

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

E.M., Appellant)	
)	
and)	Docket No. 20-0651
)	Issued: November 12, 2020
DEPARTMENT OF THE NAVY, NORFOLK)	
NAVAL SHIPYARD, Portsmouth, VA, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 3, 2020 appellant filed a timely appeal from an August 14, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish a right shoulder condition causally related to the accepted June 21, 2018 employment incident.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the August 14, 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.*

FACTUAL HISTORY

On July 11, 2018 appellant, then a 65-year-old rigger, filed a traumatic injury claim (Form CA-1) alleging that on June 21, 2018 he was assisting with the installation of a metal cover when the cover shifted and pulled his right arm while in the performance of duty. He stopped work on June 22, 2018.

In a June 22, 2018 statement, appellant noted that on June 21, 2018 he was assisting with the installation of a crane gear box cover when he lifted the cover and it shifted pulling his arm down injuring his muscle in his right arm.

On June 22 and July 6, 2018 appellant was treated at the employing establishment clinic by Dr. Elizabeth C. Merrell, an osteopath and Board-certified internist, for a right shoulder injury. Dr. Merrell checked a box indicating that he was temporarily totally disabled from work. In a June 22, 2018 medical referral form, she noted that appellant was assisting with the installation of a metal cover to a gear box and pulled a muscle in his arm/shoulder. Dr. Merrell referred him to his primary physician for further care.

In a narrative statement dated July 9, 2018, appellant indicated that as he was assisting with the installation of a crane gear box cover when the cover shifted and pulled his right arm down causing an injury to the arm muscle. He reported the incident to his zone manager and iced his arm overnight. Appellant indicated that the next morning his arm was worse, but he reported to work and was escorted to the dispensary to be examined by a physician.

In a July 9, 2018 duty status report (Form CA-17), Dr. Kenneth Putland, a Board-certified family practitioner, noted tenderness of the deltoid of the right shoulder and diagnosed right shoulder strain. He advised that appellant was temporarily disabled from work. In an attending physician's report (Form CA-20) of even date, Dr. Putland indicated that appellant was injured at work on June 21, 2018 when he was lifting a heavy object with another person who dropped the item causing a strain to appellant's right shoulder. He diagnosed acute right shoulder pain and checked a box marked "Yes" indicating that appellant's condition had been caused or aggravated by an employment activity. Dr. Putland noted that appellant was totally disabled from work beginning June 25, 2018, pending an evaluation with an orthopedist.

In a Form CA-20 dated July 10, 2018, Dr. John R. Barley, an osteopath and Board-certified family practitioner, indicated that appellant was injured at work on July 10, 2018 when he was lifting a heavy object with another person who suddenly dropped the item. He diagnosed acute right shoulder pain and checked a box marked "Yes" indicating that appellant's condition had been caused or aggravated by an employment activity. Dr. Barley advised that appellant was totally disabled from work beginning July 10, 2018. In a Form CA-17 dated July 11, 2018, he diagnosed right shoulder strain and again advised that appellant was temporarily totally disabled from work.

In a July 23, 2018 development letter, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the requested information. No additional evidence was received.

By decision dated August 23, 2018, OWCP denied appellant's claim finding that the evidence was insufficient to establish the June 21, 2018 incident occurred as described. It noted that he did not respond to the July 23, 2018 development letter. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

A July 7, 2018 magnetic resonance imaging (MRI) scan of the right shoulder revealed high-grade partial tears throughout both supraspinous tendon and infraspinatus tendon with a full-thickness tear in the supraspinous tendon, severe tendinopathy, high-grade partial tear in the subscapularis tendon, diminished superior posterior labrum, tear of the anterior inferior labrum, and severe acromial clavicle (AC) joint arthropathy.

On July 25, 2018 Dr. Thomas E. Fithian, a Board-certified orthopedist, treated appellant for right shoulder pain with an acute onset on June 21, 2018. Appellant reported lifting a 50-pound metal cover with the help of another person and felt an abrupt pull and pain in the right upper arm as though something "gave way." He reviewed the MRI scan and noted a complex full-thickness tear of the supraspinous tendon and infraspinatus tendon with thinning at the margins and marked impingement. Findings on examination revealed nontender AC joint, no atrophy or scapular winging, intact long head biceps tendon, mild external rotation weakness, and positive impingement sign. X-rays obtained that day revealed moderate type II acromion, dramatic greater tuberosity changes consistent with mechanical impingement, and mild-to-moderate degenerative changes to the AC joint. Dr. Fithian diagnosed impingement syndrome of the right shoulder, mild osteoarthritis of right glenohumeral joint, arthritis of the right AC joint, and traumatic complete tear of right rotator cuff. He recommended surgical intervention.

