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

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| **M.T., Appellant** | ) | |
| **and** | ) | **Docket No. 22-0744** |
| | ) | **Issued: November 22, 2022** |
| **DEPARTMENT OF HEALTH AND HUMAN SERVICES, INDIAN HEALTH SERVICE, Aberdeen, SD, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

### ***JURISDICTION***

On April 15, 2022 appellant filed a timely appeal from a March 1, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees'

[1] The Board notes that, following appellant's April 15, 2022 appeal to the Board, by decision dated July 13, 2022, OWCP reviewed appellant's April 15, 2022 reconsideration request received on April 19, 2022, conducted a merit review and denied modification. The Board and OWCP may not exercise simultaneous jurisdiction over the same issues in a case on appeal. 20 C.F.R. § 501.2(c)(3). Following the docketing of an appeal before the Board, OWCP does not retain jurisdiction to render a further decision regarding the issue(s) on appeal until after the Board relinquishes jurisdiction. *Id*. Therefore, the subsequent decision of OWCP dated July 13, 2022 is null and void as the Board and OWCP may not simultaneously have jurisdiction over the same issue. *See* 20 C.F.R. § 10.626; *see also M.J.*, Docket No. 20-1067 (issued December 23, 2020); *A.C.*, Docket No. 18-1730 (issued July 23, 2019); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

## ***ISSUE***

The issue is whether appellant has met her burden of proof to establish a medical condition causally related to the accepted August 9, 2021 employment incident.

## ***FACTUAL HISTORY***

On August 10, 2021 appellant, then a 58-year-old diagnostic radiology technician, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2021 she injured her right arm and shoulder while assisting a patient onto an examination table while in the performance of duty. She reported that the patient stood up to move to the examination table, complained of dizziness, started to fall and she reached out to catch the patient to place her on the examination table. Appellant did not immediately stop work.

On October 19, 2021 Dr. Chad Kurtenbach, a Board-certified orthopedist, diagnosed right shoulder pain, unspecified chronicity, and referred appellant for physical therapy. He returned her to work without restrictions.

Rebecca Rakowicz, a nurse practitioner, also treated appellant on October 19, 2021 for a right shoulder injury sustained at work on August 9, 2021. Her history was significant for a rotator cuff repair seven years prior. Physical examination revealed tenderness with palpation of proximal biceps. Ms. Rakowicz diagnosed rotator cuff tendinopathy, improving.

On October 20, 2021 appellant filed a claim for compensation (Form CA-7) for leave buyback due to disability from work on October 19, 2021.

In a November 1, 2021 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, including a physician's report explaining the causal relationship between her claimed condition and specific work factors. OWCP afforded appellant 30 days to submit the requested evidence. No response was received.

By decision dated December 3, 2021, OWCP accepted that the August 9, 2021 employment incident occurred as alleged, but denied the claim finding that the medical evidence of record was insufficient to establish a medical diagnosis in connection with the accepted August 9, 2021 employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that, following the March 1, 2022 decision, appellant submitted additional evidence to OWCP. 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. 20 C.F.R. § 501.2(c)(1). Evidence not before OWCP will not be considered by the Board for the first time on appeal." *Id*.

In a September 9, 2021 report, Dr. Kurtenbach opined that appellant aggravated her right shoulder condition at work on August 9, 2021. He diagnosed status-post right shoulder arthroscopy with rotator cuff repair and right shoulder sprain/strain. Dr. Kurtenbach administered an intra-articular injection and returned appellant to work with restrictions on heavy lifting and repetitive overhead activity. In a note dated September 9, 2021, he diagnosed right shoulder pain, unspecified chronicity and returned her to work without restrictions. Similarly, in a note dated September 13, 2021, Dr. Kurtenbach reported treating appellant on September 9, 2021 and administered a right shoulder intra-articular injection. On October 19, 2021 he diagnosed status-post right shoulder arthroscopy with rotator cuff repair and right shoulder sprain/strain, improving. Appellant reported significant improvement in right shoulder pain and function. Dr. Kurtenbach referred her for physical therapy.

