

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

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**D.B., Appellant** )

**and** )

**DEPARTMENT OF THE NAVY, NAVAL )  
UNDERSEA WARFARE CENTER DIVISION )  
NEWPORT, Newport, RI, Employer** )  
\_\_\_\_\_ )

**Docket No. 22-0915  
Issued: November 3, 2022**

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant,<sup>1</sup>*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On May 31, 2022 appellant filed a timely appeal from a March 22, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish right shoulder conditions causally related to the accepted February 11, 2021 employment incident.

## FACTUAL HISTORY

On March 15, 2021 appellant, then a 64-year-old electronics technician, filed a traumatic injury claim (Form CA-1) alleging that on February 11, 2021 he injured his right shoulder while removing shock mounts from the bottom of an electronics unit while in the performance of duty. He explained that he was working in a tight space that required a long reach in order to remove bolts and, thereafter, he was unable to lift his right arm above his shoulder without extreme pain. Appellant did not stop work.

In a February 22, 2021 email, appellant reiterated that he injured his right shoulder on February 11, 2021 while working in a tight and limited space removing shock mounts from the bottom of an electronics unit. He alleged that witnesses were present and that he subsequently reported the injury.

A March 15, 2021 witness statement from J.G., a coworker, related that he was working on a project supporting the installation of equipment when appellant injured his shoulder. J.G. noted that appellant had no prior issues performing activities, but his range of motion became limited after the incident.

Visit notes from a March 16, 2021 encounter with Dr. Nicholas DeFusco, a Board-certified family practitioner, indicated that appellant presented with a right shoulder injury incurred on February 11, 2021 while removing stripped bolts from a confined space on a submarine. Appellant reported that he felt a sharp pain in his shoulder and continued to experience stiffness and an inability to raise his shoulder above his head. Dr. DeFusco diagnosed a tear of the right rotator cuff and recommended physical therapy, an orthopedic evaluation, and an x-ray.

A March 16, 2021 x-ray report signed by Dr. Bruce Reiner, a Board-certified radiologist, noted an impression of degenerative change in appellant's right shoulder. A letter dated March 16, 2021 from Dr. DeFusco indicated that he had examined appellant and recommended light-duty work with restrictions for the next month.

In visit notes of March 23, 2021, Dr. DeFusco diagnosed rotator cuff syndrome. In a referral order and physical therapy authorization of even date, he issued a referral for occupational therapy and treatment of appellant's right shoulder.

In a March 25, 2021 referral and medical authorization request, Dr. DeFusco requested approval of a referral to an orthopedic specialist for a right shoulder rotator cuff tear.

In an April 8, 2021 letter, Dr. DeFusco held appellant off work pending a magnetic resonance imaging (MRI) scan.

In an April 12, 2021 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed to establish his claim

and provided a factual questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP received an undated email from D.G., an on-site installation coordinator, relating that on February 12, 2021 appellant reported injuring himself while working aboard a submarine on February 11, 2021. D.G. related that appellant became limited in the work he could perform and returned to his command on March 11, 2021.

On March 23, 2021 Kimberly Green, an occupational therapist, evaluated appellant for right shoulder pain related to a February 11, 2021 injury. An unsigned and undated occupational therapy note documented tenderness in appellant's supraspinatus and subacromial bursa and mild tenderness of the infraspinatus on physical examination, and indicated that he received a right subacromial corticosteroid injection.

Appellant was treated on April 6 and 8, 2021 by Melissa Gonsalves, an occupational therapist. Ms. Gonsalves noted that he had improvement with the steroid injection, but continued to experience pain and reported that physical therapy had not improved his condition.

On April 8, 2021 Dr. Roger Pocze, a Board-certified orthopedic surgeon, examined appellant and diagnosed a full-thickness right rotator cuff tear or rupture. He noted that appellant had no improvement from the steroid injection and continued to experience weakness and limited range of motion

Dr. Pocze, in an April 15, 2021 attending physician's report (Form CA-20), noted a history of injury of a sudden onset of shoulder pain on February 11, 2021 while working on a submarine and pulling a machine apart within a constricted space. He diagnosed tendinitis of the right rotator cuff and opined by checking a box marked "Yes" that the injury was work related.

