

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

F.B., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
ALBANY VETERANS HOSPITAL, Albany, NY,
Employer

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**Docket No. 14-872
Issued: August 21, 2014**

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 7, 2014 appellant, through his attorney, filed a timely appeal from a February 11, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees Compensation Act¹ (FECA) and 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 met his burden of proof to establish that his left shoulder condition is causally related to either the accepted August 1, 2012 injury or other factors of his federal employment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 6, 2013 appellant, then a 59-year-old nursing assistant, filed an occupational disease claim alleging on August 1, 2012 he fell in the performance of his duties. He claimed increasing left shoulder pain and stiffness and stopped work on February 5, 2013.

In a February 5, 2013 statement, Marlene Herrington, a registered nurse and appellant's supervisor, stated that two of the charge nurses indicated that appellant was not performing his full duties because his shoulder hurt and he was in pain. She sent him to the emergency department to be evaluated.

In a February 5, 2013 emergency department discharge note, Dr. John Morris, an emergency department attending physician, provided a discharge diagnosis of left rotator cuff tear with acute exacerbation. In a February 5, 2013 disability note, he indicated that appellant was unable to return to duty until cleared by an orthopedic surgeon.

In a February 7, 2013 note, Dr. Lee A. Kaback, a Board-certified orthopedic surgeon, indicated that appellant could return to work on March 4, 2013.

In a February 13, 2013 letter, OWCP advised appellant that the evidence received was insufficient to establish that he actually experienced the incident or employment factor alleged to have caused injury; the evidence was insufficient to support that he was injured while performing any duty of his employment; and a physician's opinion as to how his injury resulted in the condition diagnosed had not been provided. Appellant was requested to submit within 30 days a response to the questionnaire and medical evidence in support of his claim, which included a physician's opinion supported by a medical explanation as to how the reported work incident caused or aggravated the claimed injury.

In a February 7, 2013 report, Dr. Kaback noted that appellant was previously seen on August 1, 2012 and since then has been having increasing pain in the lateral aspect of his left shoulder over time with no known new trauma. He indicated that he was still waiting approval of left shoulder arthroscopy with rotator cuff repair and that appellant was seen, following his emergency room visit, for clearance back to work. Dr. Kaback noted examination findings and provided an impression of left shoulder calcific tendinitis and possible rotator cuff tendon tear. He opined that appellant was temporary totally disabled for the next three weeks hopefully to get his surgery approved.

In a February 22, 2013 attending physician's report, Dr. Kaback noted that appellant fell at work on May 8, 2012 and diagnosed left shoulder tendinitis. He opined with a check mark yes that the condition was caused or aggravated by employment activity.

In a March 4, 2013 disability note, Dr. Kaback opined that appellant could return to work with no restrictions on March 4, 2013. He noted that appellant would be reevaluated pending magnetic resonance imaging scan authorization.

By decision dated March 20, 2013, OWCP denied the claim on the grounds appellant had not provided a factual basis to support his claim and there was no medical evidence to establish that a diagnosed medical condition was causally related to the work injury or event.

In a December 3, 2013 letter, appellant, through his attorney, requested reconsideration.

Appellant provided an April 5, 2013 statement. He explained that he was passing out water pitchers to patients during the evening shift. As appellant was rolling out a tray table to fill the water pitchers in the kitchen, a patient came from a blind corner and to avoid hitting the patient he turned the table with full force away from the patient, the tray table tumbled and he fell on top of the table. He stated that the charge nurse then wheeled him to the emergency room for evaluation and treatment. In a statement dated April 10, 2013, appellant explained that he retired from the employing establishment because he was continually marked as “AWOL” when he missed work because of his shoulder injury. He explained that he was not allowed to undergo recommended shoulder surgery because the employing establishment did not verify his injury to OWCP. Also submitted were several duty status reports from Dr. Kaback regarding his return to work, some which contained the diagnosis of left shoulder tendinitis.

