

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

C.C., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
IMMIGRATION AND CUSTOMS)
ENFORCEMENT, Rouses Point, NY, Employer)

Docket No. 22-0247
Issued: January 3, 2023

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
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 December 3, 2021 appellant, through counsel, filed a timely appeal from a November 5, 2021 merit decision 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.

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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a right upper extremity condition causally related to the accepted February 14, 2012 employment incident.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On November 25, 2012 appellant, then a 49-year-old special agent/criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that on February 14, 2012 he injured his right shoulder exercising at his home gym at 8:00 a.m. while in the performance of duty. On the claim form, his supervisor indicated that he was injured in the performance of duty and that his duty hours were from 8:00 a.m. until 5:30 p.m. OWCP assigned OWCP File No. xxxxxx028.

On March 16, 2012 Dr. Luke Oh, a Board-certified orthopedic surgeon, performed a right open rotator cuff repair of the supraspinatus and infraspinatus tendons, an open biceps tenodesis, and a subacromial decompression with lysis of adhesions and release of the rotator cuff. He indicated that appellant had a history of March 2010 and September 2011 right shoulder injuries and that a magnetic resonance imaging (MRI) scan in September 2011 revealed a full-thickness supraspinatus tear and new acute subscapularis tear. Dr. Oh noted that appellant had experienced increased right shoulder pain and weakness lifting weights and performing dips in January 2012.

By decision dated January 24, 2013, OWCP denied appellant's traumatic injury claim. It found he had not established that the alleged traumatic event had occurred as described. OWCP further found that appellant had not established a medical diagnosis in connection with the incident or that he was in the performance of duty at the alleged incident.

On February 1, 2013 Dr. Oh related that on March 15, 2012 he evaluated appellant for a January 2012 injury that occurred when he was "weightlifting and performed several sets of dips." He advised that due to the injury he had right shoulder surgery on March 16, 2012.

On February 14, 2013 appellant, through his attorney, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

On May 14, 2013 Dr. Oh indicated that appellant had sustained an injury on February 14, 2012 that occurred when he performed sets of dips while weightlifting. He related that his March 16, 2012 right shoulder surgery "was a direct causation of his injury sustained on February 14, 2012."

³ Docket No. 13-2177 (issued April 2, 2014); Docket No. 14-1800 (issued March 11, 2015); *Order Dismissing Appeal*, Docket No. 18-0775 (issued June 29, 2018); *Order Dismissing Appeal*, Docket No. 19-0284 (issued January 22, 2019); *Order Remanding Case*, Docket Nos. 19-1028 and 20-0975 (issued June 12, 2020); *Order Dismissing Appeal*, Docket No. 20-1632 (issued July 23, 2021).

By decision dated June 20, 2013, OWCP's hearing representative affirmed the January 24, 2013 decision. She found that appellant was injured prior to his work shift and at his home. The hearing representative noted that he was participating in a performance fitness programs (PFP) that was voluntary and not required by the employing establishment.

Appellant appealed to the Board. By decision dated April 2, 2014, the Board affirmed the June 20, 2013 decision.⁴ It found that appellant had not provided a statement from the employing establishment supporting that he was enrolled in a PFP or that he was injured while participating in a PFP.

On June 5, 2014 appellant, through counsel, requested reconsideration. By decision dated July 7, 2014, OWCP denied modification of its prior decision.⁵

Appellant appealed to the Board. By decision dated March 11, 2015, the Board affirmed the July 7, 2014 decision.⁶

Appellant requested reconsideration. By decision dated May 18, 2015, OWCP denied modification of its prior merit decision.⁷

On February 16, 2016 appellant filed an occupational disease claim (Form CA-2) alleging that he developed numbness and pain in his right hand, forearm, and elbow due to factors of his federal employment. OWCP assigned OWCP File No. xxxxxx515 and denied his occupational disease claim.

Electrodiagnostic testing performed on May 25, 2016 showed right chronic radiculopathy at C8 and mild, incidental bilateral median neuropathies of the wrist.

In a report dated February 26, 2017, Dr. Kevin P. McCullum, Board-certified in family practice, advised that he had initially evaluated appellant in February 2016 for pain and tingling in his right upper extremity. He noted that testing showed C8 radiculopathy and attributed his symptoms to repetitive computer work and firearm use.

By decision dated June 13, 2017, OWCP modified its May 18, 2015 decision. It found that appellant had submitted evidence supporting that he was enrolled in an approved PFP and thus had established that he was in the performance of duty at the time of the accepted February 14, 2012 employment incident. OWCP found, however, that the medical evidence was insufficient to establish that he sustained a medical condition as a result of the February 14, 2012 accepted work incident.

⁴ *Id.*

⁵ OWCP indicated that it had not reviewed the merits of appellant's claim; however, in its March 11, 2015 decision, the Board found that OWCP's July 7, 2014 decision was a decision on the merits.

