United States Department of Labor
Employees' Compensation Appeals Board

O.E., Appellant	)	
and	)	**Docket No. 20-0554**
	)	**Issued: October 16, 2020**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, New Cumberland, PA, 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:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 13, 2020 appellant, through counsel, filed a timely appeal from a December 16, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[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] The Board notes that, following the December 16, 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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a right shoulder rotator cuff tendon tear causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On May 15, 2017 appellant, then a 58-year-old packer, filed an occupational disease claim (Form CA-2) alleging that he developed a tear of his right shoulder supraspinatus tendon with subtle full-thickness component and severe biceps tendinosis with partial tear of the acromioclavicular (AC) joint impingement secondary to primary osteoarthritis due to factors of his federal employment including repetitive lifting. He noted that he first became aware of his condition on April 8, 2017 and realized its relationship to his federal employment on April 10, 2017.[3]

Appellant received medical treatment from Dr. Matthew J. Espenshade, an osteopathic physician specializing in orthopedic surgery. In an April 24, 2017 report, Dr. Espenshade related appellant's complaints of ongoing right shoulder pain since April 16, 2017. He noted that appellant did not attribute the onset to an acute injury, but recounted that he moved his arm quickly when playing with his grandkids and felt a "pop with a sharp burning pain." Upon examination of appellant's right shoulder, Dr. Espenshade observed decreased range of motion in flexion and internal rotation. He noted that O'Brien's, Neer, and Hawkins testing were positive. Dr. Espenshade reviewed radiographic studies and diagnosed right shoulder pain with biceps tendinitis and possible tear with bursitis and impingement.

On April 27, 2017 appellant underwent diagnostic testing. A right shoulder magnetic resonance imaging (MRI) scan report revealed undersurface tearing of the supraspinatus tendon at the greater tuberosity insertion with subtle full-thickness component and fluid leaking into the subdeltoid bursa, tiny partial undersurface tear of the distal infraspinatus tendon, moderate-to-severe biceps tendinosis with suspect partial tearing of the proximal intrascapsular segment extending towards the labral anchor, and mild impingement at the AC joint. A right shoulder x-ray scan report demonstrated abnormal supraspinatus tendon, tiny partial tear of the infraspinatus tendon, mild-to-moderate degenerative changes at the AC joint, small glenohumeral joint effusion, and mild impingement at AC joint.

In reports dated May 1 and 22, 2017, Dr. Espenshade continued to treat appellant and noted examination findings similar to his previous report. He diagnosed right shoulder rotator cuff tear full-thickness supraspinatus, right shoulder severe biceps tendinosis with partial tear, and right shoulder acromioclavicular AC joint impingement secondary to primary osteoarthritis.

In a June 15, 2017 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of medical and factual evidence necessary to support his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the requested information. A similar letter of even date

[3] Appellant has a previously accepted traumatic injury claim for a February 3, 2018 injury. OWCP accepted the claim for left shoulder rotator cuff strain.

requested additional information from the employing establishment. OWCP afforded both parties 30 days to respond.

In a June 27, 2017 statement, appellant responded to OWCP's development letter. He related that he had worked as a packer at the employing establishment for 13 years and indicated that his job involved building air pallets and preparing trucks for loading materials. Appellant reported that his duties required lifting, reaching, standing, bending, stooping, and twisting for extended periods of time. He explained that when he began to have pain at work, he attributed it to getting older. Appellant related that one day he was playing a game with his kids on a laptop and when the laptop dropped, he reached out to catch it and felt a "pop" in his right shoulder. He noted that his only hobby was working on cars. Appellant included a copy of a position description and photographs, timesheets, earning and leave statements, and a 2016 pallet count printout.

F.S., an injury compensation specialist at the employing establishment, in a July 13, 2017 letter, indicated that the employing establishment did not concur with appellant's allegations regarding his claimed work injury. She contended that there was credible evidence that disputed the required "fact of injury" and "causal relationship" elements of his claim. F.S. related that, according to Dr. Espenshade's May 22, 2017 report, appellant was injured when he was playing with his grandkids.