Appellant underwent physical therapy treatment on April 20 and 22, 2021

In an April 22, 2021 response to OWCP's development questionnaire, appellant asserted that, while working aboard a submarine, he needed to disassemble an electronics unit and access a cross-threaded bolt that had become stuck. The bolts holding the shock mounts were tight and the effort to remove them caused an injury to his right shoulder, causing him difficulty in raising his shoulder while getting dressed the following day. Appellant asserted that he notified his supervisor, D.G., the day after the injury and followed up with a telephone call to his direct supervisor.

In a May 12, 2021 letter, the employing establishment indicated that it received timely notification that appellant sustained an injury on February 11, 2021 and it did not contest the fact that the injury was sustained while at work. It related that he was in travel status at the time and, therefore, he waited until his return to seek medical treatment.

By decision dated May 12, 2021, OWCP accepted that the February 11, 2021 employment incident occurred as alleged. However, it denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish a causal relationship between his diagnosed right shoulder condition and the accepted February 11, 2021 employment incident.

On May 13, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 11, 2021.

Appellant continued to submit evidence including a May 20, 2021 letter from Dr. DeFusco, noting that he did not have shoulder issues prior to his February 11, 2021 injury.

In a May 24, 2021 letter, Dr. Pocze noted that appellant injured his shoulder while working on a machine part in a submarine in a constricted space. He related that appellant's physical examination demonstrated concern for a rotator cuff tear and opined that, in his professional opinion, the injury was work related.

An MRI scan dated May 26, 2021 and reviewed by Dr. Ketan Patel, a Board-certified radiologist, noted a finding of right rotator cuff tendinopathy, a partial-thickness articular surface insertional right supraspinatus tendon tear, a partial thickness insertional right subscapularis tendon tear, and mild right acromioclavicular joint osteoarthritis.

On June 2, 2021 Dr. Chad Beattie, a Board-certified family practitioner, administered an injection and performed a 2-D ultrasound examination, noting a small joint effusion of the right shoulder. He assessed right rotator cuff tendinopathy with articular surface partial tears, glenohumeral joint effusion, and glenohumeral degenerative joint disease.

On June 2, 2021 Dr. Pocze reiterated his opinion that appellant's injury was work related. He further noted that the May 26, 2021 MRI scan demonstrated the need for total shoulder replacement surgery. Dr. Pocze restricted appellant from use of his right shoulder to prevent further damage.

In June 4, 2021 visit notes, Dr. Pocze provided diagnoses of a partial thickness right rotator cuff tear, right glenoid labrum tear, biceps tendinitis, and osteoarthritis of right glenohumeral joint.

On July 14, 2021 Dr. Matthew Kippe, a Board-certified orthopedic surgeon, examined appellant and concluded that he had failed extensive conservative measures, including cortisone injections and physical therapy. Appellant consented to surgical intervention.

In a June 15, 2021 letter, Dr. Pocze released appellant to light-duty work with restrictions.

On August 23, 2021 OWCP received an undated photograph of an electronics work area.

By decision dated October 25, 2021, OWCP's hearing representative affirmed OWCP's May 12, 2021 decision.

On December 22, 2021 appellant, through counsel, requested reconsideration.

OWCP received additional medical evidence. In a December 14, 2021 report, Dr. Sami Moufawad, a Board-certified physiatrist, noted that he examined appellant *via* secure audiovisual connection. He discussed appellant's work duties and the history of injury that on February 11, 2021 appellant had extended his arm into an electronics unit to remove a jammed bolt and felt a pull in his right shoulder, which caused right shoulder and arm pain with limited range of motion. Dr. Moufawad noted that he had reviewed the medical evidence of record and diagnosed a superior

glenoid labral tear of the right shoulder, incomplete right rotator cuff tear, aggravation of right shoulder osteoarthritis, and right biceps tendinitis.