⁶ *Supra* note 3.

⁷ By decision dated August 17, 2015, OWCP denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

In a report dated September 12, 2017, Dr. Oh evaluated appellant for right shoulder pain. He discussed his history of right shoulder surgery in 2012 and noted that diagnostic testing showed a supraspinatus full-thickness tear. Dr. Oh advised that appellant had fallen on June 6, 2017 injuring his left shoulder. He recommended right shoulder surgery.

On September 19, 2017 Dr. Oh related that appellant's injury to his right shoulder was "directly sustained while performing physical fitness exercises" in the employing establishment's PFP.

On October 26, 2017 appellant, through counsel, requested reconsideration.

By decision dated January 24, 2018, OWCP denied modification of its June 13, 2017 decision.⁸

In a report dated March 15, 2018, Dr. Steven A. Silver, a Board-certified orthopedic surgeon, advised that appellant had injured his right shoulder on February 14, 2012 when he was working at home and experienced "the sudden onset of severe pain in his right shoulder performing exercises." He also noted that he had injured his left shoulder when he fell in June 2017. Dr. Silver provided examination findings and diagnosed status post bilateral rotator cuff repairs with subacromial decompression and biceps tenodesis. He attributed appellant's right shoulder condition to his employment injury. Dr. Silver related, "At that time, he sustained an injury to his right shoulder as a result of lifting a heavy weight which caused the sudden rupture of his rotator cuff. It is my opinion that the mechanism of injury was sufficient to cause a rotator cuff tear. This is based on the fact that the tensile strength of the rotator cuff was not sufficient to bear the weight." He noted that appellant had no preexisting right shoulder condition. Dr. Silver further attributed appellant's June 6, 2017 left shoulder injury to a fall at work on that date.

On July 3, 2018 appellant, through counsel, requested reconsideration.

By decision dated September 28, 2018, OWCP denied modification of its January 24, 2018 decision.⁹ It noted that Dr. Oh had found that appellant had injured his right shoulder two times prior to the February 14, 2012 incident. OWCP thus found that Dr. Silver's opinion was not based on an accurate factual and medical history.

In an addendum dated December 10, 2018, Dr. Silver discussed appellant's history of a previous right shoulder injury in September 2011 and noted that an MRI scan showed a full-thickness rotator cuff tear. He advised that he had no loss of motion, required no medical intervention, and could perform his usual job duties until his February 14, 2012 injury. Dr. Silver related: "It is my opinion that [appellant's] injury on February 14, 2012 was an increase of his rotator cuff tear resulting in a surgical procedure. The mechanism of injury in which the occupational act occurred resulting in worsening, aggravating and intensifying the severity of the preexisting injury. The tensile strength of the rotator cuff was not sufficient to bear the forces

⁸ Appellant appealed to the Board. In an order dated June 29, 2018, the Board dismissed the appeal at his request. *See supra* note 3.

⁹ Appellant appealed to the Board. In an order dated January 22, 2019, the Board dismissed the appeal at his request. *See supra* note 3.

placed on it.” He opined that appellant’s right shoulder condition was causally related to his February 14, 2012 work injury. Dr. Silver advised, “While doing the dip exercise he put a good portion of his weight on his shoulder. Since his tissue had already been damaged and weakened his shoulder joint was not able to bear the load. This caused tearing of the tissue. The overload of forces caused tear of the tissue of his shoulder resulting in rotator cuff tear and biceps tendon tear.”

On January 23, 2019 appellant, through counsel, requested reconsideration.

By decision dated February 22, 2019, issued under OWCP File No. xxxxxx515, an OWCP hearing representative affirmed the denial of appellant’s occupational disease claim. The hearing representative instructed that OWCP administratively combine OWCP File No. xxxxxx028 and OWCP File No. xxxxxx515.

By decision dated March 15, 2019, OWCP denied modification of its September 28, 2018 decision.

Appellant appealed to the Board. In an order dated June 12, 2020, the Board set aside the February 22 and March 15, 2019 decisions.¹⁰ The Board noted that OWCP’s hearing representative had instructed OWCP to administratively combine OWCP File Nos. xxxxxx515 and xxxxxx028. The Board remanded the case for OWCP to combine the file numbers and issue a *de novo* decision.

By decision dated July 20, 2020, OWCP denied modification of its September 28, 2018 decision.

On July 24, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review.