In a Form CA-17 dated July 27, 2018, Dr. Fithian diagnosed right shoulder rotator cuff tear and impingement and returned appellant to work with restrictions. In a Form CA-20 dated July 31, 2018, he indicated that appellant was injured at work on June 21, 2018 while lifting a 50-pound metal cover with the help of another person and felt an abrupt pull and pain in the right upper arm as though something gave way. Dr. Fithian diagnosed traumatic right rotator cuff tear and checked a box marked "Yes" indicating that appellant's condition had been caused or aggravated by an employment activity. He advised that appellant was partially disabled from July 26, 2018.

On October 19, 2018 appellant requested reconsideration.

OWCP subsequently received additional medical evidence. Dr. Fithian treated appellant in follow-up on November 5, 2018 for right shoulder pain. He diagnosed right shoulder rotator cuff tear and adhesive capsulitis. Dr. Fithian returned appellant to sedentary work with restrictions.

In a work restriction form dated November 6, 2018, Dr. Ernest L. Fair, a Board-certified physiatrist and employing establishment physician, noted that appellant had a right shoulder injury and could perform sedentary work with temporary restrictions.

By decision dated November 29, 2018, OWCP denied modification of the August 23, 2018 decision.

On July 11, 2019 appellant requested reconsideration and submitted additional evidence. In order notes dated November 5, December 5 and 31, 2018 and April 17, 2019, Dr. Fithian treated

appellant for right shoulder pain, which began on June 21, 2018. He diagnosed right shoulder rotator cuff tear and adhesive capsulitis and recommended surgery. Dr. Fithian returned appellant to modified sedentary duty with restrictions on the right arm.

In progress notes dated December 5, 2018; and February 6, April 17, and June 17, 2019, Dr. Fithian diagnosed impingement syndrome of the right shoulder, mild osteoarthritis of right glenohumeral joint, arthritis of the right AC joint, and traumatic complete tear of right rotator cuff and recommended surgical intervention. He noted that appellant reported continued improvement of the right shoulder and declined surgical intervention. Dr. Fithian continued appellant's work restrictions of sedentary light-duty activities with the right arm.

Appellant attended physical therapy treatment from November 9 to December 4, 2018.

OWCP also received appellant's July 5, 2019 response to its development questionnaire. Appellant asserted that the injury occurred when he was assisting with the installation of a crane gear box cover. He was lifting the cover when it shifted and pulled his right arm downward causing the injury to his right upper arm and shoulder muscle. Appellant reported the injury to his zone manager and iced it overnight. The next day he noted that he could barely move his right upper arm, but reported to work and was escorted to the dispensary to be examined by the physician. Appellant then sought treatment from his primary care physician. He indicated that he did not sustain any other injury on or off duty between the date of the injury and the date he first reported it to his supervisor and physician. Appellant noted that his right upper arm condition between the date of the injury and the date he first received medical attention was initially sore, but not swollen and over time his arm and shoulder became very sore and he could barely move them. He advised that he did not have any similar disability or symptoms prior to the injury.

By decision dated August 14, 2019, OWCP modified its November 29, 2018 decision to find that appellant had established that the June 21, 2018 employment incident occurred as alleged, and that he sustained a strain of muscles and tendons of the rotator cuff of the right shoulder. However, the claim remained denied as the medical evidence of record was insufficient to establish causal relationship between the diagnosed medical condition and the accepted June 21, 2018 employment incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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 filed within the applicable time limitation of FECA,⁴ 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

³ *Id.*

⁴ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

employment injury.⁵ 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.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.⁷ Generally, fact of injury consists of 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.⁸ The second component is whether the employment incident caused a personal injury.⁹ An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the employment incident.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 accepted 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 the specific employment incident.¹³

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a right shoulder condition causally related to the accepted June 21, 2018 employment incident.