By decision dated February 11, 2014, OWCP modified its prior decision to reflect that fact of injury had been established but denied the claim because causal relationship had not been established between appellant’s diagnosed left shoulder condition and this event.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his 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, that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.² 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.³

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a fact of injury has been established. A fact of injury determination is based on two elements. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.⁴

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.⁵ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable

² C.S., Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

³ *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *See Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

⁵ *See J.Z.*, 58 ECAB 529, 531 (2007); *Paul E. Thams*, 56 ECAB 503, 511 (2005).

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 employee.⁶ The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁷ 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 or incidents is sufficient to establish causal relationship.⁸

ANALYSIS

OWCP accepted that on August 1, 2012 appellant fell during the course of his federal duties. It denied his claim on the grounds that there was insufficient medical evidence to establish that his left shoulder condition was caused or aggravated by the fall or his work factors. The Board agrees.

The Board notes that there is no medical evidence contemporaneous to the August 1, 2012 event. While Dr. Kaback states in his February 7, 2013 report that appellant was seen on August 1, 2012, the current record does not contain a record of that visit.

Dr. Kaback stated in his February 7, 2013 report that, since appellant's visit of August 1, 2012, he has had increasing pain in the lateral aspect of his left shoulder overtime with no known new trauma. He provided an impression of left shoulder calcific tendinitis and possible rotator cuff tendon tear and opined that appellant was temporary totally disabled for the next three weeks hopefully to get his surgery approved. Dr. Kaback's report is insufficient as he did not specifically address whether the employment incident or employment factors caused or contributed to appellant's diagnosed left shoulder condition.⁹

Dr. Kaback noted, in the attending physician's report dated February 22, 2013, a date of injury of May 8, 2012. He diagnosed left shoulder tendinitis and opined with a check mark yes that the condition was caused or aggravated by employment activity. The Board has held that an opinion on causal relationship which consists only of a physician checking yes to a medical form report question on whether the claimant's condition was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.¹⁰ Furthermore, Dr. Kaback provided a different date of injury than that provided by appellant and failed to address the discrepancy.¹¹ His duty status

⁶ *I.J.*, 59 ECAB 408, 415 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁷ *James Mack*, 43 ECAB 321, 329 (1991).

⁸ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

⁹ *Michael E. Smith*, 50 ECAB 313 (1999).

¹⁰ *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

¹¹ *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history have little probative value).

reports are also insufficient to establish appellant's claim as he does not relate a history of the claimed work injury¹² or offer any specific opinion regarding whether work factors caused or contributed to a diagnosed medical condition.¹³

In his February 5, 2013 reports, Dr. Morris, the emergency department attending physician, diagnosed left rotator cuff tear with acute exacerbation and opined that appellant was unable to return to duty until cleared by orthopedic surgeon. However, these reports do not relate a history of the claimed work injury or offer any specific opinion regarding whether work factors caused or contributed to a diagnosed medical condition.¹⁴

Ms. Herrington, a registered nurse and appellant's supervisor, stated that two of the charge nurses indicated that appellant was not performing his full duties because his shoulder hurt and he was in pain. However, a registered nurse is not a physician and a nurse's opinion regarding diagnosis or causal relationship is of no probative value.¹⁵

On appeal, appellant disagreed with OWCP's decision denying his claim for compensation and noted that he had submitted sufficient evidence to establish his claim. As noted above, the medical evidence does not establish that his diagnosed left shoulder condition was causally related to the accepted August 1, 2012 incident or his employment. Reports from appellant's physicians failed to provide sufficient medical rationale explaining how appellant's left shoulder condition was caused or aggravated by his accepted fall or any other particular employment duties. The need for such rationale is particularly important in view of the fact the record is devoid of any medical evidence contemporaneous to the August 1, 2012 incident.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that his left shoulder condition was causally related to his employment or the accepted August 1, 2012 incident.

¹² *Id.*

¹³ See *J.F.*, Docket No. 09-1061 (issued November 17, 2009) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹⁴ *Id.*

¹⁵ A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. See *Merton J. Sills*, 39 ECAB 572, 575 (1988).

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board