

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

_____)	
W.S., Appellant)	
)	
and)	Docket No. 17-1261
)	Issued: May 8, 2019
DEPARTMENT OF COMMERCE,)	
NATIONAL OCEANIC & ATMOSPHERIC)	
ADMINISTRATION, Norfolk, VA, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 19, 2017 appellant, through counsel, filed a timely appeal from a March 27, 2017 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 shoulder condition causally related to the accepted April 10, 2015 employment incident.

FACTUAL HISTORY

On May 15, 2015 appellant, then a 70-year-old wage mariner, filed a traumatic injury claim (Form CA-1) alleging that, on April 10, 2015, he sprained his right shoulder while throwing a garbage bag into a dumpster while in the performance of duty. The employing establishment noted on the claim form that he had been injured in the performance of duty. Appellant did not stop work.

In a June 4, 2015 report, Dr. Thomas R. Dempsey, a Board-certified orthopedic surgeon, evaluated appellant's right shoulder. He related that approximately two months prior appellant was throwing some garbage onto a pile when he felt a pop and developed pain in the anterior portion of his shoulder.³ Dr. Dempsey examined appellant's right shoulder and determined that he had a rupture of the biceps tendon. He noted full range of motion with forward flexion to 130 degrees, extension to 30 degrees, internal and external rotation to 95 degrees, and abduction and adduction to 100 degrees. Dr. Dempsey observed no muscle atrophy or weakness and noted reflexes of the biceps, triceps, and brachioradialis, were normal. He diagnosed shoulder pain, osteoarthritis of the acromioclavicular joint, and nontraumatic rupture of biceps tendon. Dr. Dempsey requested that appellant have a right shoulder magnetic resonance imaging (MRI) scan. He released appellant to work with restrictions to include no lifting over 10 pounds.

Appellant filed a series of claims for compensation (Form CA-7) for time lost from work due to his alleged injury.⁴

In a development letter dated July 27, 2015, OWCP informed appellant of the type of evidence needed to establish that he experienced the incident alleged to have caused injury. It informed him of the type of factual and medical information needed to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond. He did not respond.

By decision dated August 28, 2015, OWCP denied appellant's claim, finding that the evidence submitted was insufficient to establish that the employment incident occurred as alleged. It noted that appellant had not provided a detailed description of his injury or responded to the development questionnaire.

In a written statement dated August 23, 2015, appellant indicated that his injury occurred while working aboard the NOAA Ship Ronald H. Brown. He explained that on April 10, 2015 as

³ Appellant informed OWCP that he was delayed in obtaining medical treatment because he was at sea traveling from Tahiti to Hawaii.

⁴ In a June 17, 2015 memorandum, the employing establishment authorized continuation of pay from May 15 to June 28, 2015.

they were preparing to sail from the Port of Papeete in Tahiti, he was removing trash and garbage from the vessel to a dumpster dockside and something popped in his upper arm and shoulder. Appellant indicated that he made the Boatswain aware of this injury. He noted that the next day he could not lift his arm above shoulder height due to pain. Appellant advised that he made an additional injury report and was sent to the ship's medical officer where he was treated and notes were made in the medical log. He also noted that they arrived in Honolulu, Hawaii on May 13, 2015 and he arrived home on Saturday, May 16, 2015.

On September 17, 2015 appellant requested reconsideration. He repeated the description of his injury at sea and noted that he was providing a copy of his sea days and a statement of his port work which had been signed by his commanding officer. Appellant noted that he was not sure why his claim was being denied when he was injured while on duty.

In an August 4, 2015 report, Dr. Dempsey noted that appellant presented with chronic right shoulder pain that had persisted for four months. He also indicated that he was supposed to have a right shoulder MRI scan, but it had not been approved by OWCP.

In an October 2, 2015 report, Dr. Dempsey noted that appellant presented with chronic right shoulder pain that had started five months prior. He noted that he was still waiting for authorization for the MRI scan of the right shoulder. Dr. Dempsey advised that appellant's range of motion had improved and that he had back surgery to remove a tumor on August 10, 2015.

