

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

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| N.M., Appellant |) | |
| |) | |
| and |) | Docket No. 19-0258 |
| |) | Issued: May 8, 2020 |
| DEPARTMENT OF THE ARMY, |) | |
| WATERVLIET ARSENAL, Watervliet, NY, |) | |
| Employer |) | |
| |) | |

Appearances:
Thomas S. Harkins, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On November 15, 2018 appellant, through counsel, filed a timely appeal from a July 19, 2018 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 to consider 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 medical 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 set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 4, 2014 appellant then a 57-year-old machinist, filed an occupational disease claim (Form CA-2) alleging that he developed a large osteophyte formation about the proximal left femoral epiphysis and osteoarthritis as a result of performing repetitive, strenuous activities while in the performance of duty. He noted that he first became aware of his condition and realized its relation to his federal employment on October 14, 2014. Appellant stopped work on October 14, 2014.

Appellant submitted a statement dated December 22, 2014 and noted that from 2003 to 2008 he was responsible for cleaning gun tubes which required pushing a ram rod with a ball of rags through the length of the gun tube up to 15 times a day on four to six guns for a total of approximately 2,500 gun tubes. He noted that, during this time, he noticed worsening pain in his hips. Appellant advised that, from 2011 to 2014, his duties included making adjustments to a reciprocating grinder by stepping off a platform repeatedly, manually turning a vertical turret lathe weighing about 2,000 pounds, and manually turning a malfunctioning tool changer in a milling machine which required repetitive stair climbing.

In a January 14, 2015 e-mail, appellant's immediate supervisor noted appellant's description regarding his duties was inaccurate. He advised that appellant produced four parts a month on the surface grinder and appellant would be required to step up and down 10 times per part. The supervisor noted that the vertical turret lathe functioned as designed and other employees did not have any issue jogging the machine. With regard to the milling machines, he noted that they functioned as designed, but advised that there were occasions when a tool would need to be manually loaded approximately 10 times a day. In a January 14, 2015 statement, the chief of manufacturing for the employing establishment indicated that most of the tube cleaning description provided by appellant was accurate except that only 1,500 tubes were put through this process. The chief of manufacturing noted that the average number of times rods were pushed per tube was 4 or 5, and the maximum number of times was 15. With regard to the milling machines, there were intermittent periods of time where an employee had to change the tools manually.

Appellant was treated by Dr. John Juliano, a Board-certified orthopedic surgeon, who completed a certification of health care provider form on October 23, 2014 and found that appellant had bilateral hip osteoarthritis and low back pain. He opined that repetitive activities at work "contribute to this process" and he recommended light-duty work. In a December 14, 2014 report,

³ Docket No. 16-0403 (issued June 6, 2016), *petition for recon. denied*, Docket No. 16-0403 (issued November 9, 2016).

Dr. Juliano diagnosed bilateral hip osteoarthritis and noted that appellant continued to be off work due to employment activity which exacerbated the preexisting osteoarthritis of his hips.

By decision dated February 11, 2015, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish that the alleged employment factors occurred as described. It concluded therefore that the requirements had not been met to establish an injury as defined by FECA.

On August 25, 2015 appellant requested reconsideration of the February 11, 2015 decision and submitted additional evidence.

Appellant submitted January 6, March 2, and April 23, 2015 reports from Dr. Michael Cushner, a Board-certified orthopedic surgeon, who diagnosed bilateral hip osteoarthritis and lumbar radiculopathy.

In a February 16, 2015 report, Dr. Juliano diagnosed low back pain with exacerbation of bilateral hip osteoarthritis. He noted that appellant remained off work.

In a June 4, 2015 report, Dr. Young Don Oh, a Board-certified orthopedic surgeon, diagnosed "chronic bilateral hip pain, left greater than right, from work activities, with underlying [degenerative joint disease.]"

By decision dated November 12, 2015, OWCP denied modification of the February 11, 2015 decision.

Appellant appealed to the Board. By decision dated June 6, 2016,⁴ the Board affirmed OWCP's November 12, 2015 decision, as modified to reflect that he had established that the work activities of cleaning gun tubes, and operating surface grinders, lathes, and milling machines occurred as described.⁵ However, the Board further found that appellant did not submit sufficient medical evidence to establish a medical condition causally related to the accepted employment factors.

On May 29, 2017 appellant, through counsel, requested reconsideration of his claim and submitted additional medical evidence.

In an April 10, 2017 report, Dr. Juliano indicated in the "history of present illness" portion of the report that he was treating appellant for follow-up of bilateral hip pain (left greater than the right) "with work-related injury." He noted that appellant reported "overuse over time" which included using a ramrod to clean gun bores/tubes with his left leg supporting his body weight. Appellant reported using increased force to push the rod through the gun bore and that his left leg shortened over time. Dr. Juliano further noted that appellant indicated that he began working at

⁴ *Id.*

⁵ *Supra* note 3. The Board noted the evidence of record established that, since 2003, appellant had cleaned a total of 1,500 gun tubes, with each tube requiring pushing a rod four to five times, and that the lathe he manually turned weighed approximately 2,000 pounds. Moreover, operating the grinder required stepping off a platform repeatedly and operating the milling machine required repetitive stair climbing.

the arsenal in 2003 with symptoms starting in 2009, that in 2014 it was determined that appellant could no longer perform his duties as a machinist and in 2015 he was placed on disability. He indicated, “Causal relationship of hip arthritis with repetitive use activities understood.” Dr. Juliano noted findings on examination of tenderness of both hips at the greater trochanter, tenderness with log rolls of the left hip greater than the right hip, and intact sensory examination to light touch in the lower extremities. He diagnosed primary bilateral hip osteoarthritis, left greater than right symptoms, “causal relationship with work reviewed above.”