An x-ray of the right shoulder dated September 9, 2021 revealed no acute findings, acromioclavicular arthrosis, and mild glenohumeral osteoarthritis.

In a statement dated December 13, 2021 appellant noted that medical evidence was submitted by her physician to OWCP on November 4, 2021. She was resubmitting the requested medical evidence again electronically.

On December 13, 2021 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated March 1, 2022, OWCP's hearing representative modified the December 3, 2021 decision to find that appellant had established a specific diagnosis in connection with the accepted August 9, 2021 employment incident. However, the claim remained denied as the medical evidence of record was insufficiently rationalized to establish causal relationship between the diagnosed medical condition and the accepted August 9, 2021 employment incident.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[4] 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,[5] 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.[6] 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.[7]

[4] *Id*.

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

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

[7] *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).

To determine if an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. 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 at the time, place, and in the manner alleged.[8] The second component is whether the employment incident caused a personal injury.[9]

Rationalized medical opinion evidence is required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, 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 incident.[10] 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.[11]

## ***ANALYSIS***

The Board finds that appellant has not met her burden of proof to establish a medical condition causally related to the accepted August 9, 2021 employment incident.

On September 9 and October 19, 2021, Dr. Kurtenbach diagnosed right shoulder pain, unspecified chronicity and returned appellant to work without restrictions. On September 13, 2021 he noted that she received a right shoulder intra-articular injection on September 9, 2021. Similarly, on October 19, 2021, Dr. Kurtenbach diagnosed status-post right shoulder arthroscopy with rotator cuff repair and right shoulder sprain/strain, improving. However, he did not specifically relate the diagnosed conditions to the accepted August 9, 2021 employment incident. The Board has held that medical evidence that does not offer an opinion regarding the cause of a diagnosed condition or disability is of no probative value on the issue of causal relationship.[12] Therefore, the Board finds that Dr. Kurtenbach's medical reports are insufficient to meet appellant's burden of proof.

Appellant submitted a September 9, 2021 report from Dr. Kurtenbach who indicated that she aggravated her right shoulder at work on August 9, 2021 and diagnosed status-post right shoulder arthroscopy with rotator cuff repair and right shoulder sprain/strain. While Dr. Kurtenbach indicated that her aggravation of her right shoulder condition was work related, he failed to provide medical rationale explaining the basis of his opinion. Without explaining, physiologically, how the specific employment incident or employment factors caused or

[8] *T.M.*, Docket No. 19-0380 (issued June 26, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[9] *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

[10] *S.S.*, Docket No. 18-1488 (issued March 11, 2019).

[11] *J.L.*, Docket No. 18-1804 (issued April 12, 2019).

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

aggravated the diagnosed condition, his opinions on causal relationship are of limited probative value and insufficient to establish her claim.[13]

Appellant submitted a report from Ms. Rakowicz, a nurse practitioner. However, certain healthcare providers such as physician assistants and nurse practitioners are not considered "physician[s]" as defined under FECA.[14] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[15]

Appellant also submitted an x-ray of the right shoulder dated September 9, 2021. The Board has held that diagnostic studies, standing alone, lack probative value on the issue of causal relationship as they do not provide an opinion as to whether the employment incident caused any of the diagnosed conditions.[16] This evidence is therefore insufficient to establish appellant's claim.

As the medical evidence of record is insufficient to establish causal relationship between a medical condition and the accepted August 9, 2021 employment incident, the Board finds that appellant has not met her 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 her burden of proof to establish a medical condition causally related to the accepted August 9, 2021 employment incident.

[13] *Id*.

[14] 5 U.S.C. § 8102(2).

[14] *Id*. at section 8102(2) of FECA, which 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." 20 C.F.R. § 10.5(t). *See* 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); *see also J.D.*, Docket No. 21-0164 (issued June 15, 2021) (nurse practitioners are not physicians as defined under FECA); *Paul Foster*, 56 ECAB 208 (2004) (where the Board found that a nurse practitioner is not considered a physician under FECA).

[15] *Id*.

[16] *C.B.*, Docket No. 20-0464 (issued July 21, 2020).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 1, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 22, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board