On July 20, 2017 appellant completed OWCP's questionnaire. He related that he believed that the employment-related activities which contributed to his condition were repetitive lifting over 13 years and working a lot of overtime. Appellant noted that he worked five to six days a week, including overtime. He explained that he first noticed pain in his right shoulder on April 1, 2017. Appellant reported that the pain continued every day, all day, and worsened with lifting and pulling.

By decision dated August 10, 2017, OWCP denied appellant's occupational disease claim. It accepted his duties as a packer as described and diagnosis for a right shoulder condition, but denied his claim, finding that the medical evidence of record was insufficient to establish that his medical condition was causally related to the accepted employment factors.

On August 21, 2017 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on January 17, 2018, he testified that he always worked overtime and one day felt a tear and excruciating pain in his right shoulder.

Appellant subsequently submitted a December 18, 2017 report by Dr. Michael A. Jones, an osteopathic physician specializing in internal medicine, who related appellant's complaints of pain and intermittent weakness in his right shoulder with overt activities. Dr. Jones indicated that on April 8, 2017 appellant had an injury at home when he leaned over and felt a pop in his shoulder and had experienced pain and dysfunction since the incident. He reported that appellant had expressed concerns over the repetitive nature of his job and the heavy duty involved. Examination of appellant's right shoulder revealed mild weakness in the rotator cuff. Dr. Jones diagnosed impingement syndrome with primary degenerative joint disease of the right shoulder AC joint, biceps tenosynovitis and longitudinal tearing, and supraspinatus and infraspinatus tendinopathy with a distal supraspinatus rotator cuff tear.

In reports dated December 26, 2017 to March 12, 2018, Dr. David P. Frank, a Board-certified family practitioner, related appellant's complaints of right shoulder pain and recounted that appellant stated that it was due to the heavy lifting and pulling of nets at work. He reported that right shoulder examination revealed almost full range of motion and diffuse discomfort and diagnosed right shoulder impingement syndrome, right shoulder bursitis, right shoulder bicipital tendinitis, right shoulder rotator cuff strain, and left shoulder pain. In the December 26, 2017 report, Dr. Frank noted: "There is no specific slipped trip or fall. There is no specific mechanism of injury."

By decision dated April 3, 2018, an OWCP hearing representative affirmed the August 10, 2017 decision.

On November 2, 2018 appellant requested reconsideration. In a January 30, 2019 decision, OWCP denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

On February 6, 2019 appellant requested reconsideration of the April 3, 2018 decision.

Appellant submitted reports cosigned by Dr. April Armstrong, a Board-certified orthopedic surgeon, dated April 9 to July 18, 2018. Dr. Armstrong related that appellant presented for evaluation of bilateral shoulder pain, right worse than left. In an April 9, 2018 report, she recounted that appellant noted that he had pain related to his work activities. Dr. Armstrong indicated that appellant built pallets for aircraft carriers, which required repetitive movements that aggravated his shoulder pain. She noted that appellant's right shoulder pain was exacerbated in April 2017 when he reached for a video gaming system for his grandson and felt a pop in his right shoulder. Dr. Armstrong reviewed appellant's medical history and noted that x-rays and MRI scans of the right shoulder revealed maintenance of glenohumeral joint space and a full-thickness rotator cuff tendon tear of the supraspinatus tendon. She provided examination findings and assessed right shoulder rotator cuff tendon tear with persistent pain. Dr. Armstrong recommended that appellant undergo surgery.

OWCP received a right shoulder x-ray examination report dated April 9, 2018, which revealed chronic enthesopathic changes involving the anterior greater tuberosity and lesser tuberosity consistent with sequelae of known tendon disease.

On July 19, 2018 appellant underwent right shoulder arthroscopic rotator cuff repair, biceps tenodesis, and subacromial decompression. The operative report noted a preoperative diagnosis of full-thickness rotator cuff tear.

In a July 26, 2018 note, Kelly Martin, a certified nurse practitioner, related that appellant underwent right arthroscopic rotator cuff repair surgery on July 19, 2018. She conducted an examination and noted assessment of seven days status post right shoulder arthroscopic rotator cuff repair, biceps tenodesis, and subacromial decompression.

In reports dated September 11 and December 5, 2018, Dr. Armstrong related that appellant noted improved pain compared to before his surgery. Upon examination of appellant's right shoulder, she observed active forward elevation to 150 degrees and external rotation to 40 degrees. Dr. Armstrong assessed post right shoulder arthroscopic rotator cuff repair, biceps tenodesis, and

subacromial decompression. In the December 5, 2018 report, she authorized appellant to work modified duty.