In an addendum report dated May 5, 2017, Dr. Juliano noted that a magnetic resonance imaging scan in 2014 revealed osteoarthritis of both hips. He advised that appellant reported that his duties at the arsenal included cleaning a large gun tube with a ramrod, pivoting on his left leg, and using his body weight to push the ramrod. Dr. Juliano noted, “This repetitive activity over the consecutive years contributed to [appellant’s] left and right hip osteoarthritis.” He opined that the findings on the x-ray and clinical examination were consistent with bilateral hip osteoarthritis causally related to the repetitive activity required by appellant’s machinist position.

By decision dated August 24, 2017, OWCP denied modification of its prior decisions, finding that appellant had not met his burden of proof to establish a medical condition causally related to the accepted factors of his federal employment.

On July 18, 2018 appellant, through counsel, requested reconsideration of the August 24, 2017 decision.

Appellant submitted a November 28, 2017 report from Dr. Juliano, who noted that appellant reported symptoms of left hip pain with activities of daily living and reported not working secondary to left hip pain. Findings on examination revealed an antalgic gait and leg length discrepancy with the left leg shorter than the right. Dr. Juliano diagnosed osteoarthritis of the left hip, with symptoms causally related to repetitive activities at work which required axial loading of the left leg.

By decision dated July 19, 2018, OWCP denied modification of its August 24, 2017 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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, 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

⁶ *Supra* note 2.

to the employment injury.⁷ These are the essential elements of every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁸

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant 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 identified employment factors.⁹

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹⁰ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.¹¹ 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 factor(s).¹²

ANALYSIS

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

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹³ It is therefore unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's November 12, 2015 decision because the Board considered that evidence in its June 6, 2016 decision.¹⁴ After OWCP issued its November 12, 2015 decision, appellant submitted an April 10, 2017 report from Dr. Juliano who indicated that appellant reported "overuse over time" which included using a ramrod to clean gun tubes with his left leg supporting his body weight. Dr. Juliano indicated, "[c]ausal relationship of hip arthritis with repetitive use activities understood." He

⁷ *K.V.*, Docket No. 18-0947 (issued March 4, 2019); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

⁸ *K.V. and M.E., id.*; *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ *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).

¹⁰ *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

¹¹ *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

¹² *Id.*; *Victor J. Woodhams*, *supra* note 9.

¹³ *J.T.*, Docket No. 18-1757 (issued April 19, 2019); *S.S.*, Docket No. 17-1106 (issued June 5, 2018); *H.G.*, Docket No. 16-1191 (issued November 25, 2016).

¹⁴ *Supra* note 3.

diagnosed primary bilateral hip osteoarthritis, left greater than right symptoms, “causal relationship with work reviewed above.” In an addendum report dated May 5, 2017, Dr. Juliano noted that appellant reported that cleaning gun tubes with a ramrod required pivoting on his left leg and using his body weight to push the ramrod. He indicated, “This repetitive activity over the consecutive years contributed to [appellant’s] left and right hip osteoarthritis.” Dr. Juliano opined that the findings on the x-ray and clinical examination were consistent with bilateral hip osteoarthritis causally related to the repetitive activity required by appellant’s machinist position. The Board finds that, although Dr. Juliano noted that appellant was injured at work, his reports are of limited probative value because they do not include medical rationale explaining the basis of his conclusory opinion regarding the causal relationship between appellant’s hip condition and the accepted factors of employment.¹⁵ Specifically, Dr. Juliano did not adequately discuss the mechanism of how appellant’s employment duties resulted in an injury. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how an employment activity could have caused or aggravated a medical condition.¹⁶ Therefore, these reports are insufficient to meet appellant’s burden of proof.

In a November 28, 2017 report, Dr. Juliano diagnosed progressive osteoarthritis of the left hip causally related to repetitive activities at work which required axial loading of the left leg. Although he found work-related causal relationship, this report is also of limited probative value because it does not include sufficient medical rationale explaining the basis of his opinion regarding the causal relationship between appellant’s diagnosed condition and his repetitive work duties.¹⁷ Dr. Juliano opined that appellant’s work duties involved axial loading of the left leg, but did not provide medical rationale explaining the medical mechanics of how such axial loading would be competent to cause or aggravate the diagnosed condition. Such medical rationale is especially necessary in the present case, in light of the preexisting degenerative changes to appellant’s hips.¹⁸ Dr. Juliano noted that appellant had symptoms during a period of work, but the Board has held the fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.¹⁹ Therefore, this evidence also is insufficient to meet appellant’s burden of proof.

On appeal counsel asserts that OWCP improperly denied the claim and that the submitted medical evidence is sufficient to establish that appellant developed a medical condition as a result of performing repetitive duties at work. As noted above, the medical evidence does not establish that he had a diagnosed condition causally related to his accepted employment factors. Appellant has not submitted a sufficiently rationalized physician’s report which explains how his work activities caused or aggravated a medical condition.

¹⁵ *L.G.*, Docket No. 19-0142 (issued August 8, 2019).

¹⁶ *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

¹⁷ *See G.R.*, Docket No. 19-0940 (issued December 20, 2019).

¹⁸ *See J.H.*, Docket No. 19-0838 (issued October 1, 2019); *D.M.*, Docket No. 19-0389 (issued July 16, 2019).

¹⁹ *See L.D.*, Docket No. 09-1503 (issued April 15, 2010).

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 medical condition causally related to the accepted factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 8, 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