By decision dated December 3, 2015, OWCP modified appellant's claim, finding that he had met his burden of proof to establish that the employment incident had occurred as alleged. However, the claim remained denied as he had not established a diagnosed condition causally related to the accepted employment incident of April 10, 2015.⁵

In a December 1, 2015 report, Dr. Dempsey noted that appellant presented for follow up of an April 10, 2015 work injury which caused right shoulder pain. He noted that appellant did not complain of pain, but that it only hurt intermittently and did not radiate. Dr. Dempsey noted that the pain was exacerbated by overhead activity. He noted that appellant admitted that no other symptoms were associated with his right shoulder and he denied any new numbness or tingling in his right upper extremity. Dr. Dempsey diagnosed: pain in the joint of the right shoulder; arthritis of shoulder region, right, degenerative; and elevated blood pressure.

On January 21, 2016 appellant requested reconsideration and submitted additional evidence.

In a January 12, 2016 report, Dr. Dempsey noted that appellant complained of his arm feeling weak and his shoulder feeling like it was catching. He explained that physical examination of appellant's upper extremity revealed a gap in the upper part of his right arm consistent with a rupture of the biceps tendon. Dr. Dempsey noted that appellant was treated with anti-inflammatories and a right shoulder MRI scan had been ordered for a "probable biceps tendon

⁵ OWCP also determined that his claim for wage-loss compensation would not be addressed, as his traumatic injury claim was denied.

rupture (which was likely the pop he felt).” He explained that x-rays of appellant’s right shoulder showed some arthritis changes. Dr. Dempsey opined that appellant suffered a rupture of the biceps tendon when he threw garbage onto a pile at work on April 10, 2015 and that the history and examination was consistent with a torn biceps tendon.

By decision dated April 4, 2016, OWCP modified the December 3, 2015 decision to accept that appellant had established a diagnosed condition, degenerative arthritis of the right shoulder. However, appellant had not established that the condition was causally related to the accepted employment incident.⁶

On January 9, 2017 appellant, through counsel, requested reconsideration of the April 4, 2016 decision.⁷ In support of his request, he submitted a recent letter from Dr. Dempsey.

In an October 5, 2016 letter, Dr. Dempsey noted the denial of appellant’s claim and explained that he had been injured tossing garbage into a truck. He explained that he believed appellant sustained a rotator cuff tear, but the MRI scan that was requested had been denied and thus the condition could not be definitively provided. Dr. Dempsey explained that the probable rotator cuff tear with pain was directly related to the employment incident. He noted that “as far as a biomechanical or pathophysiologic explanation, if there is stress on the rotator cuff going into abduction and extension, you can tear the rotator cuff.” Dr. Dempsey noted that this is common knowledge and that it is also commonly documented that a biceps tendon rupture can occur lifting objects or with quick motions upwards and outwards with the biceps musculature. He explained that appellant has legitimate pain that occurred directly after his injury and that the only way to definitely diagnose a rotator cuff tear or a bicep tendon tear is with an MRI scan, which OWCP “refuses to allow.”

By decision dated March 27, 2017, OWCP denied modification of its prior decision. It determined that the medical evidence of record did not contain a rationalized opinion from a physician, explaining why or how a firmly diagnosed medical condition was caused or aggravated by the accepted April 10, 2015 employment incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 timely filed within the applicable time limitation period,⁸ that an injury was sustained in the performance of duty as alleged, and that

⁶ On August 10, 2016 appellant, through counsel, filed an appeal to the Board from the April 4, 2016 merit decision. By letter dated October 21, 2016, counsel withdrew the appeal. By order dated January 3, 2017, the Board dismissed the appeal. *Order Dismissing Appeal*, Docket No. 16-1632 (issued January 3, 2017).

⁷ The request for reconsideration initially requested reconsideration of a purported decision dated August 4, 2016. However, there is no decision of that date found in the case record. On March 24, 2017 OWCP confirmed with counsel that the request for reconsideration was with regard to the April 4, 2016 merit decision.

