

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

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L.S., Appellant)	
)	
and)	Docket No. 21-0694
)	Issued: October 15, 2021
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
Calexico, CA, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 29, 2021 appellant filed a timely appeal from a January 28, 2021 merit decision and a March 23, 2021 nonmerit 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.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a diagnosed medical condition causally related to the accepted factors of her federal employment; and (2) whether OWCP properly denied appellant's request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124(b).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances of the case as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On November 28, 2019 appellant, then a 47-year-old supervisory customs and border protection officer, filed an occupational disease claim (Form CA-2) alleging that she developed left shoulder pain due to factors of her federal employment. She noted that she had surgery on her right shoulder on June 13, 2018 and could only use her left arm and experienced pain due to overcompensating with the left arm. Appellant became aware of her condition on October 1, 2018 and realized that it was caused or aggravated by her federal employment on November 1, 2018.

Appellant filed a prior traumatic injury claim (Form CA-1) on August 17, 2017 under OWCP File No. xxxxxx197 alleging that she injured her right shoulder on August 14, 2017 when she was cleaning and moving boxes while in the performance of duty. On November 29, 2017 OWCP accepted her claim for impingement syndrome of the right shoulder, and strain of muscle, fascia, and tendon of other parts of the biceps, right arm, initial encounter. On June 13, 2018 Dr. James McSweeney, a Board-certified orthopedist, performed an authorized arthroscopy of the right shoulder and diagnosed full-thickness anterior tear supraspinatus tendon right shoulder, impingement syndrome right shoulder, and superior labrum anterior and posterior II lesion, right shoulder.³

In a December 13, 2019 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed to establish her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence. No response was received.

By decision dated January 15, 2020, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish that she sustained an injury in the performance of duty, as alleged. It noted that, as she did not respond to its questionnaire, it was unable to determine the factual component of her claim.

OWCP received additional evidence. Appellant was treated by Dr. McSweeney on February 5, 2019 for a permanent and stationary evaluation with regard to her right shoulder injury. Dr. McSweeney noted that she sustained a work-related injury to her right shoulder as a result of lifting boxes at work. He also reported that on June 13, 2018 he performed arthroscopic surgery and indicated that appellant was currently stable, returning to work regular duty 12-hour days. Dr. McSweeney indicated that she reported developing a recent onset of left shoulder pain without any specific trauma. He diagnosed right shoulder impingement syndrome, full thickness supraspinatus tear, superior labrum from anterior to posterior tear lesion, and status post right shoulder arthroscopy. Dr. McSweeney opined that appellant was permanent and stationary. He noted that she sustained 10 percent permanent impairment of the right upper extremity.

² *Order Remanding Case*, Docket No. 20-1111 (issued December 7, 2020).

³ On June 7, 2019 OWCP granted appellant a schedule award for 10 percent permanent impairment of the right upper extremity. The award ran for 28.8 weeks from February 6 through September 12, 2019.

Dr. McSweeney evaluated appellant on February 11, 2020 for left shoulder pain. He noted a history of her right shoulder injury occurring at work as a result of lifting boxes. Dr. McSweeney noted that appellant had right shoulder arthroscopic surgery and ultimately went back to work regular duty and was released from his care on February 5, 2019. Appellant reported left shoulder pain with a gradual onset in October 2018 that progressively increased. Findings on examination revealed tenderness with palpation over the bicipital groove and anterior leading edge of the humeral footprint near the suprascapular insertion, limited range of motion, positive Hawkins sign, and positive Neer impingement sign. Dr. McSweeney diagnosed status post industrial related right shoulder injury on August 14, 2017 status post arthroscopy right shoulder June 13, 2018, permanent and stationary rating of right shoulder February 5, 2019. He further diagnosed an industrial-related overcompensation injury left shoulder explaining that it was secondary to a specific injury of the right shoulder dated August 14, 2017.

On February 18, 2020 appellant requested reconsideration.

By decision dated April 29, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On May 6, 2020 appellant appealed her claim to the Board. By order dated December 7, 2020, the Board set aside OWCP's January 15 and April 29, 2020 decisions and remanded the case with instructions to administratively combine OWCP File Nos. xxxxxx197 and xxxxxx931.⁴ Thereafter, OWCP administratively combined the files with File No. xxxxxx197 serving as the master file

By decision dated January 28, 2021, OWCP found that appellant had established that the employment incident occurred as alleged, but denied the claim, finding that she had not submitted medical evidence containing a diagnosis in connection with the accepted factors of federal employment, and thus had not met the requirements to establish an injury as defined by FECA.

In an appeal request form dated and received on March 1, 2021 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

In a March 1, 2021 report, Dr. McSweeney described the mechanism of injury noting that appellant previously injured the right shoulder that required complex surgery followed by a period of immobilization. As a result of the right shoulder condition appellant sustained a compensatory injury to the left shoulder. Dr. McSweeney opined that she sustained an industrial injury to the left shoulder on October 1, 2018 and diagnosed a left shoulder rotator cuff strain and possible rotator cuff injury.

By decision dated March 23, 2021, OWCP denied appellant's request for a review of the written record as untimely filed, finding that her request was not made within 30 days of the January 28, 2021 OWCP decision as it was dated and received on March 1, 2021. It further exercised discretion and determined that the issue in this case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence.

⁴ *Id.*

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁵ 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 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 question that requires rationalized medical opinion evidence to resolve the issue.¹⁰ The opinion of the physician must be based on a complete and accurate factual and medical background of the claimant, 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 the specific employment factors identified by the claimant.¹¹ Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.¹²

ANALYSIS -- ISSUE 1

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

In support of her claim, appellant submitted a February 11, 2020 report from Dr. McSweeney who treated her for left shoulder pain. In this report, Dr. McSweeney diagnosed

⁵ *Supra* note 1.

⁶ *J.W.*, Docket No. 18-0678 (issued March 3, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *J.S.*, Docket No. 18-0657 (issued February 26, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ *L.J.*, Docket No. 19-1343 (issued February 26, 2020); *R.R.*, Docket No. 18-0914 (issued February 24, 2020); *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 *J.F.*, Docket No. 18-0492 (issued January 16, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹¹ *A.M.*, Docket No. 18-0562 (issued January 23, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

¹² *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *Gary L. Fowler*, 45 ECAB 365 (1994).

status post industrial related right shoulder injury on August 14, 2017, status post arthroscopy right shoulder June 13, 2018, permanent and stationary rating of right shoulder February 5, 2019. He further diagnosed an industrial-related overcompensation injury left shoulder explaining that it was secondary to a specific injury of the right shoulder dated August 14, 2017. The Board finds that this report establishes a medical diagnosis of an industrial-related overcompensation injury of the left shoulder secondary to a specific injury of the right shoulder dated August 14, 2017.

As the medical evidence of record establishes a diagnosed condition, the case must be remanded for consideration of the medical evidence with regard to the issue of causal relationship. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision with regard to whether appellant has met her burden of proof to establish a diagnosed medical condition causally related to the accepted factors of her federal employment.¹³

ORDER

IT IS HEREBY ORDERED THAT the March 23 and January 28, 2021 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: October 15, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹³ In light of the disposition of Issue 1, Issue 2 is rendered moot.