United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 24-0267**
	)	**Issued: June 12, 2024**
DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Long Beach, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On January 23, 2024 appellant filed a timely appeal from an October 18, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 a right upper extremity condition causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On September 5, 2022 appellant, then a 51-year-old claims examiner, filed an occupational disease claim (Form CA-2) alleging that he developed an aggravation of cubital tunnel syndrome

[1] 5 U.S.C. § 8101 *et seq*.

of the right arm due to factors of his federal employment. He noted that he first became aware of his condition and realized its relation to his federal employment on July 15, 2022. Appellant stopped work on September 6, 2022.

OWCP received August 18, 2022 electromyography/nerve conduction velocity (EMG/NCV) studies read by Dr. Jeff Altman, Board-certified in physical medicine and rehabilitation, which were normal and revealed no findings of any nerve entrapments, neuropathies, plexopathies, or cervical radiculopathies.

In a statement dated September 5, 2022, appellant indicated that he had a history of cubital tunnel syndrome from his previous employment when he injured his arm while shooting at a gun range on January 24, 2020. He noted that he had been working at the employing establishment as a claims examiner since August 2021, for eight hours per day, five days a week, which aggravated his condition, and it was painful to type with his right hand. Appellant alleged that his "right-hand pinky and ring finger are useless for typing at this time."

A September 6, 2022 hospital report signed by Yong Shen, a registered nurse, related that appellant was seen for right wrist pain and was held off work for four days.

In a development letter dated September 15, 2022, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. OWCP also sent a separate letter of the same date to the employing establishment, requesting comments from a knowledgeable supervisor on the accuracy of the statement provided by appellant and additional information including his position description and physical job requirements. It afforded both parties 30 days to respond.

In an October 22, 2020 postoperative report, Dr. James Coleman, a general surgeon, noted that appellant had undergone neurolysis of the ulnar nerve at the elbow with anterior subfascial transposition.

In a September 15, 2022 statement, appellant reiterated his daily activities, which required use of the right arm.

In reports dated September 27, 2022, Dr. Luis Rivera, a family medicine and general surgeon, diagnosed cubital canal syndrome, ulnar canal syndrome, paresthesia of the thumb of right hand, and weakness of right hand and trigger finger. In an attending physician's report (Form CA-20) of even date he marked the box "Yes" indicating the conditions were caused or aggravated by an employment activity. He further indicated that appellant was only capable of limited use of a computer.

OWCP received September 23, 2022 treatment notes from a physician assistant. These notes indicated that appellant may have sustained a possible aggravation of a preexisting cubital tunnel syndrome, with possible early carpal tunnel syndrome of the right wrist.

A September 23, 2022 right elbow x-ray read by Dr. Curt Liebman, a Board-certified diagnostic radiologist, revealed under penetration limits evaluation of fine bone detail and no acute traumatic or osseous abnormality.

In an October 7, 2022 report, Dr. Rivera repeated his diagnoses and provided work restrictions.

In an October 7, 2022 report, Dr. Brooke Alexander, an osteopath and family medicine specialist, diagnosed carpal tunnel syndrome of right wrist, cubital tunnel syndrome on the right, and (unspecified) trigger finger, and recommended that appellant be seen by a hand surgeon.

By decision dated October 19, 2022, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed medical conditions and the accepted factors of his federal employment.

OWCP continued to receive medical evidence.

In a March 24, 2020 report, Dr. Scott Shoemaker, a Board-certified neurologist, diagnosed right ulnar neuropathy at the elbow without denervation (mild right cubital tunnel syndrome); some relative slowing of the ulnar motor conduction velocity across the left, not enough to call abnormal; borderline right median sensory latency across the carpal tunnel of uncertain clinical significance; and no evidence for any cervical radiculopathy (80% sensitivity), brachial plexopathy, neurogenic thoracic outlet syndrome, or ulnar neuropathy at the wrist.

