.

Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter. While the appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁴

The case will therefore be remanded to OWCP for further development of the medical evidence on the issue of causal relationship, including the preparation of a statement of accepted facts which shall set forth all of appellant's accepted employment duties and then make a referral to an appropriate medical specialist for consideration of the entire medical record. After this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2017 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 2, 2020
Washington, DC

Patricia H. Fitzgerald, 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

¹⁴ *J.J., id.; M.B.*, Docket No. 17-1999 (issued November 13, 2018).