By decision dated May 6, 2019, OWCP denied modification of the April 3, 2018 decision.[4]

OWCP subsequently received an April 16, 2019 return to work note by Jaime Halin, a certified physician assistant, who authorized that appellant may return to work with restrictions of lifting 40 pounds at the waist level and no repetitive overhead activities.

On September 17, 2019 appellant, through counsel, requested reconsideration of the May 6, 2019 OWCP decision and submitted medical evidence.

In an August 5, 2019 letter, Dr. Armstrong related that she had been asked to explain the anatomical process by which appellant's work duties caused him to have the medical condition of right rotator cuff tear. She recounted that appellant initially presented at her clinic on May 29, 2018 for complaints of bilateral shoulder pain, right worse than left. Dr. Armstrong indicated that appellant had informed her that he worked manual labor building aircraft carriers, which required repetitive moment and lifting. She explained that repetitive motion and lifting of the upper extremity required contraction/pulling of the rotator cuff, which was the tendon that attaches onto the ball of the shoulder, and can lead to overuse and tearing of the rotator cuff. Dr. Armstrong reported that with "repetitive use and movement and lifting, particularly overhead, the tendon then gradually tears off of the bone and so I feel that this work is causally related to his diagnosis of rotator cuff tear." She further indicated that rotator cuff tears can also develop as a gradual degenerative process with no known lifting or repetitive motion. Dr. Armstrong related that if appellant has a preexisting rotator cuff tear, the activities described at work would aggravate this preexisting condition and contribute to the ultimate rupture of the rotator cuff, also known as a full-thickness rotator cuff tear.

By decision dated December 16, 2019, OWCP denied modification of the May 6, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim, including 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,[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

[4] Appellant filed an appeal before the Board. In an August 8, 2019 letter, appellant's attorney requested that the appeal be dismissed. In an order dated September 13, 2019, the Board granted appellant's request for the dismissal of the appeal. *Order Dismissing Appeal*, Docket No. 19-1294 (issued September 13, 2019).

[5] *Supra* note 2.

[6] *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.[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]

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 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 claimant.[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 relationship between the diagnosed condition and 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 rotator cuff tendon tear causally related to the accepted factors of his federal employment.

Appellant submitted a series of reports from Dr. Armstrong dated April 9, 2018 to August 5, 2019. In the initial report, she related that appellant was seen for complaints of bilateral shoulder pain, right worse than left, which he attributed to his work activities. Dr. Armstrong indicated that appellant built pallets for aircraft carriers, which required repetitive movements that aggravated his shoulder pain. She also noted that appellant's right shoulder pain was exacerbated in April 2017 when he reached for a video gaming system for his grandson and felt a pop in his right shoulder. Dr. Armstrong conducted an examination and assessed right shoulder rotator cuff tendon tear with persistent pain. In a subsequent letter, she explained that with repetitive use and movement and lifting, the rotator cuff gradually tears off of the bone. Dr. Armstrong reported that she felt that appellant's work was causally related to his rotator cuff tear. She further indicated that rotator cuff tears can also develop as a gradual degenerative process with no known lifting or repetitive motion. Dr. Armstrong related that, if appellant has a preexisting rotator cuff tear, the

[7] *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] *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] *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

[10] *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *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); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

activities described at work would aggravate this preexisting condition and contribute to the rotator cuff tear.

Dr. Armstrong mentioned both appellant's repetitive movement and lifting at work and also related that rotator cuff tears could develop as part of the degenerative process with no known lifting of repetitive motion. Accordingly, it is unclear from her opinion whether she attributed appellant's right shoulder condition to his repetitive employment duties or as part of the gradual degenerative process.[12] Additionally, Dr. Armstrong also noted that "if" appellant had a preexisting condition, his work would contribute to the rotator cuff tear. While the opinion supporting causal relationship does not have to reduce the cause or etiology of a disease or a condition to an absolute certainty, the opinion must be one of reasonable medical certainty and not speculative or equivocal in character.[13]

Furthermore, Dr. Armstrong also described a history of an April 2017 incident when appellant reached out to grab a video gaming system. She did not offer any explanation of how appellant's right shoulder condition resulted from his repetitive overhead lifting activities, and not the April 2017 incident or how the April 2017 incident may have aggravated his right shoulder condition. Medical opinion evidence should reflect a correct history and offer a medically-sound explanation of how the specific employment incident or work factors, physiologically caused injury.[14] For these reasons, these reports are insufficient to establish appellant's claim.