OWCP received reports dated August 4, 2021, from Dr. Kenneth R. Grabow, a Board-certified anesthesiologist, who diagnosed an injury to the ulnar nerve causing neuritis and mild right carpal tunnel syndrome. Dr. Grabow related that the injury occurred on January 24, 2020 while appellant was working as a police officer for the city of Irvine, California.

In another October 7, 2022 report, Dr. Alexander diagnosed right carpal tunnel syndrome, right cubital tunnel syndrome, paresthesia of the right thumb, and trigger finger and weakness of right hand. She noted that appellant typed approximately 8 hours per day since August 2021. Dr. Alexander related that he previously served as an active-duty police officer and had a history of four surgeries to the right wrist to include a right scope with triangular fibrocartilage complex (TFCC) debridement on March 20, 2014; a right wrist scope, synovectomy, and TFCC debridement on February 8, 2017; a right wrist extensor carpi ulnaris tenosynovectomy with stabilization on May 26, 2017; excision of the right wrist extensor carpi ulnaris tendon, extensor retinaculum repair on August 20, 2018; and multiple ganglion cysts of right wrist volar distal. She opined that appellant's current diagnoses of carpal and cubital tunnel syndromes began in July 2022 and developed during the prior year. Dr. Alexander opined that his current conditions were newly developed after his prior ulnar nerve entrapment surgeries and recommended referral to a hand surgeon.

On October 23, 2022, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 22, 2023.

Appellant provided an undated summary of his right upper extremity injury timeline.

In a November 1, 2022 report, Dr. Rivera diagnosed right carpal tunnel syndrome, right cubital tunnel syndrome, paresthesia of the right thumb, and trigger finger and weakness of the right hand.

In a December 2, 2022, report, Dr. Richard Rogachefsky, a Board-certified orthopedic and hand surgeon, diagnosed right cubital tunnel syndrome. He opined that an incident at work on January 24, 2020 caused appellant's condition when appellant was shooting his gun and developed pain in the right medial elbow radiating down his right forearm and wrist. Dr. Rogachefsky opined that appellant was not at maximum medical improvement and would benefit from further treatment, to include revision surgery for right ulnar nerve submuscular transposition, and postoperative occupational therapy.

OWCP received treatment notes dated December 5, 2022, from Dr. Mitchell Y. Watanabe, a family medicine specialist, who noted that appellant was seen for weakness of the right hand, right wrist surgery, and history of decompression of the ulnar nerve. Appellant was also seen by Dr. Ziba Ranjbaran, a Board-certified physiatrist, and Dr. Amar Patel, a Board-certified orthopedic surgeon. Dr. Ranjbaran diagnosed right hand weakness and history of decompression of ulnar nerve.

In a December 19, 2022 report, Dr. Patel diagnosed right elbow ulnar nerve decompression with transposition by outside surgeon and right ulnar neuropathy, recurrent. He noted that appellant's symptoms were aching and dull pain, exacerbated by typing, hand motion and direct pressure, and ordered additional diagnostic testing. Dr. Patel related that appellant's pain was sudden onset one year prior and opined "the cause of the injury was unprovoked."

A January 4, 2023 magnetic resonance imaging (MRI) scan of the right elbow read by Dr. Michael D. Brown, an orthopedic surgeon, revealed postoperative changes from ulnar nerve transposition with scarring along the medial epicondyle region; increased signal and caliber of the ulnar nerve throughout the operative bed that may represent sequelae of residual/recurrent entrapment or small post-traumatic neuroma and be concordant with clinically reported signs/ symptoms of recurrent neuropathy; and tiny remote avulsion of the medial epicondyle with partial involvement of the ulnar collateral ligament (UCL) proximal attachment fibers.

In a January 5, 2023 report, Dr. Patel diagnosed ulnar neuropathy of right upper extremity.

