

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

D.N., Appellant	)	
	)	
and	)	Docket No. 22-0377
	)	Issued: March 7, 2023
DEPARTMENT OF THE NAVY,	)	
WATERFRONT SERVICES DIVISION,	)	
Kings Bay, GA, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On January 13, 2022 appellant filed a timely appeal from a September 13, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant has met his burden of proof to establish an injury in the performance of duty, as alleged.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the September 13, 2021 decision, appellant submitted additional evidence to OWCP and on appeal to the Board. 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.*

## **FACTUAL HISTORY**

On July 9, 2019 appellant, then a 66-year-old painter, filed an occupational disease claim (Form CA-2) alleging that he injured both arms and experienced muscle pains due to factors of his federal employment. He described that the injury occurred “while pressure washing the underside of [a] submarine hull for the whole eight[-]hour shift.” Appellant noted that he first became aware of his condition and realized its relationship to his federal employment on July 18, 2009.

Appellant submitted a December 23, 2009 left shoulder magnetic resonance imaging (MRI) scan by Dr. Terry Reynolds, a Board-certified radiologist, which demonstrated a tear of the distal supraspinatus tendon extending from the articular surface to the bursal surface, supraspinatus tendinopathy, degenerative changes of the acromioclavicular (AC) joint with effacement of the underlying supraspinatus tendon, and mild degenerative changes of the glenohumeral joint.

In a development letter dated July 19, 2019, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed to establish his occupational disease claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP received a position description for a painter at the employing establishment. It described the duties of appellant’s position to include surface preparation, which involved “chemically cleaning, hydro blasting, steam cleaning, washing[,] scraping, hand sanding, slurry blasting, wheelabrator tumble blasting, grit blasting, and using various Pneumatic tools.” OWCP also received a notification of personnel action (Standard Form (SF-50)) dated March 17, 2019, which noted his position title as a painter.

By decision dated September 10, 2019, OWCP denied appellant’s occupational disease claim, finding that the evidence of record was insufficient to establish a causal relationship between his diagnosed left shoulder condition and the accepted employment factors.

On April 6, 2020 appellant requested reconsideration.

In a November 15, 2019 progress note, Frank Clements, a physician assistant, reported appellant’s complaints of bilateral shoulder pain and conducted an examination. He diagnosed left and right shoulder bursitis and left and right shoulder pain.

In progress notes dated December 10, 2019 through February 18, 2020, Dr. Denny Carter, a Board-certified orthopedic surgeon, indicated appellant’s complaints of left elbow, left shoulder, right shoulder, and right elbow pain for several years. On initial examination of appellant’s shoulders, he observed normal limits, no scars, and no lesions. Dr. Carter reviewed appellant’s diagnostic examination reports and diagnosed left elbow pain, right and left shoulder pain, tendinopathy of the left rotator cuff, tendinopathy of the right shoulder, right shoulder osteoarthritis, and left shoulder pain.

Appellant also submitted diagnostic examination reports. A November 15, 2009 right shoulder MRI scan showed AC joint osteoarthropathy with probable changes of prior subacromial-decompression, subacromial/subdeltoid bursitis, glenohumeral osteoarthropathy, degenerative tearing of possibly postsurgical changes, infraspinatus tendinopathy with low-grade intrasubstance tearing, and subscapularis tendinopathy. A December 16, 2009 right shoulder MRI scan

demonstrated hypertrophic degenerative changes of the AC joint and near full thickness tear of the supraspinatus tendon. A February 12, 2020 right shoulder MRI scan demonstrated AC joint osteoarthropathy with probable changes of prior subacromial decompression, subacromial/subdeltoid bursitis, glenohumeral osteoarthropathy, attenuated superior labrum with rounded morphology to the posterior labrum, obscuration of the rotator interval fat suggestive of adhesive capsulitis, infraspinatus tendinopathy and subscapularis tendinopathy. A February 27, 2020 left elbow MRI scan demonstrated mild degenerative changes with osteophytosis and areas of chondromalacia, extensor origin tendinopathy with focal partial thickness intrasubstance tearing, radial collateral ligament sprain, and nonspecific flexor carpi radialis edema.

By decision dated May 4, 2020, OWCP denied modification of its September 10, 2019 decision.

On September 9, 2020 appellant requested reconsideration.

In an August 13, 2020 progress note, Dr. Carter indicated that appellant's bilateral shoulder pain remained unchanged. He reported that range of motion testing of the shoulders demonstrated pain with forward elevation and external rotation. Dr. Carter diagnosed left and right shoulder pain, left and right shoulder rotator cuff tendinopathy, long head biceps tendinopathy, left shoulder glenoid labral tear, right rotator cuff tendinitis, bursitis, and AC degenerative joint disease.

By decision dated December 8, 2020, OWCP denied modification of its May 4, 2020 decision.

On June 16, 2021 appellant requested reconsideration.

