

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

D.A., Appellant)	
)	
and)	Docket No. 23-0423
)	Issued: September 18, 2023
DEPARTMENT OF THE AIR FORCE, 61 st)	
SECURITY FORCES SQUADRON,)	
LOS ANGELES AIR FORCE BASE, CA,)	
Employer)	
)	

Appearances:
Paul H. Felser, Esq., for the appellant¹
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 February 2, 2023 appellant, through counsel, filed a timely appeal from a December 22, 2022 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 bilateral shoulder conditions causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On August 11, 2021 appellant, then a 57-year-old police officer, filed an occupational disease claim (Form CA-2) alleging that he developed a left shoulder superior labral tear, subacromial impingement, acromioclavicular joint arthritis, and a rotator cuff tear due to factors of his federal employment. He related that he was advised by his physician that his injuries were the result of wearing a bulletproof and tactical vest performing the duties of a police officer for 38 years. Appellant indicated that he first became aware of his condition on March 18, 2021 and realized its relation to his federal employment on August 4, 2021. He did not stop work.

Along with his claim, appellant submitted a January 29, 1998 personnel document and position description and a January 3, 2021 notice of personnel action (Standard Form (SF) 50).

A March 11, 2021 magnetic resonance imaging (MRI) scan report of appellant's left shoulder noted an impression of moderate-grade partial articular-sided tearing of the posterior supraspinatus/anterior infraspinatus tendon fibers on a background of mild tendinosis, mild acromioclavicular joint osteoarthritis with bony hypertrophic change, mild cartilage thinning of the glenohumeral joint, and minimal subacromial/subdeltoid bursitis.

A July 27, 2021 operative report from Dr. Stephen Nuccion, a Board-certified orthopedic surgeon, noted preoperative diagnoses of a left shoulder rotator cuff tear and acromioclavicular joint arthritis and postoperative diagnoses of left shoulder superior labral tear, subacromial impingement, acromioclavicular joint arthritis, and rotator cuff tear. Dr. Nuccion described the procedures that he performed without complications, including a left shoulder arthroscopy, arthroscopic rotator cuff repair, arthroscopic acromioclavicular joint resection arthroplasty, intra-articular debridement extensive, and subacromial decompression with acromioplasty.

In an August 4, 2021 report, Dr. Nuccion diagnosed left shoulder pain, right shoulder pain, and left elbow pain. He noted that appellant reported experiencing similar symptoms in his right shoulder and that he was required to wear a heavy 35- to 40-pound vest for many years and perform repetitive activities with his right shoulder. Dr. Nuccion indicated that appellant's history of wearing a bulletproof vest and repetitive activities placed appellant's right shoulder at risk for a similar process as that of his left shoulder.

In a statement dated August 13, 2021, appellant related that in August 1983 he became a U.S. Air Force police officer, which required him to wear a bulletproof vest and suspenders that held ammunition on his waist. He was honorably discharged in May 1986 and became a civilian police officer in December 1986, where he was required to wear a bulletproof vest and tactical vest. Appellant related that the tactical vest, which weighed 30 to 50 pounds, allowed him to carry gear on the vest, relieving some low back pain caused by bulging discs in his lower back. He worked 13-hour shifts, which repeated in a pattern of four days on, three days off, three days on, and four days off, and he was on his feet for at least 9 of the 13 hours. Appellant asserted that in

2011 he began having issues with his left shoulder from the weight of the vest, including neck and shoulder pain. He related that he had trouble sleeping and took over-the-counter pain medication, but the pain increased, culminating in his surgery. On August 4, 2021 appellant learned that his right shoulder was likely in similar condition to his left, and Dr. Nuccion advised that the cause of appellant's shoulder conditions was the prolonged and repetitive activities that he engaged in while wearing the vests.

In an August 16, 2021 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the additional factual and medical evidence needed to establish his claim and provided a factual questionnaire for his completion. In a second development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor. It afforded both parties 30 days to submit the requested evidence.

Thereafter, appellant submitted an August 30, 2021 request that OWCP include his right shoulder in his claim and relating that he had been employed as a federal police officer since 1986 at the employing establishment as an officer, sergeant, lieutenant, and detective. He wore a mandatory bulletproof vest and tactical vest supplied by the department and had duties including making arrests, issuing citations, responding to reports of violence, entry control, and court testimony. As a detective, appellant was required to be on foot with minimal breaks and to wear a bulletproof vest and ceramic tactical vest. He worked 13-hour workdays, and during mission weeks, he regularly worked up to 18 hours a day for four to five days, wearing the bulletproof vest all day. Appellant noted that, due to his work schedule and two heart attacks he experienced in 2007 and 2013, he spends little time on outside activities and his hobbies include woodworking and stained glass. He explained that he wore his bulletproof vest daily to ensure that he would return home to his family safely.

In a September 1, 2021 note, Dr. Nuccion related that he treated appellant on that date and that, in his opinion, appellant's chronic use of a heavy bulletproof and tactical vest "likely contributed to the underlying pathology" of his conditions.

