

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

C.M., Appellant

and

DEPARTMENT OF THE NAVY, NAVAL
INSTALLATIONS COMMAND, San Diego, CA,
Employer

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**Docket No. 20-1384
Issued: October 6, 2021**

Appearances:

Russell T. Uliase, 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 July 14, 2020 appellant, through counsel, filed a timely appeal from February 14, 2020 merit decisions 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.³

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.*

³ The Board notes that, following the February 14, 2020 decisions, 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that OWCP should expand acceptance of his claim to include consequential right shoulder conditions; and (2) whether appellant has met his burden of proof to establish an employment-related disability for the period October 1, 2017 through December 27, 2018.

FACTUAL HISTORY

On December 2, 2016 appellant, then a 56-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on July 27, 2015 he injured his right elbow when pulling a chain link fence vehicle gate while in the performance of duty. OWCP accepted the claim for right elbow lateral epicondylitis and lesion of radial nerve, upper limb.

In a March 23, 2016 report, Dr. David Chao, Board-certified in critical care medicine, noted that on November 15, 2014 appellant was exercising at an employing establishment gym. Appellant was performing hammer curls when he first experienced lateral right elbow pain. Dr. Chao added that on July 29, 2015 appellant further injured his right elbow while closing a vehicle gate at work and was given a cortisone injection and placed on light duty. He indicated that on May 18, 2016 appellant underwent right elbow surgery, including right elbow lateral epicondylectomy and extensor tendon debridement and repair. Dr. Chao diagnosed right elbow lateral epicondylitis, right elbow pain, right elbow radial nerve compression, cervical radiculopathy, and cervical degenerative disc disease. He opined that appellant was no longer able to perform his duties as a police officer due to his right elbow and cervical conditions which, despite ongoing care and treatment, had not and would not resolve and would continue to deteriorate, with continuing symptoms of pain, weakness, and loss of range of motion

In a December 23, 2016 operative note, Dr. Chao noted that appellant had undergone a right shoulder arthroscopy with loose body removal, chondroplasty, labral debridement, subacromial decompression with coracoacromial ligament resection and bursectomy, and arthroscopic distal clavicle excision.

On March 9, 2017 Dr. Chao noted that appellant related that on July 27, 2015 he was closing an approximately 500-pound gate when he injured his right elbow and underwent considerable conservative care that failed. He noted that appellant underwent surgery on May 18, 2016 with lateral epicondyle with extensor tendon repair. Dr. Chao also diagnosed osteoarthritis of acromioclavicular joint on the right; impingement syndrome of shoulder region, right shoulder; osteoarthritis of glenohumeral joint, right; and disorder of rotator cuff on the right. He further opined that “per patient history” appellant “acknowledges preexisting right shoulder arthritis, however, the [right] elbow work[-]related injury caused compensatory aggravation of [appellant’s] [right] shoulder preexisting arthritis.”

In reports dated November 20, and December 15 and 26, 2017, Dr. Chao noted appellant’s history of injury and treatment. He indicated that on October 19, 2016 appellant presented to the clinic for a new injury to his right shoulder and explained that on October 5, 2016 after deer hunting, appellant had to drag a deer and the next day he had right shoulder pain. Dr. Chao noted that x-rays of the right shoulder showed significant degenerative joint disease (DJD) of the glenohumeral joint which, following a referral for an MRI scan, revealed right shoulder DJD, impingement and arthrosis. He further related that appellant underwent right shoulder surgery on

December 23, 2016 and was told that appellant would need future shoulder replacement surgery. Dr. Chao indicated that appellant acknowledged preexisting right shoulder arthritis; however, he opined that the right elbow work injury caused a temporary aggravation of the right shoulder preexisting arthritis and limited use of the right elbow caused aggravation of the right shoulder arthritis. He opined that appellant's "[r]ight shoulder arthritis was likely aggravated by the work injury to the [r]ight elbow." Dr. Chao further opined that appellant was no longer able to perform his duties as a police officer or any similar job and the condition was permanent.

On March 18, 2019 OWCP received treatment notes from Dr. Chao dated from 2016 to 2019. In a November 29, 2017 report, Dr. Chao indicated that the right elbow condition was work related and the preexisting arthritis of the right shoulder was aggravated by the elbow condition. In a March 11, 2019 report, he opined that "the right shoulder injury is related to the right elbow as the elbow limitations aggravated the right shoulder, extended right shoulder issues required overuse of the right shoulder over a 1.5 year period of time." Dr. Chao explained that appellant's previous degenerative osteoarthritis in the right shoulder was exacerbated by the work-related injury to his right elbow due to overcompensation which led to a "frozen shoulder." He opined, "To a reasonable degree of medical certainty, the overuse of the right shoulder due to compensation for the July 27, 2015 right elbow injury leading to further the DJD on [appellant's] right shoulder and neck."

On March 19, 2019 appellant filed a claim for compensation (Form CA-7) for leave without pay, night and Sunday differential pay from October 1, 2017 to November 30, 2018. The employing establishment indicated that he requested time off for personal reasons, effective October 1, 2017.