In reports dated April 24 to May 22, 2017, Dr. Espenshade conducted an examination and diagnosed right shoulder rotator cuff tear full-thickness supraspinatus, right shoulder severe biceps tendinosis with partial tear, and right shoulder acromioclavicular AC joint impingement secondary to primary osteoarthritis. He noted that appellant did not attribute the onset to an acute injury, but recounted that he moved his arm quickly when playing with his grandkids and felt a "pop with a sharp burning pain." This report is insufficient to establish appellant's occupational disease claim as Dr. Espenshade attributed appellant's right shoulder condition to a nonwork-related injury that occurred when playing with his grandkids. Likewise, Dr. Frank opined in a December 26, 2017 report that there was no specific mechanism of injury. As neither physician provided an opinion relating appellant's right shoulder condition to the accepted factors of his employment, these reports fail to establish appellant's claim.

In a December 18, 2017 report, Dr. Jones described an injury at home when appellant leaned over and felt a pop in his shoulder and also related that appellant also expressed concerns over the repetitive nature of his job. He diagnosed impingement syndrome with primary degenerative joint disease of the right shoulder AC joint, biceps tenosynovitis and longitudinal tearing, and supraspinatus and infraspinatus tendinopathy with a distal supraspinatus rotator cuff tear. Dr. Jones merely communicated appellant's belief on the issue of causal relationship and did

[12] *See H.A.*, Docket No. 18-1466 (issued August 23, 2019). *See also D.S.*, Docket No. 19-1814 (issued April 1, 2020); *Roy L. Humphrey*, 57 ECAB 238, 242 (2005); *Michael E. Smith*, 50 ECAB 313 (1999).

[13] *A.S.*, Docket No. 19-1955 (issued April 9, 2020); *C.H.*, Docket No. 19-0409 (issued August 5, 2019).

[14] *See L.R.*, Docket No. 16-0736 (issued September 2, 2016).

not provide a definitive opinion that appellant's right shoulder condition resulted from his work duties.[15] His opinion, therefore, is insufficient to establish causal relationship.

Appellant also submitted diagnostic testing reports, including the April 27, 2017 right shoulder MRI scan and x-ray examination reports and April 9, 2018 right shoulder x-ray examination report. The Board has held that reports of diagnostic tests, standing alone, lack probative value as they do not provide as to whether the accepted employment factors caused the diagnosed condition. For this reason, this evidence is not sufficient to meet his burden of proof.[16]

The July 26, 2018 note by Ms. Martin, a certified nurse practitioner, and April 16, 2016 return to work note by Mr. Halin, a certified physician assistant, are of no probative value to establish causal relationship because nurse practitioners and physician assistants are not considered physicians as defined under FECA.[17]

As appellant has not submitted rationalized medical evidence explaining the causal relationship between his diagnosed right shoulder conditions and the accepted factors of his federal employment, the Board finds that he has not met his burden of proof.

On appeal counsel argues that OWCP failed to adjudicate the claim in accordance with the proper standard of causation and failed to give due deference to the findings of the attending physician. The Board finds, for the reasons explained above, the medical evidence of record is insufficient to establish causal relationship.

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 rotator cuff tendon tear causally related to the accepted factors of his federal employment.

[15] *C.M.*, Docket No. 19-0264 (issued December 19, 2019); *see also P.K.*, Docket No. 08-2551 (issued June 2, 2009) (an award of compensation may not be based on a claimant's belief of causal relationship).

[16] *G.S.*, Docket No. 18-1696 (issued March 26, 2019); *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

[17] 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See also 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). 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *George H. Clark*, 56 ECAB 162 (2004) (a physician assistant is not considered a physician under FECA); *James A. White*, 34 ECAB 515, 518 (1983) (a physical therapist is not considered a physician under FECA).

ORDER

IT IS HEREBY ORDERED THAT the December 16, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 16, 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