

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

T.L., Appellant)	
)	
and)	Docket No. 18-0778
)	Issued: January 22, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Milwaukee, WI, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 28, 2018 appellant, through counsel, filed a timely appeal from a November 3, 2017 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.

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 a right shoulder condition causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

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

On December 23, 2014 appellant, then a 56-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a right shoulder condition while in the performance of duty. He explained that he started a new route in May 2014, which consisted of mostly apartment buildings that required top loading mailboxes. Appellant related that he believed the motion required to top load the mailboxes, along with 24 years of casing mail caused his right shoulder condition. He noted that he first became aware of the condition and its relationship to his federal employment on June 15, 2014. Appellant stopped work on December 17, 2014.

By decision dated March 26, 2015, OWCP denied appellant's claim. It found that the evidence of record was insufficient to establish causal relationship between the accepted factors of his federal employment and his diagnosed right shoulder condition.

On April 16, 2015 counsel requested a telephonic hearing before an OWCP hearing representative, which was held on November 9, 2015.

By decision dated January 8, 2016, an OWCP hearing representative affirmed the March 26, 2015 decision. He found that appellant's testimony established employment factors of repetitive use of the right arm to case and deliver mail. The hearing representative also found that the medical evidence submitted established the diagnosis of shoulder tendinitis, but did not establish causal relationship between the diagnosed condition and appellant's accepted employment factors.

Appellant, through counsel, appealed to the Board on February 23, 2016. By decision dated October 12, 2016, the Board affirmed the January 8, 2016 decision. The Board found that appellant had not met his burden of proof to establish an injury causally related to the accepted factors of his federal employment.

On September 12, 2017 counsel requested reconsideration and submitted new medical evidence.

In a May 30, 2017 report, Dr. Ryan J. Kehoe, a Board-certified orthopedic surgeon, explained that appellant had been under his care for the past several years. He indicated that appellant had persistent right shoulder and arm pain related to his long-term work exposure at the

³ Docket No. 16-0687 (issued October 12, 2016).

employing establishment. Dr. Kehoe related that appellant was involved in repetitive reaching in an overhead fashion that had predisposed him to rotator cuff tendinitis and subsequent degenerative change of the acromioclavicular joint. He advised that appellant underwent surgical intervention involving shoulder arthroscopy, subacromial decompression, distal clavicle excision, and open biceps tenodesis. Dr. Kehoe opined that appellant’s “repetitive reaching in the workplace was a significant causative factor in his persistent right shoulder pain and ultimate need for surgical intervention.”

By decision dated November 3, 2017, OWCP denied modification of its prior 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 of FECA,⁵ 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 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 a disease or condition;⁸ (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;⁹ and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.¹⁰

The medical evidence required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable certainty, and must be supported by

⁴ *Supra* note 2.

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

⁶ *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 *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.C.*, Docket No. 18-1242 (issued March 13, 2019); *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

⁹ *B.K.*, Docket No. 19-0829 (issued September 25, 2019); *Michael R. Shaffer*, 55 ECAB 386 (2004).

¹⁰ *See J.R.*, Docket No. 17-1781 (issued January 16, 2018); *I.J.*, 59 ECAB 408 (2008).

medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹¹

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a right shoulder condition causally related to the accepted factors of his federal employment.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's January 8, 2016 decision because the Board considered that evidence in its October 12, 2016 decision and found that it was insufficient to establish his claim. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.¹² The Board will, therefore, not review the evidence addressed in the prior appeal.

On reconsideration counsel submitted a May 30, 2017 report from Dr. Kehoe. Dr. Kehoe noted that appellant had been under his care for the past several years, and explained that he had persistent right shoulder and arm pain related to his long-term work exposure at the employing establishment. He indicated that repetitive reaching in an overhead fashion had predisposed appellant to rotator cuff tendinitis and subsequent degenerative change of the acromioclavicular joint. Dr. Kehoe opined that appellant's "repetitive reaching in the workplace was a significant causative factor in his persistent right shoulder pain and ultimate need for surgical intervention." However, while he attempted to provide an opinion on causal relationship, his opinion is conclusory in nature. A mere conclusory opinion provided by a physician without the necessary rationale explaining how and why the incident or work factors were sufficient to result in the diagnosed medical conclusion is insufficient to meet a claimant's burden of proof to establish a claim.¹³ Dr. Kehoe opined that appellant's "repetitive reaching in the workplace was a significant causative factor in his persistent right shoulder pain." A medical opinion must provide an explanation of how the specific employment factors physiologically caused or aggravated the diagnosed conditions.¹⁴ Absent this explanation, Dr. Kehoe's report is insufficient to establish appellant's claim.

As there is no reasoned medical evidence explaining how appellant's accepted employment factors caused or aggravated a right shoulder condition, appellant has not met his burden of proof in establishing causal relationship.

On appeal counsel argues that appellant did not need to rule out all other causes, and appellant presented *prima facie* evidence. He contends that the burden was on OWCP to "disapprove the causation, not us." However, as noted above, appellant has the burden of proof to

¹¹ *T.H.*, Docket No. 19-0685 (issued September 9, 2019); *see also J.R.*, *id.*

¹² *S.H.*, Docket No. 19-1128 (issued December 2, 2019); *see B.R.*, Docket No. 17-0294 (issued May 11, 2018).

¹³ *D.L.*, Docket No. 19-1176 (issued December 13, 2019); *F.D.*, Docket No. 19-0932 (issued October 3, 2010).

¹⁴ *A.H.*, Docket No. 19-0270 (issued June 25, 2019); *M.W.*, Docket No. 18-1624 (issued April 3, 2019).

establish his claim and the Board finds that the medical evidence of record contains insufficient rationale explaining how appellant's employment factors caused or aggravated a medical condition involving his right shoulder. Thus appellant has not met his 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 his burden of proof to establish that his right shoulder condition was causally related to the accepted factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 22, 2020
Washington, DC

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

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

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