On March 19, 2019 appellant filed a Form CA-7 claiming disability for the period November 30 to December 27, 2018. The employing establishment contended that he was separated due to disability retirement as of August 17, 2018.

In a letter dated March 28, 2019, OWCP noted that it had received appellant's March 19, 2019 Form CA-7 and explained that the evidence of record indicated that he had requested leave without pay from September 30 to November 11, 2017 to take care of his father's estate. It requested additional evidence to establish disability from work during the period claimed and afforded appellant 30 days to respond.

In an April 2, 2019 letter, OWCP requested that appellant submit additional evidence in support of the expansion of the acceptance of his claim to include right shoulder conditions. It advised that he should obtain a physician's opinion supported by a medical explanation as to how the claimed consequential injury was related to the accepted work-related conditions. OWCP afforded appellant 30 days to respond.

In a report dated April 5, 2019, Dr. Chao noted that appellant was seen for follow-up of impingement syndrome of the shoulder region, biceps tendinitis, and osteoarthritis of the acromioclavicular joint. He indicated that appellant's conditions included osteoarthritis of acromioclavicular joint, right; osteoarthritis of glenohumeral joint, on the right; disorder of rotator cuff on the right; and biceps tendinitis on the right. Dr. Chao noted that appellant also presented for right elbow follow up and that appellant wanted to have the elbow added to his claim so he could continue with therapy. He diagnosed impingement syndrome of the shoulder region on the right and osteoarthritis of the glenohumeral joint, primary osteoarthritis of the right shoulder, and

lateral epicondylitis of the right elbow. Dr. Chao explained that appellant had documented previous degenerative osteoarthritis in his right shoulder which was exacerbated by the work-related injury to the right elbow due to overcompensation use of the right shoulder caused by the right elbow condition. He opined “to a reasonable degree of medical certainty, the overuse of the right shoulder due to compensation for the [July 27, 2015] right elbow injury leading to further the DJD on the right shoulder, prior to elbow injury, the shoulder symptoms were minor. In my opinion, the deer incident played little or no role in the shoulder as examination and imaging post incident was negative.” Dr. Chao explained that appellant was unable to work due to elbow, shoulder, and cervical issues and the need for medication for pain and muscle relaxant.

By decision dated June 11, 2019, OWCP denied expansion of the acceptance of the claim for a consequential injury, finding that the evidence of record did not demonstrate weakness or impairment caused by the accepted work-related injury or an aggravation of the original injury. On June 17, 2019 counsel for appellant requested a hearing before a representative of OWCP’s Branch of Hearings and Review. In a letter dated October 8, 2019, counsel requested a review of the written record in lieu of an oral hearing.

By decision dated November 26, 2019 OWCP’s hearing representative vacated the June 11, 2019 decision, finding that the medical evidence of record required further development. The hearing representative explained that, while the opinion of the treating physician, Dr. Chao, was insufficiently rationalized to establish that appellant sustained an employment-related aggravation of his preexisting right shoulder cervical conditions, the treating physician provided an uncontroverted opinion that required further development and referral for a second opinion examination.

On December 23, 2019 OWCP referred appellant for a second opinion examination with Dr. William P. Curran, a Board-certified orthopedic surgeon, for an assessment of the work-related conditions, whether expansion to include additional conditions was warranted, the extent of disability, and appropriate treatment.

In a January 27, 2020 report, Dr. Curran noted appellant’s history of injury and medical treatment. He noted the accepted conditions of right elbow lateral epicondylitis and lesion of radial nerve, upper limb, and a May 18, 2016 right lateral epicondylectomy, extensor tendon release, and debridement. Dr. Curran noted that on October 19, 2016 Dr. Chao indicated that appellant was dragging a deer and experienced right shoulder pain the following day. He related that on October 9, 2016 Dr. Chao evaluated the right shoulder, obtained radiographs, and found significant acromioclavicular joint disease and type III acromioclavicular spur. Dr. Curran also noted that Dr. Chao indicated that appellant had right shoulder surgery on December 23, 2016 with an arthroscopic-assisted removal of loose body, chondroplasty, labral debridement, subacromial decompression with coracoacromial ligament resection, bursectomy, and distal clavicectomy. He also noted that Dr. Chao continued to follow appellant for right shoulder complaints through April 22, 2019. Dr. Curran indicated that appellant was no longer employed as a police officer. He examined appellant and diagnosed right lateral epicondylitis, impingement syndrome of right shoulder, osteoarthritis of the right shoulder joint, and disorder of the right rotator cuff. Dr. Curran opined that the shoulder diagnoses were not causally related to the July 27, 2015 work injury. He explained that there was no evidence that appellant sought or received medical care to his right shoulder from July 27, 2015 through October 19, 2016, and advised that, based upon his 40 plus years as a treating orthopedic surgeon, his education, and training, in the event that appellant “had injured his right shoulder on July 27, 2015, as he did his right elbow, I would have expected right