By decision dated August 13, 2020, OWCP denied appellant’s request for a telephonic hearing under 5 U.S.C. § 8124(b) as it was made after he had requested reconsideration.¹¹

In a report dated June 8, 2021, Dr. Silver attributed appellant’s right rotator cuff and right biceps tendon tears to the February 14, 2012 employment incident. He opined that doing dip exercises had overloaded an already injured rotator cuff. Dr. Silver indicated that appellant had findings of effusion, synovitis, and pain and noted that an MRI scan in 2012 after the injury showed a tear of the biceps tendon which had not been present before his injury exercising and a worsened shoulder condition with full-thickness tears of the supraspinatus, subscapularis, and infraspinatus tendons. Dr. Silver related, “The downward force sustained during the exercise maneuver overwhelmed the load bearing capacity of the shoulder joint causing the soft tissue injury to the rotator cuff and the biceps tendon to tear. The tear in tissue also altered the mechanics of the shoulder and caused trauma to the shoulder joint.”

¹⁰ *Supra* note 3.

¹¹ Appellant appealed to the Board. In an order dated July 23, 2021, the Board dismissed the appeal at his request. *Supra* note 3.

On June 9, 2021 appellant, through counsel, requested reconsideration.

By decision dated November 5, 2021, OWCP denied modification of its July 20, 2020 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA¹² 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 filed within the applicable time limitation of FECA,¹³ that an injury was sustained while in the performance of duty as alleged; and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.¹⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.¹⁵

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.¹⁶ Generally, fact of injury consists of two components that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.¹⁷ Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.¹⁸

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹⁹ The opinion of the physician must be based upon a complete factual and medical background, must be one of reasonable medical certainty, and must be

¹² *Supra* note 2.

¹³ *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

¹⁴ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *R.C.*, 59 ECAB 427 (2008).

¹⁵ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

¹⁶ *S.S.*, Docket No. 18-1488 (issued March 11, 2019); *T.H.*, 59 ECAB 388 (2008).

¹⁷ *D.S.*, Docket No. 21-1315 (issued May 5, 2022); *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁸ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁹ *E.G.*, Docket No. 20-1184 (issued March 1, 2021); *T.H.*, 59 ECAB 388 (2008).

supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment incident.²⁰

ANALYSIS

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

On December 10, 2018 Dr. Silver noted that appellant had a history of a prior right shoulder injury in September 2011 that required no medical intervention or work restrictions. He related that on February 14, 2012 while doing dip exercises appellant had worsened his rotator cuff tear such that he required surgery. Dr. Silver opined that the exercises had overloaded the forces on the tear of the shoulder causing a rotator cuff and biceps tendon tear. In a June 8, 2021 report, he advised that an MRI scan obtained in 2012 after the injury showed a biceps tendon tear not present before his injury and a worsening shoulder condition with full-thickness tears of the supraspinatus, subscapularis, and infraspinatus tendons. Dr. Silver found that the downward force during exercising on February 14, 2012 had overwhelmed the load-bearing capacity of appellant's shoulder causing the rotator cuff and biceps tendons to tear.

The Board finds that Dr. Silver's reports are sufficient to require further development of the medical evidence. Dr. Silver provided a comprehensive understanding of the medical record and case history. His reports provide a pathophysiological explanation as to how the accepted February 14, 2012 employment incident worsened his preexisting shoulder condition and caused biceps and rotator cuff tears. There is no evidence of record contradicting Dr. Silver's opinion on causation.

The Board has long held that it is unnecessary that the evidence of record in a case be so conclusive as to suggest causal connection beyond all possible doubt.²¹ Rather, the evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound, and logical.²² The Board finds that Dr. Silver's opinion is rationalized and logical and is, therefore, sufficient to require further development of appellant's claim.²³

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

²⁰ *D.C.*, Docket No. 19-1093 (issued June 25, 2020); *see L.B.*, Docket No. 18-0533 (issued August 27, 2018).

²¹ *See T.G.*, Docket No. 21-0494 (issued May 23, 2022); *D.M.*, Docket No. 21-0908 (issued March 4, 2022).

²² *T.G.*, *id.*; *C.S.*, Docket No. 19-1809 (issued July 29, 2020); *W.M.*, Docket No. 17-1244 (issued November 7, 2017).

²³ *See J.H.*, Docket No. 18-1637 (issued January 29, 2020); *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

responsibility in the development of the evidence.²⁴ OWCP has an obligation to see that justice is done.²⁵

On remand OWCP shall prepare a statement of accepted facts and refer appellant to a specialist in the appropriate field of medicine, along with the case record and the statement of accepted facts, for a reasoned opinion regarding whether he sustained a right upper extremity condition causally related to or aggravated by the February 14, 2012 accepted employment incident. If the second opinion physician disagrees with the opinion of Dr. Silver, he or she must provide a fully rationalized explanation of why the accepted employment incident was insufficient to have caused or aggravated appellant's condition. After this and other such further development of the case record as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

²⁴ *Id.*; see also *A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

²⁵ See *B.C.*, Docket No. 15-1853 (issued January 19, 2016); *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2021 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: January 3, 2023
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