⁸ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁹ 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.¹⁰

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.¹¹ 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.¹² Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.¹³

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence sufficient to establish such causal relationship.¹⁴ The opinion of the physician must be based on a complete factual and medical background, 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.¹⁵

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a left knee condition causally related to the accepted April 10, 2015 employment incident.

Appellant treated for his right shoulder and upper extremity with Dr. Dempsey who diagnosed osteoarthritis of the right shoulder joint and possible bicep tendon tear and rotator cuff tear. In a June 4, 2015 report, Dr. Dempsey repeated the history of injury and performed a physical examination of the right upper extremity. He initially diagnosed shoulder pain, osteoarthritis of the acromioclavicular joint, and a nontraumatic rupture of the biceps tendon, requested a right shoulder MRI scan, and restricted appellant from lifting greater than 10 pounds. Dr. Dempsey reported on August 4, October 2, and December 1, 2015 that the requested MRI scan had not been approved by OWCP and that the chronic right shoulder pain persisted, but range of motion had improved. He explained that appellant's pain was exacerbated by overhead activity and there were no additional symptoms in the right upper extremity. These reports are insufficient to establish causal relationship in this claim. The Board has held that medical evidence that does not offer an

⁹ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

¹⁰ *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).

¹¹ *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

¹² *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹³ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁴ *K.V.*, Docket No. 18-0723 (issued November 9, 2018).

¹⁵ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁶ As Dr. Dempsey did not discuss the cause of the conditions he had diagnosed, these reports have no probative value.

In a report dated January 12, 2016, Dr. Dempsey again noted appellant's complaints of right arm weakness and a feeling of catching in the shoulder. He again noted a probable biceps tendon rupture, but noted no definitive diagnosis of a rupture as the requested MRI scan had not been authorized. Dr. Dempsey opined that appellant suffered a rupture of the biceps tendon when he threw garbage onto a pile at work on April 10, 2015. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/disability was related to employment factors.¹⁷ The Board finds that the January 12, 2016 report contains no medical rationale and is therefore of minimal probative value on the issue of causal relationship.

Dr. Dempsey provided a letter dated October 5, 2016 in which he concluded that appellant sustained injury when tossing garbage into a truck. He explained that he believed that appellant sustained a rotator cuff tear, but because the requested MRI scan had been denied the condition could not be definitively provided. Dr. Dempsey opined that from a biomechanical or pathophysiological explanation that "if there is stress" on the rotator cuff going into abduction and extension that the rotator cuff "can tear." He noted that "it is common knowledge" that a biceps tendon rupture can occur when lifting objects or with quick motions upwards and outwards with the biceps musculature. Dr. Dempsey acknowledged that while appellant had legitimate pain directly after the accepted employment incident, he had not definitely been able to diagnose that either a biceps tendon rupture or rotator cuff tear had occurred. The Board has held that it is not possible to establish the cause of a medical condition if the physician has not provided a diagnosis, but only notes pain.¹⁸ The Board has consistently held that pain is a symptom and not a compensable medical diagnosis.¹⁹ While Dr. Dempsey expressed his belief that appellant's upper extremity pain is due to a biceps tendon rupture or a rotator cuff tear, he acknowledged that neither diagnosis had yet been confirmed.

As appellant has not submitted rationalized medical evidence sufficient to establish that he sustained a right shoulder condition causally related to the accepted April 10, 2015 employment incident, he has not met his burden of proof to establish the claim.

On appeal counsel asserts that appellant has met his burden of proof as the medical evidence was sufficiently rationalized. For the reasons set forth above, the Board finds that appellant has not met his burden of proof.

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

¹⁷ See *Y.D.*, Docket No. 16-1896 (issued February 10, 2017) (finding that a report is of limited probative value regarding causal relationship if it does not contain medical rationale describing the relationship between the accepted work factors and a diagnosed condition/disability).

¹⁸ See *A.C.*, Docket No. 16-1587 (issued December 27, 2016).

¹⁹ *B.P.*, Docket No. 12-1345 (issued November 13, 2012); *C.F.*, Docket No. 08-1102 (issued October 2008).

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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a right shoulder condition causally related to the accepted April 10, 2015 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 8, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board