shoulder complaints to be recorded, diagnosed, and treated within 48 to 72 hours from the date of the incident. Therefore, any treatment given to [appellant]’s right shoulder would not be causally related to a July 27, 2015, incident.” Dr. Curran further opined that appellant was temporarily totally disabled from employment due to his right elbow condition from May 18 through December 15, 2016, and that appellant was currently partially disabled due to the right elbow. He completed a work capacity evaluation (Form OWCP-5c) noting that appellant had partial disability due to weakness of grip strength testing and limitation of right elbow flexion and extension. Dr. Curran opined that appellant was not a candidate for a functional capacity evaluation and listed the restrictions on the Form OWCP-5c as sedentary and permanent with limitations of no more than 6 hours of twisting for the right elbow, no more than 6 hours of repetitive movements of the right wrist and elbow, no more than 6 hours of pushing, pulling, and lifting on the right, and no more than 30 pounds, with 10-minute breaks every hour. He also noted that right elbow support was needed.

By decision dated February 14, 2020, OWCP denied expansion of the acceptance of the claim to include a consequential injury, as the evidence did not demonstrate that the weakness or impairment was caused by the accepted work-related injury or illness, an aggravation of the original injury, or a new work injury.

By separate decision also dated February 14, 2020, OWCP denied appellant’s claim for disability for the period October 1, 2017 through December 27, 2018. It found that the evidence supported that he was not working for personal reasons and/or medical reasons not related to his accepted conditions.

LEGAL PRECEDENT -- ISSUE 1

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁴

Causal relationship is a medical question that requires medical opinion evidence to resolve the issue.⁵ The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the accepted employment injury.⁶

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to a claimant’s own intentional misconduct.⁷ Thus, a subsequent

⁴ See *R.R.*, Docket No. 19-0086 (issued February 10, 2021); *K.T.*, Docket No. 19-1718 (issued April 7, 2020); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁵ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

⁶ *Id.*

⁷ See *S.M.*, Docket No. 19-0397 (issued August 7, 2019); *Mary Poller*, 55 ECAB 483, 487 (2004).

injury, be it an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural consequence of a compensable primary injury.⁸

ANALYSIS -- ISSUE 1

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

Dr. Chao, opined in several reports that he believed that appellant's right shoulder conditions were aggravated by overcompensation to protect his right elbow from further injury. He indicated, in a November 29, 2017 report, that appellant's work-related injury to his right elbow caused overcompensation of appellant's right shoulder which led to a "frozen shoulder." Dr. Chao elaborated in March 11 and April 5, 2019 reports, that appellant's right shoulder condition was related to the right elbow as the elbow limitations required overuse of the right shoulder over a 1.5 year period of time.

Based upon Dr. Chao's opinion that appellant's right shoulder conditions were a consequence of his right elbow injury and appellant's request for expansion of his claim, OWCP referred appellant to Dr. Curran for a second opinion evaluation. However, OWCP did not specifically request that Dr. Curran address whether appellant's right shoulder conditions were consequential to the right elbow injury. Dr. Curran did not address this aspect of the claim, but rather limited his opinion to a finding that the employment injury of July 27, 2015 did not cause appellant's right shoulder conditions as appellant did not seek medical treatment for his right shoulder condition until October 19, 2016. He further opined that if appellant had injured his right shoulder on July 27, 2015 he would have expected treatment within 48 to 72 hours of injury.

It is well established that proceedings under FECA are not adversarial in nature, and while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.⁹ It has an obligation to see that justice is done.¹⁰ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹¹ In this case, Dr. Curran was not asked to address whether appellant's right shoulder condition could have been a consequence of his right elbow condition. Due to the deficiencies in Dr. Curran's report, OWCP should have sought clarification or referred appellant for another second opinion evaluation.¹²

The case shall therefore be remanded for further development. On remand, OWCP shall refer appellant, together with an updated statement of accepted facts (SOAF) and a list of specific questions, to Dr. Curran for a supplemental opinion as to whether appellant developed a consequential right shoulder condition causally related to his accepted right elbow condition. If

⁸ *A.T.*, Docket No. 18-1717 (issued May 10, 2019); *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139 (2001).

⁹ *See, e.g., M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

¹⁰ *See A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

¹¹ *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

¹² *D.G.*, Docket No. 20-1183 (issued May 26, 2021); *M.S.*, Docket No. 19-0282 (issued August 2, 2019); *V.H.*, Docket No. 14-0433 (issued July 3, 2014).

Dr. Curran is unavailable or unwilling to render a supplemental opinion, then OWCP shall refer appellant, together with a SOAF and the medical records, to another second opinion physician in the appropriate field of medicine for a rationalized opinion on the issue to be resolved.¹³ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹⁴

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2020 decisions are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 6, 2021
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

¹³ *R.M.*, Docket No. 20-0486 (issued June 9, 2021); *M.T.*, Docket No. 20-0321 (issued April 26, 2021).

¹⁴ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.