By decision dated November 2, 2021, OWCP found that the evidence of record was sufficient to establish that the implicated employment factors. However, it denied appellant's claim, finding that the evidence of record was insufficient to establish causal relationship between his diagnosed medical conditions and the accepted factors of his federal employment.

On December 1, 2021 appellant requested reconsideration of the November 2, 2021 decision and submitted additional evidence.

In a November 19, 2021 report, Dr. Nuccion related that appellant was employed as a police officer for over 38 years and wore a required bulletproof vest while performing his duties for over 48 hours per week. He noted that appellant had a left shoulder rotator cuff tear which was treated with arthroscopy in July 2021 and opined that it would be "medically reasonable to assume" that use of a heavy tactical vest for over 40 hours per week for many years "could contribute" to the degradation of the rotator cuff, starting with a partial tear and eventually leading to a full tear. Dr. Nuccion explained that the mechanism of injury would be repetitive use and repetitive lifting and asserted that "it would be reasonable to assume that this would lead to

[appellant's] injury" and, therefore, there was causal relationship between appellant's left shoulder rotator cuff tear and his federal employment duties. Regarding appellant's right shoulder, he related that "it would seem very reasonable to think" that the cumulative effect of wearing and removing a heavy tactical vest daily "could also lead" to a right shoulder injury through a similar process. However, Dr. Nuccion noted that appellant had not undergone an MRI scan of his right shoulder to confirm a specific diagnosis and issued a general diagnosis of right shoulder dysfunction. He concluded that there was causal relationship between appellant's long-term use of a heavy tactical vest for over 40 hours per week for over 30 years and his rotator cuff dysfunction in both shoulders.

By decision dated January 11, 2022, OWCP denied modification of its November 2, 2021 decision.

Appellant continued to submit evidence, including a July 16, 2022 report from Dr. Nuccion noting that he evaluated appellant for left shoulder pain on February 5, 2021. Dr. Nuccion reiterated that appellant worked as a police officer for over 38 years and was required to wear a bulletproof vest while performing his duties, which included repetitive lifting and adjustment of a heavy vest for over 48 hours per week. He explained that appellant also used his left upper extremity for repetitive actions including lifting, grabbing, grasping, and firearms practice. Dr. Nuccion indicated that appellant incurred extra stress on appellant's left shoulder due to a chronic and recurrent left elbow injury, which placed additional burden on his left shoulder to complete required tasks. He reviewed diagnostic imaging and noted that appellant underwent surgical repair of his left shoulder conditions on July 27, 2021.

Dr. Nuccion asserted that, though many variables can contribute to rotator cuff pathology, he would "more likely than not" attribute the chronic, repetitive grabbing, grasping, lifting, overhead activities, and picking up a heavy vest as significantly contributing to the development of appellant's rotator cuff pathology. He explained that the condition would develop by repetitive overloading of the tendon as it attaches to the humerus, resulting in degeneration and fraying of the tendon which would compromise the mechanical integrity of the tendon and could lead to partial tearing, which would progress to full tearing. Dr. Nuccion indicated that the most likely contributing factor to appellant's left shoulder pathology rotator cuff tear was the repetitive lifting, grabbing, grasping, and overhead activities that he performed as a police officer because his exposure to these activities was far greater than his exposure from hobbies such as woodworking. He also noted that he had not evaluated or reviewed imaging of the right shoulder and was unable to issue a diagnosis of the right shoulder, but asserted that "it would seem medically reasonable to attribute" the same repetitive movements that appellant experienced on his left shoulder to his right shoulder symptoms. Dr. Nuccion concluded that there was causal relationship between appellant's long-term federal employment duties and his left shoulder rotator cuff tear.

On October 7, 2022 appellant, through counsel, requested reconsideration of the January 11, 2022 decision.

By decision dated December 22, 2022, OWCP denied modification of its January 11, 2022 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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,⁴ 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.⁵ 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.⁶

To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee must submit the following: (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 employee.⁷

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁸ 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 factor(s) identified by the employee.⁹

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.¹⁰

³ *Id.*

⁴ *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).

⁵ *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).

⁶ *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).

⁷ *T.D.*, Docket No. 20-0921 (issued November 12, 2020); *M.S.*, Docket No. 18-1554 (issued February 8, 2019). *See also Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ *S.A.*, Docket No. 18-0399 (issued October 16, 2018); *Robert G. Morris*, 48 ECAB 238 (1996).

⁹ *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *supra* note 7.

¹⁰ 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).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted factors of his federal employment.

Appellant submitted a November 19, 2021 report in which Dr. Nuccion described appellant's work history and opined that it would be "medically reasonable to assume" that use of a heavy tactical vest for over 40 hours per week for many years "could contribute" to the degradation of the rotator cuff. Dr. Nuccion explained that the mechanism of injury would be repetitive use and repetitive lifting and asserted that "it would be reasonable to assume that this would lead to [appellant's] injury" and, therefore, there was causal relationship between appellant's left shoulder rotator cuff tear and his federal employment duties. Regarding appellant's right shoulder, he related that "it would seem very reasonable to think" that the cumulative effect of wearing and removing a heavy tactical vest "could also lead" to a right shoulder injury through a similar process. However, Dr. Nuccion noted that appellant had not undergone an MRI scan of his right shoulder to confirm a diagnosis in that shoulder.