In a January 19, 2023 report, Dr. Grabow noted that appellant injured his elbow on January 24, 2020 while working as a police officer and shooting his gun at the range. He related that appellant retired from the police force secondary to this injury; that he was hired as a federal claims examiner, which involved typing on his keyboard 8 hours per day, five days per week; and that he developed increasing pain in his right elbow down to his wrist. Dr. Grabow opined that the activity of repetitive hand and keyboard use significantly aggravated appellant's condition and requested clearance for wrist surgery.

By decision dated April 4, 2023, an OWCP hearing representative set aside the October 19, 2022 decision and remanded the case for further development of the medical evidence with regard to causal relationship.

On April 27, 2023, OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. Michael Einbund, a Board-certified orthopedic surgeon, for a second opinion examination.

In a June 2, 2023 report, Dr. Einbund recounted appellant's history of injury and medical course. He provided appellant's physical examination findings and diagnosed right cubital tunnel syndrome. Dr. Einbund opined that appellant's condition was not related to his work at the employing establishment and explained that appellant's conditions predated his employment at the employing establishment, which started on August 16, 2021, only 12 days after appellant was released from care by Dr. Grabow on August 4, 2021. He noted that appellant was seen on July 29, 2022 by Dr. Rogachefsky who attributed appellant's condition to the injury to the right elbow on January 24, 2020 and recommended revision surgery of the right elbow related to that injury, and not related to any new injury while working for the employing establishment. Dr. Einbund opined that, based on the available information, a work-related aggravation injury was not established. He explained that appellant had a high level of symptoms and findings relative to the right elbow which predated his employment with the employing establishment. Dr. Einbund noted the updated EMG/NCV studies revealed normal findings and did not establish any increased findings and that the MRI scan of the right elbow revealed postsurgical scarring along the medial epicondyle which likely was the cause of the present symptoms. He noted that his findings on examination were very similar to those documented prior to appellant's employment at the employing establishment when appellant was found to have medial elbow tenderness, positive Tinel's sign, and decreased sensation over the ulnar two fingers. Dr. Einbund opined that appellant's right elbow condition and/or findings did not have an etiological relationship with appellant's present work activities and were related to an ongoing preexisting condition that was active at the time appellant commenced work at the employing establishment, and to postsurgical complications of scarring which resulted in irritation and/or pressure over the ulnar nerve. He advised that appellant did not require any medical treatment as related to his current employment.

On July 6, 2023 OWCP found that a conflict in medical opinion existed between appellant's attending physician Dr. Grabow and Dr. Einbund regarding the cause of appellant's diagnosed medical conditions. It referred appellant, the medical record, a SOAF, and a series of questions to Dr. Jeffrey Bernicker, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In a September 27, 2023 report, Dr. Bernicker recounted appellant's history of injury, his medical course of treatment, and physical examination findings. He noted that appellant related that his right elbow symptoms had completely resolved when he began work at the employing establishment and that Dr. Patel indicated in his December 19, 2022 report that appellant was "fine after the surgery, but started having progressive symptoms." However, Dr. Bernicker further noted that the August 4, 2021 report from Dr. Grabow, 12 days prior to appellant's start date of August 16, 2021 with the employing establishment, documented persistent pain, weakness, numbness, and tingling of the right elbow within the ulnar nerve distribution. Based upon Dr. Grabow's report, Dr. Bernicker opined that appellant began work at the employing establishment with a symptomatic right upper extremity. He explained that appellant's work activities at the employing establishment "merely led to a transient flare-up of the preexisting condition," but did not result from an aggravation or acceleration of appellant's condition which was caused by the injury on January 24, 2020. He noted that Dr. Rogachefsky had the same opinion and that the right upper extremity EMS/NCV study performed by Dr. Altman on August 18, 2022 was normal, without any interval changes relative to the previous study in 2021. Dr. Bernicker opined that the August 18, 2022 EMG/NCV study was incontrovertible evidence that appellant's current right elbow condition was identical to that which existed prior to his work

at the employing establishment. He noted that Dr. Patel requested approval of revision surgery and that appellant had a future medical care allowance from Irvine, California for the January 24, 2020 injury.

