

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

JAMES D. ALSTON, Appellant

and

**DEPARTMENT OF JUSTICE, U.S. MARSHALS
SERVICE, Montgomery, AL, Employer**

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**Docket No. 04-1930
Issued: February 7, 2005**

Appearances:
James D. Alston, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 27, 2004 appellant filed a timely appeal of a June 29, 2004 merit decision of the Office of Workers' Compensation Programs, finding that he did not sustain an injury while in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an injury while in the performance of duty.

FACTUAL HISTORY

On April 5, 2004 appellant, then a 44-year-old marshal, filed a claim alleging that he sustained a recurrence of disability on April 1, 2004 that was causally related to an injury he sustained on April 7, 2000.¹ He stated that, although his pain subsided for periods of time from

¹ The case record does not contain any information as to the nature and extent of appellant's April 7, 2000 injury and whether it was accepted by the Office.

one to two months, it recurred frequently which caused intense headaches, pain in his neck and left arm and hand. He noted that the pain became unbearable while performing firearms qualifications on March 29 and 30, 2004. Appellant related that his pain also included spasms in his lower back.

On April 28, 2004 the Office determined that appellant's recurrence of disability claim should be treated as a new occupational disease claim based on his statement that his pain became unbearable while performing firearms qualifications on March 29 and 30, 2004 and included spasms to his lower back.

By letter dated May 4, 2004, the Office advised appellant that his claim would be adjudicated as an occupational disease claim based on the information provided in his claim form; the Office assigned number 06-2112566. The Office advised him that the information submitted was insufficient to establish his claim and to submit additional factual and medical evidence to establish his claim.

In an undated letter, received by the Office on May 20, 2004, appellant responded that the injury he described in his recurrence of disability claim form was an injury that was on file with the Office and assigned number 06-2007619 and that his test results were contained in that file. He noted that he was treated by a Dr. Barnes, a retired orthopedic surgeon,² a Dr. Shashy,³ a radiologist, who performed two magnetic resonance imaging scans and Dr. Larry W. Epperson, a Board-certified neurologist, who conducted numerous neurological tests. Appellant stated that the test results revealed damage to his C4 and C5 vertebrae with a bulging disc and subsequent nerve damage. He explained that he attempted to obtain copies of Dr. Barnes' reports and test results from a medical records archive after he retired but the company was unable to locate them.

By decision dated June 29, 2004, the Office found that, although the claimed event(s) occurred as alleged, appellant failed to submit medical evidence in support of his claim that he sustained an injury while in the performance of duty. The Office noted that the last medical report in appellant's case record assigned number 06-2007619 was dated November 23, 2001. The Office concluded that no current medical records had been submitted to support a finding that appellant sustained an injury on March 29 or 30, 2004. Accordingly, the Office denied appellant's claim.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act⁴ has the burden of establishing the essential elements of his claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the

² The record does not contain a medical report from Dr. Barnes.

³ Similarly, the record does not contain a medical report from Dr. Shashy, thus Dr. Shashy's professional qualifications cannot be verified.

⁴ 5 U.S.C. §§ 8101-8193.

performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁵ These are the essential elements of each 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, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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 the specific employment factors identified by the claimant.⁷

ANALYSIS

The Office accepted as factual that appellant participated in firearms qualifications on March 29 and 30, 2004, which renders this an occupational disease claim as his exposure to employment factors occurred over more than one workday or shift.⁸ The record indicates, however, that appellant submitted no medical evidence regarding his claim. Although he submitted a statement which addressed prior medical treatment, he did not submit any medical report addressing the firearms qualification training or making any findings as to his physical condition. As appellant has not submitted any medical evidence supporting a causal relationship between his claimed condition and the implicated factors of his employment, he has failed to meet his burden of proof.⁹

⁵ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *See Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

⁷ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

⁸ *See* 20 C.F.R. § 10.5(q) which defines "occupational disease or illness." *Cf.* 20 C.F.R. § 10.5(ee) which defines "traumatic injury."

⁹ The Board notes that on appeal appellant submitted additional evidence. However, this evidence has not been reviewed by the Office and the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c). Appellant may resubmit such evidence to the Office through the reconsideration process. *See* 5 U.S.C. § 8128 and 20 C.F.R. § 10.606(a).

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an injury while in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2005
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member