Similarly, in a July 16, 2022 report, Dr. Nuccion noted that he evaluated appellant on February 5, 2021 and described his 38-year work history and duties. He indicated that appellant incurred extra stress on appellant's left shoulder due to a chronic and recurrent left elbow injury, which placed additional burden on his left shoulder. Dr. Nuccion asserted that, though many variables can contribute to rotator cuff pathology, he would "more likely than not" attribute the chronic, repetitive activities of appellant's federal duties as significantly contributing to the development of his rotator cuff pathology. He explained that the condition would develop by repetitive overloading of the tendon as it attaches to the humerus, resulting in degeneration and fraying of the tendon, which would compromise the mechanical integrity of the tendon and could lead to partial tearing and progress to full tearing. Dr. Nuccion concluded that there was causal relationship between appellant's long-term federal employment duties and his left shoulder rotator cuff tear. He also noted that he had not reviewed imaging of the right shoulder and was unable to issue a diagnosis of that shoulder, but asserted that "it would seem medically reasonable to attribute" the same repetitive movements that appellant experienced on his left shoulder to his right shoulder symptoms.

The Board finds that Dr. Nuccion's reports, opining that it was "reasonable to assume" that the use of a heavy tactical vest for many years "could contribute" to appellant's left shoulder conditions, and that his diagnosed conditions were "more likely than not" attributable to the duties of appellant's federal employment, are speculative in nature.¹¹ Medical opinions that are speculative or equivocal in character are of diminished probative value.¹² Accordingly,

¹¹ See *K.P.*, Docket No. 21-1173 (issued May 4, 2022) (physician's opinion on causal relationship was speculative in nature when couched in terms "more likely than not"). See also *P.D.*, Docket No. 18-1461 (issued July 2, 2019); *S.R.*, Docket No. 18-1295 (issued March 20, 2019); *G.M.*, Docket No. 18-0989 (issued January 3, 2019); *E.B.*, Docket No. 18-1060 (issued November 1, 2018); *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

¹² *D.B.*, Docket No. 18-1359 (issued May 14, 2019); *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

Dr. Nuccion's November 19, 2021 and July 16, 2022 reports are insufficient to establish appellant's claim.¹³

Appellant also submitted a September 1, 2021 note in which Dr. Nuccion opined that appellant's chronic use of a heavy bulletproof and tactical vest "likely contributed to the underlying pathology" of his conditions. The Board has held that a report is of limited probative value regarding causal relationship if it is conclusory and does not contain medical rationale explaining how a given medical condition has an employment-related cause.¹⁴ Dr. Nuccion's September 1, 2021 note did not provide sufficient medical rationale explaining the basis of his conclusory opinion that appellant's diagnosed conditions were due to the accepted factors of his federal employment.¹⁵ This report is, therefore, insufficient to establish appellant's claim.

OWCP also received a July 27, 2021 operative report and an August 4, 2021 report from Dr. Nuccion diagnosing left shoulder pain, right shoulder pain, and left elbow pain. However, Dr. Nuccion did not provide an opinion on causal relationship in these reports. The Board has held that medical evidence which does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship. As such, these reports are also insufficient to establish appellant's claim.¹⁶

The remaining evidence of record includes a March 11, 2021 MRI scan report. The Board has held that diagnostic reports, standing alone, lack probative value on the issue of causal relationship as they do not provide an opinion as to whether the accepted employment incident caused a diagnosed condition.¹⁷ Thus, this evidence is insufficient to establish the claim.

As appellant has not submitted rationalized medical evidence sufficient to establish that his diagnosed medical conditions were caused or aggravated by the accepted factors of his federal employment, the Board finds that he has not met his burden of proof.¹⁸

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.

¹³ See *S.S.*, Docket No. 21-0837 (issued November 23, 2021).

¹⁴ See *S.S.*, Docket No. 21-0763 (issued November 12, 2021); *A.G.*, Docket No. 21-0756 (issued October 18, 2021); *T.S.*, Docket No. 20-1229 (issued August 6, 2021).

¹⁵ *R.T.*, Docket No. 17-1230 (issued May 3, 2018); *T.M.*, Docket No. 08-0975 (issued February 6, 2009) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

¹⁶ See *D.Y.*, Docket No. 20-0112 (issued June 25, 2020); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁷ *W.M.*, Docket No. 19-1853 (issued May 13, 2020); *L.F.*, Docket No. 19-1905 (issued April 10, 2020).

¹⁸ See *T.J.*, Docket No. 19-1339 (issued March 4, 2020); *F.D.*, Docket No. 19-0932 (issued October 3, 2019); *D.N.*, Docket No. 19-0070 (issued May 10, 2019); *R.B.*, Docket No. 18-1327 (issued December 31, 2018).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 18, 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