By decision dated October 18, 2023, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish that the claimed medical condition was causally related to the accepted employment factors. It determined that the report of Dr. Bernicker, the impartial medical examiner (IME), was entitled to special weight.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] 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,[3] 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.[4] 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.[5]

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 casually related to the identified employment factors.[6]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[7] The opinion of the physician must be based upon a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by

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[2] *Id*.

[3] *See S.F.*, Docket No. 23-0264 (issued July 5, 2023); *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).

[4] *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).

[5] *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).

[6] *T.W.*, Docket No. 20-0767 (issued January 13, 2021); *L.D.*, Docket No. 19-1301 (issued January 29, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019).

[7] *I.J.*, Docket No. 19-1343 (issued February 26, 2020); *T.H.*, 59 ECAB 388 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

medical rationale explaining the nature of the relationship between the diagnosed condition and the identified employment factors.[8]

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.[9]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[10] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[11] Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[12]

ANALYSIS

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

In a January 19, 2023 report, Dr. Grabow noted that appellant injured his elbow on January 24, 2020 while working as a police officer for Irvine, California and opined that the activity of repetitive hand and keyboard use at the employment establishment aggravated appellant's condition. Dr. Einbund in a June 2, 2023 report, opined that a work-related aggravation injury was not established. He explained that appellant had a high level of symptoms and findings relative to the right elbow which predated his employment with the employing establishment. OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Grabow, appellant's treating physician, and Dr. Einbund, an OWCP second-opinion examiner, regarding the cause of appellant's diagnosed right upper extremity conditions. It properly referred appellant to Dr. Bernicker for an impartial medical examination and opinion.

In his September 27, 2023 report, Dr. Bernicker opined that appellant began work at the employing establishment with a symptomatic right upper extremity. He explained that appellant's

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[8] *D.C.*, Docket No. 19-1093 (issued June 25, 2020); *see Victor J. Woodhams*, 41 ECAB 345 (1989).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

[10] 5 U.S.C. § 8123(a). *See J.J.*, Docket No. 23-0440 (issued December 21, 2023); *M.E.*, Docket No. 21-0281 (issued June 10, 2022); *R.C.*, Docket No. 18-0463 (issued February 7, 2020); *see also G.B.*, Docket No. 16-0996 (issued September 14, 2016).

[11] *See M.E.*, *id.*; *M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019); *James P. Roberts*, 31 ECAB 1010 (1980).

[12] *M.E.*, *id.*; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, *id.*

work activities at the employing establishment led to a transient increase in the documented preexisting symptoms, but did not result in an aggravation or acceleration of appellant's condition which was caused by the injury on January 24, 2020. Dr. Bernicker opined that the August 18, 2022 EMG/NCV study was incontrovertible evidence that appellant's current right elbow condition was identical to that which existed prior to his work at the employing establishment.

The Board finds that Dr. Bernicker's report was well rationalized and based on a complete and accurate history, a complete SOAF, physical examination and review of the medical record. Dr. Bernicker examined appellant thoroughly, reviewed the medical records, and reported accurate medical and employment histories. Thus, the Board finds that Dr. Bernicker's opinion as expressed in his September 27, 2023 report is probative and reliable evidence and entitled to the special weight of the evidence accorded to an IME.[13]

As the medical evidence is insufficient to establish a right upper extremity condition are causally related to the accepted factors of his federal employment, the Board finds that he has not met his burden of proof.

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 upper extremity condition causally related to the accepted factors of his federal employment.

[13] *P.B.*, Docket No. 17-1687 (issued May 8, 2018); *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (200); *Alice J. Tysinger*, 51 ECAB 638 (2000).

ORDER

IT IS HEREBY ORDERED THAT the October 18, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 12, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy 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