Dr. Moufawad explained that with repetitive motions, the rotator cuff muscles become tired and begin to tear, causing movement of the humeral head and subsequent impingement against the labrum, which will also tear and lead to erosion of the cartilage and progression to arthritis. He opined that appellant likely had preexisting changes in his shoulder joint, including tears of the rotator cuff and arthritis as shown on the May 26, 2021 MRI scan, but he remained asymptomatic until the February 11, 2021 employment incident permanently aggravated his condition. Dr. Moufawad explained that appellant's shoulder joint was at a mechanical disadvantage and his position placed a high amount of torque (150 to 175 pounds) on his shoulder joint, causing the rotator cuff muscle to fail to keep the humeral head contained in the glenoid cavity. He found that this would have led to further injury and tearing of the rotator cuff muscle, further injury of the glenoid labrum, as well as aggravation of the tendinitis of the biceps tendon and aggravation of the arthritis of the shoulder joint. Dr. Moufawad concluded that, if not for the February 11, 2021 incident, appellant would have likely remained asymptomatic. He explained that his opinions were based on the described mechanism of injury, the clinical progress provided by appellant, and his review of the medical records and clinical observations during the audiovisual interview.

By decision dated March 22, 2022, OWCP denied modification of the October 25, 2021 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> 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,<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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. There are two components involved in establishing fact of injury. The first component is whether he or she actually experienced the employment incident at the time, place, and in the manner alleged.

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<sup>3</sup> *Id.*

<sup>4</sup> *F.H.*, Docket No.18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>6</sup> *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.<sup>7</sup>

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.<sup>8</sup> 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 the specific employment incident identified by the claimant.<sup>9</sup>

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship, therefore, involves aggravation, acceleration or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.<sup>10</sup>

### ANALYSIS

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

In his December 14, 2021 report, Dr. Moufawad conducted an audiovisual examination, reviewed the medical evidence of record, and diagnosed a superior glenoid labral tear of the right shoulder, incomplete right rotator cuff tear, aggravation of right shoulder osteoarthritis, and right biceps tendinitis. He opined that the accepted February 11, 2021 employment incident, which resulted in an excessive amount of torque placed on appellant's shoulder while working in a confined space, aggravated his preexisting right shoulder conditions, causing a tear in the right rotator cuff and progression of his arthritis.

The Board finds that Dr. Moufawad's December 14, 2021 report is sufficient to require further development of the medical evidence. Dr. Moufawad's report provided a pathophysiological explanation as to how the accepted February 11, 2021 employment incident caused the diagnosed right shoulder rotator cuff tear and progression of his preexisting arthritis. Dr. Moufawad's medical evidence provided a rational and logical opinion and is, therefore, sufficient to require further development of appellant's claim.<sup>11</sup>

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<sup>7</sup> *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>8</sup> *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>9</sup> *A.S.*, Docket No. 19-1955 (issued April 9, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *K.G.*, Docket No. 18-1598 (issued January 7, 2020); *M.S.*, Docket No. 19-0913 (issued November 25, 2019).

<sup>11</sup> *D.V.*, Docket No. 21-0383 (issued October 4, 2021); *K.S.*, Docket No. 19-0506 (issued July 23, 2019); *H.T.*, Docket No. 18-0979 (issued February 4, 2019); *D.W.*, Docket No. 17-1884 (issued November 8, 2018); *John J. Carlone*, *supra* note 7.

The Board notes that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While it is appellant's burden of proof to establish the claim, OWCP shares responsibility in the development of the evidence.<sup>12</sup> It has an obligation to see that justice is done.<sup>13</sup>

The Board will, therefore, remand the case to OWCP for further development of the medical evidence. On remand OWCP shall refer appellant, a statement of accepted facts (SOAF) and the medical evidence of record to a specialist in the appropriate field of medicine. The referral physician shall provide a rationalized opinion on whether the diagnosed conditions are causally related to the accepted employment incident. If the physician opines that the diagnosed conditions are not causally related, he or she must explain with rationale how or why his or her opinion differs from that of Dr. Moufawad. Following this and any further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim.

### CONCLUSION

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

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 22, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 3, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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