In support of his claim, appellant submitted a series of medical reports from Dr. Fithian dated July 25 to December 31, 2018 and February 6 to June 17, 2019. Dr. Fithian repeated appellant's history of injury and diagnosed impingement syndrome of the right shoulder, mild osteoarthritis of right glenohumeral joint, arthritis of the right AC joint, and traumatic complete tear of right rotator cuff. The mere recitation of patient history does not suffice for purposes of

⁵ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *K.M.*, Docket No. 15-1660 (issued September 16, 2016).

⁷ *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

⁸ *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

¹¹ *T.H.*, *supra* note 7; *Robert G. Morris*, 48 ECAB 238 (1996).

¹² *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

¹³ *Id.*; *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

establishing causal relationship between a diagnosed condition and the employment incident.¹⁴ The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.¹⁵

In a July 31, 2018 Form CA-20 report, Dr. Fithian diagnosed traumatic right rotator cuff tear and indicated by checking a box marked "Yes" indicating that appellant's condition had been caused or aggravated by an employment activity. In a Form CA-20 dated July 9, 2018, Dr. Putland indicated that appellant was injured at work on June 21, 2018 and diagnosed acute right shoulder pain and checked a box marked "Yes" indicating that appellant's condition had been caused or aggravated by an employment activity. Similarly, in a Form CA-20 attending physician's report dated July 10, 2018, Dr. Barley diagnosed acute right shoulder pain. In this report he checked a box marked "Yes" indicating that appellant's condition had been caused or aggravated by an employment activity. However, the Board has held that an opinion on causal relationship with an affirmative check mark, without more by way of medical rationale, is insufficient to establish the claim.¹⁶ As such, these reports are insufficient to establish appellant's claim.

In a Form CA-17 dated July 27, 2018, Dr. Fithian diagnosed right shoulder rotator cuff tear and impingement and returned appellant to work with restrictions. However, he did not address whether appellant's employment was sufficient to have caused or aggravated a diagnosed medical condition. Medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.¹⁷

In duty status reports dated July 9 and 11, 2018, Drs. Putland and Barley diagnosed right shoulder strain and noted that appellant was temporarily disabled from work. Similarly, on November 6, 2018, Dr. Fair treated appellant for a right shoulder injury and returned him to sedentary work. On June 22 and July 6, 2018 Dr. Merrell treated appellant for a right shoulder injury. She noted that on June 22, 2018 he was assisting with the installation of a metal cover to a gear box and pulled a muscle in his arm/shoulder. As these notes do not address causation, they are of no probative value and insufficient to meet appellant's burden of proof.¹⁸

Appellant submitted reports from a physical therapist. However, certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers'

¹⁴ *N.S.*, Docket No. 19-0167 (issued June 21, 2019); *J.G.*, Docket No. 17-1382 (issued October 18, 2017).

¹⁵ *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁶ *See C.S.*, Docket No. 18-1633 (issued December 30, 2019); *D.S.*, Docket No. 17-1566 (issued December 31, 2018).

¹⁷ *See supra* note 15.

¹⁸ *Id.*

are not considered “physician[s]” as defined under FECA.¹⁹ Consequently, these reports do not constitute competent medical evidence.²⁰

Appellant also submitted a July 7, 2018 MRI scan report of the right shoulder. The Board has held, however, that diagnostic test reports, standing alone, lack probative value as they do not provide an opinion on causal relationship between an employment incident and a diagnosed condition.²¹

As the record lacks rationalized medical evidence establishing causal relationship between appellant’s claimed conditions and the accepted June 21, 2018 employment incident, the Board finds that he has not met his burden of proof.

On appeal appellant asserts that he submitted sufficient medical evidence in support of his claim for compensation. However, as explained above, there was no rationalized medical evidence by a physician of record at the time OWCP issued its August 14, 2019 decision. As such, 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 a right shoulder condition causally related to the accepted June 21, 2018 employment incident.

¹⁹ Section 8101(2) of FECA provides that physician “includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law.” 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (physical therapists are not considered physicians under FECA).

²⁰ *N.B.*, Docket No. 19-0221 (issued July 15, 2019).

²¹ *L.F.*, Docket No. 19-1905 (issued April 10, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 12, 2020
Washington, DC

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

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

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