In a May 24, 2021 letter, Dr. Carter indicated that appellant had been his patient for over 10 years. He reported that appellant developed rotator cuff tears in both shoulders and opined that "[m]ore likely than not, these rotator cuff tears were at least related and potentially caused directly by [appellant's] job duties." Dr. Carter related that appellant worked for 32 years performing pressure washing, sandblasting, spray painting, and touch up painting in confined spaces and overhead positions. He explained that, by performing these repetitive overhead activities, appellant "likely developed increased friction across the rotator cuff by the coracoacromial ligament and anterior acromion" which led to tendinopathy and rotator cuff tear development. Dr. Carter noted that, upon physical examination, appellant demonstrated pain and weakness with rotator cuff testing and positive provocative maneuvers, which were consistent with the condition. He concluded that there was a causal relationship between appellant's work duties and the development of rotator cuff tendinopathy and rotator cuff tears in both shoulders.

By decision dated September 13, 2021, OWCP modified the December 8, 2020 decision finding that the basis for denial was changed to a denial of fact of injury from a denial on causal relationship. It explained that the evidence of record was insufficient to establish the implicated employment factors. OWCP specifically noted that, based on the description provided on the CA-2 form, it appears that the employment incident was a traumatic event. Thus, the claim remained denied. OWCP concluded that it was "unclear if [appellant's] alleged injury occurred over a period longer than one workday or shift or on the date of injury."

## 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 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.<sup>7</sup>

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.<sup>8</sup> The opinion of the physician must be based on a complete 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 specific employment factors identified by the claimant.<sup>9</sup> 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, is sufficient to establish causal relationship.<sup>10</sup>

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

<sup>4</sup> *D.D.*, Docket No. 19-1715 (issued December 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).

<sup>5</sup> *Y.G.*, Docket No. 20-0688 (issued November 13, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>6</sup> *C.H.*, Docket No. 19-1781 (issued November 13, 2020); *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).

<sup>7</sup> *T.M.*, Docket No. 20-0712 (issued November 10, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

<sup>8</sup> *J.F.*, Docket No. 18-0492 (issued January 16, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>9</sup> *A.M.*, Docket No. 18-0562 (issued January 23, 2020); *I.J.*, 59 ECAB 408 (2008); *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>10</sup> *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *Gary L. Fowler*, 45 ECAB 365 (1994).

## ANALYSIS

The Board finds that the case is not in posture for decision regarding whether appellant has met his burden of proof to establish an injury in the performance of duty, as alleged.

On his claim form appellant alleged that he developed pain and symptoms in both arms while pressure washing a submarine hull. He provided a position description, which indicated that the duties and responsibilities of a painter involved cleaning, hydro blasting, and washing various surfaces. By decision dated September 13, 2021, OWCP determined that the evidence of record was insufficient to establish the implicated employment factors occurred as described. It specifically noted that, based on the description provided on the CA-2 form, it was “unclear if your alleged injury occurred over a period longer than one workday or shift or on the date of injury.” Thus, OWCP concluded that the requirements had not been met to establish an injury as defined by FECA.

OWCP’s procedures provide that, if the actual benefits claimed by the claimant cannot be determined from review of the form, OWCP should develop the claim based upon the claim form filed and direct questions to the claimant to determine the type of benefits claimed.<sup>11</sup> Based upon the response to the development letter, OWCP should then make a determination as to whether the correct claim was established and, if not, OWCP should convert the claim to the proper type of claim and notify the claimant and the employing agency (any representative, if applicable) of the conversion.<sup>12</sup> In this case, it failed to follow its proper procedures when it determined that it was unclear if the “alleged injury occurred over a period longer than one workday or shift or on the date of injury.” While OWCP issued a July 19, 2019 development letter, it did not seek clarification from appellant regarding whether he was claiming a traumatic injury or an occupational disease. For this reason, the Board finds that the case must be remanded for further development of the factual evidence regarding whether he has alleged a traumatic injury or an occupational disease in the performance of duty.<sup>13</sup> It is well established that, proceedings under FECA are not adversarial in nature and while the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment.<sup>14</sup> OWCP has an obligation to see that justice is done.<sup>15</sup>

On remand, OWCP should obtain a detailed statement from appellant indicating whether his symptoms developed over a period longer than one workday or shift or on the specific July 18, 2009 date of injury only. Based upon appellant’s response, OWCP should then make a determination as to whether he filed the correct claim and, if not, it should convert the claim to the

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<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.3c(2)(b). (June 2011)

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

<sup>13</sup> *See G.H.*, Docket No. 19-1 141 (issued January 2, 2020).

<sup>14</sup> *D.O.*, Docket No. 20-0006 (issued September 9, 2020); *R.A.*, Docket No. 17-1030 (issued April 16, 2018); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

<sup>15</sup> *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

proper type of claim. After this, and other 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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 13, 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: March 7, 2023  
Washington, DC

Alec J. Koromilas, 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